



The Social and Labour Plan Series
Phase 2: Implementation
Operation Analysis Report
by the Centre for Applied Legal Studies

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CALS
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I. Executive summary

The rationale behind the social and labour plan ('SLP') system is to use the state's power to grant or refuse the right to mine to ensure that companies offer opportunities for mine workers and communities to benefit from the resources in their area. These include, among other components, human resources development and training and contributing to the realisation of infrastructural and developmental needs of the area.¹

In order to be eligible for a mining right, mining companies are required to submit an SLP, developed in consultation with affected communities, containing commitments to the Department of Mineral Resources (or 'DMR') in respect of human resources and local economic development. On the granting of the mining right, these commitments become binding conditions of the mining right. Non-compliance with the SLP can lead to the suspension of the mining right. While not stated in the existing regulations, each SLP text contains commitments over a five-year cycle.² Before the end of each cycle, companies will need to draw up a new document for the subsequent five years. This will repeat itself until the end of life of mine.

It is within this context of the need for pro-poor economic development and mechanisms for wealth redistribution that this research developed. The SLP system is a mechanism designed to effect fair distribution of the benefits of mining to all South Africans. And yet, in CALS' experience, the system is not working. Given that SLPs are a vehicle for rectifying the unequal relationship between companies on the one hand and communities and workers on the other, the failure of the system to achieve these aims represents a failure to realise the Constitution.

This is the second in a three-part series of research and reports on SLP. The first component of this research critically examined the regulatory framework for SLPs. Using an analysis instrument developed by the authors, the first report assessed a sample 50 SLPs on a number of metrics including but not limited to the quality of background information on the particular mining operation, evidence of responsiveness to community needs, engagement with the social context of community, and evidence of sound planning and version finality. The research unearthed signs of a number of design related problems: the SLPs varied in form and content across the board. There was therefore a need for empirical studies to establish how SLPs are actually being implemented by mining companies and government. This report captures these empirical audits. CALS conducted field research in several communities each falling within the class of beneficiaries for a particular SLP. The research also includes interviews with a range of critical role players including local government, the Department of Mineral Resources (DMR), traditional leadership structures and mining companies.

Using the analysis of the 50 SLPs, CALS selected five communities that are the supposed beneficiaries of an SLP. Following engagement with these communities (for a discussion of the nature of such engagement and the emphasis on symbiotic engagement, see the methodology section

in Annexure 3), CALS has created five case studies. This report presents the findings of the five case studies, which include:

- Whether the community in question has experienced the benefits promised in SLPs;
- Whether the SLP undertakings are commensurate with the negative social and environmental impacts of mining;
- The views of a range of role players, including communities, mine workers, the DMR, local government, traditional authorities and mine management on how SLPs are being implemented.

The conclusion of the report seeks to answer the crucial question of whether the SLP system, as it currently stands, can be salvaged or whether the system should be reformulated in order to meet its objectives. In summary, we conclude that the amendments required to accord workers and communities a central role would entail, at the very least, a radical overhaul of the system.

II. Introduction

The Centre for Applied Legal Studies (CALS) is a civil society and public interest legal organisation based at the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five interconnecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law.

The Social and Labour Plan project is located in CALS' Environmental Justice Programme, which works towards making the environmental right contained in Section 24 of the Constitution a tangible reality for all who live in South Africa. The starting point of the environmental justice programme is that a healthy environment is critical for the development of all people. The work of the Programme is driven by the need to facilitate access for affected communities to the processes available to combat unacceptable environmental degradation, with a primary focus on extractives.

1. Context

1.1 Overcoming the legacy of inequality

The foundation of the South African mining sector is rooted in inequality, mistreatment and economic exploitation of a domestic and sub-Saharan migrant workforce. This discrimination has been systematic and intentional, driving people from their land and keeping power in the hands of the white minority. During apartheid, mining companies accrued enormous wealth by utilising low-wage workers, exposing them to dire health and safety conditions with little reward. For this reason, the racial and economic injustices in the mining sector and the need for their rectification occupied a central place in the aspirations of the liberation struggle against apartheid.³ That the migrant labour system persists to this day is one of the most severe failures of the democratic dispensation.

The Mineral and Petroleum Resources Development Act ('MPRDA') provides a number of mechanisms for realising the transformative objectives of increasing Historically Disadvantaged Person ('HDP') participation in mining and ensuring that mining contributes to the development of affected communities.⁴ Of these mechanisms, it is social and labour plans that are specially focused on development for workers and communities.

1.2 Challenges acknowledged by government and the private sector

Communities have, for a long time, been saying that they haven't seen any tangible improvements in their lives under the MPRDA. In the past few years, there has been growing recognition of these challenges not only on the part of DMR and parliament, but also private sector economists.

“As of 31 March 2015, a total of 240 mining right holders failed to comply with their SLPs.”⁵

Minister of Mineral Resources, Parliamentary Q and A in the NCOP

Notwithstanding the binding nature of SLPs, there is mounting evidence that SLP obligations are in fact often unmet.

“Since 2002, mining companies have adhered to the required SLP commitments – yet, operationally, very few have complied with the spirit of the law. They have seldom delivered any effective SLP schemes. At times, they have even corrupted the social community networks for short term compliance convenience. Consequently, far from mitigating their operational risks, they have compounded the complexities.”⁶

Dr Iraj Abedian, Anglo American house journal, Optima, in Dec 2014

The fact that much of the content of SLPs is not prescribed by legislation has led to mining companies having large swathes of discretion regarding how SLPs are designed, what they contain and how they are implemented. This has led to an absence of community participation in the development of SLPs. It has also meant that SLP programmes have often not been of a scale and quality commensurate with the negative impacts of mining experienced by workers and communities.

“When we conduct oversights, we come back depressed. Because before you enter into a mine, you walk through a sea of poverty... In our own experience these Social and Labour Plans are indeed not implemented... Mining communities lament that here, within our area we extract the wealth of the country but there is no drop that comes back to us as the mining community.”⁷

Chairperson of the Parliamentary Portfolio Committee on Mineral Resources

The Marikana Massacre has revealed workers' and communities' growing anger and impatience at remaining in poverty while companies prosper. Since the purpose of SLPs is to change this, ineffective SLP projects and widespread non-compliance are heightening this anger.

2. Aim of this report

In order to understand the challenges of implementation, and the extent to which they are solvable under the present system, we needed to gather evidence that could not be gained via a desktop study. The *Phase 2: Implementation Operation Analysis Report* aims to interrogate whether the SLP system is achieving its core objectives and, if not, whether it is capable of achieving these objectives through reforms addressing the design of this system and how it is implemented. The Implementation Phase: SLP incorporates the perspectives of the various stakeholders and utilised five individual mining-community case study areas to obtain intimate knowledge of the practical implementation issues associated with SLPs. SLPs from each of the case study areas have been examined to assess compliance and identify common thematic obstacles. This is a solution-based report and therefore CALS proposes recommendations on how to improve its efficacy

and address fundamental obstacles. Ultimately, we assess whether the system can, in fact, be rescued. In so doing we take into account the findings of the last three years so we can be satisfied that we have made a considered and informed decision.

3. Structure of this report

Having presented the overall structure of the SLP project, and where this report fits in, the structure of this report will now be summarised in brief.

Chapter III provides a brief introduction to the SLP system. The chapter sets out the main legal sources of SLPs, the process by which they are developed, what needs to go into a SLP, and a brief history of the system's implementation.

Chapter IV introduces some of the key role players in the SLP system through presenting their functions, how they perceive themselves and how others perceive them.⁸

Chapter V presents and explains the five case studies (in the form of field research) that were undertaken to inform this report. The chapter presents these case studies individually. Each case study is divided into three sections comprising of:

1. The economic, social, political and economic context;
2. Our preliminary findings regarding the particular SLP we orientated the study around; and
3. A summary of the issues we uncovered in the course of our field work.

Chapter VI identifies the findings and possible solutions, while Chapter VII lists the recommendations.

Chapter VIII contains the conclusion which sums up the findings of this report and addresses the question of whether South Africa should retain the SLP system in its present form.

We have included annexures in this report which are designed to provide background information. Annexure I contains a glossary and list of acronyms while Annexure II briefly summarises the key findings of the first report in this series of reports into the SLP system.⁹

Finally, Annexure III explains theoretical Approaches and Methodology that guided the conducting and processing of this research. This annexure explains the theoretical approach and underpinnings of the research. It also explains the limitations to our research findings, in other words what claims we are in a position to make, based on the information we have obtained.

THE SOCIAL AND LABOUR PLAN SERIES: PROJECT PLAN	
2014: ACCESS TO INFORMATION	
PAIA Applications	Submit PAIA applications to the DMR and Mining Companies using physical and electronic methods of lodgement
2015: DESKTOP ANALYSIS AND BEGINNING OF FIELD RESEARCH	
Development of SLP analysis instrument	Develop an analysis instrument addressing the indicators of effectively designed SLPs
Analyse 50 SLPs	Analyse the SLP sample utilising the instrument
Release of Year 1 Report	Release report on trends in SLP design and legislative attributes responsible for these trends.
2016: CONTINUATION OF FIELD RESEARCH	
Preparatory engagement for field research	Engage with communities, state role players and companies prior to each field visit.
Field research	Conduct on-site interviews with relevant stakeholders in community, government and mining companies.
Release of Year 2 Report on Implementation	Release report containing findings on the efficacy of SLPs in beneficiary communities and linking these to underlying issues of implementation.
Develop SLP Community Toolkit	The toolkit will assist communities in understanding the SLP system, analysing SLPs and monitoring companies' compliance.
2017: STRATEGIC INTERVENTIONS	
Release of Year 3 Compendium Report	This report shall integrate the design and implementation phases and shall make definitive recommendations to specified stakeholders.
Engagement with the stakeholders on findings	Stakeholders will include communities, Parliamentary portfolio committees, and officials from the Department of Mineral Resources responsible for SLPs, local government, mining companies and civil society.

III. SLP system overview

Legal sources of the SLP system	
MPRDA and Regulations	The ultimate source of the SLP system is the MPRDA, the primary piece of legislation that governs mining in South Africa. The MPRDA requires mining companies to submit an SLP to be eligible for a mining right. ¹⁰ The Act requires mining companies to comply with their SLP and report annually to the DMR on their compliance. ¹¹
SLP Guidelines	While the MPRDA is the source of the SLP system, the content of the SLP objectives, obligations and processes is largely set out in Regulations 40 – 46 of the MPRDA Regulations and the 2010 SLP Guidelines. ¹²
BBBEE Act and Mining Charter	The key governing piece of transformation legislation remains the Broad Based Black Economic Empowerment Act ('BBBEE Act'). ¹³ There are also various Codes of Good Practice, which utilise a scorecard to assess entities' compliance with BEE. The Broad-Based Socio-Economic Charter for the South African Mining Industry is the code of good practice for the Mining Sector and overlaps significantly with the content of SLPs.
Development Planning Policies and Legislation	As a developmental tool, the SLP system also needs to be viewed in the context of the laws and policies framing government's local, provincial and national development agenda. Of particular importance are, first, national government's National Development Plan ('NDP') and National Growth Path ('NGP') and, second, the integrated development plans ('IDP') of provinces and municipalities. ¹⁴
Spatial Planning Legislation	The Spatial Planning and Land Use Management Act is the overarching legislative framework that aligns spatial planning to constitutional development imperatives. ¹⁵ The national policy framework is the National Spatial Development Perspective, which guides developmental planning and assists in co-ordination and co-operation through a shared planning methodology and sets out principles to guide infrastructural and other development planning decisions between all levels. ¹⁶
Other Codes of Good Practice	The overarching code governing South African Companies is the King Code of Governance Principles, now in its fourth iteration. ¹⁷ King IV applies to corporate entities in the private, public and non-profit sectors. King IV adopts a more inclusive 'stakeholder-based' model of doing business and provides for engagements with all stakeholders. ¹⁸

1. How SLPs are formulated

SLPs are drafted by mining companies and submitted to the DMR when the mining company applies for a mining right. In practice, however, the development of SLPs is often outsourced to consultants. The 2010 SLP Guidelines provide that applicants must prepare the LED component ‘through consultation with communities and relevant authorities’.

The SLPs become binding on the applicant company after the DMR grants the mining rights and will need to be updated every five years with new commitments until the mine closes.¹⁹ The company has a duty to submit a report on a yearly basis to DMR explaining the progress which has been made with its obligations in terms of the SLP.²⁰ If the mining company is not honouring the promises it has made under the SLP, the DMR can suspend or revoke the company’s mining right.²¹

2. What needs to go into an SLP

Regulation 46 of the MPRDA identifies the required content for all SLPs and is augmented by the 2010 SLP Guidelines. The table below provides a brief summary of the mandatory content of SLPs.²² A more in-depth breakdown is provided in the first report of this series, *The Social and Labour Plan Series - Phase I: System Design*.²³

Preamble
The preamble provides an overview of the mine’s business plan for the next five years. ²⁴
Human Resources Development Programme
Section 46 (b): The section provides for skills development opportunities for workers and to community members. This includes the right mix of skills applicable within and outside of the mining sector to ensure improved employment prospects of workers and communities on the closure of the mine. The elements include: skills development plan, learnerships, core skills, and portable skills programmes. The section also includes a career progression plan, mentorship plan, bursary and internship plans for learners. Finally the HRD includes employment equity strategies and targets with focus on HDSAs in management and women in mining.
Local Economic Development Programme
Section 46 (c): This section must demonstrate how the mine will support and contribute to the socio-economic development of mining communities aligned to the relevant IDP. It should develop economic linkages to sectors other than mining to ensure that there are other sources of employment opportunities during and after mine operations. LED programmes are designed to ensure mining wealth is converted into the development of communities. The projects are identified as either Infrastructure Development or Income Generating. Provisions for housing and living conditions of the workforce are also required.

Downscaling and Retrenchment
Section 46(d): Mine closure requires right holders to assist mine workers to access employment opportunities as well as measures to mitigate the impact of closure on local mining communities. Given that closure can happen earlier than anticipated at the inception of the project, it is important that proactive measures, such as portable skills training, commence significantly earlier than when closure is anticipated.
Financial Provision
Section 46 (e): This section contains the budget for the implementation of all sections of the SLP.

3. Concluding note on historical context

In our interviews with mining companies and with government, one can divide the 12 years in which the SLP system has been operational, into three periods. In the first period, due to the limited detail in the legislation, there was much confusion amongst role players about the precise nature of SLP obligations and how they would be carried out.²⁵ In response, a number of workshops were organised which brought together mining management, lawyers and the regulator at which the details were discussed and fleshed out (workers and communities did not seem to have been included).²⁶

During the second phase, companies and the regulator benefited from a clearer understanding of how the system was to work and from experience gained in its implementation.²⁷ Currently, many companies have been responding to the commodities slump by significantly reducing SLP commitments and/or the size of internal teams working on SLPs.²⁸ Finally, we are now seeing the emergence of technologies that render much of the workforce superfluous (mechanisation) which means that employment on mines is decreasing, especially in sectors such as platinum.²⁹

IV. Introducing the role players

The SLP system is designed to achieve a positive social impact through mandating the allocation of resources towards specific ends and requiring particular actions by role players internal and external to government. To understand how this regulatory system is intended to work, it is therefore important to know the roles, responsibilities, interests and perceptions of each role player. This section will therefore introduce the role players critical to the functioning of the SLP system. The section will further provide an evaluation of the interests and actual role played by each role player from the perspective of other role players and from our own perspective. This will be informed by individual interviews, community engagements, hearings and cases. The following key role players are in our opinion the chief role players in the formulation and execution of SLPs.

Mining companies	
Roles and responsibilities	
Mining companies are the main duty bearers under the SLP system. They are required to draw up an SLP as part of their mining right, to comply with this SLP and to report annually on their compliance.³⁰ Where SLP programmes cannot be realised in their present form, the mining rights holder must obtain the consent of the Minister for amendments.³¹ As was found in the first report, the legislation does not provide sufficient clarity on companies' duties to consult communities on SLPs.³² Mineral complexes will typically host many mining projects and companies. It is critical that there is co-ordination of the efforts of all role players in these areas including companies, aimed at planning mining development in the public interest and addressing negative impacts.	
Conceptions of their role and the challenges they face	
Interviewees from mining companies largely view themselves as doing their best to contribute to sustainable local economies in the face of growing pressure from communities, workers and government. Some of the main challenges companies identified in relation to SLPs included:	
a)	Failures of IDP system – Failures identified included IDPs that were wish lists rather than plans, municipal projects based upon politicians' interests rather than the public good and a divergence between IDP programmes and community needs³³
b)	Slow turnaround times from the DMR in approving SLPs, amendments to SLPs and feedback from inspections – A number of company interviewees stated that the Ministers' role in granting approvals needs to be delegated³⁴
c)	Lack of clarity on roles and responsibilities – interviewees spoke of conflict between different government role players seeking to define SLPs and of mining companies finding themselves playing the role of local government³⁵

Other role players' perceptions
Communities' perceptions of mining companies diverged from companies' self-perception as benevolent actors in several respects: a) Community members viewed mining companies as exploiting their land and harming their environment³⁶ b) Companies do not consult communities on the design, execution and monitoring of SLPs³⁷ c) Companies are not accessible and communities need to resort to protest or litigation to have their grievances taken seriously³⁸
Concerns expressed by municipal officials on the role of companies included: a) Companies bypass municipalities when seeking approval of SLPs³⁹ b) Companies do not participate on municipal planning fora such as the IDP representative forum⁴⁰ c) Mining companies do not integrate their SLP programmes into municipal IDPs⁴¹

Department of Mineral Resources ⁴²
Roles and responsibilities
The DMR's role under the MPRDA is of the regulator. It manages the mining right application process in which the SLP is submitted for approval. ⁴³ It must review SLP submissions and communicate its approval or non-approval of the SLP and, in the latter case, communicate the required changes in the SLP. ⁴⁴ The DMR is required to facilitate public participation during the mining right application. ⁴⁵ The DMR is responsible for monitoring compliance with the SLP. ⁴⁶ This requires 'receiving, reviewing and approving Annual SLP Implementation Plans' and the annual reports on SLP compliance submitted by mining companies. ⁴⁷ On-site inspections are vital to verify compliance. ⁴⁸ Where non-compliance is detected, the DMR must use its powers of enforcement including notices and, where necessary, the suspension or cancellation of the mining right. ⁴⁹ Instances of mining rights being suspended or cancelled for SLP non-compliance are very rare. ⁵⁰ Finally, the DMR will need to collaborate with stakeholders to ensure SLPs are implemented. ⁵¹
Conceptions of their role and the challenges they face
The DMR admits that in its implementation of the SLP system, it is limited by capacity constraints as it cannot monitor every mine. ⁵² The DMR's approach to community consultation on SLPs was that mining companies were required to engage with municipalities on IDPs. ⁵³ This was on the basis that communities were consulted on IDPs. ⁵⁴ They identified difficulties in consultation with communities including the multitude of groups and difficulty of verifying representativeness of leadership structures. ⁵⁵

A DMR official stated that after consulting community representatives, another set of community members would often state that they had not been consulted.⁵⁶ The official further stated that when this occurred, their first questions to the community members were 'who are you' and 'what is your structure?'⁵⁷

Other role players' perceptions

Community members experienced the DMR as:

- a) Absent – community members very rarely encounter DMR officials, with consultants hired by mining companies being the main points of contact. A community member in Rustenburg stated that '[the DMR] have never been seen or heard'⁵⁸
- b) Unresponsive – community members in Mokopane, for example, stated that the DMR only addressed the community on its grievances following protest⁵⁹

Officials from other government bodies also have similar experiences with the DMR:

- a) Municipal officials report an absence of consultation by the DMR in the design and monitoring of SLPs⁶⁰
- b) Officials from several national departments have reported that they did not have formal working relationships with the DMR which tended to ignore overtures for collaboration⁶¹

Many, but not all, company interviewees also experienced the DMR as unresponsive with complaints including:

- a) A slow turnaround time for approving SLPs and amendments⁶²
- b) Inconsistency in how DMR officials interpreted and applied the rules⁶³

Communities⁶⁴

Roles and responsibilities

Mine-affected communities, along with workers, are the intended beneficiaries of the SLP system.⁶⁵ It is vital that they are compensated for the harmful impacts of mining and, in addition, derive an overall benefit. Both SLPs and municipal IDPS should therefore be based on the actual expressed needs and priorities of communities. Communities need to be involved in the conception, design, execution, monitoring and amendment of SLPs.⁶⁶ It is critical that community organisations are capacitated with knowledge of their rights under the MPRDA and the SLP system, and the available avenues of recourse.⁶⁷

Conceptions of their role and the challenges they face	
Members of mine-affected communities have, on numerous different media and fora, stressed that they have a right to be included in decision-making pertaining to SLPs and all aspects of mining that affect them (including whether to allow new mining projects).⁶⁸ Community interviewees have stressed that consultation must go beyond mere invitations to meetings and that companies should draft SLPs together with communities rather than 'arriving with already drafted documents'.⁶⁹ However, the complete absence of community consultation on SLPs specifically was a consistent response during our interviews and the bulk of interviewees from each of the 5 communities did not know of the commitments contained in SLPs. There is great anger amongst communities at the environmental degradation and loss of land associated with mining and the failure of promises of jobs and development to materialise.⁷⁰ Community members view companies as untouchable and many view the state as complicit or even in collusion with mining companies.⁷¹	
Other role players' perceptions	
The DMR and, several of the mining companies, displayed scepticism about communities' ability to play an active role in the SLP system and, local economic development more broadly. More specific themes were:	
a)	Communities as short-termist – several mining company interviewees were of the view that due to the poverty of many in mining affected communities and resulting desperation, communities only focused on day to day survival and not on long term strategy and sustainability⁷²
b)	Communities have unrealistic expectations – mining company interviewees stated that community members had unrealistic expectations of companies, with some ascribing this to government and ruling party promises⁷³
c)	Divisions in communities and difficulty in identifying communities – this concern was expressed by consultants and DMR officials⁷⁴
d)	Views of communities not monolithic – Other company interviewees expressed a more positive role of community participation and some companies had developed policies that provide for community consultation on some aspects of the SLP⁷⁵

Workers	
Roles and responsibilities	
Workers invest their labour and risk their lives to extract the minerals from the ground but have not received commensurate benefits. A significant proportion of the SLP commitments are focused on workers' needs and these include human resources development, housing, living conditions and employment equity.⁷⁶	

Conceptions of their role and the challenges they face
Workers feel a keen sense of injustice as they see management live in luxury, while they and their families still live in poverty.
Other role players' perceptions
According to an interviewee from the mining sector, despite the wishes of workers, companies avoid involving workers in the formulation and implementation of SLPs as it is easier to proceed without them. ⁷⁷

Trade unions
Roles and responsibilities
A central role player is organised labour, which represents mine workers who, along with communities, are the main intended beneficiaries of the SLP system. ⁷⁸ Crucially, it was trade unions that were a main proponent of the SLP system. ⁷⁹ Trade unions in the mining sector, including the National Union of Mineworkers (NUM) and Association of Mineworkers and Construction Union (AMCU), play an important role in articulating the needs and priorities of their membership. ⁸⁰ They should therefore be involved in the compilation, planning, implementation, monitoring and amendment of SLPs. ⁸¹ Worker representatives also sit on the future forum, which plans for and responds to the economic and social consequences of downscaling and closure. ⁸² In fulfilment of this role, many trade unions have started to focus on sustainability issues and/or established transformation or SLP divisions. While there was limited participation from the respective trade unions in the drafting of this report, more robust engagement with them will take place in the drafting of Report 3.

Traditional authorities ⁸³
Roles and responsibilities
The role of traditional authorities is critical when mining occurs in areas in which the land is subject to communal ownership. It is, however, also important to note that, as emphasised by the Constitutional Court, governance roles are not given to traditional leaders in the Constitutional text. ⁸⁴ Perhaps more than any other social actor, the very definition of the roles and responsibilities of traditional leaders is unresolved. Very significantly, there is growing contestation in rural South Africa over the extent to which customary law emphasises royal prerogative or accountability to communities. There is growing acknowledgment of the frequency with which traditional authorities assume control over ownership schemes as companies negotiate mining on communal land. These ownership deals impact in subtle and overt ways on the design, implementation and 'delivery' of SLPs. ⁸⁵

Conceptions of their role and the challenges they face
We managed to interview the traditional authority in the first case study area. They described the main problems as the failure of mining companies and the municipality to consult them. ⁸⁶
Other role players' perceptions
Dissatisfaction with the performance of traditional leaders has been expressed by communities both in the course of interviews and on public platforms. Some of the issues they have raised include: a) Corrupt relationships with mining companies⁸⁷ b) Authoritarian decision-making regarding the use of communal land for mining⁸⁸ c) Usurpation of SLP and other local economic development benefits by traditional leadership⁸⁹ Some local government interviewees spoke of the need for traditional leaders to improve their knowledge of the Constitutional dispensation in relation to their powers, mining and local economic development. ⁹⁰

Investors
Roles and responsibilities
Investors provide the financing necessary for mining to take place. They have a responsibility to use their leverage to ensure that companies comply with their legal, environmental and social obligations.
Other role players' perceptions
An interviewee from the mining sector spoke of the financialisation of the sector and the consequent increased role of investors in shaping the priorities of mining companies. ⁹¹ Investors were primarily interested in quarterly returns which created the pressure for a short-termism rather than a focus on long term sustainability. This also spilled over into a lack of desire for expending significant resources into long-term processes of community engagement with uncertain results. ⁹²

Consultants
Roles and responsibilities
Consultants are often the implementing agents of the studies and the public participation aspects of the work. The consultants are paid for their expertise in a specific area and are therefore contracted by companies to compile SLPs and SLP reports.

Conceptions of their role and the challenges they face
Consultants see themselves as experts and as having the client's best interest at heart. From our conversations it is clear they do believe in transformation but feel hamstrung by the politics and bureaucratic process that they must follow.
Other role players' perceptions
Where community members spoke of or made reference to consultants, they largely spoke of them as serving the interests of the companies who paid them rather than being independent or assisting communities. ⁹³

V. Case studies

Having introduced the SLP system and the main role players, we can now proceed to a specific discussion of each five areas in which we conducted field research (our case studies). As discussed in our introduction, these case studies were designed with a view to gaining an understanding of how SLPs are being implemented and how they are translating into real impact from the point of view of communities. For each of the five case studies, our discussion is divided into three subsections. The first subsection introduces the context in which the SLP should be understood. This includes the physical environment, the local economy, the social organisation of the community and the type of mining in the area. The second subsection contains a preliminary analysis of SLP compliance in the five case study areas. The two sources we used were interviews from members of communities residing in close proximity to the mining operations, and annual reports submitted to the DMR on the company's compliance with the SLP. In this regard, our case studies can be divided into two groups. For the first two case study areas, we were able to obtain both the SLPs and annual compliance reports with the latter informing our understanding of the status of the projects. For the remaining three case study areas, we were unable to obtain these reports. We attempted to engage with mining companies to seek clarity on outstanding SLP commitments, but these attempts proved unsuccessful. For these companies, we focused on the responses from members of communities who resided in close proximity to the mining operations. We obtained their views through one-on-one interviews and group workshops. This is important because the success of the system ultimately hinges on whether the intended beneficiaries see results. The final subheading discusses the interviews conducted with community members and local government officials. More specifically, this section identifies issues that have implications for the efficacy of the SLP system and that emerged from the statements of fact and opinion by interviewees. It must be noted that, while it is seldom that a particular area hosts only one mining operation, we have limited our analysis to a single SLP for each area.

1. Case study – Platinum mine, Rustenburg, North West

Rustenburg is located at the foothills of the Magaliesburg Mountains in the North West Province. The Rustenburg municipality is part of the Bojanala Platinum District Municipality which hosts rich platinum deposits which have been heavily mined over the last 20 years with large operations by companies such as Lonmin, Anglo Platinum, Impala Platinum and Aquarius Platinum. The area is most well known as the site of the greatest mining and South African tragedy in recent history. The Marikana Massacre of 16 August 2012 remains a reminder of the stark inequality in the mining sector and its consequences.

The most spoken languages in the Rustenburg area are Setswana and IsiXhosa.⁹⁴ There is a significant division between members of communities exercising customary land rights and communities that had formed following the onset of mining.⁹⁵ Many in the former group view the latter as outsiders.⁹⁶

Our research was conducted with inhabitants of a large informal township near a large platinum mine in the Rustenburg municipality that had developed in the early 1990s.⁹⁷ Residents include mine workers and their families as well as other people who arrived in the area in search of work opportunities. It is a very diverse community with languages spoken by members including Setwana, IsiXhosa, Shangaan, IsiZulu, Sepedi, Sesotho and Tshivenda.⁹⁸ Interviewees described a difficult life marked by unemployment, an absence of basic services and no formal housing.⁹⁹

1.1 SLP analysis

This SLP, reflecting the scale of the operation, has significantly more projects than the other SLPs analysed. Some of these projects are, themselves, comprised of several initiatives. Due to constraints of space, the summary that follows just deals with a selection of projects and initiatives of significant impact. The findings are based on information from annual reports and community interviews.

SLP for case study 1	
Commitment	Preliminary findings ¹⁰⁰
170 community members in ABET as of 2015 for mine section 1	192 community members enrolled in ABET for mine section 1
38 community members in ABET as of 2015 for mine section 2	108 community members enrolled in ABET for mine section 2
Constuction of forensic mortuary to begin in 2015 and completed in 2016	Building postponed to 2016 'due to financial constraints'
Security upgrading at GLC clinic to be completed by fourth quarter of 2015	Fences put up at clinics identified in two communities. Project complete
Construction of 3 maternity homes for high risk patients to reduce infant and maternal mortality rate to be completed by 2015	2 maternity homes constructed at 2 identified community health centres; third home not completed (reason cited is Rustenburg Municipality has not approved building plans)
8 new classrooms to be built at 2 primary schools	Completed
New school to be constructed	Construction deferred until 2016, citing need for 'cash conservation'
Bulk water supply to 4 areas	Not completed; no clear explanation but municipality has agreed to include in IDP from 2016

Commitment	Preliminary findings
Household sanitation in 4 areas	On hold as company is pursuing litigation against construction companies and service firms
Conversion of hostels to single and family units to be completed by year-end 2014	Conversion of hostels completed
Company in collaboration with the North West Department of Human Settlements has contributed 50 ha of land for the development of 2658 (rental and ownership) accommodation units ¹⁰¹	Phase 1 of this project is underway (292 RDP units and 252 rental units)
Construction of apartments (4000 units) on open spaces around the converted hostels (this falls short of the unmet commitment to build 5500 houses in the company's previous SLP)	No units completed to date and company states five year 4000 unit target will be revised downwards to a third of this citing 'constrained capital expenditure'

1.2 Issues that emerged

We interviewed and engaged with a variety of interest groups in the Rustenburg area including community members residing in the aforementioned informal settlement and the local municipality. In common with all the other communities interviewed for this report, interviewees stated that they had not been consulted on, and had not seen, the SLP we presented to them.¹⁰² A community leader stated that she had never heard of the SLP system prior to the meeting of a coalition of communities and NGOs in Johannesburg.¹⁰³ An interviewee, describing the type of participation they wished to see, stated that mining companies should draft the SLP together with community members instead of arriving with already-drafted documents.¹⁰⁴

Crucially, members of this community reported discrimination by members of the community with customary land rights in the area and its traditional leadership.¹⁰⁵ They reported that traditional leaders told them that 'you are not my children'.¹⁰⁶ They also reported discrimination by the local municipality, which has not recognised the settlement as a township and has not provided services as well as by the mining company, which has left them out of its SLP.¹⁰⁷ They also stated that the DMR 'was never seen or heard'.¹⁰⁸ A community member told us that 'government and mines [are] working together to kill us, not to change our place'.¹⁰⁹

Some of the main problems described by community members include infrastructure, sanitation, lack of access to healthcare and crime. In particular, the community has continually been asking for mobile clinics and a satellite police station.

An official from the local municipality noted that that local government does not have the power to make key decisions in relation to SLPs.¹¹⁰ The interviewee stated that this should change as local government is better placed to understand the needs of the community, monitor compliance and ensure the alignment of SLPs with IDPs.¹¹¹ The official complained that the DMR did not involve local government in decisions.¹¹² Regarding the role of SLPs, the official stated that SLPs should be focused on long-term economic development and skills transfer to local government rather than direct service provision and short-term unsustainable projects like small agricultural projects.¹¹³ It emerged that The LED team has, together with various stakeholders, including the mines and the royal authority drafted an economic development master plan specifically for the city of Rustenburg.¹¹⁴ The plan focuses on the development of sustainable businesses related to mining as well as other business which will survive the cessation of mining.¹¹⁵

2. Case study – Coal mine, Pafuri, Limpopo

The mine is situated in the North East of the Limpopo Province, near the Pafuri Gate of the Kruger National Park. The area is characterised by high temperatures and low rainfall.¹¹⁶ It is rich in biodiversity and well-known as a wildlife destination, especially for birding.¹¹⁷

This sparsely populated area is largely rural in nature, with eco-tourism and agriculture (both commercial and subsistence) being the central sectors.¹¹⁸ A large scale and very profitable coal mining operation also been central to the local economy since it commenced production in 1984. Consequently, the closure of the mine has likely exacerbated the high levels of unemployment in the area.¹¹⁹

The mine is currently being decommissioned and rehabilitation is on-going. The developmental benefits enjoyed by the community after over 30 years of mining are difficult to discern and are not commensurate with the vast social and environmental impacts they have experienced. These include cracked houses and a very real risk of acid mine drainage in the future. These impacts have resulted in persistent tension between the community and the company.

2.1 SLP analysis

Poverty eradication is a central theme in this SLP. The findings below are based on information from annual reports and interviews with communities.

SLP for case study 2	
Commitment	Preliminary findings ¹²⁰
Mining learnerships to be given to five unemployed youth from surrounding communities	All learnership targets met or exceeded as of year-end 2015 (though the annual compliance report does not identify the communities that benefited)

Commitment	Preliminary findings
Business incubator renovated by first quarter 2014	No renovation of business incubator as of year-end 2015
First of three crèches to be built and handed over by fourth quarter of 2015 (to be repeated in 2016 and 2017, communities benefiting not specified in SLP)	As of February 2017, community members report that no new crèche has been constructed and the mine has only replaced an asbestos roof on an old crèche ¹²¹
Community hall in an identified village to be constructed by fourth quarter of 2015 and maintained in 2016	No construction as of year-end 2015
56 RDP houses to be constructed in the surrounding communities and handover to begin during 2014 and continue to year-end 2016 (names of the communities and annual housing targets not specified in SLP)	No houses constructed as of year-end 2015

2.2 Issues that emerged

We interviewed and engaged in interviews and conversation with a variety of role players in the area. As in the first study area, the vast majority of community interviewees were not aware of the SLP and its contents.¹²² It must be noted that the SLP programmes largely bypassed this community, despite their close proximity to the mine, and instead largely provides benefits to another community, who collectively own the land on which the mine is situated.¹²³ Community members were therefore highly frustrated at the mining company, for leaving them to shoulder the negative impacts of mining with few benefits. These impacts included cracked houses due to blasting.¹²⁴

The municipal official interviewed reported that the mining company hardly communicated with them and it seemed that the process of alignment between SLPs and local government IDPs was not occurring.¹²⁵ In fact when we read the LED initiatives contained in the particular SLP, the official stated that he had no prior knowledge of the local economic development initiatives in the SLP and that the initiatives were not in the municipalities' IDP.¹²⁶ The interviewee stated that the mining company had been invited to participate in the local economic development representative forums but did not attend.¹²⁷

What was apparent was that there was little communication between all role players in the area. It, for example, appeared that the community did not interact much with other villages in close proximity to the mine, including villages named in the SLP. A significant barrier to regular communication

villages named in the SLP. A significant barrier to regular communication was the very poor road infrastructure in the area, which meant that it took a long time to travel relatively short distances. This geographical isolation constituted a barrier to the sharing of knowledge between all the mine-affected communities in the area and towards forging a community movement. It also made it easier for the company to exclude the community we interviewed from the SLP.

3. Case study – Clay mine, Tzaneen, Limpopo

Tzaneen is a large tropical oasis that falls within the Greater Tzaneen Local Municipality and the Mopani District Municipality of Limpopo province in South Africa. The area has a climate marked by high rainfall.¹²⁸ Sub-tropical agriculture (such as bananas and mangoes) is central to the local economy. Tzaneen also has rich geological resources including clay for brickmaking and granite.

The majority of the population of the greater Tzaneen area reside in the surrounding rural villages. The predominant languages spoken are Sepedi and Xitsonga.¹²⁹ The majority of rural community members rely on subsistence agriculture and low – medium income employment to sustain their families. The unemployment rate is high at 36.7%, and 48.5% for youth (18 – 35 years old).¹³⁰ The community with whom CALS conducted interviews falls within the jurisdiction of a designated traditional authority. The traditional leadership is comprised of a headman and Indunas with the chief at the apex of the authority and leader of the council.

The SLP we analysed was for a small clay mine that has had significant negative impacts on the environment of a community that residing in villages that surround the town. These impacts have included soil erosion and pollution as well as the creation of a unfenced pit which led to the death of a child who fell into the pit.

3.1 SLP analysis

The mining operation which has had a particular impact on the community is a small scale operation. Consequently there were a limited number of programmes targeting community members and a financial provision of just over R1.5 million. The findings listed below are based on site visits and interviews with community members, who reported a low level of compliance with only one commitment being (partially) met. The mining company has since dissolved and its directors are facing litigation. As a consequence, our findings are based solely on the interviews with members of communities listed as beneficiaries in the SLP.

SLP for case study 3	
Commitment	Preliminary findings ¹³¹
12 bursaries ¹³²	Interviewees reported that none of the bursaries had been awarded

Commitment	Preliminary findings
Building of five-roomed houses in four identified villages (number of houses to be built not indicated)	Interviewees reported that no houses had been built
Building of a crèche in an identified village	Interviewees reported that no crèche had been built
Feeding scheme for pre-school in identified village from 2012 to 2015	Interviewees reported commitment had been met but only for a year and a few months ¹³³

3.2 Issues that emerged

In the Tzaneen region, a variety of role players were interviewed and engaged. Community members interviewed had no knowledge of and had never seen the SLP we presented to them. They stated that there had been a complete failure on the part of the mining company to institute a public participation process. In contrast, there was a belief amongst community members that the traditional authority had been at the forefront of discussions with mining companies. A headman stated that the mining company had only consulted the Chief and not the broader Royal Council or headmen.¹³⁴ Members stated that the traditional leadership had personally benefited from SLPs and other initiatives meant to benefit the broader community.¹³⁵ It must be noted that members of the community, including royal council members outside of the government-recognised traditional leadership, disputed the legitimacy of the current Khoshi.¹³⁶ Headmen stated that they were no longer invited to meetings of the traditional authority.¹³⁷ The official traditional leadership, in contrast, accused both the mining company and local government of not recognising them.¹³⁸

An official from the local municipality reported a lack of alignment with IDPs and SLPs in the area and that companies hardly communicated with the municipality.¹³⁹ The interviewee stated that companies often approached traditional authorities for permission to mine instead of government.¹⁴⁰

4. Case study – Coal mine, Carolina, Mpumalanga

The town of Carolina is located in the Albert Luthuli local municipality in the interior of Mpumalanga Province. It is a grassland area with a climate characterised by mild temperatures and medium rainfall.¹⁴¹ Carolina is in the Ermelo Coalfield.¹⁴² The surrounding landscape is dominated by agriculture and coal mining, the leading economic activities in the area. Unemployment levels are high at 35.4%.¹⁴³ The community is largely made up of a variety of different migrant groups who reside in the town of Carolina and two surrounding neighbourhoods. The predominant languages spoken are isiZulu, SiSwati and Afrikaans.¹⁴⁴

The focus of community activism in the area has primarily been on the severe impact of mining on water resources in the area. This has included litigation.

The case of *Federation for Sustainable Environment and Silobela Community v Minister of Water Affairs and Others* concerned the failure of government to provide potable water to Carolina following the contamination of the water by acid mine drainage.¹⁴⁵ We conducted our visit in July 2016, four years since judgment. Water was still a severe problem with community members showing us dry taps. They also showed us the small number of boreholes in the area. In one of the neighbourhoods, community members had to bring bottles to a local mosque to collect water.

4.1 SLP analysis

For each of the five case studies, we sought to rely on two primary sources of information, interviews with members of communities identified as beneficiaries in SLPs and mining companies' annual compliance reports to the DMR. We were unable to obtain annual compliance reports for this SLP. As a consequence, our findings are based primarily on interviews with community members.

SLP for case study 4	
Commitment	Preliminary findings
Poultry farm to be created on land bought by the company and start-up capital to be provided from 2015	Communities in Carolina directed us to who they stated was the only small-scale poultry farmer in the area; the farmer stated he had never benefited from any support by a mining company. Others have also reported that, in the absence of necessary infrastructure, the farm has become a dumping site ¹⁴⁶
The completion of a school hall for an identified primary school to be financed	A visit to this school revealed that no funding had been provided despite promises; only the skeleton of the school hall was present (which was used as a parking bay); the foundations of this structure were reportedly funded by the National Lottery and not the mine ¹⁴⁷

4.2 Issues that emerged

We interviewed a variety of stakeholders and role players in Carolina. As in most of the cases, the community members interviewed had never seen the relevant SLP and for the most part did not know of the programmes it contained.¹⁴⁸ They reported that they had not received developmental benefits from mining, with the failure to employ local community members being of particular concern.¹⁴⁹ Community members directed us to the school which a mining company had, in its SLP, committed to financing

the completion of a school hall. We also visited a small-scale poultry farm which would have been eligible for receiving the support to poultry farmers outlined in the same company's SLP.¹⁵⁰ At the school it was confirmed that the company had undertaken to finance the hall but the company had not met its commitment. The poultry farmer stated that he had never been approached or assisted by any mining company.

It should again be noted that the primary problem the community was dealing with was polluted water due to mining operations in the area. Consequently its engagements with the municipality and some mining companies have been with regards to this issue rather than social commitments. The prevailing experience amongst community members we spoke to was that mining companies were not responsive and that companies consulted with the municipality rather than community members directly.¹⁵¹ One of the interviewees stated that mining companies invite a small number of politically connected members of the community to consultations at places, such as hotels and game lodges that were inaccessible to most community members.¹⁵²

The municipal official interviewed echoed community members in stating that mining companies did not employ members of local communities.¹⁴⁸ The interviewee stated that the municipal town planning department was not on the IDP forum that has been established.¹⁵³

5. Case study – Platinum mine, Mokopane, Limpopo

Mokopane is a town that located just under 60 kilometres from Polokwane, the capital of Limpopo Province. In between rolling mountains, are nestled 32 villages and the town of Mokopane. High unemployment, especially amongst the youth of the area is soon apparent on visiting the area.¹⁵⁴ Mokopane is rich in minerals and lies in the midst of a platinum complex. Two of these have been in the news in recent years. One of these is run by a major South African mining company and has been operating for over 18 years while the other is run by a Canadian mining company and is still under construction.

For the communities surrounding Mokopane, mining has brought a range of negative impacts which have included damage due to blasting, the disturbance of graves and the loss of arable land to mining.¹⁵⁵ Community members have found mining companies and government unresponsive to their needs and concerns and have therefore mobilised in defence of their rights.¹⁵⁶ This mobilisation has taken a number of forms, and has included protests as well as litigation against the award of a mining right for a large scale platinum operation. There has been significant conflict between the community and the traditional authority as well, in significant measure due to agreements the latter has concluded with mining companies on behalf of the community (such as a relocation settlement) enabling the dispossession of community land.¹⁵⁷ This has been seen as a very common occurrence in rural traditional settings. These particular areas have had numerous conflicts arising out of the legitimacy of the Chief and also individual issues relating to each separate operation. There have even been attempts on the lives of community activists in the area.¹⁵⁸

5.1 SLP analysis

For each of the five case studies, we sought to rely on two primary sources of information, interviews with members of communities identified as beneficiaries in SLPs and mining companies' annual compliance reports to the DMR. We were unable to obtain annual compliance reports for this SLP. As a consequence, our findings are based primarily on interviews with community members.

SLP for case study 5	
Commitment	Preliminary findings
15 external bursaries to be awarded (whether these are reserved for communities not specified)	Community members have alleged nepotism in bursaries (going to families of traditional leader) ¹⁵⁹
A co-operative to be set up and training for community members in the breeding of Nguni cattle to be provided in an identified community	Community members have reported that project was implemented but the training provided was insufficient to ensure its sustainability ¹⁶⁰
Funding of a local lodge identified	Community members reported that the lodge that benefited was owned by someone in traditional leadership ¹⁶¹
Assistance to schools within the local municipality with early childhood development, infrastructure and equipment, educator development, and support for learners with special needs	Community members reported work being done on these projects but identified two problems: there was no consultation with the community on the selection of schools, ¹⁶² and the actual work done was minimal in relation to the amount spent ¹⁶³
Construct home-based care centres in two villages identified	Community reported that this had been implemented but excessive money had been allocated in relation to the size of the output, and that they already had home-based care centres ¹⁶⁴

5.2 Issues that emerged

In the Mokopane, a variety of stakeholders and role players we interviewed and engaged. The community with whom we conducted the workshop and interviews was, on the whole, very knowledgeable regarding the rights, duties and obligations of the mine. Community members were also aware of some of the SLP commitments of the two large mining companies in the area. However, this was not because the companies had consulted them.

Community members interviewed stated that they had never seen the text of the SLP and there had been no consultation on the SLP.¹⁶⁵ The community viewed sufficient participation as being treated as a partner in decision-making and not merely being informed of plans made by mining companies and government.¹⁶⁶

Community members were highly critical of the role of traditional leaders and members contested the legitimacy of the Chief.¹⁶⁷ They stated that the Chief was concluding agreements with mining companies regarding their communal land without consulting them.¹⁶⁸ It was alleged that the traditional leadership was improperly benefiting from SLPs in a number of manners. First, beneficiaries of SLP programmes, such as bursaries and business support were associates and family of the traditional leadership.¹⁶⁹ Second, community members drew attention to the mismatch between large spends on some infrastructure projects and the very small scale of the actual deliverable, for example, millions spent on the construction of a very small computer lab (which they showed us).¹⁷⁰ They alleged this was due to misappropriation by contractors affiliated to traditional leadership. From the point of view of community interviewees, SLPs were just benefiting 'capitalist's children'.¹⁷¹ Community interviewees spoke of significant connections between mining companies, traditional leaders and politicians and saw them all complicit in dispossession and rights violations. One of the interviewees stated that 'when the community approach the mining company they get redirected to the Chief and when they approach the chief they get redirected to the mine'.¹⁷²

In this case, a municipal official interviewed reported that there was communication with the mining companies with a view to aligning SLPs and LED, and that the municipality knew what was contained in mines' SLPs. However, the interviewee stated that mining companies did not actually align SLP programmes to IDP objectives. The municipality was of the view that because community participation takes place in IDPs, it was not necessary in SLPs.

VI. Findings & possible solutions

Having set the scene by identifying the role players, and introduced the case studies, the report can proceed to our findings.¹⁷³ Our findings emerge out of reflections on what we have observed and recorded in the field, in interviews and our engagements on other fora.

We would like this report to be of direct assistance in the pursuit of a more participatory and effective benefit-sharing system in the mining sector. For this reason, we have, for every finding, proposed a possible solution.

1. Participation

1.1 Specific consultations either do not occur or are poorly publicised

One of the basic preconditions for a meaningful participation process is that the forms of notice are sufficient to reach the bulk of affected community members. A tokenistic notice can be used to select the participants to a narrow set of interests.

Overwhelmingly, community participants were never aware of any public consultation meetings dealing with SLPs. For all five case studies, a resounding majority of participants have never attended or even been invited to attend a meeting to discuss the ramifications of the mine and the impact of the socio-economic status of the areas. This response, when read together with the views of DMR officials and companies on community participation in SLPs (discussed below), suggests that public consultation in the development of SLPs is the exception and not the norm.

Possible Solution

This problem could be addressed if a robust public participation process with clear notice requirements tailored to the circumstances of communities were inserted into the legislative framework. Some of the conditions of appropriate notice would include use of community radio stations, community newspapers, affixing notices in main points of gathering in communities, and publishing notices in the first language/s of directly affected communities. Such notices would need to explain the concept of the SLP in plain language and what community members can do to participate (including the date and venue of public meetings). Provision should be made for transport to ensure no affected communities are excluded from meetings.

1.2 Communities do not report having any influence on SLPs

None of the interviewees from any of the five communities reported that they had been involved in the development of SLPs. It follows from this that they had no influence on the content of SLPs. This reinforces the findings contained in our previous report that only two SLPs in a sample of 50 explained any projects with reference to the expressed needs of community members.¹⁷⁴

Possible Solution

Public participation is one of the most fundamental deficits in the mineral benefits system. Allowing any further ambiguity in this area will perpetuate the further exclusion of communities from the mineral benefit stream. To rectify this, legislation must provide a clear set of background conditions for a robust public participation process in the design, monitoring and termination of SLP commitments. The legislation must require the meaningful inclusion of communities in the SLP process. At a minimum this should include, a requirement for community agreement to SLPs, access to information and sufficient notice, The importance of making public participation part of formal hard law cannot be overstated.

1.3 Often no direct community participation in the implementation and monitoring of SLPs

Those interviewed in the five communities reported that this absence of participation extends to the implementation and monitoring of SLPs.

Possible Solution

As mentioned above, participation is a fundamental deficit in the mineral benefits system. Allowing further ambiguity in this area will perpetuate the further exclusion of communities from the mineral benefit stream. To rectify this, legislation must provide a clear set of background conditions for a robust public participation process in the design, monitoring and termination of SLP commitments. The legislation must require the meaningful inclusion of communities in the SLP process. At a minimum this should include, a requirement for community agreement to SLPs, access to information and sufficient notice, The importance of making public participation part of formal hard law cannot be overstated.

1.4 Consultation by mining companies often occurs with a narrow range of local interests

There is much evidence that companies often do not often have public consultation meetings focusing on SLPs. Companies do, however, as required expressly in the MPRDA, conduct public consultations on the mining right application. In many cases companies will conduct periodic stakeholder meetings during the mining operation (though again, rarely with a specific SLP focus).

A frequent complaint of community members and community-based organisations, however, is that these meetings are often with a narrow range of local interests including traditional leaders and politically connected individuals. This complaint has been raised by several interviewees but also by community-based organisations at public fora such as the SA Human Rights Commission Hearings on the Socio-economic Challenges of Mine-Affected Communities.

Possible Solution

A set of minimum requirements in legislation for consultation meetings (as suggested above) would assist in preventing this practice. Activists and community representatives who have taken a stand in opposition to the mining operation or against the way in which it is being conducted must also be invited. Legislation should also provide for the participation of non-dominant groups within communities such as women and young people.

1.5 Communities frequently have no knowledge of SLPs

The vast majority of the community members in Tzaneen, Pafuri and Carolina, had never heard of the SLP commitments before we presented them at the rights training workshops. The majority of community members also did not know of the SLP system and the duties it imposes on mining companies. Community members in Mokopane and Rustenburg had more knowledge regarding SLP programmes, though for many members this knowledge had been acquired recently and some time since the SLP was developed. This greater knowledge is not surprising due to the recent history of community and worker activism around socio-economic injustices in both communities.

The probable causes of this lack of knowledge include the afore-mentioned lack of public participation and the failure of government to proactively conduct rights training for mining-affected communities as well as the absence of public dissemination of SLPs.¹⁷⁵

Possible Solution

As mentioned above, participation is a fundamental deficit in the mineral benefits system. Allowing further ambiguity in this area will perpetuate the further exclusion of communities from the mineral benefit stream. To rectify this, legislation must provide a clear set of background conditions for a robust public participation process in the design, monitoring and termination of SLP commitments. The legislation must require the meaningful inclusion of communities in the SLP process. At a minimum this should include, a requirement for community agreement to SLPs, access to information and sufficient notice. The importance of making public participation part of formal hard law cannot be overstated.

1.6 Free prior and informed consent

The view of participation that is expressed by community members in public is that it should meet the standard of free, prior and informed consent (FPIC), an emerging norm in international human rights law.¹⁷⁶ Communities are asserting their communal ownership and individual rights to land which includes the right to say 'no' to development projects which will take place on their land and impact these rights. This view derives from, amongst other sources, the living customary law of communities.¹⁷⁷

One of the social impacts of mining most frequently raised by communities in multiple fora, are forced relocations by mining companies seeking to mine on or adjacent to communal land.¹⁷⁸ A related problem is the loss of portions of communal land used for specific activities such as agricultural land (whether for crops or livestock). The latter may occur even in instances where there is no residential relocation of community members. While, as discussed above, the MPRDA and SLP system do not conform to this standard, it has been argued that there are existing principles in South African law that require this standard in relation to mining. Most fundamentally, communities such as Xolobeni, LRC and others have argued that the prevailing position in African community's living customary law is that consent of the community is required for developments on communal land.¹⁷⁹ Section 2(1) of the Interim Protection of Informal Land Rights Act (IPILRA) provides that people cannot be deprived of rights to land in terms of the act unless they consent to being deprived of the land (or the land is expropriated by the government and suitable compensation is paid).¹⁸⁰

Possible Solution

The contradiction between the MPRDA on the one hand and African Customary Law and international human rights law on the other needs to be resolved. The MPRDA should be amended to provide for circumstances in which communities can say 'no' to mining. This requires that the MPRDA recognises the layered and consensual process of decision-making under African Customary Law and does not treat the consent of a chief as synonymous with the consent of community members.

1.7 Communities seek a substantive decision-making role throughout the mining and SLP life cycle

Crucially, community members often speak of consultation (which is the standard under the MPRDA) and FPIC interchangeably in that they speak of consultation as a substantive role in decision-making regarding mining and SLPs. A representative from the Mining and Environmental Justice Community Network South Africa (MEJCON) at the SAHRC hearings identified two key elements of communities' conception of meaningful consultation, namely access to sufficient information and being recognised as a party to decision-making.¹⁸¹

Possible Solution

As mentioned above, participation is a fundamental deficit in the mineral benefits system. Allowing further ambiguity in this area will perpetuate the further exclusion of communities from the mineral benefit stream. To rectify this, legislation must provide a clear set of background conditions for a robust public participation process in the design, monitoring and termination of SLP commitments. The legislation must require the meaningful inclusion of communities in the SLP process. At a minimum this should include, a requirement for community agreement to SLPs, access to information and sufficient notice. The importance of making public participation part of formal hard law cannot be overstated.

1.8 Many in government and mining companies see a limited role for direct community participation in SLPs and mining

As is explained in CALS' first report on SLPs, the law does not provide detailed guidance on the role of community participation in SLPs.¹⁸² Therefore the approaches taken by both the mining companies will have a significant bearing on the nature, extent and influence of community participation in SLPs. The prevailing view we encountered amongst DMR officials was the following.¹⁸³ First, SLP programmes, and the LED section in particular, should be based on the needs and interests of community members.¹⁸⁴ However, this process by which municipalities are meant to develop an integrated development plan (IDP) is designed to include multiple role players including communities.¹⁸⁵ Hence the IDP process is the appropriate venue for communities to participate in the formulation of LED priorities and the IDP is supposed to embody the interests and priorities of communities.¹⁸⁶ The SLP is required to be aligned with the IDP. Therefore, in this view, consultation with the municipality on the IDP is sufficient.¹⁸⁷

Many interviewees from the mining sector echoed that view though some did see a role for direct community participation. One of the company interviewees, for example, explained his company's policy, which provided for the consultation on LED initiatives pertaining to basic needs.¹⁸⁸ From our conversations with companies it is clear that the position is that community well-being is a central priority, yet when the possibility was raised regarding making community members party to the agreements, this was met with resistance and paternal sentiment rather than negotiation and partnership.¹⁸⁹

There are sound reasons for alignment of SLP initiatives with the IDP, as is required in the present law. If SLP initiatives are going to be impactful they should align with a broader framework for economic development in the area. Further, the failure to link project-based SLPs to a broader developmental overview and framework for a heavily mined area means that it is more likely that some communities impacted by mines in the area will fall through the cracks (will be excluded from SLP benefits even if inadvertently).

The problem with this approach, however, is that it essentially views consultation with the municipality as a surrogate for direct community consultation. The premises that underpin this view can, however, be challenged. First, there is some research indicating that communities often do not have meaningful influence over what goes into the IDP.¹⁹⁰ In addition, the IDP is the product of consultation with a range of role players (local capital, for example) aimed at aggregating the full range of local interests and not simply working class and poor communities. SLPs are, in contrast, specifically about development for these groups and not for well-to-do individuals and capital.

Possible Solution

Addressing this shortfall requires reconciling the need for SLPs to be linked to broader local economic development processes (facilitated by alignment with the IDPs) and the need to be specifically responsive to the communities who are beneficiaries.

The answer must lie in a more formal integration of the SLP into municipality's annual process of reviewing its IDP. Communities and workers, in addition to being present in the process of formulating the IDP itself, should be present in the process of aligning the SLP and IDP. This should probably be a consolidated process, with local government, communities and workers determining what initiatives should be driven by the mining industry – in other words a framework SLP for the area. Following this, there should be a process for the allocation of tasks between companies. Each company would then incorporate the tasks they have taken on into their SLPs.

1.9 Many in government and the mining sector do not view communities as equal partners

While all company interviewees portrayed community well-being as a central priority, there was a scepticism voiced by some interviewees regarding the capacity of mine-affected communities to play a meaningful role in the design and implementation of SLP projects.¹⁹¹ One assumption behind this view was that because unemployed community members were often hungry and were engaged in a day to day battle for survival, they had no capacity to critically assess and prioritise their needs, think strategically and engage in planning.¹⁹²

This was not, however, the universal view among company interviewees. One of the interviewees in company 4, for example, suggested that LED programmes should be informed by a facilitated visioning by community members of what desired development looks like in the community that begins at the unit (village / settlement / neighbourhood) level and that is then aggregated between all villages/settlements/neighbourhoods affected by the mining project.¹⁹³ The interviewee's successor, however, during the same interview expressed scepticism regarding this model, motivating this was the view of community members as not knowing what they want and being motivated by immediate needs and having a culture of entitlement.¹⁹⁴ Another company interviewee described a model for consultation with role players in the SLP that had different fora for different aspects of the SLP.¹⁹⁵ This model did involve communities directly in aspects of the LED pertaining to human need (care facilities etc). The bulk of the SLP was however dealt with between the company and organs of state.¹⁹⁶

Not all interviewees from the mining sector were receptive to the idea of requiring agreement of communities for SLPs to be valid documents. There was a concern that this could make the licensing process more uncertain and protracted.¹⁹⁷

Possible Solution

It is clear that, it is not in the short-term interest of mining companies to follow a robust public participation process for SLPs. For this reason, it is critical to afford communities the leverage to pressure companies to open the SLP to community participation. Part of the answer lies in more robust participation requirements in the legislation (including requiring the agreement of the community before approval). The increasing organisation of mine-affected communities also promises to increase the pressure on mining companies to consult. In the face of greater regulatory and grassroots pressure, the likelihood of manager with foresight recognising the unsustainability of the paternalistic approach would increase.

1.10 Some in the mining sector disagreed with community views on custodianship of mineral resources

One of the interviewees from the mining sector stated that communities harboured a ‘misunderstanding’ that custodianship meant that minerals belonged to them rather than the government.¹⁹⁸

Some of the mining sector interviewees were of the opinion that the post-apartheid ruling party and government’s promises of social change were unrealistic and that government was deflecting anger born by unmet and ‘unrealistic’ promises to mining companies.¹⁹⁹

Possible Solution

This points to the need for a clearer understanding of what the custodianship principle under the MPRDA means. It might be useful for legal representatives of communities (or Amici) to make submissions in a court case relate to the custodianship principle. The Chamber of Mines, other industry associations and the DMR should also facilitate training for communities on their rights under legislation, the Constitution and international human rights instruments.

1.11 Lack of community participation can hamper viability of projects

In some instances, community participants directly linked the failure of LED projects to a lack of meaningful consultation. For example, community members in Mokopane stated that some of the business support/creation initiatives provided for in the SLP had failed partly for the reason that there was no need for further businesses of the kind provided for and that consultation would have allowed for the gaps in the community to be identified. An example was the project of providing further care centres, which community members said were not needed.

Possible Solution

This can be addressed through, via legislation, specifying minimum requirements for consultation at different points in the lifecycle of the SLP and mining project. The requirements should speak to issues such as sufficient notice, to information provided to participants, to accurate recording of the meeting and for inclusion of priorities of communities in the final SLP. These points in time include when the initial SLP is designed (and when subsequent, five year, iterations of the SLP are developed) the implementation of the SLP, and decommissioning and closure of the mine. SLPs should also be included within the ambit of multi-stakeholder monitoring bodies, akin to the Environmental Management Committee in the environmental context and these bodies should include direct representatives of communities. Pending this, efforts of civil society to assist in capacity building in social auditing on SLPs should be consulted. CALS is presently developing a community toolkit for participation in the SLP system which would include a set of questions and a table to enable social auditing of the observable implementation of SLPs.

2. Transparency

It is critical that community members have ready access to SLPs in and up-to-date information on companies' compliance with them in a language they understand for multiple reasons. First, the principle of free prior and informed consent requires that communities be informed at all times of impacts and benefits resulting from projects. Second, access to information is necessary to ensure that communities can hold companies to account where they are not meeting their obligations.

2.1 Communities not always made aware of rights when mine arrives

It is especially important that community members are knowledgeable regarding their rights in the legal system at the inception of project, before the company is close to obtaining a mining right. The community will have far more leverage prior to the construction of the mine and the commencement of the operation.

It was not always easy, via our field research interviews, to evaluate the degree of knowledge of communities at the moment of inception since some of the areas had long existing mining operations and one, indeed had undergone decommissioning. Furthermore, in some of these areas, the operation had commenced prior to the MPRDA regime. Nevertheless, this issue did emerge in Mokopane, where there was an operation that had recently been awarded a mining right. A member of the community interviewed in this area stated that the community did not know of its legal rights at the crucial moment before mining commenced in the area.²⁰⁰

This represents a failure by the DMR and other government departments to meet their constitutional duties with respect to the environmental and socio-economic rights of mine-affected communities.

Possible Solution

It is critical that legal training be provided to communities before mining rights applications are submitted so that communities can make informed decisions. Civil society organisations are currently assisting communities by providing such training and communities are organising exchanges which bring together communities with long experience of mining with communities beginning to be affected by mining. However, for such capacity building to reach all communities to be affected by new large scale mining projects, the resources of government are required. The DMR, in partnership with other relevant departments should, in designated mining areas conduct training and capacitation workshops which should also done in a collaborative manner with community networks and could involve community exchanges.

2.2 Opaque contracts between traditional leaders and mining companies regarding benefits

A common theme that emerges from interviews and public statements and submissions by mine-affected communities as well as by civil society organisations working with communities is that contracts are often concluded between traditional leaders and mine companies without informing and consulting the broader community.²⁰¹ These are often shrouded in secrecy. The MACUA representative at the SA Human Rights Commission Hearing on the Social and Economic Challenges of Mine-Affected Communities stated that ‘as communities we have never seen any of the contracts concluded between government and mining companies’. He also stated that contracts contained confidentiality clauses.

This has significant implications for SLPs. First, these secret contracts often dispossess communities of their land rights, thereby also destroying the economic independence, food security and cohesion of the community. This dispossession renders the fundamental aspiration of SLPs, namely ensuring that mining leads to the development of mine-affected communities, impossible to realise. Second, such deals weaken the bargaining position on SLPs through removing control over land.

Possible Solution

There needs to be far greater clarity on the standards for contracts impacting on communal land rights. Transparency must be a requirement. These contracts should be held at a public space for inspection by community members.

2.3 While the tide is turning, some in government and mining sector still view SLPs as confidential

Since the inception of this project we have encountered a diversity of views within government and the mining industry. This ambivalence was also reflected in the most recent DMR PAIA manual (from 2014) which lists

SLPs as among the documents that are automatically available in terms of Section 15 of PAIA but at the same time makes this availability subject to the exclusion of 'confidential commercial and financial information' and, in what appears to be an attempt to limit the class of persons, to 'interested and affected persons'. We have also been told by a DMR official that only the local economic development section of SLPs should be public. Our requests to companies for access to SLPs were also just over 50% successful.

Since CALS' first SLP report, there have been a number of public statements by both DMR officials and some mining company executives to the effect that SLPs will be made publically available. For example, at the Human Rights Commission Hearing on the Social and Economic Challenges of Mine-Affected Communities, in August 2016, a DMR official stated that the Department was finalising a mechanism for ensuring companies make SLPs and related information publically available. Mark Cutifani, the Chief Executive of Anglo American announced his intention to make all SLPs for companies under the Anglo-American group publically available on company websites and a few companies have followed suit by posting SLPs and/or annual reports online.²⁰²

The majority of company interviewees did agree that SLPs were public documents. One of the interviewees, however, distinguished between the LED section of SLPs, which in his view should be public and the human resources development section.²⁰³ He said that since the latter emerged from sensitive agreements with organised labour, it and should therefore not be shared 'with every Tom Dick and Harry'.²⁰⁴ Nevertheless there was still an instance in 2016 in which we had difficulty accessing an SLP for a mine. The company had agreed to provide us with a copy of the relevant SLP provided we signed a non-disclosure form.

Possible Solution

First, the Department and parliament need to put an end to all uncertainty and insert unambiguous provisions in legislation that SLPs, reports and association documentation are public documents. The DMR should also deliver on undertakings to create an online platform accessible to all to which all mining licensing information is uploaded and accessible via search and browse functions.

3. Selection of community beneficiaries and exclusion from SLPs

3.1 No clarity on the basis for determining which communities benefit from SLP

There is no consistent way of delineating a beneficiary community, with criteria including municipal boundaries, radius and community boundaries. A community interviewee in Carolina complained about this inconsistency.²⁰⁵

Possible Solution

There needs to be regulation to identify the preferred manner in which this is done.

3.2 Geographically isolated communities more likely to be excluded from SLP benefits

In one of the communities with whom we conducted interviews there was limited traffic and thus limited communication between the villages comprising the mine-affected communities in relation to a large coal mine in the process of decommissioning. This was on account of a lack of roads and other infrastructure. The result was that based on our interviewees responses, there was limited communication with other villages. This made it easy for the company to avoid targeting a community that was only several kilometres from the mine site, but was just on the other side of the river from the mine (residents suspected that villages on the mine's side of the river benefited, despite this being one of the closest villages to the mine).

Possible Solution

The unfair exclusion of directly impacted communities from SLP benefits might be less likely if there was improved regional co-ordination of all role players. This is, because, if there is joint planning on all SLPs within a locality, it would be less likely that certain communities would go unnoticed. Co-ordination could be improved through effective partnerships between different state entities and the amendment of the MPRDA and regulations to provide for the co-ordination of mining companies' efforts. In addition, a clear and transparent set of criteria for determining SLP beneficiaries needs to be developed. The extent to which particular communities are impacted by the mining operation should be accorded significant weight.

3.3 Communities who lack customary land rights more likely to be excluded from SLP benefits

In one of the research areas, a community living in a large informal settlement established near a major platinum mine over 20 years ago, had been completely excluded from SLP benefits but also from basic government services. The area surrounding the mine is subject to the customary law land ownership of a traditional community. This community, which comprises of people who arrived in the area in search of livelihoods at the inception of the mine, is not part of this customary community. Members of this community report pervasive discrimination against them by the leadership of the customary community but also by ordinary members of the community, the municipality and the police.²⁰⁶ A member of the community interviewed told us that the traditional leaders say to them that 'we are not their children' (not one of their people) hence do not owe any responsibilities to them.²⁰⁷

Possible Solution

Informal communities have the right to benefit if they are impacted. Impact needs to be accorded significant weight in a formalised framework for selecting SLP beneficiaries. Greater regional co-ordination of SLP efforts would also assist in identifying which communities have been left out.

3.4 Informal settlements may be excluded if they are not declared as townships

The members of the community described in the previous subheading have for a long time been waging a struggle to get local government to supply basic services in the area such as water, electricity, roads, mobile clinics and a police station.²⁰⁸ The municipality has, to date, not declared the area a township, despite its size and longevity. Community members had also unsuccessfully attempted to get their community to be included in the SLP for a large mining operation. In explaining their exclusion from the SLP, the company has relied on the fact that the municipality had failed to declare the area as a township as the reason why the informal settlement was not included.

Possible Solution

Declaration of townships must be accelerated in mining areas.

3.5 Limited publicity of SLP benefits can lead to exclusion

In three of the five communities, there was little knowledge of the SLP which had clearly not been publicised adequately. Lack of knowledge of SLP benefits, such as bursaries, will mean community members do not apply and have no chance of accessing benefits.

Possible Solution

A comprehensive dissemination strategy for SLPs should be legally required. This needs to include the dissemination of SLP documents, reporting on compliance and the advertising of opportunities offered to members of targeted communities (for example ABET and bursaries). These adverts need to clearly explain the opportunity offered, how to apply, the selection criteria and process, and who to contact for inquiries. They will need to be in first languages spoken by communities in the area and at places and media platforms accessible to community members.

3.6 The lack of a transparent process for allocating benefits can lead to exclusion

In one of the communities, a member of the community stated that they had applied to a mining company for bursaries but had received no feedback

on their application.²⁰⁹ It has also been alleged by some interviewees that SLP benefits such as bursaries often go to the children of politically connected individuals and traditional leaders rather than those most in need.²¹⁰

Possible Solution

As mentioned above, a comprehensive dissemination strategy for SLPs should be legally required. This needs to include the dissemination of SLP documents, reporting on compliance and the advertising of opportunities offered to members of targeted communities (for example ABET and bursaries). These adverts need to clearly explain the opportunity offered, how to apply, the selection criteria and process, and who to contact for inquiries. The requirements for eligibility need to be set in a manner that will ensure bursaries and other benefits are awarded to a wider selection of candidates that are not politically connected. They will need to be in first languages spoken by communities in the area and at places and media platforms accessible to community members.

4. Mining companies' systems for implementing SLPs

In understanding company systems for implementing SLPs, it is important to understand where responsibility for SLPs is located in the institutional structure. This is partly because the seniority of the person responsible for SLPs and the relative power of the department in the company will have an influence on the extent to which necessary company resources and people are deployed for the implementation of SLPs. Second, different departments in companies will have different objectives, hence different priorities and skills, which will have an influence on how SLPs are designed. For this reason some of our questions to companies related to the division of labour for SLPs.

4.1 No consistent location of SLPs within company structures

It was apparent from our interviews with mining companies, industry associations and consultants (and our other engagements) that there is much variance with regards to where in the organisational structure of companies responsibility for SLPs is located. In some companies, SLPs were centralised, whereas in others they were dealt with at a branch level.²¹¹ Departments tasked with leading SLPs included corporate social investment and transformation.²¹²

Possible Solution

Whatever the particular implementation structure chosen by the company, it is vital that there are clear lines of accountability and that a company executive with real power is assigned responsibility for the implementation of the SLP. Further, companies must clearly indicate in the SLP text and online who is responsible for implementing particular aspects of the SLP, so that there is public accountability.

4.2 Skills and attributes of the SLP project lead

To ensure that SLPs are of sufficient quality to deliver tangible benefits it is important that the appropriate project leads are appointed and the required mix of skills and disciplines are marshalled.

One of the interviewees, a consultant who had been involved in the development of SLPs for a number of large mining operations, identified some of the attributes that a project lead should possess.²¹³ Some of these attributes include knowledge of all relevant legislation, at least five years of experience of the business of mining, and the ability to envision end goals.²¹⁴ The interviewee suggested that this person should be generalist rather than a specialist, given the diversity of issues covered by an SLP.²¹⁵

It appears that the skills set and approach of mining engineers make them a poor fit for leading SLPs. Two interviewees from the mining sector stated that a problem was that mining engineers who have either been directly involved in SLP (or CSI) projects or (as is often the case) are the senior executives in the company to whom those responsible for SLPs report, understood development solely in terms of building structures.²¹⁶ The interviewee from the mining company stated that executives from this background 'have neither the capacity nor the ability to build sustainable communities and entrepreneurs'.

Possible Solution

The above supports the approach of a specialist SLP unit in companies rather than just placing the responsibility in an existing unit.

4.3 Specialists required to contribute towards the SLP

While the afore-mentioned consultant stated that the project should be led by generalists with experience in the mining industry, she stated that the project lead should consult a number of specialists which include labour and industrial relations experts, economists, town planners and can also include sociologists, anthropologists, social development specialist, political analysts, procurement specialists and city developers.²¹⁷ It is not clear whether such specialists are regularly consulted in the design of SLPs, because SLPs seldom indicate the authors and specialists involved.²¹⁸ In part, this is because SLPs are not required to, provide the names and qualifications of all the people who contribute to a SLP. The contrasts with the requirement for this information to be included in environmental impact assessment reports under NEMA.²¹⁹

Possible Solution

SLPs should be required to list the names, specialisation and qualification of all who contribute to the document. Further the research reports that inform SLPs should also be public documents. SLP guidelines should indicate the types of specialists who should be consulted in the making of SLPs.

4.4 Limited development planning capacity

An executive of a consulting company with clients in the mining sector, at the SA Human Rights Commission Hearing on the Socio-Economic Challenges of Mine-Affected Communities, was of the opinion that the development planning capacity of both the DMR and companies was insufficient. This conforms to the picture presented by the afore-mentioned mining sector interviewees' statements that the mining engineers who often played a role in companies' local economic development project planning only understood development in terms of the building of structures rather than sustainable systemic change.²²⁰

Possible Solution

Shortfalls in planning capacity within companies can at least be partially offset by a greater degree of co-operation by companies but also more effective partnerships between government departments. Collaboration allows for different companies to work on their projects that draw on their strengths but also allows for a dissemination of the lessons learnt from successful projects.

4.5 Some evidence that SLPs are low on many companies' priority lists

Compliance with legal obligations requires that bearers of duties, for example compliance with SLPs, regard them as binding and not merely persuasive or discretionary. A number of responses by interviewees indicated that companies accorded a lower prioritization to SLP obligation than some other legislative obligations. One example was that in one of the study areas, a municipal official stated that mining companies only sought the input from local government in relation to the EIA and not SLPs.²²¹ An interviewee from the mining sector admitted that, following, the downturn in the mining industry due to the commodities slump, SLP teams, already 'thin on the ground' had been 'decimated'.²²² One of the company interviewees stated that changes of company leadership often leads to a reduction of SLP commitments.²²³

Possible Solution

One way to instil the appropriate level of prioritisation amongst companies is for the DMR to intensify its enforcement of SLP obligations so that sanctions for non-compliance are a reality. New and more effective remedies need to be developed for SLPs. These include administrative fines and criminal fines that are a percentage of turnover or the value of the operation to ensure that they make non-compliance more costly than compliance. Further, there should be provisions for the fining or jailing of directors for non-compliance.

4.6 Implementation of SLPs hampered by short-term profit motive

A theme that emerged from the interviews with consultants and people involved in the mining sector was that company interests in getting project approval, showing quarterly profits and enhancing the public image of the

company have a significant bearing on the manner in which projects are designed and implemented.

Several interviewees stated that rather than being designed to achieve tangible impacts on beneficiaries, SLPs were (or had been) designed and implemented principally in a manner that satisfied the regular, in order to obtain and retain the right to mine.²²⁴ One interviewee, for example, stated that 'the role of company SLP people is to keep the regulator at bay' and that mining companies were 'complying for the sake of complying'.²²⁵

Possible Solution

The solution lies in a greater role being accorded to communities and to workers in the implementation of SLPs – in other words, the sectors of society with the greatest interest in the SLP being implemented substantively. Legislation could require that there be multi-stakeholder bodies, which include workers and communities akin to future forum, to oversee companies' adherence to SLPs and to the mining charter. These bodies might be regional in scope, overseeing all major mining operations in a municipality.

5. Co-operative governance

SLPs are implemented in the context of a constitutional allocation of powers and functions that includes distinct and overlapping roles by national, provincial and local spheres of government. In addition, SLPs address a wide variety of different subjects including worker training, career progression and employment equity, local infrastructure and basic services, housing and local procurement amongst others.

The different types of SLP initiatives therefore require the involvement of a wide range of departments and agencies as competent authorities and these include the departments of labour, education, water and sanitation, and housing. Many SLP programmes will in fact require the participation and/or signing off by an array of organs of state at different levels. For example, a project of building a school or crèche may require the municipality to approve the zoning and provide water, sanitation and electricity and the Department of Education to provide teachers. For these reasons, co-operative governance, both vertical (between national, local and provincial spheres) and horizontal co-operative governance (between departments and agencies) is vital for the implementation of the SLP system. In the following sections we shall discuss significant issues of co-operative governance we have detected in conducting our research. A finding in the first report was that the SLPs we analysed did not clearly delineate responsibilities of the different role players (both between mining companies and the state and between different state entities). This suggested that there co-operative governance problems in the system.

5.1 Ineffective communication between organs of state

A picture emerged from interviewees of an absence of effective communication between the spheres of government on SLPs. Municipal

officials, for example, would state that the national departments seldom contacted them when deciding to issue licences to mines.²²⁶ Interviewees in one of the municipalities stated that the DEA would not copy the municipality in emails where the EIA was attached.²²⁷ The situation doesn't seem to be any better in relation to horizontal co-operative governance. Departments which are meant to be working together are working in silos. This emerged clearly in the submissions by a number of departments at the SA Human Rights Commission Hearing on the Socio-Economic Challenges of Mine-Affected Communities.

Possible Solution

A framework for co-operation for all organs of state with a key role in mining-related governance and planning must be established. These state bodies would include the DMR, the DEA, DWS, the Department of Co-operative Governance and Traditional Affairs, Department of Rural Development and Land Reform, the Department of Human Settlements and local government (district and local municipalities). This will enable co-operation on SLP matters.

5.2 Misalignment of planning frameworks of different organs of state

Alignment of planning frameworks emerged as a problem. The Department of Human Settlements, in its presentation at the SAHRC Hearing on the Socio-Economic Challenges of Mine-Affected Communities, stated that the government had not successfully developed 'transformative multi-stakeholder interventions to benefit entire communities'. The absence of concerted alignment between housing, infrastructure and economic development imperatives that includes communities and workers, explains the crises of housing, infrastructure, unemployment and poverty in these communities.

Possible Solution

An integrated strategy for aligning housing, infrastructure, and economic development in mining regions needs to be developed.

5.3 Lack of formalised relationships between DMR and other organs of state

At the SAHRC Hearings on the Social and Economic Challenges of Mine-Affected Communities it emerged that some of the departments did not have formalised relationships with the lead department, the DMR. Both the Departments of Land Reform and Traditional Affairs reported an absence of a formalised relationship with the DMR.

The latter department stated that, in relation to SLPs, while the department had taken the initiative to collaborate with the DMR, this had not resulted in the department being able to participate in this or in any mining processes.

Possible Solution

A framework for co-operation for all organs of state with a role in mining-related must be established. These state bodies would include the DMR, the DEA, DWS, the Department of Co-operative Governance and Traditional Affairs, Department of Rural Development and Land Reform, the Department of Human Settlements and local government (district and local municipalities).

5.4 Municipalities feel insufficiently consulted

Several of the municipal officials interviewed complained of insufficient consultation by national departments such as the DMR.²²⁸ An official in the local municipality in the second study area, for example, stated that the municipality, due to its presence and knowledge of what was happening locally, would be able to assist the DMR in monitoring compliance with SLPs and other licence conditions.²²⁹ However, the DMR was not taking advantage of this opportunity.²³⁰ As mentioned above, some municipal officials stated that national departments such as the DMR and DEA would seldom contact them when deciding on whether to award licences to mines.

Possible Solution

As mentioned above, a framework for co-operation for all organs of state with a role in mining-related must be established. These state bodies would include the DMR, the DEA, DWS, the Department of Co-operative Governance and Traditional Affairs, Department of Rural Development and Land Reform, the Department of Human Settlements and local government (district and local municipalities).

5.5 Tendency of shifting responsibility for problems of SLP system

What was common amongst interviews, both within government, and within the mining sector was a tendency to blame other role players for the problems in the SLP system and the lack of effective local economic development in mining communities. DMR officials viewed many municipalities as lacking capacity to conduct effective local economic development planning.²³¹ They also stated that in some cases; initiatives were driven by the private interests of local politicians.²³² Most municipal officials portrayed themselves as champions of community interests but were hampered by national department's bypassing of them. Mining companies, in many cases, portrayed themselves as being stymied in their efforts by corruption and incompetence in local government and an inefficient regulatory process run by the DMR.²³³

Possible Solution

As mentioned above, a framework for co-operation for all organs of state with a role in mining-related must be established.

These state bodies would include the DMR, the DEA, DWS, the Department of Co-operative Governance and Traditional Affairs, Department of Rural Development and Land Reform, the Department of Human Settlements and local government (district and local municipalities). This will enable co-operation on SLP matters.

5.6 Lack of clarity on what LED programmes in SLPs should focus on

One of the municipal officials and one of the companies interviewed stated that the problem of infrastructural projects was that they were too geared towards meeting immediate needs rather than realising a coherent vision of development (productive economic sectors, linkages, etc).²³⁴ Interviewees have also reported disagreement between companies, municipalities and the DMR regarding what should be contained in SLPs.²³⁵

Possible Solution

Legislation should provide greater clarity on the role of SLPs in relation to related plans (such as IDPs) pertaining to local economic development.

6. The DMR as regulator

6.1 The DMR experienced as absent actor by other role players

Communities experience the DMR as absent during the licensing process.²³⁶ This absence is felt more generally and in relation to issues that arise later in the mining life cycle too. For example, it was reported at the Human Rights Commission Hearings on the Socio-Economic Challenges of Mine-Affected Communities that MACUA had requested a meeting with the DMR on the issue of abandoned mines and artisanal miners but the DMR had only responded (in the negative) on the suggested day of the meeting.

Some municipal officials also stated that the DMR should involve them in compliance monitoring of SLPs and other licence conditions of mining companies.²³⁷

Some interviewees from mining companies also viewed the DMR as insufficiently responsive. For, example, an interviewee from one of the mining companies stated that they suspected that the DMR did not read compliance reports.²³⁸ This suspicion was because the DMR would, after receiving compliance reports, request information from the company that was already in the report.²³⁹

Possible Solution

DMR must have a stakeholder engagement plan and a dedicated line of accountability for implementing this plan for each mining project. The DMR should also, like the DEA, release annual compliance and enforcement reports that detail all interventions made.

6.2 Communities do not experience DMR as a champion of their rights

Communities experience of the DMR is that it is neither pro-active in championing their interests nor responsive when they approached it for assistance.²⁴⁰ The prevailing view of DMR amongst mine-affected communities that emerges from public statements and informal conversations is that the DMR primarily serves the interests of the mining industry.²⁴¹

Possible Solution

A designated DMR official must be contactable and available for each mining project. DMR must serve, and must be seen to serve, the interests of communities rather than just mining companies.

6.3 DMR capacity challenges

The limitations in capacity of the DMR, especially in relation to compliance monitoring and enforcement was something recognised by people we spoke to in the mining industry but also by DMR officials who acknowledged they were not able to conduct on site monitoring of every mining operation in South Africa.²⁴² One of the company interviewees linked slow turnaround times on mining rights application to what he stated was the very small number of DMR officials processing these applications in regions such as the North West.²⁴³ One of the company interviewees also observed there was a rapid staff turnover in the DMR.²⁴⁴

Possible Solution

More staff needs to be hired to handle the case load. This must include more inspectors and more officials with knowledge of community participation. Even pending the appointment of more staff, however, the compliance monitoring load of the DMR could be lightened through finding a way to draw on the capacity of communities who have a particular knowledge of the locality.

6.4 Some companies perceive the DMR as inconsistent in its approach to compliance monitoring and enforcement

The principle of the rule of law requires that the law is consistently applied and like cases are treated in a similar manner. Further, if a Department is seen to be unpredictable in how it applies legal standards (such as compliance with SLP provisions), those being regulated will find it more difficult to understand what attracts sanction and adherence is likely to be inconsistent.

One of the mining sector interviewees complained of inconsistencies in DMR's approach, stating that the DMR had no consistent view of its approach and role.²⁴⁵ He also stated that some DMR officials adopted a lenient approach, and were sympathetic to company explanations of why targets were not met, while other officials adopted a strict approach to compliance.²⁴⁶

Possible Solution

One intervention would be for the DMR to review its practices and policy on enforcement of SLPs. There needs to be a clear framework for how matters are escalated and what is sufficient to attract enforcement measures. The reasons for rapid turnover should also be identified and a plan is put in place to ensure retention of officials that are performing consistently with their job description.

7. Customary land rights and the role of traditional leaders

One of the shifts occurring in the mining industry is the increasing investment in rural and/or former homelands areas that are often subject to customary land ownership.²⁴⁷ Under the prevailing forms of living customary law amongst South Africa's many customary communities, the role of traditional leadership (where traditional leaders are part of the community's structure) in relation to communal land is of custodianship of the land in the best interests of the community to whom the land belongs. However, there are presently a large number of conflicts between mine-affected communities and traditional leaders with the former often alleging that the latter are treating communal land instead as their private property and concluding agreements with companies without their consent. This section will identify some of the problems that have been detected in this regard.

One of the most complex challenges of our Constitutional order is how to harmonise the democratic, egalitarian nature of our order with the need to give recognition to African systems of law and governance which were distorted by colonialism and apartheid. The Constitution does recognise the institution of traditional leadership. It provides that 'the institution, status and role of traditional leaders, according to customary law, are recognised, subject to the Constitution'.²⁴⁸ This clause does, however, not grant unfettered power to traditional leaders. The two main constraints in the wording are, first, 'according to customary law' and second, 'subject to the Constitution'. With regards to the first, the implication is that traditional leader's power is created and circumscribed by the customary law of the communities which they lead. The Constitutional Court has held that what the Constitution recognises is the living customary law continually generated and revised by communities as a whole and not the colonial and apartheid era codification of customary law which strengthened the power of leaders.²⁴⁹ 'Subject to the Constitution' requires that the powers of traditional leaders be read in the light of other provisions in the Constitution, including those dealing with the powers of the three spheres of government and the Bill of Rights. As noted by the Constitutional Court in the *First Certification Judgment*, the Constitution does not require a formal governmental role for traditional leaders and the text leaves open the precise role of traditional leaders under this system.²⁵⁰

The starting point for assessing the role of a particular traditional leadership structure under living customary law is to determine who the community is (based on community members' views of the boundary of their community) and what its current principles and practices are. There are, in fact, cases of customary communities that do not have traditional leadership.

While the role of traditional leadership will, therefore, vary with the particular living customary law of communities there are some deep underlying principles that are regarded as common to the bulk of customary communities in South Africa. First, traditional leaders are not owners of communal land in their individual capacity but ownership belongs to the community as a whole. Second, this, in the case of most communities, entails meaningful consultation when traditional leaders are to exercise their power over the land.²⁵¹ Third, it is not the case that the entire community has an equal right to all of the land.²⁵² Rather, there is a system of layered rights in which particular people will have particular but limited rights to use of the land for specific purposes.²⁵³ An example would be the right of women in the community to use particular portions of land for cultivating crops.

Given that there are multiple allegations by mine-affected community members that traditional leaders are being co-opted by mining companies, questions arise as to whether mining companies are continuing a practice with a long history in colonialism known as indirect rule.²⁵⁴ Indirect rule as a phenomenon was identified by Mahmood Mamdani.²⁵⁵ The practice refers to the strategy of colonial governments, such as the British colonial governments that ruled in the Cape and Natal pre-union, to, instead of ruling over colonised populations directly, to rule through indigenous intermediaries, usually traditional leaders as a means of control.²⁵⁶

7.1 Secrecy of agreements between traditional leaders and mining companies

A serious problem that has been highlighted by a wide range of communities in areas such as Mokopane and Rustenburg is of secret agreements being concluded between companies and traditional leaders regarding communal land and vehicles for community shares in the proceeds of mining. At worst, these agreements facilitate the dispossession and relocation of communities without their consent and with inadequate compensation. These agreements also involve the setting up of trusts and other vehicles for community benefit which are often opaque and mismanaged.

Possible Solution

The traditional authority must be required to produce audited reports of their finances. They must also declare all the contracts that they have entered into at a public imbizo and be required to report annually in town hall meetings.

7.2 Allegation that traditional leaders working with mining companies at expense of community

The benefits that accrue to traditional leaders as a result of these deals may mean that the latter promote the interests of mining companies at the expense of communities. In more than one community, it was reported by members that traditional leaders were involved in, or complicit with, intimidation of community members opposed to the mining operation or the manner in which the operation was conducted.²⁵⁷ In one instance this intimidation was attributed directly to members of official traditional

leadership. In one of the communities, a member of the Royal Council, which opposed the government-recognised traditional leadership, stated that 'they [officially recognised traditional leadership and its agents] pressurise you not to speak'.²⁵⁸

In three of the study areas, the legitimacy of the officially recognised Chiefs is disputed by much of the community. It has been suggested by some members of mine-affected communities that companies manipulate the vulnerability of Chiefs who have been appointed in a fraudulent manner.²⁵⁹

Possible Solution

The traditional authority must be required to produce audited reports of their finances. They must also declare all the contracts that they have entered into at a public imbizo and be required to report annually in town hall meetings.

7.3 Allegations of corruption and usurpation of SLP benefits by traditional leaders

In study areas one, two and four, it was alleged by one or more community interviewees (and in some cases, municipal officials) that social and labour plan benefits (and CSI benefits) were improperly going to traditional leaders. The alleged benefits took various forms including children of traditional leaders receiving bursaries, businesses owned by traditional leaders being the main beneficiaries of SLP programmes designed to strengthen community business, and the retention of moneys or benefits meant to benefit the broader community. It is also alleged that the reason for a pattern in which significant sums are spent on small projects that can be accomplished for fractions of the sum is that local elites are pocketing the difference themselves. This is viewed as part of the afore-said approach of effectively bribing local power brokers (such as traditional leaders) to protect mining company interests. One example of the latter was the allegation in one community that building materials donated by sand mine to the traditional leadership for the benefit of the community had been used in construction on the royal household.²⁶⁰

A possible interpretation of this phenomenon is that there are instances in which SLP programmes are serving as one of the mechanisms through which mining companies may seek to influence traditional authorities to repress community opposition to conduct by mining companies that undermine their right to development, and their health and well-being.

Possible Solution

The traditional authority must be required to produce audited reports of their finances. They must also declare all the contracts that they have entered into at a public imbizo and be required to report annually in town hall meetings.

7.4 Questions raised regarding quality of advisors of traditional leaders

In the course of our field research (and in public fora), questions have, on occasion, been raised regarding the quality of advice to some traditional leaders. One local government official interviewed stated that chiefs were not being advised by people with knowledge of law (including minerals and environmental law).²⁶¹ This manifested itself in the local chief assuming the decision to authorise the decommissioning of the mine when such power lies with the Minister of Mineral Resources.²⁶² It has been suggested that workshops for traditional leaders on the constitution, mining and environmental regulatory systems and spatial planning legislation (i.e. SPLUMA) could form part of the solution.²⁶³

Possible Solution

Traditional authorities require trained specialised legal advisors.

VII. Recommendations

1. Align MPRDA to principle of Free, Prior and Informed Consent

An underlying factor behind the lack of community influence on SLPs is the absence of the leverage that would come with being able to say 'no' to mining in certain circumstances. We therefore recommend that the MPRDA is amended to give effect to the international human rights and African customary law principle of free, prior and informed consent (FPIC).

2. Require Negotiated SLPs

To ensure communities are able to have a real influence over the contents of SLPs, the MPRDA and regulations should be amended to require that they are the product of an agreement between communities, workers and mining companies. The lack of homogeneity of communities is not a valid excuse for refusing to include them in the process of designing SLPs as a combination of measures can significantly address this challenge. Firstly, there should be a process whereby the smallest unit (village or location) is given the opportunity to present its development priorities and elect representatives to participate in the design process. Secondly, a process of social mapping should be conducted to identify the various community interests including marginalised groups. Thirdly, companies and the government should consult independent mine-community organisations and networks, such as MEJCON, MACUA and WAMUA.

3. Government facilitated rights training and capacitation for mine-affected communities

A component of FPIC is being 'informed'. It is therefore critical that prior to the mining rights process, communities are informed of their rights and available remedies for violations, including in relation to SLPs. While there are a number of rights training initiatives driven by communities and NGOs, these, to reach all the people they need to, require resourcing by the state.

4. Establish mechanism enabling mine-affected communities to access specialists

For negotiations to be on an even footing, communities should have access to development, environmental and other specialists in the same manner as companies do. This might be achieved through the same fund established to facilitate rights training.

5. Specify requirements for consultation throughout SLP life cycle

Legislation should specify a robust process for community involvement in the execution, monitoring and amendment of SLPs as well as their design. This should include adequate notification of meetings for this purpose in the first language/s of community members and legislation must specify that consultation with traditional leadership does not exhaust companies' consultation obligations.

6. Legislative framework of SLPs should address gender inequality

The MPRDA and regulations should require more measures for addressing the role of mining in entrenching gender-based inequality. In light of possible reigning traditional structures that may limit public participation of women, the Act should enact provisions to compensate for this possible gap in consultation by placing the onus on companies to appoint specialists in gender-sensitive policy drafting or provide additional requirements in respect of ensuring consultation with female stakeholders across the board.

7. Measures to disseminate SLPs must be put in place

The DMR and companies need to move expeditiously to place all SLPs and annual compliance reports online. However, not all community members will have internet access. There also needs to be an initiative to bring physical copies of SLPs to communities and which should utilise existing community networks. Dissemination measures need to include the translation of SLPs into the predominant first languages spoken by beneficiaries of SLPs.

8. Set minimum requirements for publicising SLP opportunities in binding legislation

The MPRDA regulations should require that SLPs contain a plan for publicising opportunities such as bursaries. Adverts need to be placed where they will reach community members and need to specify the application process and the criteria for eligibility.

9. Establish independent grievance mechanism for mine-affected communities

Communities' experiences of the difficulty and getting recourse for environmental and socio-economic harms by mining companies suggests the need for an independent grievance mechanism, funded by companies and government, as recommended by the Bench Marks Foundation.

10. Specify process for aligning SLPs and IDPs that includes communities and workers

The problems in aligning companies' SLPs and municipalities' IDPs revealed in interviews illustrate the need to have a clearer, more formal process for aligning SLPs and IDPs. One approach would be to integrate the development of SLPs into the annual IDP review process. Worker and community representatives also need to be invited to ensure that SLPs are simultaneously aligned to municipalities' development strategies and responsive to the needs of the particular beneficiaries.

11. Specify process for alignment of different companies' SLPs

The MPRDA regulations should specify a concrete process for the alignment of all companies' SLPs within a particular municipality to prevent duplication, enable collaboration on projects where economies of scale apply and ensure that no mining-affected communities are excluded from SLP benefits.

12. Delegate Minister's power to approve SLPs and amendments

The Minister of Mineral Resources should delegate their power to approve SLPs and amendments to eliminate unnecessary delays in turnaround time.

13. Greater regulation on securing the SLP financial provision

To ensure that SLP expenditure is not reduced when companies' turnover is less than projected, the MPRDA regulations should require that companies establish a secured 'rainy day fund' for SLPs, analogous to what is required for environmental rehabilitation.

14. Clear compliance criteria based on impact

To ensure that compliance is not a 'tick box' exercise, it is important that the DMR, when deciding whether to approve SLPs and when assessing compliance, uses criteria based on real impact. Companies should develop a standardised methodology for measuring the impact of project.

15. Provide for sufficient financial penalties for SLP non-compliance

Due to the serious economic ramifications, the DMR is often reluctant to cancel mining rights. An alternative method for enforcing compliance is significant financial administrative and criminal fines for non-compliance which can be awarded both against companies and executives. The quantum should be determined by a formula based on the wealth of the mining company.

VIII. Conclusion

This report has sought to answer the following questions:

1. Do SLPs truly belong to communities in their conception, design, execution and monitoring (SLP life cycle)?
2. Are there areas of systemic failure that can be detected across SLPs?
3. Does the SLP system facilitate integrated government responses to development in mining areas?
4. Does the SLP system address or entrench systemic inequality?
5. Is the SLP system the appropriate system for the South African landscape?

Based on our five case studies, the answer to the first question is in the negative. None of the communities reported any public participation at any stage in the SLP life-cycle.

Communities also spoke of a lack of transparency with interviewees in all five communities reporting that they had never seen the SLP before we showed them copies. In only one of the five communities did members show a high knowledge of SLP commitments (despite not having seen the text itself).

One of the most apparent failures of the SLP system was its failure to facilitate communication and alignment of efforts along a number of lines including between the different organs of state, between the state and mining companies, between mine companies themselves and, as stated above, between mining companies and communities. There was significant lack of consensus amongst the role players regarding where their responsibilities ended and the responsibilities of other role players began. Interviewees tended to describe limited communication and alignment of SLPs and other planning frameworks such as municipal IDPs. There was also much mistrust and apportioning of failures between role players. For example mining executives often viewed municipalities as inefficient, and poorly run while municipal officials often viewed mining companies as domineering and out of touch with the needs of the area. These findings can, at least in part, be attributed to the failure of the law to set clear procedures for the alignment of the efforts of mining companies and state entities as well as for delineating clear and distinct responsibilities for.

Given that communities are not accorded a role in designing, executing and monitoring SLP programmes and that programmes often seem to have a limited real impact from a community point of view, our case studies, together with the testimonies of mining communities, would suggest that SLPs are not assisting in overcoming systemic inequality.

Given these many adverse findings, we need to answer the larger question of whether the SLP system is appropriate for the South African landscape. Our verdict is based on over three years of intensive study, more than 50

SLPs analysed and various interviews across the spectrum of extractives stakeholders which included interviewing in excess of 150 individual participants. Given that the system is designed to redress the historical legacy of inequality through creating binding obligations on companies to ensure mining benefits workers and communities, it is an important step forward. However, in its present form, as outlined in this report series, the SLP system is **not** capable of achieving these objectives.

A fundamentally changed system is therefore required. Detailed proposals for an alternative system will be contained in the third and final report in this series. This report has, however, outlined a number of areas of reform that could ensure that SLPs are implemented in a manner that is more responsive to communities and better able to promote collaborative decision-making.

First, there should be changes to the structure of the MPRDA to give effect to the principle of Free Prior and Informed Consent in international and African Customary Law. There should be circumstances in which communities are to be accorded the right to say 'no' to mining. Second, while the binding and regulated nature of the system must remain, the agreement of communities, workers, mining companies and municipalities should be required before the document is accepted. Third, a process needs to be outlined for community involvement not only in the design of SLPs but also their execution, monitoring, amendment and review. Fourth, there needs to be a formal process by which SLPs and IDPs are aligned. This could be accomplished through bringing all mining companies to finalise SLPs as part of the broader process of reviewing IDPs. Representatives chosen by communities and workers would need to be included in the process.

Annexure 1: Glossary

Acronyms

ABET	Adult Basic Education and Training
AIDS	Acquired Immune Deficiency Syndrome
ART	Antiretroviral Therapy
ATR	Annual Training Report
BEE	Black Economic Empowerment
BO	Black Owned
BPF	Business Process Framework
BWO	Black Women Owned
CBO	Community-Based Organisations
DMR	Department of Mineral Resources
EIA	Environmental Impact Assessment
HDP	Historically Disadvantaged Person
HDSA	Historically Disadvantaged South African (term used in regulations and guidelines)
MC	Mining Charter or the Charter
BBSEC	Broad-Based Socio-Economic Empowerment Charter
MMP	Managerial Mastery Programme
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MQA	Mines Qualifications Authority
NEMA	National Environmental Management Act 107 of 1998
NGO	Non-Government Organisation
NPO	Non-Profit Organisation
NQF	National Qualifications Framework
NUM	National Union of Mineworkers
PAIA	Promotion of Access to information Act 2 of 2000
QCTO	Quality Council for Trades and Occupations
RPL	Recognition of Prior Learning
SDC	Skills Development Committee
SEAP	Stakeholder Engagement Action Plans

SETA	Sector Education and Training Authority
SMME	Small, Micro and Medium Enterprise
SIMS	State Intervention in the Minerals Sector
SIA	Social Impact Assessment
SLP	Social and Labour Plan
SP	Systems for People
TEBA	The Employment Bureau of Africa
WSP	Workplace Skills Plan

Glossary

Black Economic Empowerment company	Defined in the Amended Mining Charter as an entity of which a minimum of 25% plus 1 vote of share capital is directly owned by HDSA as measured in accordance with flow through principle.
Brownfields operation	A mine that is already operational at the time that the SLP was designed.
Community	Individuals and groups who have in common a direct and significant impact from the mining operation whether on account of proximity to mining activity, status as a labour sending community or other links.
Co-operative governance	The doctrine enshrined in the South African Constitution that governs the relations between the national, local and provincial spheres of government. The basic principles of co-operative governance are: first, that one sphere of government should not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state and, second, 'that the functional and institutional integrity of the different spheres of government must...be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution and the countervailing powers of other spheres of government'. It must be noted that an important dimension of co-operative governance, is horizontal collaboration (between different government departments, agencies and other public entity).
Core skills training	These are programmes equipping workers and/or community members in skills specifically related to the mining process and which are included in SLPs. Examples include rock drilling, mining engineering and geology.
Decomissioning	To take out of active service permanently or dismantle partly or wholly, a mining plant.

Environmental justice	A philosophy of environmental governance that is a response to the manner in which negative environmental impacts disproportionately fall on working class and poor communities. It requires that the harms and benefits of activities impacting on the physical environment be equitably distributed and that vulnerable groups play a central role in decision-making regarding the environment.
Environmental Monitoring Committee	The Department of Environmental Affairs has defined Environmental Monitoring committees as structures made up of representatives of stakeholders affected by a development activity whose function is to monitor the implementation of company's environmental management programmes.
Future forum	A future forum is a structure that must consist of workers, their representatives and management and is designed to anticipate crises and plan more constructive alternatives to retrenchment.
Greenfields operation	Operations that are still in their infancy at the time the SLP are designed. An SLP will, for a greenfields operation, form part of its application for its first mining right.
HDP company	A company in which a controlling (majority) share is held by historically disadvantaged persons and/or by other HDP companies.
Junior miner	Describes smaller mining companies that are also relatively new entrants into the mining sector.
Labour sending area	Any area from where company workers are sourced. The local mining area can therefore also be a labour sending area.
Learnerships	Learnerships are courses in skills required for particular roles in the workplace.
Local area	This refers to area surrounding the mine in which the most directly affected communities reside.
Local economic development	Local economic development relates to municipalities' constitutional and legislative mandate to promote the development of communities within their jurisdiction. In SLPs, local economic development programmes must include projects designed to meet the infrastructure needs of communities and projects to promote the growth of local co-operatives and entrepreneurs.
Major labour sending area	Any area from where a significant proportion of workers are sourced – the three largest labour sending areas and/or any area from where 15% or more of workers are recruited from. The local mining area can therefore also be a major labour sending area.

Mentorship	These are programmes through which a junior member of staff is paired with a more senior member for the purpose of providing the former with the soft skills necessary to progress in seniority more rapidly than otherwise. It is employed to facilitate the accelerated career development of historically disadvantaged persons.
Mine closure	Mine Closure occurs when rehabilitation has occurred and the mining company has successfully applied for a closure certificate which transfers the liability from the mining company to the state.
Mining right	A right to mine granted in terms of Section 23 (1) of the Mineral and Petroleum Resources Development Act (MPRDA).
Portable skills training	Training in skills that equip workers to work in other sectors in addition to the sector in which they are employed. This is especially critical in a sector like mining where closure is a certainty and the volatility of commodity prices mean closure often occurs earlier than initially projected.
Rehabilitation	This refers to measures, required under the National Environmental Management Act, to restore the environment either to its natural and pre-determined state (prior to mining) or to a land use compatible with sustainable development.
Spatial planning	This involves mapping and understanding the characteristics of a specified area (municipality, province, country, etc.) and identifying areas where different forms of land use and development should occur. Spatial planning accommodates notions of strategic planning that link land use and spatial development to attaining socio-economic goals.
Stakeholder	In the mining setting, stakeholder refers to any individuals or groups whose rights and/or interests stand to be impacted by a mining operation.
Sustainable development	The prevailing approach to environmental management internationally and in South African law that involves, in all decision making, balancing environmental, social and economic considerations. Ecologically-focused sustainable development entails that that this balancing exercise must occur within identified environmental thresholds beyond which any development is unacceptable.
Transformation	The reconstruction of society along egalitarian lines which requires addressing racial and gender inequalities rooted in colonialism and apartheid, and reducing socio-economic inequality.

Annexure 2: Findings of Report 1

1. Summary of findings

The *Social and Labour Plan Series – Phase 1: System Design* report addressed an aspect of the larger question of whether the SLP system is capable of achieving the transformation objectives set out in the Act, Regulations and Charter.²⁶⁴ This was whether the quality of the SLPs that are produced was sufficient to achieve the objectives of this system. Report 1 drew on an analysis of 50 SLPs in which sought to identify and explain trends regarding a number of indicators of accuracy and efficiency of design. In addition a textual gap analysis was conducted in order to assess if there were omissions and deficiencies in the laws that frame the SLP system. The Design Phase: SLP Report identified fundamental design flaws of SLPs and further made links between the deficiencies in the legislative system and deficiencies in the design of SLPs. The report set out to propose suggestions for reform to the legislative system and the design of SLPs to attenuate such design flaws.

The key findings included the following:

First, that SLP Guidelines, which address much of the content of SLPs, are not hard law and thus cannot function as a prescriptive framework.²⁶⁵ Second, the vast majority of the SLPs did not provide evidence that there was a plan for community participation in the design, operation, amendment and termination.²⁶⁶ Third, SLPs were difficult to obtain and those analysed did not provide a plan for dissemination and translation into the languages of communities.²⁶⁷ Fourth, SLPs displayed limited engagement with the social and economic dynamics in mining areas and how these informed the design of SLP projects.²⁶⁸ Fifth, most projects had not been preceded by feasibility analysis.²⁶⁹

The Report recommended wide-ranging policy and legislative changes to the system, warning that in their absence the system is certain to remain exclusionary and ineffectual.²⁷⁰ We were able to link deficiencies in the quality of SLPs with omissions in the legislative system.

However, in order make an informed assessment of whether the SLP system is salvageable, we required more knowledge about the systems for implementing SLPs. Hence the need for this second report investigating the implementation of SLPs.

Annexure 3: Methodology

While the first phase of the social and labour plan project was primarily a desktop study of SLP texts, this second phase was aimed at understanding how the system is working in practice, through the eyes of the multiple role players identified in Section 4 of this report, and based on our own observations regarding the impacts in areas surrounding the mine. Our research therefore consisted of field studies in five communities impacted by mining and interviews with people drawn from each of the identified role players. This report also draws from our engagement with role players in multiple fora including, but not limited to, parliament, SA Human Rights Commission hearings, and coalitions of civil society and mine-affected communities.

1. Theoretical underpinning

In deciding how to design each aspect of our research, we were informed by a number of principles and theories.²⁷¹ The content and structure of our questionnaires, for example, was influenced by Cultural Historical Activity Theory (CHAT) which aims to identify systems and the blockages and contradictions in a system.²⁷² The units of analysis in an activity system include the role players in a system (the subjects of activity), the objective, the tools available to achieve the objective, the division of labour to accomplish this. It is designed to assess whether and where there are contradictions in the system.²⁷³ Given that the SLP system is designed, as a regulatory scheme, to ensure that the efforts of a wide range of role players with different interests are aligned towards achieving a common goal, CHAT offers a promising manner to evaluate the system and identify the blockages. For this reason, we used CHAT when developing the questionnaires for interviews which included questions in relation to the subject of activity, objective, tools, division of labour, and rules.²⁷⁴

2. Methodology employed

2.1 CALS' approach to conducting research with communities

As a social justice organisation seeking to transform unequal power relations, we make a conscious effort to ensure that our research and other partnerships with communities are mutually beneficial. CALS has developed a Community Engagement Policy to provide guidance in how to achieve this.²⁷⁵ We took a number of steps to ensure that the field research for this report was as mutually beneficial as possible. First, in order to avoid 'flying in and flying out', we sought to work with communities with whom we have had a prior existing relationship. Where we did work with new communities, other teams in CALS are taking on their legal matters to ensure that any rights violations are not captured only for a report but are also addressed through legal processes should the communities and their leaders so wish. In other cases, communities already had legal representation. Interviews were preceded by training on using the law to respond to violation of environmental and other rights as a result of mining. We are also developing

a toolkit for communities which will explain the SLP system, and provide checklists which will assist communities in participating in the development of SLPs and in monitoring compliance.

2.2 Form of interviews

The structure and content of the interviews we developed were shaped by the CHAT theory discussed above. They were designed to elicit role players' views on a number of critical questions in evaluating the efficacy of the SLP system. This long list of questions included:

1. Role players' understanding of the objectives of the SLP system
2. How interviewees perceived their function in the SLP system in relation to other role players
3. What resources were given to role players to fulfil their functions in the SLP system and whether they perceived them to be sufficient
4. How different role players understood the blockages preventing SLPs from achieving their objective
5. The extent to which there is robust community participation in SLPs
6. The extent to which there is effective regional co-ordination on SLPs

Our approach aimed to combine the advantages of structured and non-structured interviews. The advantage of structured interviews with a fixed, uniform set of questions is the greater degree of standardisation which makes analysis and comparisons easier. The disadvantage is that it may limit further lines of enquiry based on the interviewee's response which may reveal or uncover something that one had not anticipated. Further, interviewees may (and this was our experience), be prepared to speak more candidly when interviews are more conversational. We therefore opted for semi-structured interviews. This meant that, while, we prepared questionnaires for interviewees, we were willing to depart from the interview questions based on the responses of interviewees.

In order to gain access to the widest set of role players and to create an enabling environment for interviewees to speak candidly without fear or favour, we decided that the default position in research ethics – that participant anonymity would be protected, would apply. Our research ethics clearance application, approved by Wits University Human Research Ethics Committee (non-medical), therefore contained a commitment to preserve the anonymity of participants. At the same time, for the integrity of the report, it is important to indicate to you, the reader, what the basis is for the statements made. The references in this report will therefore not name the specific participants, with the exception of those instances where the opinions and information are a matter of public record. Our approach is to identify the category of role player (mining companies, communities etc.) expressing the views without naming the individuals concerned.

2.3 Selection of interviewees

SLPs occur in a diversity of settings with regards to mineral type, scale of operation, the stage in the life of the mine and other variables. To make our research broadly as broadly applicable as possible, we chose to conduct our field research in areas that were diverse in these respects. At the same time we wanted to be able to understand each study area in depth. For this reason our sample was limited to 5 SLPs and mining-affected communities.

Interviews were conducted with elected leaders of communities, teachers and principals at schools and crèches and members of traditional councils. We also aimed to ensure the perspectives of women and the youth in communities, though this often occurred automatically due to their integral involvement in the leadership of communities. While conducting these visits we also interviewed officials in local government – such as LED and IDP managers – who are required to be involved in negotiating SLPs in order to ensure alignment with their local economic development priorities. Where possible, we interviewed traditional leadership, including in situations where communities questioned the legitimacy and conduct of traditional authorities.

We conducted interviews with several interviewees in the mine management, including mining companies. We spoke to consultants who had been involved in the design and the implementation of SLP programmes. We also conducted interview with officials in the DMR

3. Limitations of research

There are two main limitations to our research methodology.

1. The first is the size of our sample. On account of our preference for in-depth studies and our need for sustainable relationships with communities, we have only conducted field research in relation to five SLPs. As this is not a representative sample, this report aims to provide case studies to present and analyse evidence regarding how individuals and groups within communities interviewed are experiencing the benefits (or lack thereof) of particular SLPs and the issues that have arisen in their implementation.
2. Another limitation is that the five field studies did not amount to compliance monitoring exercises *per se*. This was, in part, because our research was not confined to the question of the extent to which SLP targets are met but rather understanding the process of SLPs (design, implementation, compliance monitoring) and how this was experienced by role players. Second, while we had gained access to the SLPs we requested, this was, with exceptions, not true in relation to the annual compliance reports by mining companies. We shall also include in our community toolkit a set of indicators to enable communities, who have the most knowledge of impacts on the ground, to conduct social auditing themselves.

Endnotes

¹ Required by Sections 46 (b) and 46 (b) of the MPRDA Regulations respectively.

² Section 20 (d) of the Mineral and Petroleum Resources Development Amendment Bill expressly provides for a review of the SLP every five years. This Bill was, however, referred back to the National Council of Provinces in January 2015. Its future remains uncertain.

³ The most influential example was the Congress Alliance's Freedom Charter, the document that remains the African National Congress's (ANC) guiding document which declared that 'The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole. The lasting health impacts of mining are illustrated by the class action by mine workers suffering from silicosis and the dependents of miners who died of the disease.

⁴ Act No. 28 of 2002 is the overarching mineral regulatory framework and is informed by the vision of the Freedom Charter, which vests mineral rights in the state, thereby allowing the state to act as custodian of the mineral wealth on behalf of all who live in SA. This is the term used in the MPRDA. The MPRDA Regulations and SLP Guidelines refer to historically disadvantaged South Africans (HDSAs). The Broad-Based Socio-economic Charter for the South African Mining Industry of 2004 ('Mining Charter') and the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry of 2010 set the framework, targets and time-table for effecting the entry of HDPs into the mining industry, allowing HDPs to benefit from mining and mineral resources.

⁵ NCOP Question for oral reply No. 178 Advance Notice No: CO582E. Date of Publication in Internal Question Paper: 19 October 2015. Internal Question Paper Number: 37.

⁶ Dr Iraj Abedian, writing in the Anglo American house journal, Optima, in Dec 2014

⁷ Mr F. Gona MP, Chairperson of the Parliamentary Portfolio Committee on Mineral Resources at the public hearings on Mining Charter, 24 Aug 2011.

⁸ In so doing we make reference to the interviews we conducted as well as statements by representatives of role players in various fora.

⁹ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016).

¹⁰ Sections 23 (1) (e) and (1) (h) of the MPRDA. Note that if the triggering conditions are satisfied, the MPRDA provides that the Minister must issue a mining right.

¹¹ 24 (3) (c) and 25 (2) (f) of the MPRDA respectively; Section 25 (2) (h) of the MPRDA.

¹² GN R. 527 of 2004. Section 40 of the Regulations addresses the application of the provisions. Section 41 identifies the objectives of the SLP system. Section 42 sets out the process for submitting the SLP as part of the mining right application. Section 43 provides that the SLP is valid until the issuing of a closure certificate. Section 44 states that rights holders require the consent of the Minister to amendments and variations to the SLP. Section 45 provides that annual SLP reports must be to the relevant Regional Manager. Section 46 provides a succinct description of the required content of SLPs.

¹³ No. 53 of 2003.

¹⁴ The NDP is government's overarching strategic development agenda that aims to eliminate poverty and reduce inequality by 2030 through economic growth, job creation and investing in education and skills. *National Development Plan 2030: Our future – make it work*, 15 August 2012; IDPs are plans for integrated LED planning by provinces and municipalities as mandated by the Constitutional allocation of functions and powers and, more specifically, the Local Government: Municipal Systems Act. Act No. 32 of 2000.

¹⁵ Act No. 16 of 2003.

¹⁶ Ibid at 13; National Spatial Planning Perspective, 2006.

¹⁷ Institute of Directors in Southern Africa (2016) 'King Code of Governance Principles' (King IV).

¹⁸ Ibid.

¹⁹ This has become though there is no express reference to a five year SLP cycle in the MPRDA and current regulations. The 2010 SLP Guidelines however provides for five year periods in its project plan templates.

²⁰ Section 25 (2) (h) of the MPRDA.

²¹ Section 47 (1) (b) read with Section 25 (1) (f) of the MPRDA.

²² This section was adapted from a section contained in a submission made by a consultant who has worked on SLPs to the Marikana Commission of Enquiry. MTS The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa Managing Transformation Solutions (Pty) Ltd (MTS) Affidavit to Marikana Commission of Inquiry Table 2: Summary of prescribed contents of an SLP and core objectives per section.

²³ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016).

²⁴ Preamble Section 46 (a).

²⁵ Interview with mining company, 1 June 2016.

²⁶ Ibid; Interview with mining company, 8 June 2016.

²⁷ Interview with mining company, 1 June 2016; 8 June 2016.

²⁸ Interview with member of the mining industry, 19 August 2016.

²⁹ This is illustrated by the new Platreef Ivanhoe mine near Mokopane, Limpopo, which is to use mechanised methods. While it is a very large platinum mine, it plans to employ only 2116 workers during the production phase (the number of contractors have not been indicated). In contrast, Impala Platinum, which has been operational since 1969, employs 32 909 workers directly and 13 744 contractors, <http://www.implats.co.za/implats/Implats-history.asp>; <http://www.implats.co.za/implats/Impala-platinum.asp>.

³⁰ Section 23 (1) (c) of the MPRDA; (note 23 above) at 39; Section 24 (3) (c) of the MPRDA; MTS (note 22 above) 39; Section 25 (2) (h) of the MPRDA; MTS (note 22 above) at 40.

³¹ Section 102 of the MPRDA read with Section 44 of the MPRDA Regulations; MTS Consulting (note 22 above) at 40.

³² The main applicable framework for consulting mine-affected communities is provided by the Guideline for Consultation with Communities and Interested and Affected Parties ('DMR Consultation Guidelines') but these guidelines don't speak to when and how participation must take place in relation to SLPs specifically.

³³ Interview with mining company, 7 June 2016; Interview with mining company 8 June 2016; Interview with member of the mining industry, 19 August 2016.

³⁴ Interview with Mining Company, 18 May 2016; Interview with Mining Company, 7 June 2016; Interview with Mining company 8 June 2016; Interview with Mining Company, 13 June 2016.

³⁵ Interview with Mining Company, 1 June 2015; Interview with Mining Company, 7 June 2016.

³⁶ Interviewees from each of the five communities reported both harm to their environment and an absence of meaningful benefits from mining.

³⁷ Interviewees from all five communities reported this.

³⁸ A member of a community in Mokopane, for example, stated that companies only respond when communities take to the streets.

³⁹ Interview with municipal official, 16 August 2016; Interview with municipal official, 5 May 2016.

⁴⁰ Interview with municipal official, 15 October 2015; Interview with municipal official, 5 May 2016.

⁴¹ Interview with municipal official, 5 May 2016; Interview with municipal official, 12 August, 2016; Interview with municipal official, 16 August 2016.

⁴² See DMR's Strategic Plans and Annual Reports as cited in MTS (note 22 above) 41.

⁴³ Ibid at 49.

⁴⁴ Ibid at 40.

⁴⁵ Sections 10 and 22 (4) of the MPRDA. While not expressly stated and not always observed, this must include participation in the development of the SLP and not only the environmental impact assessment ('EIA') process.

⁴⁶ MTS (note 22 above) 41.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ In terms of Section 93, Section 47 and Section 93 (b) (ii) of the MPRDA respectively. MTS (note 22 above) at 41.

⁵⁰ The first case involved the cancellation of Central Rand Gold's mining right in September 2011 due to non-compliance with the SLP, mining works programme and EMPR. The company approached the High Court to set aside this order and an agreement was reached with the DMR by which the DMR would not oppose the relief sought. SENS Announcement: Central Rand Gold Limited – Review and Setting Aside of Decision to Cancel (12 December 2011), http://www.moneyweb.co.za/mny_sens/crd-central-rand-gold-limited-review-and-setting-aside-of-decision-to-cancel/. The second case related to Glencore's optimum mine. The reason for the DMR's suspension of mining rights on 3 August 2015 related to the manner in which retrenchment was conducted. The Minister stated that these retrenchments had been conducted inhumanely and contrary to legal requirements, including the companies' SLP. However 4 days later, following an agreement with the DMR, its licence was re-instated. The Company stated that it had satisfied the DMR that it had complied with the legal provisions applicable to retrenchment and all conditions of its mining right. South Africa Reinstates Glencore's Optimum Coal Licence Bloomberg Business (7 August 2015), <http://www.bloomberg.com/news/articles/2015-08-07/south-africa-lifts-suspension-of-glencore-optimum-s-mine-license>.

⁵¹ MTS (note 22 above) 41.

⁵² Meeting with DMR, 19 May 2016.

⁵³ Ibid.

⁵⁴ Meeting with DMR, 19 May 2016.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Group interview with community members, 15 August 2016.

⁵⁹ Group interview with community members, 11 August 2016.

⁶⁰ Interview with municipal official, 5 May 2016; Interview with municipal official, 12 August 2016; Interview with municipal official, 16 August 2016.

⁶¹ This came to light in submissions at the SA Human Rights Commission hearings on the Socio-Economic Challenges of Mine-Affected Communities.

⁶² Interview with mining company, 18 May 2016; Interview with mining company, 7 June 2016; Interview with mining company, 8 June 2016; Interview with mining company, 13 June 2016.

⁶³ One of the company interviewees suggested that this was due to rapid staff turnover in the DMR. Interview with mining company, 1 June 2016.

⁶⁴ Ibid at 43 – 44. While the evidence for this first report is primarily the texts in the SLP sample rather than field research on developments at the coalface, we have been informed by the findings in the MTS report and have read the SLP texts in part with a view to assessing whether they contain symptoms of the issues highlighted by this report. We will accordingly, for example, examine whether SLPs tend to discuss the SLPs of other mining companies and disclose any efforts at co-ordination.

⁶⁵ Regulation 46 (c) of the MPRD Regulations requires local economic development projects to be in line with the IDPs of 'the areas where the mine operates and major sending areas'. This means that communities in both areas are beneficiaries.

⁶⁶ Where communities are organisationally fragmented, companies and government should engage with all organisations representing a significant sector/s within the community.

⁶⁷ Ibid at 43.

⁶⁸ See, for example, the People's Mining Charter, adopted on 26 June 2016, at Berea.

⁶⁹ These ideas, of the insufficiency of public meetings and the need for communities to have an equal role in developing SLPs, were articulated forcefully by community interviewees from Mokopane and Rustenburg. Group interview with mining community members, 11 August 2016; group interviews with community members, 15 August 2016.

⁷⁰ Interview with community member, 14 October 2015; Interview with community

member, 19 July 2016.

⁷¹ Group interview with members of mining community, 19 July 2016; Group interview with members of mining community, 11 August 2016.

⁷² Interview with mining company, 18 May 2016; Interview with mining company, 1 June 2016. In the latter interview there were differences of opinion between an outgoing manager and an incoming manager. The former was of the view that communities could participate in SLPs whereas the incoming manager stated that communities were too hungry to be involved in planning development and had a culture of entitlement.

⁷³ Interview with mining company, 1 June 2016; Interview with member of the mining industry, 10 May 2016.

⁷⁴ Interview with consulting firm, 20 April 2016; Meeting with DMR, 19 May 2016.

⁷⁵ Interview with mining company, 18 May 2016; Interview with mining company, 7 June 2016; Interview with mining company, 8 June 2016.

⁷⁶ See Section 3, heading 3 ('what needs to go into an SLP') above.

⁷⁷ Interview with member of the mining industry, 19 August 2016.

⁷⁸ Organised labour refers collectively to the recognised trade unions in the South African mining sector.

⁷⁹ Interview with trade union researcher. The interviewee explained that the initial intention was to have two separate plans – a 'labour plan' focusing on workers issues and a 'social plan' dealing with local economic development issues.

⁸⁰ MTS (note 22 above) 45.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid at 44 – 45.

⁸⁴ *Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) (First Certification Judgment)* at para 190.

⁸⁵ MTS (note 22 above) at 82.

⁸⁶ Interview with traditional authorities, 15 October 2015.

⁸⁷ Group interview with community members, 11 August 2016; Group interview with community members, 15 August 2016.

⁸⁸ Group interview with community members, 11 August 2016.

⁸⁹ Interview with primary school teacher in case study 1, 14 October 2015; Interview with community members (case study 1), 27 January 2016; Group interview with community members, 11 August 2016; Group interview with community members, 15 August 2016.

⁹⁰ Interview with municipal official, 15 October 2015.

⁹¹ Interview with member of the mining industry, 19 August 2016.

⁹² Ibid.

⁹³ Note however, that given that specific consultation on SLPs doesn't seem to be common, the consultant's community members had experiences of, were not necessarily consultants working on SLPs, but rather general stakeholder engagement and environmental assessment practitioners. Which is even worse because it means that communities never meet the SLP consultants at all.

⁹⁴ http://www.statssa.gov.za/?page_id=993&id=rustenburg-municipality.

⁹⁵ This emerged through our interactions both with members of both groups.

⁹⁶ These sentiments were expressed by some members of the former communities at a mine-affected community workshop we attended in Rustenburg on 16 August 2016. Members of the latter community reported that they also experienced this during the course of interviews CALS conducted on 15 August 2016.

⁹⁷ C. Chinguno 'Marikana and the post-apartheid workplace order' (2013) 12.

⁹⁸ Interview with community members, 15 August 2016.

⁹⁹ Group interviews with community members, 15 August 2016.

¹⁰⁰ The preliminary findings for this SLP are derived from the most recent annual compliance report submitted to the DMR at the time of writing, namely the report for 2015.

¹⁰¹ Note, however, that this is being financed by government with the Company's role being to donate the land.

¹⁰² Group interviews with community members, 15 August 2016.

¹⁰³ She was referring to the meeting of the MPRDA Coalition, a coalition of communities and NGOs that met in Berea in 2015 in order to develop a co-ordinated community strategy in relation to the still ongoing process of amending the MPRDA.

¹⁰⁴ Group interview with community members, 15 August 2016.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Community members at research feedback workshop, 15 February 2017.

¹¹⁰ Interview with municipal official, 16 August 2016.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ [http://www.saexplorer.co.za/southafrica/climate/pafuri_gate_\(kruger\)_climate.asp](http://www.saexplorer.co.za/southafrica/climate/pafuri_gate_(kruger)_climate.asp).

¹¹⁷ <https://www.sanparks.org/parks/kruger/camps/pafuri/>.

¹¹⁸ http://www.statssa.gov.za/?page_id=993&id=mutale-municipality.

¹¹⁹ The unemployment rate in the area, as of the last (2011) national census.

¹²⁰ This assessment draws on the most recent (2015) annual report on SLP compliance.

¹²¹ Community members at research feedback workshop, 15 February 2017.

¹²² None of the interviewees had seen the companies SLP and the bulk of participants in our rights training workshop had never heard of the concept of SLPs. An ex-employee on the mine (a clerk) knew of the ABET programme and the overall skills programme but stated that the company did not advertise bursaries to workers or the community. A student from the area interviewed did know of some community members receiving bursaries.

¹²³ SLP for the years 2013 – 2017.

¹²⁴ Three community interviewees referred to blasting, including cracked houses and injury to livestock, when asked about the negative impacts of mining.

¹²⁵ Interview with municipal official, 5 May 2016.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ http://www.saexplorer.co.za/south-africa/climate/tzaneen_climate.asp.

¹²⁹ http://www.statssa.gov.za/?page_id=993&id=greater-tzaneen-municipality.

¹³⁰ Statistics South Africa Statistics by Place (2011 national census) – Greater Tzaneen Local Municipality, http://www.statssa.gov.za/?page_id=993&id=greater-tzaneen-municipality.

¹³¹ We did not obtain this company's annual reports on compliance with its SLP so this preliminary assessment is based on what interviewees eligible for benefits (e.g. teachers at crèches) and other community members reported.

¹³² The SLP states that applicants will be prioritised in the following order: 'deserving students, who are children of employees, then from schools in the feeder area will be considered first and in the event of none, the subsidy will be open for learners in the Greater Tzaneen Municipality'.

¹³³ A teacher working at a crèche stated that the company in question had provided grocery items as selected by the crèche for the period of a year and a few months.

¹³⁴ Interview with a headman, 13 October 2015.

¹³⁵ Interview with headman, 13 October 2015; Interview with primary school teacher, 14 October 2015; Interview with community member, 27 January 2016.

¹³⁶ Interview with member of royal council, 14 October 2015; Interview with community member, 27 January 2016.

¹³⁷ Interview with headman, 13 October 2015.

¹³⁸ Interview with the Khoshi and 3 headmen, 14 October 2015.

¹³⁹ Interview with municipal official, 15 October 2015.

¹⁴⁰ Ibid.

¹⁴¹ <http://en.climate-data.org/location/13131/>.

¹⁴² <http://www.xmpconsulting.com/documents/SA%20Desktop%20Study.pdf>.

¹⁴³ http://www.statssa.gov.za/?page_id=993&id=albert-luthuli-municipality.

¹⁴⁴ http://www.statssa.gov.za/?page_id=4286&id=11430.

¹⁴⁵ *Federation for Sustainable Environment and Another v Minister of Water Affairs and Others* 2012 ZAGPPHC 140 (unreported judgment).

¹⁴⁶ Community members at research feedback workshop, 15 February 2017.

¹⁴⁷ Ibid.

¹⁴⁸ One exception was that a community member reported that the mining company in question had visited a school and promised bursaries to matriculants but that nothing had materialised. Interview with community member, 19 July 2016.

¹⁴⁹ This was a concern raised by five interviewees from the community.

¹⁵⁰ Community members stated that the farm we visited was the only small-scale community poultry farm in the area.

¹⁵¹ This first emerged during the rights training workshop. None of the interviewees knew of any process by which they could lodge complaints with companies. Two interviewees specifically stated that the practice was to lodge complaints with the municipality who would then take their complaints to the company. One of the community interviewees stated that when they want to raise a grievance with a mining company, they do so by taking to the streets.

¹⁵² Interview with community member, 20 July 2016.

¹⁵³ Interview with municipal official, 20 July 2016.

¹⁵⁴ As of the 2011 national census, the unemployment rate for Mogalakwena Local Municipality was 40.2% with 51.7% youth unemployment.

¹⁵⁵ ActionAid *Precious Metals II: Systemic Inequality* (2016) 27 – 32.

¹⁵⁶ Group interview with community members, 11 August 2016.

¹⁵⁷ ActionAid *Precious Metals II: Systemic Inequality* (2016) 19 – 21.

¹⁵⁸ Mining Watch 'Is Ivanhoe Mining Informing its Shareholders of Ivanplats' Real Risks, Liabilities, and Irregularities?' (18 May 2016), <http://miningwatch.ca/news/2016/5/18/ivanhoe-mining-informing-its-shareholders-ivanplats-real-risks-liabilities-and>

¹⁵⁹ We did not obtain this company's annual reports on compliance with its SLP. This preliminary assessment is based on what community members interviewed reported.

¹⁶⁰ This emerged during the rights training workshop on 11 August 2016 when we took community members through SLP commitments.

¹⁶¹ This also emerged in the course of the same session.

¹⁶² Group interview with community members, 11 August 2016.

¹⁶³ Ibid. One of our team was shown a computer lab as part of a school infrastructure and support project. It was a very small structure which, it appeared, could accommodate around 20 learners.

¹⁶⁴ Group interview with community members, 11 August 2016.

¹⁶⁵ Rights training workshop, 11 August 2016; Group interviews with community members, 11 August 2016.

¹⁶⁶ Rights training workshop, 11 August 2016.

¹⁶⁷ Group interview with community members, 11 August 2016.

¹⁶⁸ Ibid.

¹⁶⁹ Rights training session, 11 August 2016.

¹⁷⁰ Ibid.

¹⁷¹ Group interview with community members, 11 August 2016.

¹⁷² Ibid.

¹⁷³ The role players are introduced in Chapter IV.

¹⁷⁴ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016) 69.

¹⁷⁵ The last of these factors will be discussed under the forthcoming heading on transparency.

¹⁷⁶ United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295; M Barelli 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead' (2012) 16 (1) *International Journal of Human Rights* 1.

¹⁷⁷ See the discussion of consent and African Customary Law by Wicomb & Smith. W. Wicomb and H. Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal* 422, 444 – 445.

¹⁷⁸ The People's Mining Charter adopted on 26 June 2016 in Berea, Johannesburg; Comments of the Mining and Environmental Justice Community Network on the Mineral and Petroleum Resources Development Act Draft Amendment Bill, 2012.

¹⁷⁹ W. Wicomb and H. Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal*, 422, 444 – 445.

¹⁸⁰ Centre for Law and Society 'Communal Land Tenure Policy and IPLRA, February 2015; Section 2 (1) of the Interim Protection of Informal Land Rights Act No. 31 of 1996 (IPLRA).

¹⁸¹ The representative stated that 'Consultation is when two parties meet with idea of coming to an agreement.... Companies and governments should bring all relevant documents. Technical documents should be translated. Reasonable time must be afforded to the community to read through documents and, if necessary, consult experts'. Oral submission by MEJCON at the SA Human Rights Commission Hearing into the Socio-economic Challenges of Mine-Affected Communities.

¹⁸² CALS The Social and Labour Plan Series – Phase 1: System Design (March 2016) 95 – 97.

¹⁸³ Meeting with DMR, 19 May 2016.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Interview with mining company, 18 May 2016.

¹⁸⁹ Interview with member of the mining industry, 19 August 2016.

¹⁹⁰ T. Njenga 'A critical analysis of public participation in the integrated development Plans (IDP) of selected municipalities in some provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa' MSS dissertation UKZN.

¹⁹¹ Interview with mining company, 26 April 2016; Interview with mining company, 1 June 2016.

¹⁹² Interview with mining company, 26 April 2016; Interview with mining company, 1 June 2016.

¹⁹³ Interview with mining company, 1 June 2016.

¹⁹⁴ Ibid.

¹⁹⁵ Interview with mining company, 18 May 2016.

¹⁹⁶ Ibid.

¹⁹⁷ Interview with member of the mining industry, 19 August 2016.

¹⁹⁸ Interview with mining company, 1 June 2016.

¹⁹⁹ Interview with member of the mining industry, 10 May 2016; Interview with mining company, 1 June 2016;.

²⁰⁰ Group interview with community members, 11 August 2016.

²⁰¹ Interview with headman, 13 October 2015; Group interview with community members, 11 August 2016.

²⁰² 'Social labour plan commitment welcomed as a first for mining' Times Live (10 February 2016), <http://www.timeslive.co.za/local/article1205148.ece>.

²⁰³ Interview with mining company 1 June 2016.

²⁰⁴ Ibid.

²⁰⁵ Interview with community member, 20 July 2016.

²⁰⁶ Group interviews with mining community members, 15 August 2016.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ This was in the course of the rights training workshop on 11 August 2016.

²¹⁰ Interview with community member, 19 July 2016; Rights training workshop, 11 August 2016.

²¹¹ Interview with consultant, 15 June 2016; Interview with mining company, 7 June 2016.

²¹² Mining companies interviewed on 1 June and 7 June respectively.

²¹³ Interview with consultant, 15 June 2016.

²¹⁴ Ibid.

²¹⁵ Ibid.

- ²¹⁶ Interview with mining company, 26 April 2016; Interview with member of the mining industry, 19 August 2016.
- ²¹⁷ Interview with consultant, 15 June 2016.
- ²¹⁸ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016) 78 – 79.
- ²¹⁹ Appendix 3 (a), Appendix 4 1 (a), Appendix 5 1 (1) (a) of the Environmental Impact Assessment Regulations, 2014 GN. R. 982.
- ²²⁰ Interview with mining company, 26 April 2016; Interview with member of the mining industry, 19 August 2016.
- ²²¹ Interview with local government, 12 August 2016.
- ²²² Interview with member of the mining sector, 19 August 2016.
- ²²³ Interview with mining company, 26 April 2016.
- ²²⁴ Interview with mining company, 26 April 2016; Interview with mining company, 7 June 2016; Interview with consultants, 20 April 2016; Interview with consultant, 15 June 2016.
- ²²⁵ Interview with mining company, 26 April 2016.
- ²²⁶ Interview with municipal official, 15 October 2015; Interview with municipal official, 5 May 2016; Interview with municipal official, 16 August 2016.
- ²²⁷ Interview with municipal official, 15 October, 2015.
- ²²⁸ Interview with municipal official, 15 October 2015; Interview with municipal official, 5 May 2016; Interview with municipal official, 16 August 2016.
- ²²⁹ Interview with municipal official, 5 May 2016.
- ²³⁰ Ibid.
- ²³¹ Interview with DMR, 19 May 2016.
- ²³² Ibid.
- ²³³ Interview with mining company, 18 May 2016; Interview with mining company, 7 June 2016; Interview with mining company, 8 June 2016; Interview with mining company, 13 June 2016.
- ²³⁴ Interview with municipal official, 16 August 2016; Interview with mining company, 26 April 2016.
- ²³⁵ Interview with mining company, 18 May 2016; Interview with mining company, 1 June 2016; Interview with mining company, 13 June 2016; Interview with municipal official, 20 July 2016; Interview with municipal official, 16 August 2016; Interview with DMR, 19 May, 2016.
- ²³⁶ Group interview with community members, 11 August 2016; Group interview with community members, 15 August 2016.
- ²³⁷ Interview with municipal official, 5 May 2016; Interview with municipal official, 16 August 2016.
- ²³⁸ Interview with mining company, 5 June 2016.
- ²³⁹ Ibid.
- ²⁴⁰ Community members in all five areas reported rarely seeing DMR officials.
- ²⁴¹ This emerged clearly at the SA Human Rights Commission Hearings on the Socio-Economic Challenges of Mine-Affected Communities.
- ²⁴² Interview with mining company, 18 May 2016; Interview with mining company, 1 June 2016; Interview with mining company, 7 June 2016; Interview with DMR, 19 July 2016.
- ²⁴³ Interview with mining company, 18 May 2016.
- ²⁴⁴ Interview with mining company, 1 June 2016
- ²⁴⁵ Ibid.
- ²⁴⁶ Ibid.
- ²⁴⁷ This shift has been the focus of the Mining and Rural Transformation in Southern Africa (MARTISA) project by the Society, Work and Development Institute (SWOP), a research unit in the Wits Department of Sociology, <https://www.wits.ac.za/swop/research-clusters/>.
- ²⁴⁸ Section 211 (1) of the Constitution.
- ²⁴⁹ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Shilubana & Others v Nwamitwa* 2009 2 SA 66 (CC) para 45; W Wicomb and H Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law*

Journal, 422.

²⁵⁰ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016).

²⁵¹ Land & Accountability Research Centre, *Submission on the Traditional and Khoi-San Leadership Bill*, 2015.

²⁵² This was stressed by the Legal Resources Centre in its oral submissions at the SA Human Rights Commission Hearings on the Socio-Economic Challenges of Mine-Affected Communities.

²⁵³ A Claasens 'The Communal Land Rights Act and women: Does the Act remedy or entrench discrimination and the distortion of the customary?' (2005) 2.

²⁵⁴ Examples of this can be found in the documentary by Joseph Oesi entitled 'Black Lives Matter' which examines relationships between mining companies, traditional leadership, communities and the state in Marikana and Mokopane.

²⁵⁵ M. Mamdani 'Indirect Rule, Civil Society, and Ethnicity: The African Dilemma' (1996) 23 *Social Justice* 145.

²⁵⁶ *Ibid* 145 – 146.

²⁵⁷ Interview with member of royal council, 14 October 2015; Group interview with community members, 11 August 2016.

²⁵⁸ Interview with member of royal council, 14 October 2015.

²⁵⁹ Examples of this can be found in the documentary by Joseph Oesi entitled 'Black Lives Matter' which examines relationships between mining companies, traditional leadership, communities and the state in Marikana and Mokopane.

²⁶⁰ Interview with headman, 13 October 2015; Interview with community member, 27 January 2016.

²⁶¹ Interview with municipal official, 15 October 2016.

²⁶² *Ibid*.

²⁶³ *Ibid*.

²⁶⁴ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016).

²⁶⁵ *Ibid* at 98.

²⁶⁶ *Ibid* at 70.

²⁶⁷ *Ibid* at 19 – 20, 67.

²⁶⁸ *Ibid* at 42 – 49.

²⁶⁹ *Ibid* at 81 – 82.

²⁷⁰ *Ibid* at 107 – 113.

²⁷¹ We wish to thank Victor Munnik for suggesting the use of the Cultural Historical Activity Theory (CHAT) framework to inform our questionnaires, for providing us with a for generously lending his time to comment on our initial draft and for providing us with the following Masters of Science thesis by a student he co-supervised which employs this methodology: A Sahula 'Exploring the development of an integrated, participative water quality management process for the crocodile river catchment, focusing on the sugar industry' Thesis submitted in fulfilment of the requirements of Master of Science Degree, Water Resource Science at Rhodes University.

²⁷² See discussion of the approach and its evolution in Sahula at 100 – 105. Some of the key literature cited includes: Y Engstrom 'Expansive learning at work: Towards an activity theoretical re-conceptualisation (2001) 14 (1) *Journal of Education and Work* 133 – 156 and; DH Jonassen and L Roher-Murphy 'CHAT as a framework for designing constructivist learning environments (1999) 47 (1) *Educational Technology Research and Development* 61 – 79.

²⁷³ Sahula 100 – 101.

²⁷⁴ In formulating questions we adapted the questions contained in the appendix of this thesis.

²⁷⁵ Centre for Applied Legal Studies, *Community Engagement Policy* (April 2014).

Cover art: Still from the film *Marikana: The Lived Reality* produced in partnership with the New Media Advocacy Group and the International Human Rights Clinic at Harvard Law School

