



A JUST TRANSITION TOWARDS SUSTAINABLE DEVELOPMENT

A legal analysis of the transition to a low-carbon economy in the South African mining industry in the context of sustainable development.

by

Nondumiso Zondo (ZNDNON013)

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Supervisor: Professor Hanri Mostert

Co-supervisor: Dr Richard Henry Cramer & Dr Anri Heyns

Department of Private Law, University of Cape Town



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Abstract

Section 100 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) mandates the Broad-Based Socio-economic Empowerment Charter for the Mining and Minerals Industry (the Mining Charter) to outline how the MPRDA's objectives of redressing historical social and economic inequities can be met. However, the MPRDA does not require that environmental protection be included as one of the fundamental concerns to be addressed by the Mining Charter. Thus, the resulting Mining Charter does not establish a framework for achieving environmental objectives. Environmental justice redresses the injustices of the past that are associated with the inequality that resulted from economic growth which caused environmental degradation and pollution, as well as the distorted access to and benefits from the extraction and use of natural resources. This leads us to the central question of this study: Can the Mining Charter do more to promote sustainable development in the mining industry in the context of an energy transition?

Section 24 of the Constitution of the Republic of South Africa of 1996 declares environmental justice as a national priority, encouraging the mainstreaming of environmental protection measures into legislation to promote sustainable development and use of natural resources while promoting socioeconomic development. This research argues that the lack of environmental mandate in the Mining Charter is a point of concern for its effectiveness in addressing 'historical social and economic inequalities'. This research offers insight into the challenges presented by not incorporating climate change and environmental justice into regulations, which ignores a host of social, economic, and environmental vulnerabilities that will be brought about by climate change, especially on the historically disadvantaged whom it claims it aims to redress. This research is premised on the conviction that social and economic justice cannot be achieved without environmental and climate justice.

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Chapter 1: Introduction

In many nations, the mining industry is crucial to economic growth strategies and objectives.¹ Despite the fact that developing nations are predicted to be more vulnerable to climate changes, relatively little research has explored the link between climate change and natural resource development in developing nations.² Southern African Countries have been highlighted as being particularly vulnerable to climate change and the uncertainty it introduces.³ They will be subjected to high water stress, which will affect agricultural production, consequently food security, among many other climate-related risks.⁴ Current adaptation and mitigation efforts are hampered by a lack of technical and financial resources.⁵ Thus, it is crucial that development initiatives take into account the role of the extractive industry in both development and climate change.⁶ Due to their considerable economic returns, mining operations are often seen as a viable strategy for combating poverty and promoting growth and development.⁷

To set off the adverse effects of climate-related risks,⁸ measures to reduce carbon and other greenhouse gases (GHGs) emissions are imperative. However, transitioning to climate-resilient economies heralds the arrival of severe economic uncertainty, as many people in the developing world will lose their sources of livelihood.⁹ Even so, climate inaction will also exacerbate the vulnerability of the poor.¹⁰ Therefore, the

¹ L Rüttinger & V Sharma "Climate Change and Mining: A Foreign Policy Perspective" *Climate Diplomacy* (20-6-2016) | <<https://www.semanticscholar.org/paper/Climate-change-and-mining%3A-a-foreign-policy-R%C3%BCttinger-Sharma/d6bb8d608c0409b914ff24534208f5bd6fd9c4d9>> (accessed 5-02-2023).

² |.

³ UNFCCC "Physical and Socio-Economic Trends in Climate-Related Risks and Extreme Events, and Their Implications for Sustainable Development" (2008) 4.

⁴ 4.

⁵ L Rüttinger & V Sharma "Climate Change and Mining: A Foreign Policy Perspective" *Climate Diplomacy* (20-6-2016) | <<https://www.semanticscholar.org/paper/Climate-change-and-mining%3A-a-foreign-policy-R%C3%BCttinger-Sharma/d6bb8d608c0409b914ff24534208f5bd6fd9c4d9>> (accessed 5-02-2023).

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⁷ 7.

⁸ UNFCCC, 'Physical and Socio-Economic Trends in Climate-Related Risks and Extreme Events, and Their Implications for Sustainable Development' (2008) 4.

⁹ 4.

¹⁰ The negative impacts of climate change and weather fluctuations are progressively undermining basic needs, skills, and rights, with the poor and marginalised bearing the brunt of the consequences. See L Olsson et al "Livelihoods and Poverty" in *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (2015) 798.

South African government must implement its transition strategies at a pace and manner that enables people to adapt and live whilst still ensuring that South Africa will meet its climate change targets.¹¹

This study primarily considers the attempts to transition away inclusively and equitably from fossil fuel extraction and use in South Africa. It focus on the legislative framework that governs the extractive and energy sectors related to climate change and sustainable development. Specifically, the research engages with the provisions of the Mineral and Petroleum Resources Development Act (MPRDA),¹² the National Environmental Management Act (NEMA),¹³ the Climate Change Bill,¹⁴ and the Broad-Based Socio-economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter).¹⁵ This research assesses whether the existing statutory provisions for the extractive sector are adequate to reconcile economic, social, and environmental justice in the context of an energy transition. The research mainly considers whether the Mining Charter can do more to promote environmental justice in mining areas.¹⁶

1.1 Background

1.1.1 Climate change and the just transition and the effect on poor persons

South Africa is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC).¹⁷ Despite this commitment, South Africa's average temperature is reported to be rising at a rate two times faster than the pace at which the global temperature is increasing.¹⁸ Thus, the nation is already experiencing more droughts and severe weather events than in previous decades.¹⁹ The climate crisis

¹¹ South Africa's emissions are projected to peak, plateau and from year 2025 decline. See the 'Integrated Resource Plan' (GN 1360 in GG 42784 of 18 October 2019) 8.

¹² Mineral and Petroleum Resources Development Act 28 of 2002.

¹³ The National Environmental Management Act 107 of 1998.

¹⁴ The Climate Change Bill B9-2022.

¹⁵ The 'Broad Based Socio- Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 in GG 41934 of 27 September 2018).

¹⁶ Environmental justice entails protecting the environment while also safeguarding livelihoods. Chapter 2 of this dissertation.

¹⁷ South Africa signed and ratified the Paris Agreement in April 2016 and November 2016 respectively. UNFCC "South Africa" <<https://unfccc.int/node/61201>> (accessed 15-01-2022).

¹⁸ UNFCCC South Africa's First Nationally Determined Contribution under the Paris Agreement (2020) 3.

¹⁹ 3.

continues to threaten sustainable development and livelihoods, it is now, more than ever critical to implement measures to mitigate its consequences and contribute to the global efforts of limiting global warming to below 1.5°C, especially if it wants to realise its goals for sustainable development.²⁰

For the purposes of this dissertation, a just transition is defined as a transition of the economy away from fossil-fuel based industries towards a more environmentally friendly, climate-resilient, and climate-neutral economy and society.²¹ Such a transition must be achieved in a manner that is fair and inclusive to all parties that will be affected by climate change and resulting policies for climate action.²² A just transition creates adequate job opportunities for all, leaving no one behind.²³ A just transition is necessary to guarantee that the advantages of greening the economy are equitably shared while simultaneously compensating those who will be affected during the transition.²⁴ The greening of economies is further essential to mitigate the severe environmental damages that have been caused by climate change.²⁵

1.1.2 Inequality and poverty in South African mining areas and mining workers

Inequality is a recurring issue in South Africa, especially mining areas in South Africa.²⁶ It is crucial to consider the interactions of livelihoods, inequality, and poverty with climate change to understand the

²⁰ Global warming must be limited to 1.5 degrees Celsius to curb any further impacts of climate change worldwide. IPCC “Summary for Policymakers” in V Masson-Delmotte et al (eds) *Global Warming of 1.5°C* (2018) 5.

²¹ International Trade Union Confederation “Justice Transition Centre” <https://www.ilo.org/global/topics/green-jobs/WCMS_824102/lang--en/index.htm> (accessed 18-04-2021).

²² International Trade Union Confederation “Justice Transition Centre” <https://www.ilo.org/global/topics/green-jobs/WCMS_824102/lang--en/index.htm> (accessed 18-04-2021).

²³ When it comes time to a just transition, the objective of decent employment for everyone is essential, as it ensures that all people have equal access to social and economic opportunities. See International Labour Organization ‘Guidelines for a just transition towards environmentally sustainable economies and societies for all’ (2015) 4; “South Africa’s First Nationally Determined Contribution under the Paris Agreement 2021 Update” 3; International Trade Union Confederation “Justice Transition Centre” <https://www.ilo.org/global/topics/green-jobs/WCMS_824102/lang--en/index.htm> (accessed 18-04-2021).

²⁴ International Labour Organization “Guidelines for a just transition towards environmentally sustainable economies and societies for all” (2015) 4.

²⁵ A just transition entails striking a balance between maximising benefits of the transition and minimising and managing any challenges that may arise because of it. International Labour Organization “Guidelines for a just transition towards environmentally sustainable economies and societies for all” (2015) 4.

²⁶ V Sulla *et al* “Inequality in Southern Africa: An Assessment of The Southern African Customs Union” (2022) *The World Bank* 1.

concept of a just transition for sustainable development.²⁷ Climate change as a stressor does not act in a vacuum; it is inextricably tied to other social, economic, and political factors that determine how people pursue livelihoods and make a living.²⁸ As a result, people are not affected by climate stressors the same way because of their positions in the social and economic strata.²⁹

Heffron³⁰ cites a correlation between rising carbon dioxide (CO₂) emissions and increasing social inequality. The cause of the correlation is that people at the bottom of the socioeconomic ladder endure the consequences of climate change in a disproportionate manner, further compounding their marginalisation.³¹ The Intergovernmental Panel on Climate Change (IPCC)³² reaffirms this by saying the interplay between climate change and other factors that have led to unequal power distribution—including race, literacy, class, dis(ability), and gender—is a primary driver of rising inequality.³³ Social inequality leads to the disadvantaged to suffer disproportionately from the effects of climate change.³⁴ There are mainly three ways in which social inequality gap widens during climate change: first, the disadvantaged people are increasingly exposed to the devastating effects of climate change, second, they become more vulnerable to the damages and lastly, their inability to buffer the effects of the damages causes by climate change.³⁵ The cycle disadvantaged are stuck in shows that climate change will reinforce the existing power structures and dynamics.³⁶

²⁷ Olsson et al (2015) 796.

²⁸ The term livelihood refers to the capabilities, assets, and activities that are necessary for making a living in the world. Livelihoods are dynamic and are adapted to prevailing circumstances. See Olsson et al (2015) *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 798.

²⁹ See Olsson et al (2015) *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 798.

³⁰ RJ Heffron & D McCauley "What is the "Just Transition"?" (2018) 88 *Geoforum* 75.

³¹ SN Islam & J Winkel "Climate Change and Social Inequality," (2017) *Working Papers* 152, United Nations, Department of Economics and Social Affairs 2 and 6.

³² The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change.

³³ Olsson et al (2015) *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 807.

³⁴ Islam & Winkel (2017) *Working Papers* 152, United Nations, Department of Economics and Social Affairs 2 and 6.

³⁵ Islam & Winkel (2017) *Working Papers* 152; United Nations, Department of Economics and Social Affairs 2 and 6.

³⁶ A. Kaijser & A. Kronsell "Climate change through the lens of intersectionality, *Environmental Politics*" (2014) 23 *Environmental Politics* 417.

Historically disadvantaged people are the least equipped to cope with climate stressors and recover from the losses.³⁷ The inability of the poor and the marginalised to cope with climate stress and shocks is a result of a confluence of social and political ills, including poverty, inequality, underrepresentation, unequal access to resources, poor infrastructure, and the ability to anticipate and mitigate climate risks ahead of time.³⁸ Extreme climate conditions and fluctuations exacerbate the stress on existing means of making livelihoods.³⁹ Changes in weather and climate conditions reshape the livelihoods of the poor and marginalised by stripping them of the resources to meet their basic needs and decreasing their capabilities to cope with the shocks presented by climate change.⁴⁰

Highly unpredictable weather conditions have been shown to have a greater impact on people in low-income communities, pushing them deeper into poverty and, in some circumstances, dislocation.⁴¹ In areas prone to floods and/or droughts due to climate change, for instance, the poor in terms of income have little to no infrastructure to protect themselves and their livelihoods, and they are least likely have insurance to cover the losses and damages of the natural disasters.⁴² The poor who live in these areas are less likely to have a safety net than their more financially secure counterparts.⁴³

Of all the countries in the world struggling with inequality, South Africa ranks among the top five globally.⁴⁴ In post-apartheid South Africa, some have seen an improvement in their standard of living whilst some are stuck in endemic poverty.⁴⁵ Income distribution continues to be racially distorted, 27 years since South

³⁷ J. Ribot "Vulnerability Does Not Fall from The Sky: Toward Multiscale, Pro-Poor Climate Policy." in Robin Mearns & Andrew Norton (eds) *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* (2010) 50; Islam & Winkel (2017) *Working Papers* 152, United Nations, Department of Economics and Social Affairs 6.

³⁸ J. Ribot (2010) *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* 50; Islam & Winkel (2017) *Working Papers* 152, United Nations, Department of Economics and Social Affairs 6.

³⁹ Olsson et al (2015) *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 798.

⁴⁰ 798.

⁴¹ 796.

⁴² J. Ribot (2010) *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* 50.

⁴³ 50.

⁴⁴ An issue inherited from the colonial and Apartheid regimes. At the beginning of the democratic regime the Gini coefficient of the household per capita was measured at 0,61, growing to 0,65 in 2015, The 2008 global financial crisis escalated the income inequality in the country. Income inequality is fast tracked by technological changes, privatization of public functions and changes in tax regimes. See Department of Statistics South Africa 'Inequality Trends in South Africa: A multidimensional diagnostic of inequality' at 5, 11 and 34; Olsson et al (2015) *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 802; J. Seekings and N. Natrass *Poverty, Politics & Policy in South Africa: Why Has Poverty Persisted after Apartheid* (2016) 2.

⁴⁵ Seekings and Natrass (2016) 27.

Africa's transition to democracy.⁴⁶ Unskilled labour continues to have fewer opportunities for formal employment due to illiteracy.⁴⁷ Poverty continues to coexist with wealth visibly and uncomfortably in South Africa.⁴⁸ The geographic location of a population determines the degree to which it is vulnerable to climate change.⁴⁹ Beyond that, the capacity of such areas to deal with the consequences of climate change will be determined by the quality of infrastructure and services mining communities receive.⁵⁰ Even the most basic services⁵¹ are not readily available to poor communities, putting them at a disadvantage and limiting their ability to cope with climate change and the accompanying pressures.⁵²

Workers that rely on fossil-fuel-based industries such as the coal industry are said to be at risk of losing their jobs during the transition to a low carbon economy.⁵³ For example, employment in South Africa's coal mines has declined chiefly as the industry has become increasingly capital-intensive over the years following global mining mechanisation trends.⁵⁴ In the face of falling coal outputs, economic and employment trajectories are being forced to be reviewed.⁵⁵ The average age of the coal mine workforce is under 40.⁵⁶ Coal mines are projected to be closed in the next ten to fifteen years, partly influenced by the reduced coal demand.⁵⁷ Retirement⁵⁸ would not be an option for many employees in the industry.⁵⁹ There will be a rise in the number of individuals who will need to change jobs.⁶⁰ However, several variables

⁴⁶ Department of Statistics South Africa 'Inequality Trends in South Africa: A multidimensional diagnostic of inequality' 7.

⁴⁷ Seekings and Nattrass (2016) 30.

⁴⁸ 27.

⁴⁹ J. Laukkonen et al 'Combining climate change adaptation and mitigation measures at the local level' (2009) 33 *Habitat International* 287.

⁵⁰ Laukkonen et al (2009) *Habitat International* 287.

⁵¹ Most mining communities are in rural areas.

⁵² Laukkonen et al (2009) *Habitat International* 287.

⁵³ J. Burton et al "Coal Transition in South Africa - Understanding the Implications of a 2°C - Compatible Coal Phase-out for South Africa. IDDRI & Climate Strategies" (2018) *IDDRI and Climate Strategies* 11.

⁵⁴ Automation and digitisation are also reported to certainly result in a substantially reduced workforce, including in the mining industry, echoing worldwide trends. C Strambo et al 'The End of Coal? Planning a "Just Transition" In South Africa' (2019) *Stockholm Environment Institute* 6.

⁵⁵ Strambo et al (2019) *Stockholm Environment Institute* 5.

⁵⁶ The average age of the coal mine workforce is under 40. Strambo et al (2019) *Stockholm Environment Institute* 6.

⁵⁷ 6.

⁵⁸ The average retirement age for South Africans is 60. Trading Economics "South Africa Retirement Age" <<https://tradingeconomics.com/south-africa/retirement-age-women>> (accessed 05-01-2022).

⁵⁹ Strambo et al (2019) *Stockholm Environment Institute* 6.

⁶⁰ 6.

determine the ease of labour mobility, including age, availability and awareness of alternative occupations, education and skills, and people's ease of relocating.⁶¹ In spite of the fact that 70 per cent of coal mine employees have at least a matriculation certificate, however, a formal high school education offers limited career prospects.⁶² Unskilled workforce may be replaced by a mid-to-high skilled workforce.⁶³ Unskilled people continues to have fewer opportunities for formal employment due to lack of formal education and/or literacy.⁶⁴ These kinds of limits serve to amplify the existing social and economic disparities.

The environmental costs that come along with mining developments outweigh their economic gains, even though they form an integral part of the South African economy.⁶⁵ The mining industry is responsible for a significant increase in both waste and pollution, as well as the depletion of natural resources.⁶⁶ Despite the mining communities benefitting little from the exploited mineral resources,⁶⁷ mining activities continue to pass the disproportionate cost onto mining communities, such as environmental pollution.⁶⁸ Mine communities continue to lose land for subsistence farming and grazing, to be subjected to contaminated water and infertile soil.⁶⁹ Mining employees have also been exposed to terminal diseases such as silicosis⁷⁰ and a variety of airborne illnesses.⁷¹

1.1.3 Impacts of mining on the environment and sustainable development

To demonstrate the effect of environmental consequences of mining operations, this section uses the case of acid mine drainage to demonstrate how environmental impacts may affect social and economic

⁶¹ 6.

⁶² 7.

⁶³ Burton et al (2018) *IDDRI & Climate Strategies* 12.

⁶⁴ Seekings and Nattrass (2016) 30.

⁶⁵ L Feris, & LJ Kotzé "The regulation of acid mine drainage in South Africa: law and governance perspectives" (2014)17 *PELJ* 2105 2105.

⁶⁶ Feris & Kotzé (2014) *PELJ* 2105.

⁶⁷ *Minerals Council of South Africa v Minister of Mineral Resources and Energy and others* 2021 (4) All SA 836 (GP) Para 5.

⁶⁸ 2021 (4) All SA 836 (GP) Para 5.

⁶⁹ 2021 (4) All SA 836 (GP) Para 5.

⁷⁰ Silicosis is a chronic lung disease brought on by breathing excessive amounts of silica dust over an extended period. See L. Chi Chiu et al "Silicosis" (2012) 379 *The Lancet* 2008. 2021 (4) All SA 836 (GP) Para 5.

⁷¹ 2021 (4) All SA 836 (GP) Para 5.

aspects and, as a result, impede sustainable development. It further demonstrates the interdependence of environmental, social, and economic concerns. The challenges that emanate from acid mine drainage in the three pillars of sustainability, namely, environmental, social, and economic context, is discussed.

Several mines lie abandoned in South Africa.⁷² Abandoned mineshafts continue to discharge acidic water unsafely.⁷³ The owners of the derelict mines cannot be traced to apportion the liability of environmental and social damage.⁷⁴ As a result, acid mine drainage from centuries of gold⁷⁵ and coal⁷⁶ mining has become a complicated challenge to manage with time.⁷⁷ An analysis of the social impacts of mining operations on communities reveals that the observed acid mine drainage stems from the formative years of mining.⁷⁸

⁷² TS McCarthy "The impact of acid mine drainage in South Africa" (2011) 107 *South African Journal of Science* 5.

⁷³ One of the mine shafts of the Mogale Gold processing facility discharges roughly 30 million litres of acid mine drainage monthly. L. Matenga & T. Gumbo "An Assessment of the Social Impact of Acid Mining Drainage on the West Rand, South Africa Towards Responsive Mining and Sustainable Cities on the African Continent" in M. Mujuru & S.S. Mutanga (eds) *Management and Mitigation of Acid Mine Drainage in South Africa* (2016) 66.

⁷⁴ O Lwabukuna "Interrogating and Reviewing Legal and Policy Frameworks Governing Acid Mine Drainage in South Africa" in M. Mujuru & S.S. Mutanga (eds) *Management and Mitigation of Acid Mine Drainage in South Africa* (2016) 124.

⁷⁵ Even though gold production has declined over the 120 years of mining, South Africa is still home to the largest gold deposit globally, contributing about 4.2 per cent to global gold production. Meanwhile, growing energy demands in the mining and manufacturing sectors propelled the exploitation of coal deposits. Gold mining was the beginning of large-scale mining in South Africa during the discovery of gold in the 1880s. See Minerals Council South Africa "Gold: Key Figures and Facts" <<https://www.mineralscouncil.org.za/sa-mining/gold>> (accessed 21-11-2021); V. Mjimba et al "The Legacy of Acid Mine Drainage in South Africa" in M Mujuru & SS Mutanga (eds) *Management and Mitigation of Acid Mine Drainage in South Africa* (2016) 11.

⁷⁶ South Africa's energy infrastructure remains largely based on coal. See the National Climate Change Response Plan White Paper (2011) 30. Coal forms an integral part of South Africa's economy. South Africa hosts about 3.5 per cent of the global coal reserves, making up 72 per cent of the total primary energy needs in South Africa. See Department of Energy *South African Coal Sector Report* (2016) 1 and 9.

⁷⁷ Mining waste dumps are concentrated with sulphates and heavy metals. When sulfur-bearing minerals are exposed to water and air, they form sulfuric acid and dissolved iron. Acid mine drainage occurs when water meets sulfur-bearing minerals such as pyrite. As a result of this process heavy metals such as copper, zinc, arsenic, and mercury are dissolved in the runoff water. The discharge water is highly acidic and contaminated. Gold and coal mining are sites for acid mine drainage in South Africa. The contaminated water channels to other water courses and increasing their acidity, contaminating drinking water, and disrupting aquatic life. Mjimba et al (eds) (2016) *Management and Mitigation of Acid Mine Drainage in South Africa*.

⁷⁸ The state's ignorance of the consequences of mining in the early years culminated in the extensive acid mine drainage issue visible today. What is more, when the link between acid mine drainage and mining was ascertained in the 1950's, the state reacted with hesitation and delay in addressing the problem. No established regulatory frameworks and measures managed acid mine drainage until 1991, which is the reason for present-day acid mine drainage issues. See Vuyo Mjimba, Munyaradzi Mujuru and Shingirirai S. Mutanga 'The Legacy of Acid Mine

There is undeniable scientific evidence pointing to the existence of acid mine drainage in gold and coal mining regions.⁷⁹ However, a common issue noted in both pre and post-democratic governments is the lack of aggressive attempts at braving the acid mine drainage issue, resulting in the absence of progress made in remedying the problem.⁸⁰ Acid mine drainage has left behind not only environmental damage but also devastating socio-economic decay.⁸¹

Acid mine drainage poses a severe threat to the environment, particularly its water resources.⁸² The most notable is the contamination of ground and surface water sources for human consumption.⁸³ South Africa ranks among the top water-scarce countries in the world, with a below-average rainfall.⁸⁴ The expanding demand for water exceeds the water that is available.⁸⁵ Not only is the supply of water in the country not enough, but there also remains a disproportionate access to clean water across the country.⁸⁶ Climate change is said to only exacerbate the matter, Africa is projected to experience severe droughts as the globe is warming.⁸⁷ The country is already said to be warmer, and the rainfall is predicted to fall.⁸⁸ Communities in Johannesburg have limited access to clean water due to acid mine drainage, excessive water demand, and climate change, which has resulted in community protests.⁸⁹

The issue of acid mine drainage provides a case in point of how an environmental issue, such as acid mine drainage, can affect the social, environmental, and economic pillars of sustainability.⁹⁰ Beyond access to clean water, acid mine drainage is projected to affect infrastructure, displace people and their

Drainage in South Africa' in Munyaradzi Mujuru & Shingirirai S. Mutanga (eds) *Management and Mitigation of Acid Mine Drainage in South Africa* (2016) 21.

⁷⁹ Mjimba et al (eds) (2016) *Management and Mitigation of Acid Mine Drainage in South Africa* 18.

⁸⁰ 23.

⁸¹ 8.

⁸² Feris & Kotze Potchefstroom Electronic Law Journal 2106.

⁸³ 2106.

⁸⁴ T. Grewar, "South Africa's options for mine-impacted water re-use: A review" (2019) *Journal of the Southern African Institute of Mining and Metallurgy*, 119(3); Feris & Kotze *Potchefstroom Electronic Law Journal* 2106.

⁸⁵ Grewar (2019) *Journal of the Southern African Institute of Mining and Metallurgy* 321-331; Feris & Kotze *Potchefstroom Electronic Law Journal* 2106.

⁸⁶ Feris & Kotze Potchefstroom Electronic Law Journal 2106.

⁸⁷ IPCC "Summary for Policymakers" In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021) *IPCC* 24.

⁸⁸ Feris & Kotze Potchefstroom Electronic Law Journal 2106.

⁸⁹ A Tamiru et al "Potential role of acid mine drainage management towards achieving sustainable development in the Johannesburg region, South Africa" (2022) 19 *Groundwater for Sustainable Development* 8.

⁹⁰ Feris & Kotze Potchefstroom Electronic Law Journal 2106.

livelihoods and to it further has consequences on the efforts made towards the transition to a low-carbon future. Like climate change, '[acid mine drainage] is also a temporal issue with past, present, and more worryingly, unknown future impacts that collectively lead to all sorts of challenges for law and governance interventions.'⁹¹

The issue of acid mine drainage has proven that failing to consider not only the environment but also the socio-economic effects of mining activities can have severe consequences in the communities surrounding the mine site in question. Sustainable development meets the needs of people living today without compromising the needs of future generations, and it does so by striking a balance between social, economic, and environmental factors, meaning, if one pillar of sustainable development is compromised, the other two cannot be achieved.

Acid mine drainage shows that if immediate impacts are not managed, they will persist.⁹² Long-term environmental management initiatives of mining activities need to account for both the social and environmental challenges of the mining operations.⁹³ Adaptation strategies adopted need to consider how immediate environmental impacts — including climate change impacts caused by fossil-based mining, will influence long-term socio-economic development.⁹⁴

The notion of sustainable development is predicated on the principle that development and environmental protection must co-exist and be integrated.⁹⁵ If the environmental, social, and economic aspects of development are treated as inseparable, policy measures taken towards sustainable development will give greater weight to environmental concerns in the future.⁹⁶

⁹¹ 2107.

⁹² Mujuru & Mutanga (eds) (2016) *Management and Mitigation of Acid Mine Drainage in South Africa* 1.

⁹³ Strambo et al (2019) *Stockholm Environment Institute* 9.

⁹⁴ Strambo et al (2019) *Stockholm Environment Institute* 9.

⁹⁵ Section 24(b) of the Constitution.

⁹⁶ Van der Bank Marjone & Karsten Jaco 'Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices' (2020) 13 *Air, Soil and Water Research* 4.

1.2 Research Aims

In the context of sustainable development, the dissertation aims to examine the adequacy of the provisions of the MPRDA, NEMA, the Climate Change Bill and the Mining Charter to reconcile economic, social, and environmental justice in the context of an energy transition.

In the context discussed in the background, the following primary research question will be assessed:

“Can the Mining Charter do more to promote sustainable development in the mining industry, in the context of mitigating the risks of climate change and pursuing a just transition?”

To answer this question, three sub-inquiries are considered:

- (i) What is the link between sustainable development, environmental justice, and climate justice?
- (ii) Which legislative provisions give effect to environmental and climate justice for sustainable development in the mining sector?
- (iii) What does the existing 2018 Mining Charter regulate?
- (iv) Can section 100 (2) of the MPRDA and the Mining Charter promote environmental justice for sustainable development in the context of the energy transition?

The dissertation is premised on the conviction that social and economic justice cannot be achieved without environmental justice. The integration of social, economic, and environmental imperatives are all three aspects of sustainable development. The hypothesis is that the provisions under Mining Charter are not sufficient as it does not provide for targets to meet the environmental objectives and only considers socio-economic development imperatives, rendering it ineffective to provide for sustainable development it sought to achieve, its effectiveness will further be challenged during the energy transition.

The research is a desktop study and focuses on both primary and secondary resources. These sources will include statutes, case law; committee reports; books and academic journals, articles, and commentaries.

1.3 Dissertation Structure

Chapter one is the introductory chapter that briefly provides the historical and legislative background of achieving sustainable development during in the context of the energy transition in the extractives sector. The first chapter further considers how climate change overlaps with other stressors to inform poverty, livelihoods, and inequality trajectories. Lastly, chapter one presents the purpose of the research study and the research question it seeks to answer.

Chapter two considers the history and meaning of sustainable development as a concept to emphasize the obstacles to sustainable development generated by the compartmentalization of environmental, social, and economic challenges in natural resource management. The connection between sustainable development and environmental and/or climate change issues is developed further in chapter two. Environmental issues, including climate change, have serious consequences for development initiatives, the transformation of the mining industry, and equity, as shown by acid mine drainage in Chapter two.

Chapter three provides an overview of how sustainable development is put into effect in the legal framework that governs the mining sector. The third chapter further provides an analysis of the legislation that governs the environment and the just societal transition to a low-carbon economy. The progress of incorporating environmental and climate justice in mining legislation is tracked in chapter three. It considers the provisions of NEMA, the Climate Change Bill, MPRDA and the Mining Charter. Considering the transformational goal to redress historically disadvantaged persons in South Africa, chapter three pays attention to the Mining Charter as it gives effect to section 100(2) of the MPRDA to redress the historically disadvantaged in South Africa.

Chapter four discusses whether the Mining Charter can promote sustainable development and a just transition as part of empowering historically disadvantaged persons, in a way that prioritises environmental sustainability and lessening the effects of climate change, especially in regions where the poor reside. The chapter criticises the shortcomings of the One Environmental System in providing for environmental justice that is required to redress past wrongs against the historically disadvantaged.

Chapter five summarised the findings of this study. The final chapter further provides concluding observations. Finally, recommendations for potential reform of the Mining Charter on how environmental

and climate justice can be incorporated into the Mining Charter as it gives effect to the transformation and sustainable development imperative in the mining sector.

Chapter 2: Connecting the Dots: Sustainable Development, Environmental Justice, Climate Justice, and Empowerment

2.1 Introduction

The term "sustainable development," taken from the Brundtland report of 1987, is used to describe development that satisfies the requirements of the present without compromising the ability of future generations to do the same.⁹⁷ The concept of sustainable development rests on the recognition of the inextricable link between socio-economic growth and environmental sustainability.⁹⁸ It is essential for this dissertation to unpack the meaning of sustainable development as a concept in order to emphasize the obstacles to sustainable development generated by the compartmentalization of environmental, social, and economic challenges in natural resource management.

This chapter explains key concepts underlying this dissertation. It begins by offering an overview on the concept of sustainable development, its history and genesis, and the birth of the Sustainable Development Goals. After establishing the meaning of sustainable development and its fundamental pillars, the chapter will go on to describe the relationship between sustainable development, climate and environmental justice, and empowerment.

2.2 The Concept of Sustainable Development

Some two hundred years ago, the first connections were made between human civilization's development and its effect on the environment.⁹⁹ It was not until the United Nations Conference on the Environment in

⁹⁷ United Nations Report of the World Commission on Environment and Development: Our Common Future 41.

⁹⁸ 41.

⁹⁹ BD Paul "A History of The Concept of Sustainable Development: Literature Review" (2008) 17 *Annals of the University of Oradea: Economic Science* 576 576; Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, *Department of Agriculture, Conservation and Environment, Mpumalanga Province* (2007) 6 SA 4 (CC) para 44.

Stockholm in 1972¹⁰⁰ that environmental protection was made a priority globally.¹⁰¹ The Stockholm Declaration put environmental issues on the front burner and initiated discussions on how increased economic activity contributes to environmental degradation¹⁰² and threatens social well-being.¹⁰³

The World Commission on Environment and Development, more commonly referred to as the Brundtland Commission,¹⁰⁴ was established in 1983 by the General Assembly of the United Nations. The Commission issued the Brundtland Report, titled "Our Common Future," in 1987.¹⁰⁵ The document expanded on the Stockholm Declaration and offered the definition of sustainable development as: "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."¹⁰⁶

The next major defining moment for sustainable development came in 1992, when the United Nations Conference on the Environment and Development, commonly known as the Rio Earth Summit, was held in Rio de Janeiro, Brazil.¹⁰⁷ The concept of sustainable development was at the centre of proceedings of the Rio Earth Summit, and as a result, the Agenda 21,¹⁰⁸ Rio Declaration¹⁰⁹ and the Commission on Sustainable Development were birthed.¹¹⁰

Agenda 21 was the defining text of the summit, and it outlined the commitment of global leaders to sustainable development.¹¹¹ The 40-chapter document details the action plan for sustainable development.¹¹² Agenda 21 is structured around environmental and development issues such as quality of life, the sustainable use of natural resources and sustainable economic growth.¹¹³ Agenda 21 stresses

¹⁰⁰ A total of 113 nations and 19 international organizations were represented at the conference held in Stockholm, Sweden.

¹⁰¹ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 577.

¹⁰² Degradation includes pollution of the air, water, and land.

¹⁰³ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 578.

¹⁰⁴ The Brundtland Commission got its name from the Norwegian Prime Minister Gro Harlem Brundtland who chaired the commission at the time.

¹⁰⁵ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 577.

¹⁰⁶ 578.

¹⁰⁷ 578.

¹⁰⁸ 578.

¹⁰⁹ 578.

¹¹⁰ 578.

¹¹¹ 578.

¹¹² 578.

¹¹³ 578.

the need for integrating environmental and development issues and argues that giving attention to these concerns will result in the basic needs being met,¹¹⁴ living standards improved and the natural resources will be better managed and preserved effectively.¹¹⁵ The document acknowledges that extreme poverty persisting in certain areas of the globe while others enjoy a high standard of living supported by the ill-management of natural resources is not sustainable and that all nations need to devise ways to ensure sustainable environmental management and protection.¹¹⁶ Reaffirming that sustainable development is threatened by the excessive exploitation of natural resources and subsequent environmental degradation.¹¹⁷

2.2.1 The Millennium Development Goals

In the year 2000, the United Nations hosted the Millennium Summit in New York.¹¹⁸ The Millennium Development Goals¹¹⁹ were adopted to end all forms of extreme poverty and hunger, diseases, illiteracy, environmental degradation, and gender inequality to name a few. Leaders of 189 countries at the Millennium Summit adopted a set of eight quantifiable goals known as the Millennium Development Goals which were intended to be realised by 2015.¹²⁰ Environmental sustainability was included as one of the Millennium Development Goals. The goal targeted to institutionalise sustainable development principles into national programs and policies, halt the depletion of natural resources, and cut down on greenhouse gas emissions, signifying the connection between climate change and sustainable development.¹²¹ Efforts

¹¹⁴ Preamble to Agenda 21 reaffirms that integrating environment and development concerns will assist in the reduction of poverty, hunger, poor health, and illiteracy.

¹¹⁵ Preamble to Agenda 21.

¹¹⁶ Agenda 21 Chapter 4, section 4.5.

¹¹⁷ Agenda 21 Chapter 4, section 4.5.

¹¹⁸ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 578.

¹¹⁹ By the year 2015, the eight measurable goals the United Nations Member States were as follows: “eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality, and empower women, reduce child mortality, improve maternal health, combating HIV/AIDS, malaria, and other diseases, ensure environmental sustainability and develop a global partnership for development.” United Nations “Official list of MDG indicators” (15-01-2008) <<https://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.BDf>> (accessed 05-02-2023).

¹²⁰ United Nations “Official list of MDG indicators” (15-01-2008) <<https://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.BDf>> (accessed 05-02-2023).

¹²¹ The Millennium Development Goal, goal 7, Target 7A and 7B See United Nations “Official list of MDG indicators” (15-01-2008) <<https://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.BDf>> (accessed 05-02-2023).

to combat climate change were recognised as central for the realisation of all other Millennium Development Goals.¹²²

To mark the tenth anniversary of the United Nations Conference on Environment and Development, the World Summit on Sustainable Development was convened in Johannesburg in 2002.¹²³ The central message of the Johannesburg Summit was the importance of collaboration between governments, non-governmental organisations (NGOs), businesses, and the United Nations.¹²⁴ Not only did the Johannesburg Summit reaffirm the Millennium Development Goals, but it also created numerous additional ones, such as decreasing the number of people without access to basic sanitation and eliminating the harmful consequences of chemicals.¹²⁵ The Plan of Implementation of the World Summit on Sustainable Development was adopted at the Johannesburg Summit.¹²⁶ The document lays out the actions required to realise development that is mindful of environmental sustainability.¹²⁷ The Plan of Implementation emphasised the need for increasing the share of renewable energy sources in the global energy mix.¹²⁸ The Plan of Implementation urged the creation of a global system to guarantee the equitable distribution of the benefits accruing from the use of natural resources.¹²⁹ The document featured measures for reducing greenhouse emissions.¹³⁰ The link between sustainable development, natural resource management, climate action, and environmental protection is strengthened by the Plan of

¹²² The United Nations highlighted the interconnectedness of the Millennium Development Goals and the necessity to consider them. The aim was for all nations to foster an environment that favours development and the eradication of poverty. United Nations “Official list of MDG indicators” (15-01-2008) <<https://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.BDf>> (accessed 05-02-2023); “What UNDP “Will It Take to Achieve the Millennium Development Goals?” (6-2010) 17 <https://www.undp.org/sites/g/files/zskgke326/files/publications/IA_English.BDf> (accessed 05-02-2023).

¹²³ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 579.

¹²⁴ 579.

¹²⁵ 579.

¹²⁶ United Nations “Plan of Implementation of the World Summit on Sustainable Development” <https://www.un.org/esa/sustdev/documents/WSSD_POI_BD/English/WSSD_PlanImpl.BDf> (accessed 28-01-2023).

¹²⁷ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 579.

¹²⁸ United Nations “Plan of Implementation of the World Summit on Sustainable Development” 9 <https://www.un.org/esa/sustdev/documents/WSSD_POI_BD/English/WSSD_PlanImpl.BDf> (accessed 28-01-2023).

¹²⁹ 26.

¹³⁰ 26.

Implementation's insistence on the need to increase natural resource benefit sharing, diversify the global energy portfolio, and ensure ecological sustainability.¹³¹

2.2.2 The Sustainable Development Goals

The United Nations tracked progress toward eight Millennium Development Goals (MDGs) from 1990 to 2015.¹³² The United Nations noted a decrease in poverty, infant mortality, and an increase in access to clean water and sanitation.¹³³ Yet poverty persisted and there was still a lack in access to adequate healthcare whilst an increasing number of people were suffering from the effects of climate change and environmental degradation and pollution.¹³⁴ The United Nations was compelled to take further action and established the Sustainable Development Goals, which replaced the Millennium Development Goals.¹³⁵ The Sustainable Development Goals (SDGs) set targets to end extreme poverty and hunger, provide universal access to health care, education, economic opportunity, clean water and energy, revitalize and protect the world's cities and infrastructure, advance gender equality, combat climate change, and safeguard marine and terrestrial ecosystems.¹³⁶

'Transforming Our World: The 2030 Agenda for Sustainable Development,' which includes the 17 Sustainable Development Goals (SDGs), was adopted by global leaders during in 2015,¹³⁷ The 17 new goals, which apply to all nations, would be used to galvanize international efforts to eradicate poverty,

¹³¹ 26.

¹³² United Nations "The Millennium Development Goals Report" (6-7-2015) 4 <<https://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2015/English2015.pdf>> (accessed 05-02-2023).

¹³³ 5.

¹³⁴ 8.

¹³⁵ Preamble United Nations "Transforming Our World: The 2030 Agenda for Sustainable Development" A/RES/70/1 *United Nations* <<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> (accessed 05-02-2023).

¹³⁶ United Nations "Transforming Our World: The 2030 Agenda for Sustainable Development" A/RES/70/1 *United Nations* Para 3 <<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> (accessed 05-02-2023).

¹³⁷ Agreed upon by 193 member states of the United Nations, formally went into force in January 2016.

reduce inequality, and combat climate change by 2030.¹³⁸ The Sustainable Development Goals¹³⁹ recognise that eradicating poverty necessitates addressing issues like climate change and environmental protection in addition to a socioeconomic demands like access to education, healthcare, and decent employment opportunities.¹⁴⁰

2.2.3 The connection between climate change and sustainable development is cemented

Sustainable Development Goal (SDG 13) on climate action urges nations to ‘take urgent action to combat climate change and its impacts’ closely linking sustainable development to climate action and sustainable development.¹⁴¹ Incorporating climate change as an SDG acknowledges the inextricable link between the need for climate action and other development objectives.¹⁴² Climate change influences the capacity to realise sustainable development goals.¹⁴³ Moreover, reducing global warming will aid in achieve sustainable development goals.¹⁴⁴

There are two types of interactions between climate action and sustainable development: synergies and trade-offs.¹⁴⁵ Synergies, where actions to reduce global warming result in sustainable development, or vice versa; should be emphasized, and minimize trade-offs where efforts to fight climate change sacrifices the realisation of sustainable development strategies.¹⁴⁶ There are many synergies between responses

¹³⁸ United Nations “Transforming Our World: The 2030 Agenda for Sustainable Development” A/RES/70/1 *United Nations* Para 2.4
<<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> (accessed 05-02-2023).

¹³⁹ From ending poverty and hunger to promoting equitable economic growth, expanding people's access to resources, and ensuring that everyone has a healthy environment to live in, the Sustainable Development Goals include a wide range of issues. United Nations “Sustainable Development Goals” *United Nations* <<https://sdgs.un.org/goals>> (accessed 05-02-2023).

¹⁴⁰ Section 2.4 of United Nations Transforming Our World: The 2030 Agenda for Sustainable Development.

¹⁴¹ United Nations Transforming Our World: The 2030 Agenda for Sustainable Development.

¹⁴² Sustainable Development Goal 13.

¹⁴³ United Nations “The Millennium Development Goals Report” (6-7-2015) 8
<<https://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2015/English2015.pdf>> (accessed 05-02-2023).

¹⁴⁴ 8.

¹⁴⁵ Positive and negative effects respectively.

¹⁴⁶ IPCC “Summary for Policymakers” in V Masson-Delmotte et al (eds) *Global Warming of 1.5°C* (2018) 12, 18, 19 and 20.

to climate change and the sustainable development goals, for example SDG 7 which promotes 'access to affordable, reliable, sustainable and modern energy for all'. This goal speaks to renewable energy and energy efficiency that are fundamental for climate change mitigation.¹⁴⁷ One example of a trade-off between climate change mitigation and sustainable development is employment loss because of the shift from fossil fuels to alternative energy sources.¹⁴⁸ However, if the transition is adequately planned for, with facilities for reskilling and keeping employment in renewable energy industries, such a trade-off may be avoided.¹⁴⁹

In June 2012, Rio de Janeiro, Brazil hosted the United Nations Conference on Sustainable Development (Rio+20).¹⁵⁰ The transition to a low carbon economy was discussed extensively during the conference in the context of the goals of sustainable development and the elimination of poverty.¹⁵¹ The outcome of the conference was a resolution enforcing the principle that better natural resource management and less environmental damage would result from a green economy based on sustainable development and the elimination of poverty.¹⁵²

Developed nations agreed to reduce their emissions of greenhouse gases at the Kyoto conference on climate change in 1997, resulting in a fundamental framework that became known as the Kyoto Protocol.¹⁵³ From 2008 through to 2012, parties to the Kyoto Protocol committed to reducing emissions of six greenhouse gases¹⁵⁴ by at least 5.2 per cent below 1990 levels.¹⁵⁵ Fast-track to 2015, at the United

¹⁴⁷ Sustainable Development Goal 7 at section 7.1. of United Nations Transforming Our World: The 2030 Agenda for Sustainable Development.

¹⁴⁸ IPCC "Summary for Policymakers" in V Masson-Delmotte et al (eds) *Global Warming of 1.5°C* (2018) 19.

¹⁴⁹ 21.

¹⁵⁰ Twenty years after the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, and ten years after the World Summit on Sustainable Development, held in Johannesburg in 2002.

¹⁵¹ United Nations The Future We Want: Outcome document of the United Nations Conference on Sustainable Development (2012) section 1.

¹⁵² United Nations The Future We Want: Outcome document of the United Nations Conference on Sustainable Development (2012).

¹⁵³ The Kyoto Protocol to the United Nations Framework Convention on Climate Change. The protocol entered into force later in 2005.

¹⁵⁴ The six greenhouse gases, also called the Kyoto basket includes: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and F-gases (hydrofluorocarbons and perfluorocarbons) and sulphur hexafluoride (SF₆). United Nations Climate Change "Kyoto Protocol - Targets for the first commitment period" *United Nations Climate Change* <<https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period>> (accessed 05-02-2023).

¹⁵⁵ BD Paul (2008) *Annals of the University of Oradea: Economic Science* 578.

Nations Climate Change Conference (COP21) in Paris, 196 member nations ratified the Paris Agreement.¹⁵⁶ The goal of the Paris Accord was to keep global warming below 2 degrees Celsius relative to pre-industrial times.¹⁵⁷

2.2.4 Sustainable development, climate and environmental justice and empowerment

The Brundtland Report describes sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'¹⁵⁸ The definition positions the meeting of basic human needs as a primary concern of development.¹⁵⁹ The definition further places a condition on this objective, that the means by which each generation achieves this goal must be consistent with ensuring that subsequent generations will be able to achieve their own goals as well.¹⁶⁰ This understanding of the concept of sustainable development prioritizes intragenerational justice and intergenerational justice.¹⁶¹ Sustainable development is offered as a solution to reconcile environmental protection, meeting the needs of humans, and equal opportunities within and between generations.¹⁶² This definition makes justice central to the process of achieving sustainable development.¹⁶³

Intragenerational justice is a top priority of sustainable development. Intragenerational justice can be interpreted as meeting the basic human needs¹⁶⁴ of the present and giving everyone an equal opportunity

¹⁵⁶ The agreement came into effect in November 2016.

¹⁵⁷ United Nations Climate Change "The Paris Agreement. What is the Paris Agreement?" *United Nations Climate Change* <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> (accessed 05-02-2023).

¹⁵⁸ United Nations Report of the World Commission on Environment and Development: Our Common Future Chapter 2: Towards Sustainable Development 41.

¹⁵⁹ One of the central ideas of this definition is 'the concept of 'needs', in particular the essential needs of the world's poor to which overriding priority should be given.' 41.

¹⁶⁰ 41.

¹⁶¹ Langhelle Oluf "Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice" (2000) 9 *Environmental Values* 295 299.

¹⁶² 318.

¹⁶³ 299.

¹⁶⁴ '[Basic human needs are needs that] must be met if citizens are to be in a position to take advantage of the rights, liberties, and opportunities of their society. They include economic means as well as institutional rights and freedoms'. Oluf (2000) *Environmental Values* 300.

at doing so. It is encapsulated in the opening sentence¹⁶⁵ of the sustainable development definition offered by the Brundtland Report. Considering this definition, it can be understood that sustainable development commits to redistribution within and between countries among the rich and the poor.¹⁶⁶

One of the ways to ensure intergenerational justice, which is not compromising the ability of future generations to meet their own needs, is through environmental protection. The minimum requirement for sustainable development as stated by the Brundtland Report is, 'sustainable development must not endanger the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings.'¹⁶⁷ This requirement is consistent with the objective of the UNFCCC which is to: 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'¹⁶⁸ Adding that achieving this target within a reasonable amount of time would guarantee that ecosystems can naturally adjust to climate change, that food supply is not jeopardized, and that economic growth can continue in a sustainable way.¹⁶⁹ Both ideals originate from the imperative to preserve natural resources while also advancing economic development and ensuring the continued sustenance of the current generation.¹⁷⁰ Each goes even farther by emphasizing the need of preserving the environment for future generations and calling for growth that does not damage systems.¹⁷¹

The concept of environmental justice centres on ensuring that people who have been harmed by environmental injustices have a fair chance to seek redress.¹⁷² It seeks to provide this level playing field for seeking restitution by calling for equal representation and involvement in political, judicial, and administrative decision-making on the environment and resource management is another component of environmental justice.¹⁷³ Taking part in the processes of creating, enforcing, and amending environmental laws, regulations, and policies is included under the

¹⁶⁵ 'Development that meets the needs of the present...'. United Nations Report of the World Commission on Environment and Development: Our Common Future Chapter 2: Towards Sustainable Development (1987) 41.

¹⁶⁶ Oluf (2000) Environmental Values 300.

¹⁶⁷ United Nations Report of the World Commission on Environment and Development (1987) para 9.

¹⁶⁸ United Nations United Nations Framework Convention on Climate Change (1992) article 2.

¹⁶⁹ Article 2.

¹⁷⁰ United Nations United Nations Framework Convention on Climate Change article 2; United Nations Report of the World Commission on Environment and Development para 9.

¹⁷¹ United Nations United Nations Framework Convention on Climate Change article 2.

¹⁷² UNICEF East Asia and the Pacific "Legal Empowerment to Advance Climate and Environmental Justice for Children in East Asia and the Asia Pacific" (01-06-2022) *UNICEF East Asia and the Pacific 2* <<https://www.unicef.org/eap/reports/legal-empowerment-advance-climate-and-environmental-justice>> (accessed 05-02-2023).

¹⁷³ C Glinski "Environmental Justice in South African Law and Policy" (2003) 36 *Law and Politics in Africa, Asia and Latin America* 49.

umbrella term of environmental justice.¹⁷⁴ Environmental justice places a premium on the involvement of everyone, particularly the most disadvantaged, because they are disproportionately at danger of suffering from the effects of environmental injustices.¹⁷⁵

Integral to the pursuit of environmental justice is the pursuit of climate justice.¹⁷⁶ In essence, environmental justice is therefore concerned with ensuring that environmental deterioration impacts the most vulnerable people while contributing the least to environmental degradation, is the seed from which calls for climate justice sprouted.¹⁷⁷ As an extension of environmental justice, climate justice advocates taking a human rights perspective on climate change and drawing attention to the social and political ramifications of the climate emergency in addition to the environmental problems it poses.¹⁷⁸ The concept of climate justice considers what happens a community that has been in perpetual crisis for centuries due to disenfranchisement and add yet another danger to their already precarious situation.¹⁷⁹ Mary Annaïse Heglar succinctly summed up the issue by saying, ‘Climate change takes any problem you already had, any threat you were already under, and multiplies it.’¹⁸⁰ The effects of climate change increase the severity of pre-existing difficulties and threats.¹⁸¹ Flowing from this understanding, climate justice stresses that marginalized or disadvantaged populations are more likely to suffer negative consequences because of climate change on a variety of fronts, including social and economic conditions, putting a risk to a variety

¹⁷⁴ EPA “Environmental Justice” EPA <<https://www.epa.gov/environmentaljustice>> (accessed 28-01-2023).

¹⁷⁵ UNICEF East Asia and the Pacific “Legal Empowerment to Advance Climate and Environmental Justice for Children in East Asia and the Asia Pacific” *UNICEF East Asia and the Pacific 2*.

¹⁷⁶ UNICEF East Asia and the Pacific “Legal Empowerment to Advance Climate and Environmental Justice for Children in East Asia and the Asia Pacific” *UNICEF East Asia and the Pacific 24*.

¹⁷⁷ Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁷⁸ UNICEF East Asia and the Pacific “Legal Empowerment to Advance Climate and Environmental Justice for Children in East Asia and the Asia Pacific” (01-06-2022) *UNICEF East Asia and the Pacific 2*.

¹⁷⁹ The threats of climate change on the most vulnerable in our communities is discussed in chapter 1.

¹⁸⁰ MA Heglar “We Don’t Have to Halt Climate Action to Fight Racism” (12-06-2020) *Huffpost* <https://www.huffpost.com/entry/climate-crisis-racism-environmental-justice_n_5ee072b9c5b6b9cbc7699c3d> (accessed 02-02-2022).

¹⁸¹ The threats of climate change on the most vulnerable in our communities is discussed in chapter 1.

of fundamental human rights.¹⁸² The notion thus backs making the people who are least accountable for and most affected by the climate issue the focal point of strategies to solve the climate change problem.¹⁸³

Inequalities within a nation are also highlighted by a climate justice approach.¹⁸⁴ Wealthier individuals in both developing and developed nations are more likely to have access to conveniences¹⁸⁵ that both contribute to climate change and protect them from its effects,¹⁸⁶ such as droughts and flooding that result from climate change.¹⁸⁷ Social disparities due to systemic racism, socioeconomic marginalization, and other kinds of social exclusion are exacerbated by climate change.¹⁸⁸

Climate action comes with its own unequal impacts.¹⁸⁹ The strategies adopted to reduce greenhouse gas emissions and combat climate change could have either improve or exacerbate existing inequalities, which is why climate justice is essential in efforts to fight climate change. For example, the principle of a

¹⁸² The concept of climate justice recognises that equal access to food, water, and other health-supporting resources are only some of the fundamental human rights that are under risk due to climate change. UNICEF East Asia and the Pacific “Legal Empowerment to Advance Climate and Environmental Justice for Children in East Asia and the Asia Pacific” (01-06-2022) *UNICEF East Asia and the Pacific* 2; Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁸³ Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁸⁴ Although not essential for the purposes of this discussion, it is worth noting that climate justice extends to justice between nations. Climate justice between developing and developed nations requires the benefits accrued from actions that produce as well as the liabilities of the effects of climate change should be equally allocated to all affected countries. Realising climate justice requires that the nations that became prosperous because of unrestricted carbon emissions have the greatest responsibility not only to put an end to the warming of the planet, but also to assist other nations in adapting to the effects of climate change and growing economically using technologies that do not pollute. Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁸⁵ Such conveniences include access to energy-intensive housing (heating and cooling systems), private transportation and the ability to travel for leisure. See Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁸⁶ In the case of extreme weather events such as extreme heat, droughts and floods resulting from climate change.

¹⁸⁷ Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁸⁸ The unequal causes and effects of climate change are discussed in detail in chapter 1 of this dissertation.

¹⁸⁹ Anonymous “What’s climate justice?” (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

just transition¹⁹⁰ centres on climate justice in that it considers the implications of the transition to a low-carbon economies on the communities employed in and supported by carbon-intensive industries.¹⁹¹

Climate justice and environmental justice both focus on addressing injustices faced by vulnerable and marginalised populations, in the same way that empowerment seeks to prioritise the needs of the marginalised.¹⁹² Furthermore, climate and environmental justice have a role in determining how benefits and disadvantages resulting from climate action and environmental protection are distributed, how these solutions are selected, and who gets a part in determining those responses.¹⁹³ As has been said,¹⁹⁴ a key component of empowerment is expanding decision-making opportunities to those on the margins of society. The three concepts share underlying aims; thus, environmental justice, climate justice, and empowerment are inextricably related and complementary.

In the field of international development, the idea of giving authority to the marginalized, gave rise to the notion of 'legal empowerment'.¹⁹⁵ The term was coined by Stephen Golub as a rebuttal to the "rule of law orthodoxy," which, in Golub's view, places too much emphasis on top-down, State-centred approaches to development that highlight the role of law reform and government institutions in reducing poverty by creating a business-friendly environment.¹⁹⁶ Empowerment as envisioned by Golub is a bottom up approach that encompasses the giving disadvantaged persons more autonomy and control over their lives.¹⁹⁷ This understanding of legal empowerment requires the improving of the disadvantaged persons capacity and ability to participate in decision-making.¹⁹⁸

¹⁹⁰ The concept of a just transition is discussed in chapter 1 of this dissertation.

¹⁹¹ Fossil fuel-based industries such as the coal industry. As the coal industry shrinks, communities near coal power facilities get funding from some nations like the United States to assist them diversify their economy and infrastructure and retrain its fossil fuel-dependent workforce. See Anonymous "What's climate justice?" (15-12-2022) *Friends of the Earth* <<https://groups.friendsoftheearth.uk/resources/whats-climate-justice>> (accessed 24-01-2023).

¹⁹² UNICEF East Asia and the Pacific "Legal Empowerment to Advance Climate and Environmental Justice for Children in Asia and the Pacific" *UNICEF East Asia and the Pacific* 24.

¹⁹³ 24.

¹⁹⁴ Chapter 2 of this dissertation.

¹⁹⁵ 22.

¹⁹⁶ 22.

¹⁹⁷ 22.

¹⁹⁸ 22.

For purposes of this dissertation, empowerment is:

“an intentional ongoing process centred in the local community, involving mutual respect, critical reflection, caring, and group participation, through which people lacking an equal share of valued resources gain greater access to and control over those resources; or a process by which people gain control over their lives, democratic participation in the life of their community, and a critical understanding of their environment.”¹⁹⁹

From this definition, first, empowerment is a process that occurs amongst disadvantaged communities and calls for the active participation of those communities; secondly, it necessitates that those communities have an awareness of the interests and structures at play in their context; and thirdly, it gives individuals a greater voice in the decision-making process regarding resource management.²⁰⁰

The link between sustainable development, climate justice, environmental justice and empowerment is solidified in the sustainable development goals and their targets. From the definition of empowerment employed in this dissertation, empowerment is a process amongst disadvantaged communities, Sustainable Development Goal 13 which explicitly calls for climate action targets to support initiatives that empower disadvantaged persons to effectively prepare for and manage the effects of climate change.²⁰¹

Goal 16 of the Sustainable Development Goals encompasses the principle of empowerment by aiming to ensure that all affected parties at all levels can participate in, contribute to, and benefit from decision-making that is both inclusive of and accountable to them.²⁰² Thereby, giving effect to the tenet of empowerment of giving individuals a greater voice in the decision-making. The goal also puts into practice the central concept of empowerment, which is to give people more say in matters affecting their lives. In the context of environmental protection, Goal 15 aims to offer local communities' more agency by

¹⁹⁹ EC Albers & N Paolini “The Dual Face of Empowerment: A Model for Cooperative Resource Building” (1993) 20 *The Journal of Sociology & Social Welfare* 99 101.

²⁰⁰ 101.

²⁰¹ Sustainable Development Goal 13, Target 13B. United Nations “Sustainable Development Goals” *United Nations* <<https://www.un.org/sustainabledevelopment/climate-change/>> (accessed 20-01-2023).

²⁰² Sustainable Development Goal 16, Target 16.7.

encouraging actions that boost the capacity of local communities to pursue sustainable livelihood opportunities, again giving effect to the concept of empowerment.²⁰³

It is widely agreed that the end result of economic development as a process whose is a qualitative and quantitative measurable shift in economic and social conditions through time.²⁰⁴ Economic development is when poverty, unemployment, and inequality are decreased and average income rises.²⁰⁵ Economic growth, on the other hand, entails an increase of a country's wealth, measured quantitatively, such as an increase in the gross domestic product, gross national product and national income per capita.²⁰⁶ Economic growth can be a consequence of these shifts.²⁰⁷ Economic growth, by extension, entails increasing national economies,²⁰⁸ whereas economic development shows the ripple effects of economic growth in the form of an improved quality of living for everyone.²⁰⁹ Comparatively economic growth is a process of increase,²¹⁰ whereas economic development is a process of structural change, something different and/or more.²¹¹ This dissertation proceeds from this understanding of economic growth and economic development.

Empowerment requires that there be an equal share of valued resources gain greater access to and control.²¹² Goal 15 promotes fair and equitable distribution of benefits accruing from natural resource exploitation.²¹³ Equal distribution of environmental pollution and fair access to, use of, and enjoyment of natural resources are essential tenets of the concept of environmental justice.²¹⁴ This necessitates the

²⁰³ Sustainable Development Goal 15, Target 15.C. United Nations "Sustainable Development Goals" *United Nations* <<https://www.un.org/sustainabledevelopment/biodiversity/>> (accessed 20-01-2023).

²⁰⁴ AP Haller "Concepts Of Economic Growth And Development. Challenges Of Crisis and Of Knowledge" (2012) 15 *Economy Transdisciplinarity Cognition* 66 66.

²⁰⁵ E Malizia "Economic Growth and Economic Development: Concepts and Measures" (1990) 20 *Review of Regional Studies* 30 30.

²⁰⁶ Increase in gross domestic product, gross national product per capita, and national income per capita. See AP Haller (2012) *Economy Transdisciplinarity Cognition* 66.

²⁰⁷ 66.

²⁰⁸ Measured through macroeconomic indicators such as gross domestic product, gross national product per capita, and national income per capita. 66.

²⁰⁹ 66.

²¹⁰ 66.

²¹¹ E Malizia (1990) *Review of Regional Studies* 31.

²¹² EC Albers & N Paolini (1993) *The Journal of Sociology & Social Welfare* 101.

²¹³ Sustainable Development Goal 15, Target 15.6. United Nations "Sustainable Development Goals" *United Nations* <<https://www.un.org/sustainabledevelopment/biodiversity/>> (accessed 20-01-2023).

²¹⁴ C Gliński (2003) *Law and Politics in Africa, Asia and Latin America* 49.

consolidation of environmental justice issues with those of social and economic justice.²¹⁵ Environmental justice requires the restitution of improperly taken environmental resources, the remediation of contaminated environments, and the imposition of responsibility on those who cause environmental harm.²¹⁶

All South Africans should be active in their own development to alleviate poverty and inequality, and historical injustices to be redressed. This includes being able to exercise their environmental right. If victims of environmental/climate injustices are to be offered the same level of protection as everyone else, they must have a voice in the decision-making and policy-making processes. In essence: 'Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life—economic quality, health care, housing, human rights, environmental protection, and democracy.'²¹⁷

2.3 Conclusion

Sustainable development, a phrase adopted from the Brundtland report in 1987, refers to development that meets the needs of the present without sacrificing the capacity of future generations to do the same. Sustainable development seeks to promote economic development without compromising social or environmental integrity. Recognizing that economic development and environmental protection are inextricably linked is fundamental to the idea of sustainable development. While improvements in extraction technology may help in the near term, irresponsible development might lead to far worse difficulties in the long run. This chapter introduced the idea of sustainable development, defined it, and discussed its three foundational tenets—social, environmental, and economic considerations. It went on to detail the sustainable development objectives, which connect climate change with sustainable development.

²¹⁵ 49.

²¹⁶ 49.

²¹⁷ Quoting the South African Environmental Justice Networking Forum DA McDonald "What is Environmental Justice?" (2002) in DA McDonald (ed) *Environmental Justice in South Africa* 4.

Chapter 3: Considerations Legislative Provisions for Environmental and Climate Justice for sustainable development

3.1 Introduction

This chapter examines the legislative framework that governs sustainable development throughout the transition to a low-carbon economy in the mining sector. This chapter starts by discussing the framework created by the Constitution of the Republic of South Africa for sustainable development. Next, the broad requirements for environmental protection for sustainable development are set out. Under this discussion, it takes into account the requirements of NEMA as they apply to the environmental pillar of sustainable development, as well as the measures for a just transition for sustainable development as outlined in the Climate Change Bill. Finally, this chapter evaluates the MPRDA and the Mining Charter, two pieces of legislation that aim to promote transformation and empowerment in the mining industry, to assess whether they go far enough in addressing the historical inequalities.

3.2 The Constitution

The concept of sustainable development is enshrined in section 24(b) of the Constitution, and it calls for the ecologically sustainable development for 'present and future generations.' It explicitly refers to the three fundamental principles of sustainable development, namely, environmental protection and social and economic development.²¹⁸ By virtue of including the essential principles of sustainable development as defined by the Brundtland Commission, the Constitution formalises and codifies sustainable development in the South African context.²¹⁹ The Constitution envisions sustainable development to balance social, and economic progress with environmental protection. Section 24(b)(iii) situates the

²¹⁸ M. Van der Bank & K. Jaco "Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices" (2020) 13 *Air, Soil and Water Research* 4.

²¹⁹ The Constitution respects the link between the environment and development; in fact, it emphasises the necessity for environmental protection while simultaneously acknowledging the need for socio-economic development in the same sentence. Van der Bank & Jaco (2020) *Air, Soil and Water Research* 4.

sustainable development as well as the sustainable extraction and use of natural resources at the centre of environmental protection.²²⁰

Section 24 of the South African Constitution²²¹ is divided into two sections: Section 24(a) guarantees the right to an environment that is not harmful to the health or well-being of present and future generations. Section 24(b) compels the state to adopt appropriate legislative and other measures to guarantee a protected environment, the promotion of conservation and secure ecologically sustainable development and use of natural resources, without limiting socio-economic development.²²² The purpose of section 24 is to ensure that the environment is protected through the adoption of legal and other measures which balances the social, economic, and environmental objectives. Section 24 situates the environmental right as fundamental to sustainable development and explicitly makes sustainable development a constitutional objective.²²³

Section 24(b) does not explicitly place responsibility on the state.²²⁴ However, the state is the only entity that can devise and implement legislative framework and other measures, by virtue of section 7(2) of the Constitution, which places the responsibility to uphold the Bill of Rights on the state, of which the environmental right is one of them, thus the right under section 24(b) falls on the state.²²⁵ Section 8(1) further provides that the Bill of Rights is applicable and binds all organs of state. This provision requires the state to consider the environmental right in making legislative and administrative choices.²²⁶ Thus,

²²⁰ Van der Bank & Jaco (2020) *Air, Soil and Water Research* 4.

²²¹ Section 24 of the Constitution states that “[e]veryone has the right—

(a) to an environment that is not harmful to their health or wellbeing; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures 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.”

²²² Van der Bank & Jaco (2020) 13 *Air, Soil and Water Research* 4.

²²³ By adopting the widely accepted definition of the concept of sustainable development offered by the Brundtland Commission into the Constitution, it codifies sustainable development in law. Van der Bank & Jaco (2020) *Air, Soil and Water Research* 4.

²²⁴ Section 24(b) of the Constitution.

²²⁵ Van der Bank & Jaco (2020) *Air, Soil and Water Research* 3.

²²⁶ The concept of sustainable development is explained in chapter 2 of this dissertation.

the obligation to protect the environment is imposed on the state, through formulating and implementing 'legislative and other measures.'²²⁷

Section 8(2) adds that all natural or juristic persons are bound by the provisions of the Bill of Rights. Private players therefore also have a responsibility to achieve sustainable development, since the environmental right must be interpreted as having both horizontal and vertical applicability. The environmental right applies to everyone, the responsibility for promoting sustainable development, consequently environmental protection, rests not only with the government but also with private entities.²²⁸

The court in *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*²²⁹ acknowledged the damage and harm that mining can cause to the environment.²³⁰ The court adopted the meaning of sustainable development as defined by the Brundtland commission, by calling for development that considers the ability of present and future generations to fulfil their needs when issuing mining licences.²³¹

3.3 Legislative Framework: Environmental Protection and Sustainable Development

3.3.1 The One Environmental System

The One Environmental System came into effect in 2014 to regulate environmental authorisations and water use in the mining sector.²³² The establishment of the One Environmental System was a response to the inefficient and redundant processing system.²³³ Before the enactment of the One Environmental

²²⁷ Section 24(b) of the Constitution.

²²⁸ In this context, the private actors would constitute the mining companies.

²²⁹ *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999) para 20.

²³⁰ (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999) para 20.

²³¹ (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999) para 20.

²³² Department of Environmental Affairs "Government's One Environmental System" (9-12-2014) *Department of Environmental Affairs* <<https://www.dffe.gov.za/mediarelease/oneenvironmentalsystem>> (accessed 28-01-2023).

²³³ Shamila Mpinga "The One Environmental System for the mining industry: Has it given rise to intra-governmental conflict of interest?" (05-12-2017) *Mineral Law in Africa* <<http://www.mlia.uct.ac.za/news/one-environmental-system-mining-industry-has-it-given-rise-intra-governmental-conflict-interest>> (accessed 05-02-2023); Department of Environmental Affairs "Government's One Environmental System" (9-12-2014) *Department of Environmental Affairs* <<https://www.dffe.gov.za/mediarelease/oneenvironmentalsystem>> (accessed 28-01-2023).

System, the framework governing the South African mining sector has been seen as one of the most complex and overly regulated industries for many years.²³⁴ Mining companies required several permits and licenses to conduct prospecting, exploration, mining, and production; prior to the implementation of the One Environmental System.²³⁵ NEMA required an environmental authorisation and an environmental management plan. The MPRDA also required an environmental management plan.²³⁶

Under the new system, environmental regulations are established by the Department of Forestry, Fisheries, and the Environment per Section 50A of NEMA.²³⁷ The MPRDA no longer contains any provisions relating to environmental authorisations.²³⁸ Mining companies must now only submit environmental management plans in accordance with the provisions of NEMA.²³⁹ The then Department of Environmental Affairs' role became limited to that of an appeals body.²⁴⁰

Vivoda states that extensive legal formalities required to establish and/or operate a business discourage foreign investments.²⁴¹ They added that, '[r]egulatory overlap between various government departments (often Energy/Resources/Mining and Environment) may result in unclear lines of authority [...]. Regulatory overlap or duplication is a significant investment deterrent'.²⁴² In this regard, streamlining the environmental authorization procedure would eliminate excessive regulation in the mining industry, offer legal clarity, and restore investor trust.²⁴³ Efficiency in processing applications for mining rights was a driving factor in this integration.²⁴⁴

²³⁴ A Jeffery "Grounding Growth: Finding The Right Balance Between Mining and The Environment" (2018)3 *IRR* 5.

²³⁵ 5.

²³⁶ 5.

²³⁷ Section 50A of NEMA.

²³⁸ Shamila Mpinga "The One Environmental System for the mining industry: Has it given rise to intra-governmental conflict of interest?" (05-12-2017) *Mineral Law in Africa*.

²³⁹ Section 50A of NEMA.

²⁴⁰ Shamila Mpinga "The One Environmental System for the mining industry: Has it given rise to intra-governmental conflict of interest?" (05-12-2017) *Mineral Law in Africa*.

²⁴¹ V Vivoda "Determinants of Foreign Direct Investment in the Mining Industry" in T O'Callaghan & G Geordan (eds) *Mining in the Asia-Pacific: Risks, Challenges and Opportunities* (2017) 25.

²⁴² 25.

²⁴³ A Jeffery "Grounding Growth: Finding The Right Balance Between Mining and The Environment" (2018)3 *IRR* 5.

²⁴⁴ Shamila Mpinga "The One Environmental System for the mining industry: Has it given rise to intra-governmental conflict of interest?" (05-12-2017) *Mineral Law in Africa*.

During the preliminary deliberations about how the One Environmental System would be implemented, was that the now Department of Forestry, Fisheries, and the Environment ²⁴⁵ would regulate all matters regarding the environment. The One Environmental System was initiated with the hope that the then Department of Environmental Affairs would take over environmental enforcement from the now Department of Mineral Resources & Energy.²⁴⁶ This never materialized, however. The Department of Mineral Resources & Energy still maintains its authority over environmental matters. NEMA delegates responsibility to the Minister of Mineral Resources to make judgements about the issuing of environmental authorisations.²⁴⁷ This may be one of the reasons why the One Environmental System is not an effective tool for implementing environmental justice and, by extension, fostering sustainable development in the mining sector, as discussed under chapter 4 of this dissertation.

3.3.2 Environmental Legislation: NEMA

The White Paper on Environmental Management Policy was published in 1997 and marked a significant change in South Africa's strategy for environmental management.²⁴⁸ South Africa's legal foundation for environmental management is laid out in the National Environmental Management Act (NEMA) of 1998,²⁴⁹ which was enacted in response to the White Paper. The environmental justice imperative for the mining sector in South Africa is enforced through NEMA and the One Environmental System, as discussed under section 3.3.1 above.

NEMA calls for environmental justice to be sought for the environmental impacts not to fall disproportionately on the most vulnerable and disadvantaged.²⁵⁰ NEMA further seeks equitable access

²⁴⁵ Then Department of Environmental Affairs.

²⁴⁶ Then Department of Mineral Resources.

²⁴⁷ For example, a broad discretionary authority to grant environmental authorisations is granted to the Minister of Mineral Resources under Section 24F of NEMA, and a similar authority is granted under Section 24G of the NEMA, which allows the Minister of Mineral Resources to take appropriate action if mining activities have commenced unlawfully. Section 24M of the NEMA empowers the Minister of Mineral Resources to grant exemptions and to specify the conditions under which such exemptions may be granted.

²⁴⁸ The White Paper on Environmental Management Policy of 1998 (GN 749 in GG 18894 of 15 May 1998)

²⁴⁹ National Environmental Management Act 107 of 1998.

²⁵⁰ Section 2(4)(c) of NEMA. The preamble to the NEMA further recognises that harmful environmental practices are a key cause and consequence of inequality of wealth and access to resources resulting in poverty.

to environmental resources and the advantages that come with them, without discrimination, and that steps be taken to guarantee equal access of the disadvantaged to such resources.²⁵¹

NEMA outlines the national environmental management principles, the principles which echo the concept of sustainable development.²⁵² All the principles in section 2 of NEMA have a direct impact on the mining industry. However, Glazewski and Plit,²⁵³ calls attention to three principles that are the most applicable for regulating the mining sector, namely, the precautionary, preventative, and the polluter-pays principles.²⁵⁴ The 'polluter-pays' principle is enshrined in the environmental management principle providing that those responsible for environmental pollution or degradation must pay for the costs associated with remedying, mitigating, or minimising the harm to the environment and human health that results from their activities.²⁵⁵

A precautionary principle is emphasised in the call for a cautious approach in making decisions on projects to be authorised considering there are limitations in existing information regarding the implications of choices and actions.²⁵⁶ Lastly, the preventative principle which Glazewski explains is reflected in the view that any disturbances of people's environmental rights, the environment, or the nation's cultural heritage, must be anticipated and prevented, and if not prevented, minimised and remedied.²⁵⁷ Explain above concepts using what is below

Section 24 of NEMA extends the provisions for the environmental protection for the extractive industry.²⁵⁸ NEMA includes several provisions which delegate responsibility to the Minister of Mineral Resources to

²⁵¹ Section 2(4)(d) of NEMA

²⁵² J. Glazewski & L. Plit "Mineral and petroleum resources" in Jan Glazewski (ed) *Environmental Law in South Africa Environment* (2012) 50.

²⁵³ 50.

²⁵⁴ 50.

²⁵⁴ 50.

²⁵⁵ Section 2(4)(p) of NEMA as cited by Glazewski & Plit (2012) in Glazewski (ed) *Environmental Law in South Africa Environment* 50. The polluter-pays principle was enshrined in the legislative text as early as 1903 holding that the mining rights holders responsible for environmental degradation and pollution during the project lifecycle. See Lwabukuna (2016) in Mujuru & Mutanga (eds) *Management and Mitigation of Acid Mine Drainage in South Africa* 125.

²⁵⁶ Section 2(4)(a)(vii) of NEMA .

²⁵⁷ Sections 2(4)(a)(ii), 2(4)(a)(iii) and 2(4)(a)(viii) of NEMA.

²⁵⁸ Section 24 of NEMA.

make judgements about the issuing of environmental authorisations.²⁵⁹ Section 24O provides the criteria for the Minister of Mineral Resources' consideration while reviewing mining right applications.²⁶⁰ Section 24N establishes the contents of the environmental management programme pertaining to the information on environmental management, mitigation, protection, or corrective actions. Section 24M also specifies obligations and conditions which the holder issued with an environmental authorisation must follow.²⁶¹ Section 24P deals with the financial provision for remediation of environmental harm caused by the operations.²⁶² Section 24P of NEMA requires financial provision for post-mining environmental rehabilitation operations.²⁶³ A notable aspect of the development of environmental management in mining legislation is that before 1994, the mining right holder was not held liable for any environmental impacts of their mining activities after the mining activities had been issued.²⁶⁴ In the current legislation, provisions for mine closure are included in section 24R of NEMA. Until the Minister of Mineral Resources issues a closure certificate, the holder of environmental authorisation is held accountable for any environmental liability.²⁶⁵ Section 24S deals with residual stockpiles and deposits, allowing the National Management Waste Act²⁶⁶ to serve as guidance for how the residue is handled.²⁶⁷

The Department of Water and Sanitation (DWS), together²⁶⁸ with Department of Forestry, Fisheries, and the Environment (DFFE) regulate the use of water bodies used for mining activities through the National Water Act (NWA).²⁶⁹ The provisions for the protection of water resources in the NWA complement those

²⁵⁹ For example, a broad discretionary authority to grant environmental authorizations is granted to the Minister of Mineral Resources under Section 24F of NEMA, and a similar authority is granted under Section 24G of the NEMA, which allows the Minister of Mineral Resources to take appropriate action if mining activities have commenced unlawfully. Section 24M of the NEMA empowers the Minister of Mineral Resources to grant exemptions and to specify the conditions under which such exemptions may be granted.

²⁶⁰ Section 24O of NEMA.

²⁶¹ Section 24N of NEMA.

²⁶² Section 24P of NEMA.

²⁶³ Section 24P of NEMA.

²⁶⁴ V Munnik *et al* "The social and environmental consequences of coal mining in South Africa. A Case Study" (2010) 8.

²⁶⁵ Section 24R of NEMA.

²⁶⁶ National Management Waste Act 59 of 2008.

²⁶⁷ Section 24S of NEMA.

²⁶⁸ According to the scope of definition of an 'environment' in NEMA, water resources are included.

²⁶⁹ National Water Act 36 of 1998.

in the NEMA.²⁷⁰ Sustainability and equity are at the heart of the 'use, allocation and protection of and access to water resources' in NWA.²⁷¹ The NWA contains an element of justice in that it recognises that discriminatory laws of the past have skewed access to water resources and seeks to redress this wrong by protecting and equitably allocating the equal access to water bodies, a basic human need for present and future generations.²⁷² The polluter pays-principle is also embedded in the NWA and its regulations in that the mining right holder is held liable for the pollution of water resources.²⁷³

Significant air quality concerns are associated with mining, beneficiation, and the use of some natural resources; thus, these activities are regulated by the National Environment Management: Air Quality Act (NEM: AQA).²⁷⁴ NEM: AQA has so far been the sole statutory instrument in South Africa that deals with greenhouse gas emissions.²⁷⁵ However, it must be noted that NEM: AQA has no stated goal of addressing climate change.²⁷⁶ The South African Government adopted the National Greenhouse Gas Emission Reporting Regulations to fulfil its reporting obligations to the United Nations Framework Convention on Climate Change (UNFCCC) and other treaties it is accountable to.²⁷⁷ The National Greenhouse Gas Emission Reporting²⁷⁸ regulations are a measure that was introduced to track greenhouse gas emissions. These steps were taken to create a centralised reporting system for greenhouse gas emissions, which would be used to inform laws aimed at combating climate change.²⁷⁹

²⁷⁰ The NWA regulations further encourage coordination between the relevant departments regulating the environmental aspects of the mining industry between the *Department of Mineral Resources and Energy* and *Department of Forestry, Fisheries and Environment*.

²⁷¹ Preamble to the National Water Act 36 of 1998.

²⁷² Preamble to the National Water Act 36 of 1998.

²⁷³ V Munnik et al 'The social and environmental consequences of coal mining in South Africa. A Case Study' (2010) at 8. The regulations on the use and protection of water resources for mining and incidental activities were enacted as required by section 26(1)(b) and (g) of NWA see National Water Act: Regulations: Use of Water for Mining and Related Activities Aimed at Protection of Water Resources (GN 1091 in GG 19182 of 4 June 1999).

²⁷⁴ National Environment Management: Air Quality Act (39 of 2004).'

²⁷⁵ Van der Bank & Jaco (2020) *Air, Soil and Water Research* 6.

²⁷⁶ 6.

²⁷⁷ South Africa signed and ratified the Paris Agreement in April 2016 and November 2016 respectively. UNFCCC 'South Africa' <<https://unfccc.int/node/61201>> (15-01-2022).

²⁷⁸ National Greenhouse Gas Emission Reporting Regulations (GN 275 in GG 40762 of 3 April 2017).

²⁷⁹ The gazetted National Greenhouse Gas Emission Reporting Regulations require that the large-scale emitters submit plans that outline how they expect to reduce and prevent greenhouse gas emissions and update them on the progress they have made towards this goal. Section 2 of National Greenhouse Gas Emission Reporting Regulations (GN 275 in GG 40762 of 3 April 2017).

Climate and environmental policy that supports ecologically sustainable development must prioritise social equity and inclusivity.²⁸⁰ As previously stated, in section 24 of the Constitution,²⁸¹ the government is mandated to conserve the environment and ensure that it is healthy and safe for present and future generations. Furthermore, according to NEMA, 'environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.'²⁸² For this reason, to meet the requirement of developing effective legislative and other measures to protect the environment, adaptation and mitigation efforts must not only focus on short-term emissions, but must also consider long-term emissions and socio-economic effects. As already noted, the National Greenhouse Gas Emission Reporting regulations were devised to gather enough data to inform legislative framework and policies that will regulate the transition to a low-carbon economy. The Climate Change Bill, if it passes into law, will be a crucial tool in the transition to a low-carbon future.

3.3.3 Environmental Legislation: A just transition and sustainable development

To contribute to the global effort to reduce greenhouse gas emissions, a Cabinet-approved Climate Commission was formed to monitor the nation's just transition.²⁸³ In June 2018, the first National Climate Change Bill was made available for public comment.²⁸⁴ Three years later, on the 18th of February 2022, the Department of Forestry, Fisheries, and the Environment officially tabled the Climate Change Bill in Parliament.²⁸⁵ If the bill is passed, it will be the first South African piece of legislation to address climate change.²⁸⁶ The Climate Change Bill sets out to provide a legal foundation in the regulation of the implementation of adaptation and mitigation strategies in a climate emergency.²⁸⁷ The Climate Change

²⁸⁰ United Nations "Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions" (2-7-2021) *United Nations VI* <<https://www.unescwa.org/news/enabling-sdgs-through-inclusive-just-energy-transitions>> (17-11-2021).

²⁸¹ Constitution of the Republic of South Africa 1996 section 24.

²⁸² United Nations "Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions" (2-7-2021) *United Nations VI* <<https://www.unescwa.org/news/enabling-sdgs-through-inclusive-just-energy-transitions>> (17-11-2021).

²⁸³ Presidential Climate Commission "Presidential Climate Commission: Towards a Just Transition" <<https://www.climatecommission.org.za/>> (accessed 15-01-2022).

²⁸⁴ Section 2(2) of NEMA.

²⁸⁵ Key Aspects of South Africa's much-anticipated Climate Change Bill <<https://www.fasken.com/en/knowledge/2022/06/9-key-aspects-of-south-africas-much-anticipated-climate-change-bill>> accessed 28 January 2023.

²⁸⁶ Key Aspects of South Africa's much-anticipated Climate Change Bill <<https://www.fasken.com/en/knowledge/2022/06/9-key-aspects-of-south-africas-much-anticipated-climate-change-bill>> (accessed 28-01-2023).

²⁸⁷ Van der Bank & Jaco (2020) *Air, Soil and Water Research 7*.

Bill aims to 'enable the development of an effective climate change response and a long-term transition to a low-carbon and climate-resilient economy and society for South Africa in the context of sustainable development.'²⁸⁸ The Climate Change Bill highlights the necessity for an efficient, progressive, and gradual response to climate change, a problem recognized as an immediate and urgent concern.²⁸⁹

The Climate Change Bill defines a 'just transition' as 'a shift towards a low-carbon, climate-resilient economy and society and ecologically sustainable economies and societies which contribute toward the creation of decent work for all, social inclusion and the eradication of poverty.'²⁹⁰ The definition centres on the prioritisation of socioeconomic and environmental factors and shows that the Climate Change Bill recognises that the just transition should centre around sustainable development.²⁹¹ The Climate Change Bill retains the meaning of the term 'sustainable development' as it is assigned in NEMA, that emphasises incorporating social, economic, and ecological considerations into strategy development, execution, and decision-making.²⁹² The Climate Change Bill further intends to give effect to the national environment management principles outlined by NEMA and envisages to protect the climate system for present and future generations.²⁹³ The Bill therefore provides a link with existing legislation on environmental management and protection.

The Climate Change Bill calls for a just transition that accounts for both the socioeconomic synergies and trade-offs that will result from the adoption of climate response strategies.²⁹⁴ By calling for a transition that promotes ecologically sustainable economies and societies, the definition prioritises sustainable development and all its integral pillars.²⁹⁵ The Climate Change Bill affirms that climate change response is a sustainable development priority.²⁹⁶ The Climate Change Bill demonstrates an appreciation that the resulting unpredictable and extreme weather conditions due to climate change will affect other

²⁸⁸ Aim of the Climate Change Bill.

²⁸⁹ Preamble to the Climate Change Bill.

²⁹⁰ Preamble to the Climate Change Bill.

²⁹¹ Preamble to the Climate Change Bill.

²⁹² Sustainable development is defined as '*the integration of social, economic, and environmental factors into planning, implementation, and decision-making to ensure that development serves present and future generations*' in NEMA definitions.

²⁹³ Section 3(a) of the Climate Change Bill.

²⁹⁴ Section 3.

²⁹⁵ Section 3.

²⁹⁶ Preamble to Climate Change Bill.

socioeconomic factors such as human health, food and water security, and infrastructure to name a few.²⁹⁷ The Climate Change Bill explicitly states that the impacts of global warming and climate change will undermine the country's development goals.²⁹⁸

The Climate Change Bill anticipates that the social, economic, and environmental opportunities flowing from the transition will aid in realising the country's development, empowerment, and transformation objectives.²⁹⁹ The Climate Change Bill specifically highlights objectives of transformation and empowerment in its text, it does not divorce these imperatives from sustainable development.³⁰⁰ The Climate Change Bill does not define empowerment, neither does NEMA. However, the Climate Change Bill provides that the interpretation and application of its provisions must be guided by the principles set out in section 2 of NEMA.³⁰¹ In the context of transformation and empowerment, section 2(4)(c) of NEMA explicitly encourages the pursuit of environmental justice to ensure that the burden of negative environmental consequences is not disproportionately borne by anyone and more especially, those who are already disadvantaged. A subsequent provision in section 2 of NEMA³⁰² calls for the empowerment of communities through knowledge-sharing of environmental matters. Thus, the Climate Change Bill shows an understanding that the environmental issues are fundamental considerations for a transformed society with empowered citizens.³⁰³

As mentioned in Chapter 2, empowerment is a process that occurs amongst disadvantaged communities and calls for the active participation of those communities.³⁰⁴ It requires that those communities have an awareness of the interests and structures at play in their context. It gives individuals a greater voice in the decision-making process regarding resource management.³⁰⁵ The central tenets of the term 'empowerment' are at the heart of the NEMA provisions.³⁰⁶ It firstly values diversity and by employing the term empowerment, NEMA acknowledges that citizens in a democratic society are afforded the freedom

²⁹⁷ Preamble to Climate Change Bill.

²⁹⁸ Preamble to Climate Change Bill.

²⁹⁹ Preamble to Climate Change Bill.

³⁰⁰ Preamble to Climate Change Bill.

³⁰¹ Section 3(a) of the Climate Change Bill.

³⁰² Section 2(4)(h) of NEMA.

³⁰³ Section 3(a) of the Climate Change Bill.

³⁰⁴ Chapter 2 of this dissertation.

³⁰⁵ Chapter 2 of this dissertation.

³⁰⁶ Chapter 2 of this dissertation.

to make decisions³⁰⁷ regarding their own lives. In addition, NEMA emphasizes education as a key tenant of the process of empowerment.³⁰⁸ Further, NEMA acknowledges that understanding one's immediate surroundings is essential for effective participation in environmental decision-making.³⁰⁹

3.4 Legislative Framework: Transformation and Empowerment in the mining sector

3.4.1 The Mineral and Petroleum Resources Development Act

The Constitution of the Republic of South Africa reflects the country's values, which are to transform a society that was formerly unequal and unjust.³¹⁰ The South African Constitution is acknowledged by Constitutional Court and other courts as a transformative constitution, 'to transform our society into one in which there will be human dignity, freedom and equality'.³¹¹ This imperative is echoed in the core mission and objects of the MPRDA, as it promotes 'equitable access to and sustainable development of the nation's mineral and petroleum resources'.³¹² The MPRDA acknowledges that equality is a prerequisite for a reformed society. MPRDA was enacted to, amongst other objectives, address the legacy of apartheid in the mining industry.³¹³ The Preamble to the MPRDA asserts that it is the state's duty to manage and develop natural resources in a manner that protects the environment for current and future generations and promote social and economic growth, thus promoting sustainable development.³¹⁴ The MPRDA notably recognizes the necessity for social upliftment of mining-affected communities as well as the industry's commitment to reformation aimed at fostering equal access to the country's natural resources.³¹⁵

³⁰⁷ Chapter 2 of this dissertation.

³⁰⁸ Chapter 2 of this dissertation.

³⁰⁹ Chapter 2 of this dissertation.

³¹⁰ Van der Bank & Jaco (2020) *Air, Soil and Water Research* 4.

³¹¹ *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8. 'The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own history and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle' *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 74.

³¹² Act of the MPRDA.

³¹³ Section 2(c) & (d) MPRDA.

³¹⁴ Preamble to the MPRDA.

³¹⁵ Preamble to the MPRDA.

Under the MPRDA, the state became the sole custodian of all mineral and petroleum resources for the benefit of all South Africans.³¹⁶ The government, through the MPRDA and its regulations,³¹⁷ oversees the acquisition, use and disposal of prospecting and mining rights and permits in South Africa.³¹⁸ The state is empowered to be a 'facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised'.³¹⁹ The preamble to the MPRDA further reiterates the state's obligation to 'protect the environment for present and future generations to ensure ecologically sustainable development of mineral resources',³²⁰ thereby solidifying the commitment to sustainable development.

At the heart of the MPRDA is the commitment to redress past racial discrimination that resulted in present-day inequalities.³²¹ Section 100(2)³²² of the MPRDA mandates the development of a Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter). The Mining Charter gives effect to the object of the MPRDA³²³ which seeks to promote equitable access to the country's natural resources to all people. It also gives substance to the right to equality as provided by section 9 of the Constitution of the Republic of South Africa, which aims to rectify historical imbalances of the past.³²⁴ The Mining Charter sets out the framework for targets and timetables for facilitating the entry and meaningful participation of the historically disadvantaged South Africans into the mining industry. Section 100(2) and the resulting Mining Charter cements the link between empowerment and development. The vision of the Mining Charter is to "facilitate sustainable transformation, growth and

³¹⁶ V. Munnik et al "The social and environmental consequences of coal mining in South Africa. A Case Study" (2010) 8.

³¹⁷ Mineral and Petroleum Resources Development Act: Regulations (GN 7949 in GG 26275 of 23 April 2004).

³¹⁸ Section 2 and 3 of the MPRDA.

³¹⁹ *Agri South Africa v Minister for Minerals and Energy* 2013 (7) BCLR 727 (CC) para 68.

³²⁰ Preamble to the MPRDA.

³²¹ Preamble to the MPRDA.

³²² Section 100(2) of the MPRDA on the transformation of minerals industry provides:

'(a) To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.

(b) The Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.'

³²³ MPRDA section 2 (c) and (d).

³²⁴ Section 9 of the Constitution of the Republic of South Africa.

development of the mining and minerals industry”.³²⁵ To achieve this, the framework, targets, and timeline for facilitating the admission of historically persons into the mining industry will be established.³²⁶

3.4.2 The Mining Charter and Broad-based Black Economic Empowerment

Unfair discrimination perpetuated by the Apartheid system limited the access to opportunities in the economy to many black people.³²⁷ This disparity remains in the post-apartheid era as many white South Africans have continued to benefit from privileges granted under Apartheid.³²⁸ Poverty remains a pervasive issue and is a legacy of the apartheid regime.³²⁹

Black Economic Empowerment (BEE) was introduced in the early years of the new South Africa to deracialise the South African Economy.³³⁰ BEE initially focused only on the transfer of the ownership in black business, creating a new elite to the detriment of other black persons excluded from the South African economy.³³¹ The scope of BEE was consequently broadened in terms of the Broad-Based Black Economic Empowerment Act of 2003 to empower black persons through more than just the transfer of ownership in the South African economy.³³² BBBEE aims to increase the meaningful participation of black persons in the economy by setting out different objectives (called elements) that businesses must promote to be BBBEE compliant.³³³ The Minister of Trade and Industry was empowered to issue Codes of Good Practice for the assessment of Broad-Based Black Economic Empowerment (BBBEE) compliance in accordance with section 9 of the Broad-Based Black Economic Empowerment Act of 2003.

The Mining Charter has been revised four times.³³⁴ The Department of Mineral Resources first announced the final version of the Mining Charter in 2004, with subsequent amendments in 2010 and a draft version

³²⁵ Vision of the Mining Charter.

³²⁶ Section 100 (2) of the MPRDA.

³²⁷ Chapter 1 of this dissertation.

³²⁸ Chapter 1 of this dissertation.

³²⁹ 2001 Black Economic Empowerment Commission Report 1; See also A Heyns Empowerment through Mine Community Development: How the politics of development perpetuate poverty in mining areas – A legal theoretical analysis PhD thesis University of Cape Town (2020) 64-65.

³³⁰ 2001 Black Economic Empowerment Commission Report 1.

³³¹ 2.

³³² 1.

³³³ 2.

³³⁴ A Heyns & H Mostert “Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty” (2018) 11 *Law and Development Review* 3.

in 2016.³³⁵ The current Mining Charter is the fourth version and has been applicable as of 2018.³³⁶ The structure of the 2018 Mining Charter follows that of the BBBEE scorecard. The first scorecard element is the ownership element³³⁷ of the Mining Charter which seeks to deracialize the mainstream economy.³³⁸ The ownership element seeks to transform the mining industry which gives effect to the constitutional mandate and the objects of the MPRDA.³³⁹ Which are remedying the ongoing legacy of apartheid,³⁴⁰ and to rectify the wrongs of apartheid against black people that resulted in a racialised economy and unevenly distributed wealth.³⁴¹ Through changing the demographics of who owns the mining rights, the Mining Charter calls for meaningful participation and integration into the economy of historically disadvantaged persons.³⁴²

The Mining Charter recognises that procuring manufactured goods and services used in the mining sector locally, expands economic development and creates more employment opportunities. Thus, the Mining Charter necessitates mining right holders to expand economic opportunities to small, medium, and micro enterprises when procuring mining goods and services.³⁴³ By encouraging local procurement, the Mining Charter uses the mining sector to provide opportunities that boost the South African economy. To promote inclusive procurement, the Mining Charter requires that mining right holders source a certain percentage

³³⁵ 4.

³³⁶ Section 2.1 of 2018 Mining Charter.

³³⁷ Holders of mining rights, both new and existing, are subject to a minimum BEE ownership requirement of 26% for new rights and 30% for existing rights.

³³⁸ Department of Trade, Industry Competition "Broad-Based Black Economic Empowerment" at *Department of Trade, Industry Competition* <<http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/broad-based-black-economic-empowerment/>> (28-01-2023).

³³⁹ Department of Mineral Resources Assessment of the Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry (Mining Charter) (2015) Section 4.2.

³⁴⁰ Department of Trade, Industry Competition "Broad-Based Black Economic Empowerment" at *Department of Trade, Industry Competition* <<http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/broad-based-black-economic-empowerment/>> (28-01-2023).

³⁴¹ Department of Trade, Industry Competition "Broad-Based Black Economic Empowerment" at *Department of Trade, Industry Competition* <<http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/broad-based-black-economic-empowerment/>> (28-01-2023).

³⁴² Section 2.1 of 2018 Mining Charter.

³⁴³ Scorecard Element 2: Inclusive Procurement, Supplier and Enterprise Development. Section 2.2 of 2018 Mining Charter.

of their manufactured goods and services from companies that are owned by historically disadvantaged persons, women or youth, and BEE complaint companies.³⁴⁴

The Human Resource Development element³⁴⁵ was introduced to transform the mining sector's workforce, as well as to position the South African mining sector on a competitive scale globally when it comes to the knowledge and skills it possesses.³⁴⁶ The Mining Charter aims to diversify the demographics of the mining sector and provide opportunities for historically disadvantaged persons to develop their skills and increase their employment prospects.³⁴⁷ To this end, the Mining Charter requires that the mining right holder invest a minimum of 5 per cent to essential skills development activities that would be useful for the mining sector.³⁴⁸

The Mining Charter calls for a more diverse and equitable representation of historically disadvantaged persons at all levels of the workplace, affirming that this would be crucial for social stability, and transformation and competitiveness of the sector.³⁴⁹ The Mining Charter sets out to diversify the sector by ensuring meaningful participation of the historically disadvantaged persons in the management and control of the mining industry, not only at all levels of decision making but also in executive and management positions within the mining industry. The Mining Charter thus requires a certain percentage of the historically disadvantaged persons to be represented amongst others, in every board, executive management, senior management and any core and critical skills level.³⁵⁰ Furthermore, mining businesses must identify and accelerate the development of their current talent pools to assure their careers progress quickly.³⁵¹

³⁴⁴ Scorecard Element 2: Inclusive Procurement, Supplier and Enterprise Development. Section 2.2 of 2018 Mining Charter.

³⁴⁵ Scorecard Element 3: Human Resource Development. Section 2.3 of 2018 Mining Charter. Section 2.3 of 2018 Mining Charter.

³⁴⁶ Department of Mineral Resources Assessment of the Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry (Mining Charter) (2015).

³⁴⁷ Section 2.3 of 2018 Mining Charter.

³⁴⁸ Section 2.3.

³⁴⁹ Section 2.3.

³⁵⁰ Section 2.3.

³⁵¹ Section 2.3.

History shows that mining developments' disproportionate negative social and economic effects have been felt most by the communities that host mines.³⁵² The majority of South Africa's mining industry is in rural and poor regions.³⁵³ Thus, the Mining Charter requires that the social and labour plans and Mine Development Projects are implemented, these initiatives are said to improve the socioeconomic standing of both mining host communities and labour sending communities.³⁵⁴

The Mining Charter seeks to restore miner employees' human dignity by ensuring that the mineworkers do not live in hostels as in the past.³⁵⁵ It aims to transform the housing and living conditions by requiring mining companies to provide a Housing and Living Conditions plans that provide for housing conditions that are in line with the principles of housing conditions such as decent and affordable housing, home ownership and secure housing tenure for mine workers.³⁵⁶ The living conditions must include appropriate healthcare services.³⁵⁷

3.5 Conclusion

This chapter traced the development of environmental and climate justice concerns into mining legislation and regulation. It was the purpose of this chapter to present an overview of the legislation that promote sustainable development in the context of the need for a just and equitable social transition to a low-carbon economy in the mining sector. The considered key legislative framework deemed to give effect to the constitutional environmental right are: NEMA, Climate Change Bill, MPRDA and the Mining Charter.

Populations in mining host communities are exposed to health risks and other negative consequences because of mining activities. However, the environmental right is not given due consideration in the Mining Charter, which is a document that is supposed to bring about transformation in the industry. One of the

³⁵² Department of Mineral Resources *Assessment of the Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry (Mining Charter) (2015)* Scorecard Element 5: Mine Community Development.

³⁵³ Department of Mineral Resources *Assessment of the Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry (Mining Charter) (2015)* Section 4.7; Chapter 1 of this dissertation.

³⁵⁴ Section 4.7.

³⁵⁵ 2018 Mining Charter section 2.6.

³⁵⁶ Section 2.6.

³⁵⁷ Section 2.6.

objectives of the MPRDA is to give effect to section 24 of the Constitution, which guarantees the right to live in an environment not harmful to human health or well-being.

Chapter 4: A Mining Charter for Sustainable Development

4.1 Introduction

In many parts of the world, with depleting natural resources and increasing pollution levels, the lives, and livelihoods of many are threatened, and existing structural inequalities are worsening.³⁵⁸ Due to poverty and the lack of efficient means for defending their rights, the poor lack the capacity to access and profit from natural resources or the ability to contest the detrimental consequences of environmental degradation and pollution on their quality of life.³⁵⁹

The emerging concerns of structural inequality, poverty and climate change require effective governance of natural resources for sustainable development whilst shifting away from fossil fuels.³⁶⁰ The environmental harm caused by the vulnerable populations is negligible, yet they continue to bear the burdens and consequences of climate change more than the people responsible for the damage.³⁶¹ South Africa is faced with the task of implementing its energy transition strategies in the context of high unemployment, inequality and national development plans.³⁶²

This chapter, first discusses the insufficiencies of the of the One Environmental System to address environmental protection in the mining industry. Second, the chapter provides a critique of the Mining

³⁵⁸ United Nations Development Programme “Environmental Justice - Comparative Experiences in Legal Empowerment” (12-06-2014) *United Nations Development Programme* 5 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

³⁵⁹ National Planning Commission ‘National Development Plan 2030: Our Future - Make It Work’ (2011) 198-199.

³⁶⁰ United Nations Development Programme “Environmental Justice - Comparative Experiences in Legal Empowerment” (12-06-2014) *United Nations Development Programme* 5 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

³⁶¹ *Minerals Council of South Africa v Minister of Mineral Resources and Energy and others* 2021 (4) All SA 836 (GP) para 5.

³⁶² National Planning Commission ‘National Development Plan 2030: Our Future - Make It Work’ (2011) 197-198.

Charter in addressing the above concerns. Thereafter, the chapter discusses how the Mining Charter, as a tool initially intended for empowerment and transformation, can be useful during the energy transition to facilitate sustainable development by incorporating environmental and climate justice into its provisions. This argument is made by considering the removal of the sustainable development element in the amended Mining Charter and the shortcomings of the One Environmental System in giving effect to environmental justice.

4.2 Critiquing the One Environmental System

The 2010 Mining Charter required of mining right holders to promote sustainable development as part of BBBEE.³⁶³ The 2018 Mining Charter omits any reference to sustainable development. There is a case to be made that the amended Mining Charter left the environmental protection obligation to the One Environmental System.

In chapter 3 some elements of the deliberation process in finalising the One Environmental System were considered. Critics claim that the then Department of Mineral Resources & Energy leveraged its considerable political and economic strength to protect its position.³⁶⁴ Some have criticized those entrusted with monitoring and enforcing environmental laws because of the inherent conflict of interest that arises from doing so.³⁶⁵ Furthermore, there is evidence that mining interests are prioritized above environmental protection.³⁶⁶

Some have criticized those entrusted with monitoring and enforcing environmental laws because of the inherent conflict of interest that arises from doing so.³⁶⁷ Furthermore, there is evidence that mining interests are prioritized above environmental protection.³⁶⁸ It is essential to acknowledge that environmental and/or climate injustices occur and are addressed in circumstances where there are power

³⁶³ Section 2.8 of 2010 Mining Charter.

³⁶⁴ Shamila Mpinga "The One Environmental System for the mining industry: Has it given rise to intra-governmental conflict of interest?" (05-12-2017) *Mineral Law in Africa* <<http://www.mlia.uct.ac.za/news/one-environmental-system-mining-industry-has-it-given-rise-intra-governmental-conflict-interest>> (accessed 05-02-2023).

³⁶⁵ C Strambo et al 'The End of Coal? Planning a "Just Transition" In South Africa' (2019) *Stockholm Environment Institute* at 9.

³⁶⁶ 9.

³⁶⁷ 9.

³⁶⁸ 9.

and resource imbalances, no accountability, transparency, and the willingness to take responsibility.³⁶⁹ This challenge points to the gap in the current legislative framework, and enforcement capacity in giving effect to environmental and social justice of mining is not adequate to effectively transition away from the fossil-fuel-based economy. Environmental justice addresses how power dynamics shape and perpetuate development. Structural measures must be taken to ensure that the interests of the underrepresented groups are better represented in the pursuit of sustainable development through the energy transition.³⁷⁰

Roger Few et al³⁷¹ put it succinctly that: 'changing many of the social drivers of the vulnerability requires a kind of transformation that challenges the existing structures of power and politics, redefining and opening the political space to marginalised groups.'³⁷² The transformation would include addressing and altering the underlying social structures and power relations that perpetuate the issue, which in this instance is inequality.³⁷³ Empowerment would be the primary emphasis of transformation to lessen existing social inequalities and achieve inclusive and equitable development with a sustained reduction in inequality.³⁷⁴

To answer the question of whether or not the Mining Charter delegated environmental protection to the One Environmental System; the One Environmental System's stated goal is not to advance sustainable development *per se*. It seeks to improve environmental management processes and foster an environment conducive to doing business in the mining sector. Therefore, it cannot be used a tool to promote sustainable development in the mining sector. Environmental justice places people at the centre of all the social, economic, and environmental considerations for sustainable development. The direct conflict of interest in the implementation of the One Environmental System, as well as the very purpose it was created would not be effective to environmental justice for promote sustainable development. For a just and inclusive energy transition, empowerment of the historically disadvantaged and those who

³⁶⁹ P Van der Watt & L Marais, "Implementing social and labour plans in South Africa: Reflections on collaborative planning in the mining industry" (2021) 71 *Resources Policy* 6.

³⁷⁰ United Nations "Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions" (2-7-2021) *United Nations VI* <<https://www.unescwa.org/news/enabling-sdgs-through-inclusive-just-energy-transitions>> (17-11-2021).

³⁷¹ R Few et al "Transformation, Adaptation and Development: Relating Concepts to Practice" (2017) 3 *Humanities and Social Sciences Communications* 7.

³⁷² 7.

³⁷³ 7.

³⁷⁴ 7.

continue to live in poverty must be prioritised in legislative reforms governing natural resources and the environment.³⁷⁵ The Mining Charter is the instrument suitable for this as it already claims to centre around prioritising the empowering the historically disadvantaged persons.

4.3 The failure and the potention of the Mining Charter and Sustainable Development and Transformation

The Mining Charter is mandated to redress past and present discrimination against historically disadvantaged persons through broad-based economic empowerment.³⁷⁶ The Mining Charter aims to accomplish this objective by supporting inclusive procurement, which would not only result in the development of the South African economy but will also allow for the expansion of possibilities for historically disadvantaged people in the larger economy.³⁷⁷ It also supports employment fairness and the equitable representation of the country's demographics in the workforce, as well as increasing the prospects of professional advancement for historically disadvantaged people by expanding ownership opportunities and developing their skill sets.³⁷⁸

Section 100(2)(b) of the MPRDA does not explicitly require the inclusion of the object on environmental protection³⁷⁹ as one of the critical issues to be addressed by the Mining Charter. However, reading into the phrasing of section 100(2)(b), which instructs that, '[t]he [Mining] Charter must set out, amongst others...' in this context, the words 'amongst others' are interpreted to mean that the objectives to be addressed are not confined to just the objects expressly listed in Section 100(2)(b).³⁸⁰ That is to say, the Mining Charter was not limited to providing for the MPRDA's socio-economic development objectives. Even though the Mining Charter has the authority to address any of the objects³⁸¹ other than those stated

³⁷⁵United Nations Development Programme "Environmental Justice - Comparative Experiences in Legal Empowerment" (12-06-2014) *United Nations Development Programme* 7 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

³⁷⁶ Section 100(2) of the MPRDA.

³⁷⁷ Chapter 2 of this dissertation.

³⁷⁸ Department of Mineral Resources Assessment of the Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry (Mining Charter) (2015) Section 4.4.

³⁷⁹ Section 2(h) of the MPRDA.

³⁸⁰ *Minerals Council of South Africa v Minister of Mineral Resources and Energy and others* 2021 (4) All SA 836 (GP) para 36.

³⁸¹ The objects of the MPRDA on section 2 are to—

in section 100(2), the Mining Charter does not provide for the environmental objective of the MPRDA.³⁸² The Mining Charter could have provided a framework for environmental protection to promote environmental justice. In its truest essence, that would promote the sustainable development it seeks to facilitate.

The 2018 Mining Charter introduces the sustainable development concept, as it envisages to enable, as stated in its own words, 'the sustainable transformation, growth, and development of the mining industry.'³⁸³ The Court in *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others*³⁸⁴ echoes that, in the attempt for sustainable development, the need for environmental protection cannot be divorced from socio-economic development.³⁸⁵ Quoting Principle 4 of the Rio declaration: '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'³⁸⁶ One of the most important tenets of the sustainable development concept is that development and

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- '(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
 - (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
 - (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
 - (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
 - (e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
 - (f) promote employment and advance the social and economic welfare of all South Africans;
 - (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
 - (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
 - (i) ensure that holders of mining and production rights contribute towards the socio- economic development of the areas in which they are operating.'

Section 100(2)(b) states that 'the Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.'

³⁸² Centre for Environmental Rights "Mining Charter: Environmental justice central to transformation of the mining sector – MEJCON-SA" (10-05-2021) *Centre for Environmental Rights* <<https://cer.org.za/news/mining-charter-environmental-justice-central-to-transformation-of-the-mining-sector-mejcon>> (accessed 16-05-2021).

³⁸³ Vision of the Mining Charter.

³⁸⁴ *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others* 2007 6 SA 4 (CC).

³⁸⁵ 2007 6 SA 4 (CC) para 44.

³⁸⁶ 2007 6 SA 4 (CC) para 50.

environmental protection must co-exist.³⁸⁷ Integrating environmental protection with social and economic development is central to sustainable development, as has been emphasised in earlier chapters, environmental and consequently climatic justice is inseparable from social and economic justice.³⁸⁸

An instrument designed to bring about sustainable development and transformation in the mining industry should consider that residents in mining host communities are exposed to environmental risks and other negative consequences because of mining activities.³⁸⁹ One of the objectives of the MPRDA is to give effect to section 24 of the Constitution, which guarantees the right to live in an environment not harmful to human health or well-being.³⁹⁰ In line with its objectives to correct past and present wrongs of discrimination, the Mining Charter may have considered how environmental degradation and pollution of mining activities continue to be felt disproportionately by the historically disadvantaged. If the climate and environmental injustices continue to be felt differentially in society then we cannot call that equitable development.

From the vision of the Mining Charter, transformation in the mining sector would be measured by economic growth and reduced inequality.³⁹¹ However, the Mining Charter envisions transformation with a sustainability outcome by explicitly invoking the concept of sustainability in its vision statement.³⁹² Accordingly, the Mining Charter should then consider the third key tenet of sustainable development which is environmental preservation. Thus, sustainable development, which is shaped by economic growth, social inclusion, and environmental preservation, would underpin the transformation envisioned by the Mining Charter.³⁹³

Radical transformation is required if there is to be a shift to an egalitarian society that can effectively confront the existing power structures.³⁹⁴ This radical transformation would include addressing the

³⁸⁷ Discussed in Chapter 2 of this dissertation.

³⁸⁸ Centre for Environmental Rights "Mining Charter: Environmental justice central to transformation of the mining sector – MEJCON-SA" (10-05-2021) *Centre for Environmental Rights* <<https://cer.org.za/news/mining-charter-environmental-justice-central-to-transformation-of-the-mining-sector-mejcon>> (accessed 16-05-2021).

³⁸⁹ Challenges mining communities are exposed to is discussed in Chapter 1 of this dissertation.

³⁹⁰ Section 2(h) of the MPRDA.

³⁹¹ 2018 Mining Charter Vision 7.

³⁹² 2018 Mining Charter Vision 7.

³⁹³ Key tenets of sustainable development are discussed in chapter 2 of this dissertation.

³⁹⁴ Chapter 1 of this dissertation.

underlying structures and power relations that reproduce the inequality that the Mining Charter seeks to redress. Environmental injustice is one of the underlying structures that perpetuate inequality by forcing the marginalised to bear the brunt of environmental degradation that they are not responsible for. Development without consideration to environmental justice ignores the host of vulnerabilities that are brought about by environmental issues, including climate change, especially the historically disadvantaged whom the Mining Charter seeks to redress.³⁹⁵

There can be no sustainable development if the environment continues to deteriorate.³⁹⁶ Environmental protection is impossible if development through mining continues to ignore the effects of environmental devastation. As a result, environmental protection and socio-economic development are linked. The idea of sustainable development is predicated on the acknowledgement of the inextricable connection that exists between monetary expansion and the preservation of natural resources.³⁹⁷ As a result, as the court in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* highlights, it is essential that environmental matters be given the proper attention, acknowledgement, and respect in regulatory framework.³⁹⁸ It is only under these conditions that the South African government will be able maintain the environment and resources that both its present and future prosperity of the country depends on.³⁹⁹ The court stated that;

“ . . . [D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to

³⁹⁵ One of the highlights of the discussions in earlier chapters is that environment and climate issues are inextricably linked with socio-economic development. In chapter of 1 and 2, the extent to which climate and environmental injustices affect the marginalised was discussed.

³⁹⁶ 2007 6 SA 4 (CC) para 44.

³⁹⁷ 2007 6 SA 4 (CC) para 44.

³⁹⁸ 2007 6 SA 4 (CC) para 44.

³⁹⁹ 2007 6 SA 4 (CC) para 44.

the costs of environmental destruction. The environment and development are thus inexorably linked".⁴⁰⁰

For sustainable development, it is not sufficient to simply expand economic opportunities to the historically disadvantaged who have not benefitted from the natural resources as the current BBBEE scorecards the Mining Charter adopts through the ownership element and the other socioeconomic development elements in the Mining Charter. Legislation and policy must empower the poor and help them exercise their environmental right which guarantees a healthy environment that is not harmful to their health and well-being.⁴⁰¹ Thus, including an environmental and climate justice clause in the Mining Charter will provide for the mining company's responsibility to promote sustainable development and empowerment those affected by mining to exercise their right to safe environment and protection of their livelihoods. This will be beneficial for efforts of sustainable development in the context of the energy transition.

The presence of a sustainable development scorecard element in the 2010 Mining Charter⁴⁰² before it was removed in the amended in 2018 supports the claim that section 100(2) does not limit the objectives that may be considered in the Mining Charter. The 2010 Mining Charter defined sustainable development as the 'integration of social, economic and environmental factors into planning, implementation, and decision-making to ensure that the mineral and petroleum resources development serve present and future generations.'⁴⁰³ The sustainable development element had an environmental protection provision, which required that mining right holders improve the industry's environmental management by "implementing environmental management systems that focus on continuous improvement to review, prevent, and mitigate adverse environmental impacts".⁴⁰⁴ Even though this provision was a broad set of

⁴⁰⁰ 2007 6 SA 4 (CC) para 44.

⁴⁰¹United Nations Development Programme "Environmental Justice - Comparative Experiences in Legal Empowerment" (12-06-2014) *United Nations Development Programme* 6 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

⁴⁰² Section 2.8 of the 2010 Mining Charter was the sustainable development element that mining right holders were required to comply with.

⁴⁰³ 2010 Mining Charter Definitions.

⁴⁰⁴ Section 2.8 of 2018 Mining Charter.

obligations without any compliance criteria, it still acknowledged that socio-economic development cannot be divorced from environmental protection.⁴⁰⁵

The environmental compliance obligation for sustainable development is not included in the scoring system of the new Mining Charter. The sole reference of environmental components of sustainable development in the Mining Charter is under the human resource development scorecard portion.⁴⁰⁶ Mining right holders are required under the Mining Charter to spend at least 5 per cent of the leviable amount on training and education.⁴⁰⁷ This funding is intended for skills development in varied initiatives including research and development of solutions for the mining industry's challenges such as water and energy efficiency, beneficiation, environmental preservation, and rehabilitation initiatives, as well as other improvements to mining operations, exploration, mining, and mining technology.⁴⁰⁸

Purposely vague, the human resource scorecard element provision's stated goal is to improve the employability of historically disadvantaged persons, thus increasing the mining industry's competitiveness, and according to the Mining Charter, fostering 'sustainable transformation and growth'.⁴⁰⁹ As it focuses on making the mining industry more competitive, this provision might be considered part of an effort to boost the economy. Furthermore, the provision does not mandate that the provision be specific to the solving of environmental problems. 'Invest [...] on essential skills development activities such as...'.⁴¹⁰ The wording here makes it seem like investing in skills development towards solutions in environmental conservation and rehabilitation is more of a recommendation than anything else. This fund may be used for anything that enhances mining operations, exploration, beneficiation, or technology if it helps cultivate the skills that will make the mining industry more efficient.⁴¹¹

The Mining Charter is designed to set targets for the sustainable transformation, growth, and development of the mining industry.⁴¹² Sustainability comprises three pillars: the economy, society, and the

⁴⁰⁵ 2010 Mining Charter section 2.8.

⁴⁰⁶ 2018 Mining Charter section 4.6.

⁴⁰⁷ 2018 Mining Charter section 2.3.1.

⁴⁰⁸ 2018 Mining Charter section 2.3.1.

⁴⁰⁹ 2018 Mining Charter section 2.3.

⁴¹⁰ 2018 Mining Charter section 2.3.1.

⁴¹¹ 2018 Mining Charter section 2.3.1.

⁴¹² Vision Statement of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 in GG 41934 of 27 September 2018).

environment.⁴¹³ As emphasised in earlier chapters,⁴¹⁴ environmental justice is necessary to ensure that the negative environmental consequences are not dispersed in a way that unfairly discriminates against anyone, especially the most vulnerable and disadvantaged communities. Therefore, no sustainable transformation can occur unless environmental considerations are taken into account. This will be rendered harder in the context of the climate emergency. As already established, the most vulnerable people will be hit the hardest by climate change.

The cultivation of legal frameworks that reduce the unequal effects of environmental damage on those who do not have access to or benefit from natural resources is the cornerstone of environmental justice in the extractive sector.⁴¹⁵ Therefore, incorporating an environmental and climate justice imperative in a transformative instrument such as the Mining Charter will help protect the environment and the livelihoods, improve the quality of life, and reduce inequality for sustainable development during the just transition. With all the evidence presented about the effects on social and ecological well-being caused by economic growth,⁴¹⁶ it is now essential, more than ever, to ensure that the legislation addresses environmental injustices. The Mining Charter, as a tool designed for transformation, must empower the poor to actively participate in their right to a healthy environment that promotes sustainable development.

Devising and implementing a well-coordinated, equitable and inclusive energy transition is a complex challenge that will necessitate the participation of all relevant stakeholders, including and most importantly, those who are most affected by the energy transition.⁴¹⁷ Often, marginalised people live in areas where natural catastrophes such as droughts and floods are more common.⁴¹⁸ Accordingly, the consequences of global warming and fluctuating climate conditions will be more destructive for such people.⁴¹⁹ Structural measures must be taken to ensure that the interests of the underrepresented groups

⁴¹³ T Kuhlman & J Farrington 'What is sustainability?' (2010) 2 *Sustainability* 3436.

⁴¹⁴ Discussed in chapter of 1 of this dissertation.

⁴¹⁵ United Nations Development Programme 'Environmental Justice - Comparative Experiences in Legal Empowerment' 6.

⁴¹⁶ The effects of mining developments on the social and economic aspects is discussed in chapter 1 of this thesis.

⁴¹⁷ United Nations "Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions" (2-7-2021) *United Nations* 16 <<https://www.unescwa.org/news/enabling-sdgs-through-inclusive-just-energy-transitions>> (17-11-2021).

⁴¹⁸ Discussed in chapter 1 of this dissertation.

⁴¹⁹ S Schirmbeck et al "Climate action. Socially. Just." (24-11-2020) *Friedrich-Ebert-Stiftung* 16 <<https://library.fes.de/pdf-files/id-moe/16561-20201124.pdf>> (accessed 10-06-2021).

are better represented in the pursuit of sustainable development during the energy transition, also in mining areas in South Africa.⁴²⁰

Beyond expanding opportunities to those who have not had access to or benefitted from the natural resources, the Mining Charter must empower the poor to exercise their right to a healthy environment that is not harmful to their health and well-being is also required.⁴²¹ For a just and inclusive energy transition, empowerment of the historically disadvantaged and those who continue to live in poverty must be prioritised in the Mining Charter.⁴²² Being unable to participate meaningfully in the fight against environmental and climate justice will only push the marginalised into new pockets of exclusion.⁴²³

To answer the research question on whether the Mining Charter can do more to promote sustainable development during the energy transition, the answer is yes, the Mining Charter can do more in assisting that the disproportionate impacts of climate change and other environmental threats on mining communities. The historically disadvantaged are disproportionately affected by environmental and climate injustices that continue to widen the inequality gap. The Mining Charter is underpinned by the imperative to redress historical social and economic inequalities. The Mining Charter can take it a step further and empower the historically disadvantaged to reduce differential social vulnerability to climate and environmental risks.

4.4 Conclusion

Future generations will bear the full weight of the current environmental issues if the climate crisis is not addressed since they will inherit the accumulated challenges caused by present and previous generations. This chapter showed that the existing provisions in the Mining Charter are inadequate, especially in the face of the climate crisis. The mere fact that the Mining Charter lacks a mandatory environmental justice provision makes it ineffective to give effect to the of the MPRDA and ultimately the

⁴²⁰ United Nations “Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions” (2-7-2021) *United Nations VI* <<https://www.unescwa.org/news/enabling-sdgs-through-inclusive-just-energy-transitions>> (17-11-2021).

⁴²¹ United Nations Development Programme “Environmental Justice - Comparative Experiences in Legal Empowerment” (12-06-2014) *United Nations Development Programme* 6 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

⁴²² 7.

⁴²³ 5.

constitutional values of transforming an unjust society and promote sustainable development. Social issues are inextricably linked with the environment and climate; by ignoring the environmental right, the Mining Charter does not uphold the transformation principles of the Constitution nor the objectives of the MPRDA, which are to remedy disparities and encourage access to natural resources and the advantages that flow from them.⁴²⁴ As the Mining Charter provides for socio-economic justice, it should also account for environmental justice in its provisions, as there can be no socio-economic justice without environmental and consequently climate justice.

The overregulation of the mining industry necessitated the integration of different aspects of environmental management of mining activities into one streamlined system. At the heart of this integration was the need to make the processing of mining right applications more efficient. In summary, the One Environmental System was introduced primarily to, (i) consolidate the fragmented environmental management procedures required by NEMA, NWA and MPRDA into a single process. (ii) eliminate overregulation in the mining industry, offer legal certainty, and consequently restore investor confidence by streamlining the environmental authorization procedure.

In the context of a climate emergency, the Mining Charter proves to be ill-equipped to facilitate a transformation and empowerment that will allow for a just transition to a low-carbon economy as it does not provide for environmental challenges the mining sector faces.⁴²⁵ This only serves to undermine efforts to ensure that environmental impacts do not disproportionately fall on vulnerable and disadvantaged persons.⁴²⁶ The inclusion of a mandatory environmental justice provision in the Mining Charter would allow it to give effect to the objects of the MPRDA and, ultimately, the constitutional values of transforming an unjust society and promoting sustainable development.⁴²⁷

⁴²⁴ 2021 (4) All SA 836 (GP) para 56.

⁴²⁵ 2021 (4) All SA 836 (GP) para 49; Centre for Environmental Rights 'Mining Charter: Environmental justice central to transformation of the mining sector – MEJCON-SA' <<https://cer.org.za/news/mining-charter-environmental-justice-central-to-transformation-of-the-mining-sector-mejcon>> (accessed 16-05-2021).

⁴²⁶ One of the NEMA principles calls for 'environmental justice [to 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.' Section 2(4)(c) of NEMA.

⁴²⁷ 2021 (4) All SA 836 (GP) para 49.

Chapter 5: Conclusion

5.1 Introduction

Environmental justice is critical in the fight to eradicate poverty and reducing inequality.⁴²⁸ Section 24 of the Constitution positions environmental justice as a national priority, supporting the integration of measures to protect and conserve the environment and its natural resources into mainstream development policy, such as the Mining Charter.⁴²⁹ Environmental justice redresses the injustices of the past that are associated with the inequality that resulted from economic growth which caused environmental degradation and pollution, as well as the distorted access to and benefits from the extraction and use of natural resources.⁴³⁰

The MPRDA is the primary legislation that regulates the exploitation of mineral resources in South Africa. The MPRDA sets out to put into practise the values of the Constitution, which are to promote and accelerate substantive equality by establishing legislative measures to protect and empower those who have been disadvantaged by unjust discrimination.⁴³¹ The MPRDA further seeks to increase access to natural resources for everyone.⁴³² The MPRDA empowered the Minister of the Department of Mineral Resources and Energy to create a Mining Charter that will establish the framework for targets and a timetable for facilitating the entry into and active participation of historically disadvantaged South Africans in the mining industry.

The Mining Charter provides for broad-based black economic empowerment and aims to sustainably transform, grow, and develop the mining industry through socio-economic development. However, social

⁴²⁸ United Nations Development Programme “Environmental Justice - Comparative Experiences in Legal Empowerment” 3.

⁴²⁹ Constitution of the Republic of South Africa 1996 s 24.

⁴³⁰ United Nations Development Programme “Environmental Justice - Comparative Experiences in Legal Empowerment” (12-06-2014) *United Nations Development Programme* 5 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021). In the South African context, a legacy of the Apartheid regime.

⁴³¹ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 3, *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another* 2019 (1) BCLR 53 (CC) at para 95, 2021 (4) All SA 836 (GP) para 56.

⁴³² 2011 (4) SA 113 (CC) at para 3, 2019 (1) BCLR 53 (CC) para 95, (4) All SA 836 (GP) para 56.

issues are inextricably linked with the environment and climate; by ignoring the environmental right, the Mining Charter does not uphold the transformation principles of the Constitution nor the objectives of the MPRDA, which are to remedy disparities and encourage access to natural resources and the advantages that flow from them.⁴³³

This dissertation argues that the Mining Charter requires an environmental justice imperative to fulfil its central purpose of rectifying the wrongs of apartheid. There must a framework in place that enables for mining companies to promote sustainable development in order to empower historically disadvantaged individuals and communities. The Mining Charter must empower the poor and help them exercise their environmental right that guarantees a healthy environment that is not harmful to their health and well-being.⁴³⁴ To complement its attention to social and economic demands, the Mining Charter should lay forth a guideline that would promote empowered citizens to exercise their environmental right to realise sustainable development through mining companies. This chapter provides a summary of further results from the dissertation and concludes with recommendations for potential adjustments to the Mining Charter to meet the issues brought up in the research questions.

5.2 Research Aims

In the context of sustainable development, this research analysed the provisions of the energy and extractive legislation which addresses the interplay of social, environmental, and economic imperatives for a just transition. This research examined the adequacy of the provisions of the MPRDA, One Environmental System, NEMA, the Climate Change Bill and the Mining Charter to reconcile economic, social, and environmental justice in the context of an energy transition. It specifically focused on the Mining Charter as a tool that sets out to achieve sustainable development. The research aimed to assess whether the provisions under the Mining Charter are sufficient to provide for targets to enhance

⁴³³ 2021 (4) All SA 836 (GP) para 56.

⁴³⁴United Nations Development Programme "Environmental Justice - Comparative Experiences in Legal Empowerment" (12-06-2014) *United Nations Development Programme* 6 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

sustainable development and sustainable transformation in the context of a climate emergency and if there are any gaps, can it do more.

This dissertation employed a desktop study and used primary and secondary sources and realised the aim by answering the following primary research question: Can the Mining Charter do more to promote sustainable development in the mining industry, in the context of mitigating the risks of climate change and pursuing a just transition? Chapter 2 of this dissertation attempted to address this question by providing a contextual background on the the interplay between sustainable development, environmental justice, and climate justice. Chapter 3, considered the breadth of the existing Mining Charter and the legal measures that put environmental and climate justice into practise for sustainable growth in the mining industry. Chapter 4 of this dissertation analysed whether or not section 100 (2) of MPRDA and the Mining Charter could do more to promote environmental justice for sustainable development.

5.3 Research Findings

The research established that the integration of social, economic, and environmental justice is the foundation of sustainable development and sustainable transformation. The Mining Charter provides for the economic justice of sustainable development through the ownership element of the BBBEE.⁴³⁵ The Mining Charter requires the historically disadvantaged hold a prescribed percentage shareholding in the company that holds the mining right.⁴³⁶ The shareholding requirements sought to promote economic transformation of the sector.⁴³⁷

The Mining Charter acknowledges that mining developments' disproportionate negative social and economic effects have been felt most by the host communities.⁴³⁸ Thus, the social pillar of sustainable development is provided through the mine community development element of the scorecards of the Ming Charter.⁴³⁹ The Mining Charter requires that the social and labour plans and Mine Development Projects

⁴³⁵ Chapter 3 of this dissertation.

⁴³⁶ Chapter 3 of this dissertation.

⁴³⁷ Chapter 3 of this dissertation.

⁴³⁸ Chapter 3 of this dissertation.

⁴³⁹ Chapter 3 of this dissertation.

are implemented, these initiatives are said to contribute towards the development of both host communities and major labour sending communities, to uplift and improve socio-economic conditions among these groups.⁴⁴⁰ This element promotes both social and economic justice. Another way through which the Mining Charter promotes social justice is through the Housing and Living Conditions element of the scorecards which aims to transform the housing and living conditions of mineworkers.⁴⁴¹

As for the environmental pillar of sustainable, it is not expressly required under section 100(2)(b) of the MPRDA for the Mining Charter to set guidelines to give effect to the environmental justice.⁴⁴² However, the language used in section 100(2)(b) demonstrates that the list of MPRDA objectives that the Mining Charter must give effect to is not comprehensive and that the Mining Charter may give effect to the environmental right provision.⁴⁴³ The words 'amongst others' are understood to signify that the purposes to be addressed are not limited to just those aims specifically stated in section 100(2)(b) of the MPRDA.⁴⁴⁴ Section 100(2) of the MPRDA mandates the Mining Charter to outline measures that will be taken to meet the objectives of the MPRDA to rectify historical social and economic inequalities.⁴⁴⁵

The MPRDA does not expressly require that the object on environmental protection be included as one of the critical issues to be addressed by the Mining Charter.⁴⁴⁶ Not including targets and timeframes for environmental protection in a tool intended to right historical wrongs ignores that environmental challenges, including climate change, disproportionately impact the most vulnerable members of society. Populations in mining host communities are exposed to health risks and other negative consequences because of mining activities.⁴⁴⁷ Socio-economic development cannot be guaranteed without a safe environment.⁴⁴⁸

⁴⁴⁰ Chapter 3 of this dissertation.

⁴⁴¹ Chapter 3 of this dissertation.

⁴⁴² Section 2(h) of the MPRDA; chapter 3 of this dissertation.

⁴⁴³ MO Dale "South African Mineral and Petroleum Law" (2020) 648; chapter 3 of this dissertation.

⁴⁴⁴ 2021 (4) All SA 836 (GP) para 36; chapter 3 of this dissertation.

⁴⁴⁵ Section 100(2) of the MPRDA. Chapter 3 of this dissertation.

⁴⁴⁶ Chapter 3 and 4 of this dissertation.

⁴⁴⁷ Challenges mining communities are exposed to is discussed in Chapter 1 of this dissertation.

⁴⁴⁸ Chapter 2 of this dissertation.

The One Environmental System delegates responsibility to the Minister of Mineral Resources to make judgements about the issuing of environmental authorisations.⁴⁴⁹ The direct conflict of interest in overseeing and regulating environmental matters has been criticised.⁴⁵⁰ There is also evidence that the environmental issues are sometimes not enforced because mining interests often takes priority.⁴⁵¹ Furthermore, the mining context in South Africa is reeked with power and resource imbalances, no accountability, transparency and no willingness to take responsibility.⁴⁵² Thus, it lacks a tool to promote and effect environmental justice in the mining sector. Speaking to a gap in the current legislative framework, and enforcement capacity in giving effect to environmental and socio-economic justice in the mining industry, which makes the charter inadequate to effectively transition away from the fossil-fuel-based economy.⁴⁵³

5.4 Recommendation

5.4.1 The Mining Charter as a reconciling tool for environmental justice

When it comes to coordinating the enforcement of environmental and climatic imperatives, the Mining Charter might step in where the Climate Change Bill, NEMA, and the MPRDA leave off. There are questions of responsibility and accountability when several parties are involved in different aspects of a single project. Mining companies need a clear guideline on how to give effect to both the provisions of NEMA and the Climate Change Bill. This dissertation argues that the Mining Charter would be a useful tool for achieving environmental justice in South Africa by facilitating the inclusion of previously marginalized groups in the mining industry. This is especially crucial considering the impending climate emergency, when pre-existing environmental problems are likely to worsen.⁴⁵⁴

⁴⁴⁹ For example, a broad discretionary authority to grant environmental authorisations is granted to the Minister of Mineral Resources under Section 24F of NEMA, and a similar authority is granted under Section 24G of the NEMA, which allows the Minister of Mineral Resources to take appropriate action if mining activities have commenced unlawfully. Section 24M of the NEMA empowers the Minister of Mineral Resources to grant exemptions and to specify the conditions under which such exemptions may be granted; chapter 4 of this dissertation.

⁴⁵⁰ Strambo et al (2019) *Stockholm Environment Institute* 9; chapter 4 of this dissertation.

⁴⁵¹ 9; chapter 4 of this dissertation.

⁴⁵² Van der Watt & Marais (2021) 71 *Resources Policy* 6; chapter 4 of this dissertation.

⁴⁵³ Strambo et al (2019) *Stockholm Environment Institute* 8.

⁴⁵⁴ Chapter 1 of this dissertation.

When several entities are responsible for separate matters that relate to the same project, issues on accountability and responsibility arise.⁴⁵⁵ Collaboration during the energy transition will be crucial, there must be explicit guidelines and parameters in place to guide mining companies.⁴⁵⁶ The Climate Change Bill and NEMA are enforced by separate instruments, this is where the Mining Charter could reconcile the provisions of the Climate Change Bill if it becomes law to coordinate the enforcement of environmental and climate imperatives and compel mining companies to promote sustainable development. One might argue that the One Environmental System can be said to fill this gap, however, the instrument does not set out to bring about environmental justice; rather, it was enacted to streamline the environmental authorisation for mining companies and hence restore investor confidence.

The relationship between communities, local governments, and mining companies are reported to be strained on a worldwide scale.⁴⁵⁷ National climate and environmental policies that do not consider the local culture and context are considered to hinder climate adaptation efforts.⁴⁵⁸ A just energy transition requires the advantages and disadvantages of the various energy pathways and strategies to be carefully mapped, accounting for the local context.⁴⁵⁹ The Mining Charter already zeros in at a micro level by focusing on mining communities and thus would be the appropriate tool to guide mining companies and can be a useful tool for facilitating this.

5.4.2 On a just transition: safeguarding livelihoods

South Africa relies mainly on coal resources to meet significant energy needs and export earnings.⁴⁶⁰ Considering the worldwide move away from coal, countries that export fossil fuels need to prepare for the impact on their communities and workforce.⁴⁶¹ South Africa calls for a transition to low-carbon economy

⁴⁵⁵ Van der Watt & Marais, (2021) 71 *Resources Policy* 6.

⁴⁵⁶ 6.

⁴⁵⁷ 6.

⁴⁵⁸ I. Niang et al "Africa" in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 1203.

⁴⁵⁹ United Nations "Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions" (2-7-2021) *United Nations* 17 <<https://www.unescwa.org/news/enabling-sdgs-through-inclusive-just-energy-transitions>> (17-11-2021).

⁴⁶⁰ Department of Statistics South Africa 'The Importance of Coal' <<http://www.statssa.gov.za/?p=4820>> (accessed 14-01-2022).

⁴⁶¹ M Huxham et al "Understanding the impact of a low carbon transition on South Africa" (2019) *Climate Policy Initiative* 10.

that must be implemented to encourage a just transition that is mindful of the possible negative effects on employment and local economies.⁴⁶² The Mining Charter can be used to protect against the loss of livelihoods⁴⁶³ induced by the environment, make it easier for the workforce affected by climate change, and expand economic opportunities that promote sustainable development and protect the environment.⁴⁶⁴ Keeping in mind that South Africa has to implement its energy transition strategies in high inequality, an instrument designed to transform the mining industry, i.e. the Mining Charter, should encourage a just transition and mitigate its possible negative effects on employment and local communities.

Industries that are susceptible to severe damage by the climate crisis employ a primarily low-skilled workforce.⁴⁶⁵ A lack of transferable skills means that coal sector workers, for example, will not be able to work in other industries.⁴⁶⁶ As a result, job security proves to be vulnerable to the transition.⁴⁶⁷ The successful cushioning of the impacts of the transition requires reskilling of personnel in fossil-based industries for industries that use low-carbon technologies or processes.⁴⁶⁸ Thus, strategic efforts to redeploy and retrain must consider the level of education, skills and the degree of transferability of employees that are at risk of losing their jobs.⁴⁶⁹ The repurposing of the employees and economies takes a long time; therefore, the sooner strategies are developed and executed, the better.⁴⁷⁰ It is necessary to incorporate social protection in the Mining Charter for those who are likely to be negatively affected, particularly workers who are heavily reliant on natural resources and whose livelihoods are confronted with significant changes.⁴⁷¹ Combating poverty and safeguarding the livelihoods of all people will be

⁴⁶² Integrated Resource Plan (GN 1360 in GG 42784 of 18 October 2019).

⁴⁶³ As coal mining declines during the transition, it is expected that there will be less jobs.

⁴⁶⁴ United Nations 'Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions' (2021) 16.

⁴⁶⁵ S Schirmbeck et al "Climate action. Socially. Just." (24-11-2020) *Friedrich-Ebert-Stiftung* 16 <<https://library.fes.de/pdf-files/id-moe/16561-20201124.pdf>> (accessed 10-06-2021); Despite the fact that 70% of coal miners hold at least a grade 12 qualification, there are few employment options for this qualification in South Africa. See Strambo et al (2019) *Stockholm Environment Institute* 7.

⁴⁶⁶ S Schirmbeck et al "Climate action. Socially. Just." *Friedrich-Ebert-Stiftung* 16.

⁴⁶⁷ Strambo et al (2019) *Stockholm Environment Institute* 6.

⁴⁶⁸ M Ward et al "Supporting Just Transitions in South Africa" (2020) *Climate Investment Funds* 7.

⁴⁶⁹ United Nations "Theme Report on Enabling SDGs Through Inclusive, Just Energy Transitions" (2021) 20.

⁴⁷⁰ Strambo et al (2019) *Stockholm Environment Institute* 7.

⁴⁷¹ International Labour Organization Guidelines for a just transition towards environmentally sustainable economies and societies for all (2015) 16.

essential in ensuring a fair transition to a low-carbon economy.⁴⁷² The Mining Charter would be an effective instrument as it seeks to encourage historically disadvantaged persons to enter and actively participate in the mining industry, this is especially important during the climate emergency as existing challenges of unemployment would be issues will be exacerbated.⁴⁷³

5.4.3 Knowledge-sharing for a just transition

For a just and inclusive energy transition, empowerment of the historically disadvantaged and those who continue to live in poverty must be prioritised in legislative reforms governing natural resources and the environment.⁴⁷⁴ To successfully transition away from a fossil-based economy, the ones most affected by the transition must be well equipped with knowledge of the difficulties that lie ahead.⁴⁷⁵ A critical component of justice during the energy transition is to minimise knowledge gaps by making information accessible to everyone.⁴⁷⁶ Complex technical discussions must be understandable to the general public, including mining workers and their communities.⁴⁷⁷ Having limited opportunities to participate meaningfully in the fight against environmental justice because of lack of information and transparency, and illiteracy, among other factors, only serves to push the historically disadvantaged into poverty and exclusion, thereby thwarting attempts to transform the industry.⁴⁷⁸

5.4.4 The Mining Charter must be legally enforceable

Section 100(2)(b) of the MPRDA requires the charter must outline how the socio-economic objectives⁴⁷⁹ 'can' be achieved of the MPRDA that relate to transformation of the industry.⁴⁸⁰ In *Minerals Council SA v*

⁴⁷² Chapter 1 of this dissertation.

⁴⁷³ Chapter 1 of this dissertation.

⁴⁷⁴ United Nations Development Programme "Environmental Justice - Comparative Experiences in Legal Empowerment" (12-06-2014) *United Nations Development Programme* 7 <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

⁴⁷⁵ Strambo et al (2019) Stockholm Environment Institute 10.

⁴⁷⁶ 10.

⁴⁷⁷ 10.

⁴⁷⁸ United Nations Development Programme "Environmental Justice - Comparative Experiences in Legal Empowerment" (12-06-2014) *United Nations Development Programme* 5. <<https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> (accessed 05-05-2021).

⁴⁷⁹ Sections 2(c), (d), (e), (f) and (i) of the MPRDA.

⁴⁸⁰ Section 100(2)(b) of the MPRDA.

Minister Mineral Resources and Energy,⁴⁸¹ the court held that under standard grammatical interpretation, the word 'can' write the working of the section for the reader used in this provision in section 100(2)(b) is discretionary and not authoritative, arguing that choosing this word signals that Section 100(2)(b) of the MPRDA did not intend the Charter to be law.⁴⁸² Further, had the formation of legislation been intended, the provision would have used a more instructive term such as 'must' in lieu of 'can' in the provision.⁴⁸³ As it stands, the Charter developed pursuant to section 100(2)(b) in principle continues to serve as guiding principles.⁴⁸⁴ The Court in *Minerals Council SA v Minister Mineral Resources and Energy*⁴⁸⁵ concluded that section 100(2) of the MPRDA does not legally enable the Minister of Mineral Resources to develop lawfully enforceable subordinate legislation, the court held that the Mining Charter is nothing more than a policy.⁴⁸⁶

Since the Minister is not given the authority to create legally enforceable subordinate legislation under section 100(2), the Mining Charter is merely a tool for implementing government policy. Modifying the wording of section 100(2) of the MPRDA is a good place to start. An instrument guiding transformation in the mining industry and the redressing of historical wrongs should be legally enforceable to ensure that the targets set are realised.

5.5 Final Word

Through these recommendations, the imperative of sustainable development as envisioned by the Constitution, the Mining Charter, NEMA, the Climate Change Bill and the MPRDA may be realised. The scope of this dissertation is limited to whether the Mining Charter can do more to provide for sustainable development in the context of a climate emergency. Further research may be warranted to explore the potential conflicts between the Climate Change Bill and NEMA, and how the Mining Charter may clash and how the Mining Charter can be used as a reconciling tool.

⁴⁸¹ 2021 (4) All SA 836 (GP) para 34.

⁴⁸² 2021 (4) All SA 836 (GP) para 34.

⁴⁸³ 2021 (4) All SA 836 (GP) para 34.

⁴⁸⁴ 2021 (4) All SA 836 (GP) para 34.

⁴⁸⁵ 2021 (4) All SA 836 (GP) para 55.

⁴⁸⁶ 2021 (4) All SA 836 (GP) at para 55.

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