APPENDIX F

ECOLOGICAL INFRASTRUCTURE, MINING LICENSING AND CONTESTATION

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1 ECOLOGICAL INFRASTRUCTURE, MINING LICENSING AND CONTESTATION

This appendix further develops the analysis by asking how the law frames resistance and contestation in the arena of mining and the protection of wetlands, biodiversity and ecological infrastructure.

1.1.1 Legal framing of contestation and resistance

It is worth mentioning that the shortcomings outlined above come into focus from the perspective of protecting wetlands, biodiversity and ecological infrastructure, i.e. that the legal framing of mining licensing processes undergirds the strength and continued dominance of the Minerals Energy Complex. As a result, mining is frequently authorised in a manner that overrides other interests of national, regional and local importance. What options does the law establish – both within, and outside of, the mining licensing process – to resist and contend against this state of affairs? How does law channel contestation and resistance? What is the basis for, and scope of resistance? Where are the loci of dispute resolution and why have they not functioned effectively to establish a more proportional relationship between coal mining and ecological protection? What are the trade-offs? How do resistance and contestation feed back into decision-making, if at all?

In this section, we pursue these questions by drawing a broad distinction between (a) broad-scale forms of resistance and contention that challenge the frame; i.e. the law and conduct establishing the legal parameters in which mining licensing occurs; (b) resistance and contention associated with the mining licensing process. In this regard, we pay more attention to forms of resistance and contention that can be exercised prior to the authorisation of mining; and (c) forms of resistance and contention that are not necessarily linked to a licensing process. The case discussions in the section that follow draw upon the researcher's work for the Mining and Environment Litigation Review undertaken for the Centre for Environmental Rights, and available on their website (http://cer.org.za/programmes/mining/mining-and-environment-litigation-inventory).

The forms of contestation and resistance discussed in this section are necessarily formal in nature, as a result of their framing in law. It must be borne in mind that there are many avenues of informal resistance and contestation that may be pursued instead of, or alongside, these formal paths. In the case of informal resistance and contestation, law may nevertheless also play a framing role in terms of law relating to gatherings, trespass and its definition of various other forms of 'criminal' conduct.

1.1.2 Contesting the frame

Can one resist the manner in which wetlands, biodiversity and ecological infrastructure are backgrounded in current mining licensing processes by challenging the law itself? Can one challenge legislative or executive *conduct* that determines how effectively such laws function? Law in this sense can refer to any one of the statutory enactments discussed in this chapter, as well as the bylaws and local town-planning schemes of local authorities. Conduct refers to legislative or, more commonly executive, action that can be differentiated from administrative action; i.e. the kind of action involved in deciding when legislation commences, making regulations, or developing strategy.

Since South Africa became a constitutional democracy, it has been possible to contest law and conduct on the basis of unconstitutionality (s 2, Constitution). The South African Constitution articulates rights, obligations and values, with which all law and conduct must conform. The legal basis for doing so can be either one of the rights set out in the Bill of Rights (the right to environment or possibly the socio-economic rights set out in ss 26 and 27), or the constitutional principle of legality. The principle of legality is associated with constitutional

supremacy and the rule of law as articulated in s 1(c) of the Constitution, which states that South Africa is founded on the values of supremacy of the Constitution and the rule of law. The principle of legality has been used much more frequently than any of the human rights to contend against laws applicable to mining.
A selection of landmark cases (listed below) are relevant to this discussion. Details of the pertinent legal issues as well as the outcome are provided in Appendix XX1.

Case 1: *Aquarius Platinum SA (Pty) Ltd v Minister of Water and Sanitation & others* (unreported, Case No. 75622/2014, Gauteng North High Court, 27 May 2015)
In this case, the fifth-largest platinum miner in the world challenged the President's publication of the National Environmental Laws Amendment Act 25 of 2014, which had the effect of bringing this piece of amendment legislation into force and the knock-on effect of setting the SES in motion. See Appendix XX1 for further details.

The High Court distinguished the President's action of publishing the legislation as lying closer to legislative than administrative action (thus situating it within the realm of the principle of legality, see para 23). Referencing ss 79 and 81 of the Constitution, Aquarius argued that this power had to be exercised in a responsible and considered manner, having assessed the progress that had been made to promulgate the supporting regulations (in this instance, the *Draft Regulations on Mine Residue Stockpiles and Deposits*) (para 19). To this the court added that the exercise of the power had to be rational (para 23). After analysing how the President's action affected the SES, and the application of waste legislation in particular to mine residue stockpiles and deposits, the court found that the President's conduct had created a legislative vacuum and a number of other absurdities (para 26). It had also placed the holders of environmental management programmes in a state of uncertainty (para 27). As a result, the President's conduct was found to be irrational and his proclamation bringing the NEMLA was held to be invalid and set aside (para 29) pending confirmation by the Constitutional Court (s 172(2)(a) Constitution). Soon after this judgment, however, the regulations on mine residue stockpiles and deposits were in fact published (on 24 July 2015). (See Appendix B for further details).

The *case of Exxaro Coal (Mpumalanga) (Pty) Ltd & another v Minister of Water Affairs & another* 2012 JDR 2502 (GNP) illustrates how using the principle of legality can be used in conjunction with constitutional rights to challenge executive conduct.
In this case Exxaro challenged the Minister of Water Affairs' decision to suspend the Water Tribunal in 2012 on the basis that the contract of the chairperson and members of the Tribunal had expired and legislative changes relating to the Water Tribunal were pending. Exxaro had wished to appeal to the Water Tribunal against a directive issued against it in terms of s 22 of the NWA. However, following the Minister's decision all persons with matters lodged at the Tribunal were instructed to have their matters set down for a process of mediation and negotiation. The court had little difficulty in finding that the Minister had no power under the NWA to disband the Water Tribunal, or to exercise discretion to appoint its members or chairperson. Item 3, Schedule 6 of the NWA specifically provides that the Minister is obliged to take steps to fill vacancies on the Water Tribunal as they occur (para 24) and because she had failed to do this the Minister had failed in both her statutory duties, but also her constitutional duties (because s 237 of the Constitution provides that all 'constitutional obligations' must be performed diligently and without delay (para 41). The judge, however, also went on to find that in deciding not to appoint a chairperson and members of the Water Tribunal, the Minister thus also infringed the applicants' constitutional rights under s 34 of the Constitution (right of access to the courts) (paras 21, 27).

Apart from contesting law or executive action (where the remedy would be setting aside the law or conduct complained of), the higher courts can also be approached to provide an authoritative interpretation of laws, as in the case of *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 (4) SA 181 (CC). In the *Maccsand* matter the higher courts were asked to

decide whether the meaning of 'relevant law' in s 23(6) of the MPRDA referred to mining-related laws strictly speaking (such as laws dealing with mine health and safety) or also to laws dealing with land-use planning and the environment. The significance of this interpretation was that it determined whether the MPRDA, and decisions taken on its terms, 'trumped' other laws or not. The Constitutional Court decided that the term 'relevant' should be interpreted widely, thus not allowing the exclusion of land use planning laws to land upon which prospecting or mining has been authorised – one of the most significant judicial decisions in the field of mining and environment in recent years.

In the field of environmental law more generally, there are examples of civil society groups using the principle of legality or the Bill of Rights provisions of the Constitution to compel the State to properly implement environmental laws. Examples include *Wildlife Society of Southern Africa & others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & others* 1996 (3) SA 1095 (Tks) in which the Wildlife Society of Southern Africa was successful in a court application to compel the Minister of Environmental Affairs to enforce the provisions of s 39(2) of Decree No. 9 (Environment Conservation), 1992 of the former government of the Transkei to ensure the ecological integrity of the Eastern Cape coastline. This challenge succeeded notwithstanding that a Task Group had been set up by the government to tackle illegal developments on this coastline. And in *Kloof Conservancy v Government of the Republic of South Africa* 2015 JDR 0078 (KZD) the applicant sought a mandamus against the government for failing to publish a list of invasive alien species (IAS) as required by s 70(1)(a) of the National Biodiversity Act 10 of 2004. In a ground-breaking judgment Vahed J linked the meaning of 'health and well-being' in s 24 of the Constitution to biodiversity and the ecosystem services that biodiversity provides. He held further that effective conservation and sustainable use of biodiversity at all levels was a precondition for sustainable development. Development would accordingly not be sustainable if it resulted in loss and degradation of habitat in threatened ecosystems and critical biodiversity areas; further introduction or spread of IAS; or over-abstraction of water beyond the limits of the ecological reserve (para 109). On the basis of this rights-based reasoning, the court found that the Department of Environment's failure to publish the list of IASs within the statutorily delimited times was unlawful and unconstitutional, and further instructed a variety of national and provincial authorities to 'do all such things and take all such steps' necessary and within their legal authority to ensure that all organs of State in every sphere of government complied with the IAS regulatory framework.

These cases illustrate the potential to use the principle of legality or various rights in the Bill of Rights to challenge the framework for calibrating mining authorisation against the need to protect wetlands, biodiversity and infrastructure. Types of cases that could be brought include a challenge to the standards that must be used for the issue of environmental authorisations or water use licenses; the current institutional arrangements for valuing ecological infrastructure in mining licensing processes in the context of the State's duty as a custodian of various natural resources; the exceptionalism still afforded mining as regards consent; the need for the Minister of Environmental Affairs to exercise her power to declare certain specified geographical areas off limits for purposes of issuing environmental authorisations or waste use management licences. The remedy in such cases will either be the setting aside of law or conduct, the reading in of provisions into the law, interpretation of the law, or the compulsion of state action. As is apparent from the *Kloof Conservancy* case, the courts will not necessarily shy away from orders having resource implications. Nevertheless, it is important to acknowledge that launching and sustaining a test case challenging the frame is resource intensive and may involve a commitment of many years if the case is taken on appeal. Given the precedent-setting value of such decisions, the stakes of losing are also high.

1.1.3 Contestations associated with mining licensing processes 31 MAY 21.45

One can broadly distinguish between formal forms of resistance that may occur (a) before a decision to authorise mining is taken or before mining commences; (b) those that may occur within a relatively short period of time after the licensing decision and that essentially challenge the licensing decision; and (c) forms of resistance and contestation that are essentially concerned with the proper enforcement of the licensing conditions. In the case of pre-licensing resistance and contestation this report examines s 10 objections, contestations around land access, and contestations around land-use planning. In the case of immediate post-licensing resistance and contestation, ministerial appeals, appeals to the Water Tribunal and judicial review are considered. For forms of resistance and contestation associated with the enforcement of licence requests for access to information, licence amendments, complaints relating to law enforcement, directives, environmental audits, suspensions and withdrawals, public participation around closure, and criminal proceedings are considered. In each case, the emphasis falls on the capacity of each form of resistance and contestation to protect wetlands, biodiversity and ecological infrastructure.

1.1.3.1 Contestation and resistance prior to mining licensing

(a) Section 10 objections

Under the SES, an opportunity to 'object' to the granting of a prospecting or mining right still exists. This stands alongside the opportunity to engage in public participation relating to the environmental authorisation granted in terms of the NEMA. The rules set out in chapter 6 of the 2014 EIA Regulations now govern the latter process. While these rules set out better notice requirements, and require that comments submitted by interested and affected parties be recorded in reports and plans submitted to the authorities, it is our opinion that the public participation processes offer minimal opportunity for meaningful contestation and resistance. This is because comments from other state authorities and civil society are heavily mediated by the persons compiling the public participation and environmental reports; and because it is clear from the articulated purpose of public participation as set out in the EIA regulations, that participants have little more than a right to comment and have access to information, i.e. the purpose is not more broadly framed to improve decision-making pertaining to wetlands, biodiversity and ecological infrastructure. This offers little hope of comments submitted during the public participation process having any substantive impact.

At the moment, the bare legal framing of s 10 objections is still limited to s 10(2) of the MPRDA, which provides that if a person objects to the granting of a prospecting or mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining and Environment Development Committee (RMDEC) to consider the objections and advise the Minister of Minerals thereon. An objection could relate to any procedural or substantive issue and theoretically could therefore serve as a means of contesting the impact of prospecting or mining on significant ecological infrastructure. Following the entry into force of Act 49 of 2008, however, there is currently no longer a requirement for the Minister to even consider the advice of the RMDECs (a requirement that used to be found in the now repealed s 39(4)(b)(i) of the MPRDA). The MPRDA Amendment Bill, which has been before Parliament for some time, contains provisions aimed at strengthening the functioning of the RMDECs including new rules on its composition, membership requirements, the filling of vacancies and reporting. Significantly, these provisions say nothing about the need for the RMDECs to function transparently. Furthermore, the prescribed composition of the forum is heavily skewed toward mining interests (proposed s 10C of the Mining Bill states that the 14 members nominated to the committee must have experience in mineral and mining development, mine environmental management, petroleum exploration and production). The capacity of such a forum to fairly and objectively assess the impact of an extractive project on wetlands, biodiversity and ecological infrastructure may already therefore be suspect. Additionally, the proposed amendments define a new procedure whereby the Regional Manager, upon receiving an objection, may refer such to the applicant to consult with the person objecting with a view to

formulating an agreement. If an agreement is reached it must be reduced to writing and forwarded to the RMDEC. This procedure is likely to function to de-escalate the objector's concerns, raising a barrier to the consideration and resolution of the objection by an impartial forum.

A review of pending cases compiled for the Centre for Environmental Rights additionally found that the DMR failed to notify objectors that their concerns had been forwarded to the relevant RMDEC, or to alert them to the meeting at which their objection would be considered (Centre for Environmental Rights, 2011: 125). In the case of the COAL of Africa project located close to the Mapungubwe Heritage site, it was found that:

'[A] number of objections to the project were submitted in terms of s. 10 of the MPRDA. By law the RMDEC was obliged to consider these and submit recommendations to the Minister. Although the Endangered Wildlife Trust was granted an opportunity to address the RMDEC of its concerns, the RMDEC meeting at which this was to occur was postponed. No further notice of a RMDEC meeting at which objections to the Vele colliery were considered was received by the appellants and to the best of their knowledge none took place prior to the approval of the EMP' (at 125).
These considerations point to both public participation and s 10 objections as being weak avenues for contestation and resistance.

(b) Access to land (section 5(4)(c), MPRDA)

In the past landowners have used the (now repealed) notification and consultation requirement in s 5(4)(c) of the MPRDA to force some level of negotiation with the holders of prospecting or mining rights. This provision prohibited any person from prospecting or mining without 'notifying and consulting with the land owner or lawful occupier of the land in question.' In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2010 JDR 1446 (CC) the Constitutional Court affirmed that the entitlements associated with a prospecting or mining right may not be exercised without the holder undertaking such notification and consultation (para 38). If the landowner or lawful occupier impeded the entry of the prospecting or mining rights holder onto the land, or if an owner or occupier believed they would suffer loss as a result of the operation, either party could notify the Regional Manager and initiate the mediation and arbitration process envisaged in s 54. The envisaged outcome of a s 54 process would either be a written agreement regarding compensation for loss, or determination of the level of compensation by arbitration.

Section 5(4(c) consultations could protect wetlands, biodiversity and ecological infrastructure if it was in the interest of the landowner to bring these issues into the consultation process with the landowner. Frequently, however, land owners and occupiers resist granting prospecting or mining proponents not because they wish to protect nature, but because they themselves wish to mine on the land. This was the case, for instance, in the two decided cases dealing with s 5(4)(c): *Meepo v Kotze* 2008 (1) SA 104 (NC) and *Aquila Steel (Pty) Ltd v South African Steel Company (Pty) Ltd* (unreported, Case No. 14612/2013, Gauteng North High Court, 14 March 2014). Alternately, in another decided case, *Coal of Africa Ltd v Akkerland Boerdery* (unreported, Case No. 38528/2012, North Gauteng High Court, 5 March 2014) it was clear that the landowner had other strategic interests – not the protection of ecological infrastructure – that weighed against him. In this case Coal of Africa had been granted a prospecting right to a farm owned by Akkerland Boerdery. One of the grounds upon which Akkerland refused to grant Coal of Africa access to the farm was that it's Environmental Management Programme (EMP) had not been validly approved, which suggests that ecological concerns also motivated resistance. However, in dealing with the question whether Akkerland had another suitable remedy (other than refusing Coal of Africa access to the land) it was noted that the respondent was lining up 'grandiose schemes of operating hospitality business and other activities" while the legal proceedings dragged on' (para 119).

Using s 5(4)(c) as a source of resistance to prospecting and mining operations for purposes of protecting wetlands, biodiversity and infrastructure has however largely dissipated for two reasons: Firstly, there has been a narrowing of the consultative burden the courts were willing to place on the rights holder under the banner of s 5(4)(c). In the *Meepo* case, for instance, the court had held that consultation under this provision entails more than giving notice. Instead, the prospecting rights holder must attempt to obtain the consent of the landowner as regards entry upon the land for the purposes of prospecting. In *Akkerland Boerdery*, by contrast, the judge held that the purpose of the consultative process envisaged in s 5(4)(c) was to afford the landowner the opportunity to 'minimise damages' inevitably suffered as a consequence of the granting of a prospecting right. This process did not require consensus as a pre-requisite for the holder to access the land (para 36). Secondly, Amendment Act 49 of 2008 repealed s 5(4)(c) and replaced it with a new s 5A(c) which simply requires that the holder of a prospecting or mining right provide the landowner with 21 days written notice of the intent to conduct prospecting or mining operations; i.e. removing the consultation requirement all together.

One can thus conclude that contestation between landowners and occupiers and rights holders over the issue of being granted access to the land to mine or prospect is not an effective channel of resistance for purposes of protecting wetlands, biodiversity and ecological infrastructure.

(c) Land use planning

The Constitutional Court's decision in *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 (4) SA 181 (CC) established that the granting of a prospecting or mining authorisation does not obviate the need to obtain the requisite land use planning authorisations which would in almost all instances be a rezoning application. The Court said that it was permissible for different spheres of government to exercise powers in respect of the same object and for their powers to overlap at times. In these circumstances, the spheres concerned would need to attempt to resolve their differences in line with the principles of cooperative government set out in the Constitution or, alternately, bring the matter on review before a court.

Following the decision, it was thought that land use planning regulations could at least protect uses of land other than and in opposition to mining, if not to protect wetlands, biodiversity and ecological infrastructure *per se*. *Maccsand* had the effect of re-empowering landowners because in terms of land-use planning laws (which are different in different provinces) it is usually the landowner who is required to submit a rezoning application. However, the manner in which this application of *Maccsand* has played out in formal contestations has been uneven in different provinces, a direct incidence of different land use planning frameworks.

In the Western Cape, where the Land Use Planning Ordinance, 1985 (LUPO, the framework in contention in the *Maccsand* case) governs land use planning, it appears that the provincial authorities are enforcing the zoning requirement. For example, in *Jacobs & another v Transand (Pty) Ltd & another* (unreported, Case No. 11554/2014, Western Cape High Court, 14 November 2014) it was not contentious that mining required proper authorisation in terms of the LUPO before it could proceed. This case, however, reveals other difficulties with the use of zoning requirements (and contestations relating thereto) for purposes of protecting wetlands, biodiversity and ecological infrastructure. The dispute between the applicants and Transand was essentially whether and how the farm had been zoned 'Agricultural 1' in terms of s 14 of the LUPO, a zoning which did not permit mining activities to occur. Much of the case accordingly turned on the *standard* necessary to prove the zoning of a particular property, as well as the *factual evidence* in support of the particular zoning of Agricultural 1 in the case. It was contended, for instance, that it was not enough to show that a zoning certificate was insufficient proof of the zoning of property and that evidence of a decision by the relevant

council in respect of the property concerned was required (based on an unreported judgment of the Western Cape High Court (*Frenvest cc v Smith* unreported, Case No. A476/96 of 20 February 1997). Further, in one of the affidavits submitted in the case, it was noted that in the late 1990s it was general practice not to make a zoning determination of a farm property until there was an application either for a relaxation, departure or consent use in relation to that property (para 29). In using zoning requirements as a base for contestation and resistance, therefore, parties contending for the protection of wetlands, biodiversity and ecological infrastructure may come up against the fact that the property in question may not in fact have been zoned. Alternately, they may struggle to find the evidence establishing the zoning. The extent to which wetlands, biodiversity and ecological infrastructure are in fact protected by a particular zoning or not will also be mediated by the forms of land use allowed and restricted in terms of the categories of the relevant town planning scheme.

In provinces, other than the Western Cape, however, contending parties have not been successful in their reliance on the *Maccsand* principle to prevent or delay mining from occurring in their localities. In the case of *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd* 2013 JDR 0026 (KZD) it was evidently in the interests of the applicant to protect not only the socio-economic character of the town of Mtunzini, but also the ecological integrity of the pristine dunes on the Zululand coastline. They also argued that eco-tourism was a more long-term sustainable development scenario for the region. If the mining of the dunes for minerals used in the production of titanium dioxide had to occur, due process had to be followed and authorisations in terms of applicable environmental and planning legislation had to be obtained. Although the Mtunzini Conservancy relied on *Maccsand*, and highlighted the distinction between ‘mine’ as a noun (falling within the land use function) and ‘mine’ as a verb (falling within the mining function), these arguments did not convince the judge. He distinguished the case from *Maccsand*: A different land use regulatory framework was in place and this had been amended over the years, only making it clear in 2008 that development authorisations were required when land was developed for mining purposes. The mining rights to the area had also been granted in terms of the Minerals Act 50 of 1991, not the MPRDA – this Act together with the constitutional framework relevant to provincial powers made it clear, according to the judge, that a mining authorisation was the only permission required to commence mining.

In two cases – *Coal of Africa* and *Aquila Steel*, both concerning land in areas governed by the Town Planning and Townships Ordinance, 1986 (Transvaal) – the courts affirmed that prospecting and mining must comply with relevant zoning requirements as per *Maccsand*. Their judgments confirm, however, that much hinges upon the interpretation of the actual land use planning instrument in question. In *Coal of Africa*, the court found that the Makhado Land Use Planning Scheme created a ‘permanent exemption’ in favour of allowing mining to occur without the need to apply for a special consent use in areas that fell within the jurisdiction of a local municipality but outside the area of a proclaimed township. In *Aquila Steel* the judge found that the Town Planning Ordinance obviated the need for rezoning on at least two grounds: It was clear that the authority of a local authority was limited, and that only those portions of land within the jurisdiction of the local authority that fell within a town planning scheme were affected by zoning requirements. Land falling outside of a town planning scheme would accordingly fall outside a zoning scheme and the approval of the local authority would not be required. The judge then linked this finding to the controversial s 21(1) of the Ordinance, which provides that a local authority shall not prepare a town planning scheme in respect of land which is proclaimed land or land on which prospecting, digging or mining operations are being carried out, unless such land is situated within an approved township (para 60). The effect of this judgment is therefore that in areas governed by the Transvaal Provincial Ordinance local authorities cannot prepare a town-planning scheme in respect of land on which prospecting or mining is being carried out, thus conclusively excluding the need for local authorising approval for rezoning.

The cases discussed above illustrate that relying on land-use planning frameworks as a basis for contention and resistance in the context of mining, wetlands, biodiversity and ecological infrastructure is, at best, tenuous. Much depends firstly, on how town planning schemes define particular land uses and the impact of those uses on the natural landscape (for example, it is not clear that a zoning of 'Agriculture 1' would necessarily provide superior protection for wetlands and biodiversity than any other zoning). Secondly, one cannot assume that areas of undeveloped land necessarily have a zoned use, and finally there are provisions in land use planning laws that block local authorities from preparing town planning schemes in respect of land on which prospecting or mining is being carried out.

1.1.3.2 Post-licensing contestations aimed at setting the license aside

The second set of formal contestations relating to the licensing relationship may occur in the immediate aftermath of a decision to authorise prospecting or mining in a particular area. The objective of these forms of contestation is essentially to set the licence aside. Any concern relating to the protection of wetlands, biodiversity and ecological infrastructure may ground the launch of the appeals described in this section, and may form the substantive basis of the ground for judicial review.

Ministerial appeals

Since the establishment of the SES there are now two broad avenues of appeal:

- Section 96 of the MPRDA allows any person 'whose rights or legitimate expectations have been materially or adversely affected' or who is 'aggrieved' by a decision to authorise prospecting or mining to appeal to the Minister of Mineral Resources. The lodging of such an appeal does not suspend the operation of the prospecting or mining right concerned, which means that operations may commence while the appeal is being decided (s 96(2)(a). MPRDA).
- Section 43(1A) of the NEMA allows any person to appeal to the Minister of Environment against a decision taken by the Minister of Mineral Resources of any person acting under his or her delegated authority (i) in terms of the NEMA; or (ii) in terms of any 'specific environmental management Act' (i.e. waste authorisations under the NEMWA). The Minister of Environment may consider the appeal herself or appoint an appeal panel to consider and advise here thereon (s 43(5) NEMA). After considering the appeal, she may confirm, set aside or vary the original decision or any provision, condition or directive associated with the decision or make any other appropriate decision (s 43(6) NEMA). Lodging an appeal under the NEMA has the effect of suspending the initial decision.

Either of these avenues of appeal could be used to argue that a prospecting or mining right should not have been granted on ecological grounds. Since the consolidation of the SES, it seems more appropriate that appeals relating to wetlands, biodiversity or ecological infrastructure would follow the NEMA route, because they relate to the project's environmental authorisation. In parliamentary portfolio committee meeting discussions preceding the establishment of the SES, however, the need to curtail the potential for appeals was expressly discussed. The committee's concerns now find expression in s 47CA of the NEMA, which provides that in respect of a decision that relates to prospecting or mining under the NEMA or a specific environmental management Act (i.e. the NEMWA), the Minister of Minerals may only condone a failure to comply with time periods relating to appeals in 'exceptional circumstances'. This must be read with new regulations on EIA appeals, which shorten the periods for the time in which appeals may be lodged.

At the moment, an appeal to the Minister of the Environment under the NEMA is essentially an untested route. It remains to be seen whether actors interested in the protection of

wetlands, biodiversity and ecological infrastructure will be able to use the appeal process to advance their concerns.

Prior to the establishment of the SES, some civil society and community-based groups attempted to use s 96 appeals to protect wetlands, biodiversity and ecological infrastructure (see the discussion of the Limpopo Coal-Mapungubwe case and the TEM-Xolobeni case in the CER's Mining and Environment Litigation Review, 118). Both cases illustrate one of the key structural deficiencies of s 96, which is that the time within which the Minister is required to decide the appeal is not prescribed. Because the lodging of the appeal does not suspend the application, it is in the interest of the mining proponents to delay decision-making – for example, in the TEM-Xolobeni case the Minister decided the appeal nearly three years after it had been submitted. There is also no guarantee that the appeal will set the license aside and the appeal, like in the TEM-Xolobeni case, may simply result in the rights holder being instructed to remedy some defect in its application process.

Ministerial appeals, particularly under the NEMA, may prove to be an important formal basis for contending against the ecologically inappropriate granting of prospecting or mining rights. Nevertheless, the experience of relying on s 96 of MPRDA has not yielded positive results.

Appeals to the Water Tribunal

The NWA establishes the Water Tribunal as an independent body with national jurisdiction (s 146, NWA). The jurisdiction of the Water Tribunal extends to the decisions of a responsible authority on an application for a water use licence in terms of s 41. An appeal to the Water Tribunal may be submitted by the licence applicant 'or any other person who has timeously lodged a written objection against the application (s 148(1)(f), NWA). Lodgement of the appeal has the effect of suspending the water use licence contended against, unless the Minister decides otherwise (s 148(2), NWA).

It is reasonable to expect that the Water Tribunal would have played a key role in developing a substantive set of principles pertaining to the impacts of mining on wetlands, biodiversity and ecological infrastructure. Civil society actors have attempted to use the Water Tribunal as a means of resistance and contestation. Between 2009 and 2010, for instance, the Escarpment Environment Protection Group and other civil society actors lodged a number of appeals with the Tribunal contending against the granting of water use licences for coal mining operations (see *Escarpment Environment Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs & Exxaro Coal (Pty) Ltd* (unreported, WT 03/08/2010); *Escarpment Environment Protection Group & Langkloof Environmental Committee v Department of Water Affairs & WER Mining* (unreported, WT 25/11/2009); *Escarpment Environment Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs & Xstrata Mining* (unreported, WT 24/11/2009); and *Gideon Anderson T/A Zonnebloem Boerdery v Department of Water and Environmental Affairs and another* (unreported, WT 24/02/2010). None of these cases was considered on the merits, however, because the Water Tribunal adopted the ludicrous position that the applicants had no locus standi. This was based on their interpretation of s 148(1)(f) read together with s 41(4) of the NWA, which provides in turn that the responsible authority may require the applicant for a water use licence to publish a notice in newspapers and 'other media' stating that written objections may be lodged against the application within a specific time. If the responsible authority had not exercised its discretion to require the applicant to call for written objections, it followed that no person other than the applicant would have locus standi to lodge an appeal before the Water Tribunal, even where a person had submitted unsolicited written objections. Fortunately, this interpretation of the law was set aside on review. In the case of *Escarpment Environment Protection Group & another v Department of Water Affairs & others* 2013 JDR (GNP), the court had no difficulty in overruling the Water Tribunal's stance on the question of

locus standi, finding that an interpretation that limited standing on the basis of submission of a written objection in a process initiated by the water authorities was arbitrary and eccentric.

In the meantime, however, the Minister of Water Affairs had also decided to 'suspend' the operation of the Water Tribunal – a decision that was successfully challenged in the *Exxaro Coal* case. A new chairperson and members of the Water Tribunal have since been appointed. It is hoped that with the question of locus standi now clarified, the Water Tribunal will begin to play a more robust role as a forum of contention and resistance in the service of protecting the nation's water resources.

Judicial review

Appeals are distinguished from reviews in that they involve a new decision on the merits: The second decision-maker may examine the facts of the case and come to a different decision from the decision-maker of first instance. This differs from a review where the courts examine how a decision was taken. On the basis of the grounds now set out in the Promotion of Administrative Justice Act 3 of 2000, the courts may set the decision aside and refer it back to the original decision-maker, with instructions to remedy the cause of defects in the decision-making process. In certain cases, the court can make an order substituting their own decision for that of the original decision-maker. This occurs however only in exceptional cases.

Section 6 of the PAJA lays down the grounds of judicial review in South Africa. These include a variety of procedural grounds for setting the decision aside (e.g. the administrator who took the decision was not authorised to do so by the empowering provision; a mandatory or material procedure or condition prescribed by the empowering provision was not complied with; the action was procedurally unfair; the action was taken for an ulterior purpose or motive; etc.) in addition to grounds that allow for more substantive scrutiny of the decision. These include the forms of rationality review in s 6(2)(f) and review on the basis of reasonableness in s 6(2)(h). Following the Constitutional Court's decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), it is now clear that reasonableness refers to 'simple reasonableness' and not the 'gross unreasonableness' that was symptomatic of other grounds of judicial review under the common law.

Judicial review can serve as a further platform for contestation and resistance if a ministerial appeal does not succeed. It is, however, a human, financial and time resource intensive process with an inherent level of uncertainty as to the outcome. The risks of using judicial review are illustrated by the Eyesizwe-Zoekop case, discussed in the Centre for Environmental Rights' *Mining and Environment Litigation Review* (2011: 119):

In this case, the prospecting right was granted to Eyesizwe Coal on 30 October 2006. The civil society applicants were not notified of the grant of the right. Review proceedings were launched more than a year later on 23 January 2008. The respondents, which included the DMR, indicated their intention to defend but did not deliver any answering affidavits. In a surprising move, Eyesizwe then withdrew its opposition on 22 July 2009 and agreed to pay costs on the opposed scale to the date of withdrawal and on the unopposed scale thereafter, contingent upon the court granting the order to set aside the prospecting right and approval of the EMP. Sometime between 12 and 16 August 2009 it appears that the other respondents withdrew their defence as well. Documentation available, however, indicates that while this battle was playing out Exxaro Coal Mpumalanga (with which Eyesizwe Coal had in the meantime merged) had already for some time been preparing for submission of a mining right in respect of the same properties. In August 2008 consultants had been appointed to conduct baseline water studies for the proposed mine. Another set of consultants was appointed subsequent to this to prepare the scoping and environmental impact report for the EMP. A background information document, dated 21 July 2009, had already been prepared by these consultants for the scoping phase of the project. This report in turn indicates that a mining right

application for the proposed Belfast coal mine had been submitted during June 2009 and accepted by the DMR on 10 July 2009. This suggests that while the civil society applicants were engaged in launching and managing the review proceedings for the prospecting right, the DMR and the mining company concerned were simply gearing up to obtain the more far-reaching mining right. This case points to the need to use judicial review as a form of contestation strategically.

1.1.3.3 Contestation associated with enforcing licensing conditions

The third set of formal contestations relating to the licensing relationship revolves around compliance and enforcement of licence conditions, or processes for amending such conditions. They include requests for access to information, licence amendments, complaints relating to law enforcement, directives, environmental audits, suspensions and withdrawals, public participation around closure, criminal proceedings. The disadvantage of these forms of contestation relevant to the forms of contestation and resistance discussed above is that prospecting or mining would have already become entrenched in the area, at the same time changing the ecological characteristics of the landscape.

(a) Access to information requests

The Promotion of Access to Information Act 2 of 2000 (PAIA), which supposedly gave effect to the right of access to information in s 32 of the Constitution, lays down standards and procedures in order to obtain information from public and private bodies. Access to information is critical for purposes of understanding the state of ecological infrastructure in a particular locality and the level of exogenous shock it is facing from prospecting and mining, amongst other land uses. The difficulties of gaining access to information, even with the constitutional right and the PAIA framework are well illustrated by a case such as *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) (in which the applicant sought information from the State relating to genetically modified organisms). Empirical research conducted by the Centre for Environmental Rights has also established that the response on the part of key state departments to requests for access to information is also extremely poor (see CER 2012, 2013a, 2013b, 2014).

The tide on access to information, however, appears to be determining with new requirements enforcing transparency specified in the 2014 EIA regulations. Further, in *Company Secretary of ArcelorMittal, South Africa & another v Vaal Environmental Justice Community Alliance* 2015 (1) SA 515 (SCA) the Supreme Court of Appeal decided that the Vaal Environmental Justice Alliance (VEJA) had meet the threshold requirement for being granted access to Arcelor Mittal's Environmental Master Plan, and that Arcelor's status as a private body did not present a hurdle to them being granted access to the information. Significantly, at para 82 Navsa DJP held: 'Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.'

(b) Licence amendments

Prior to the establishment of the SES, amendments to the environmental management plan or programme attached to a prospecting or mining right did not require any form of public participation, but simply the written consent of the Minister of Minerals (see s 102, MPRDA). The EIA regulations that are now applicable to environmental authorisations for prospecting and mining establish new thresholds for public participation in this process. Chapter 5 of the EIA regulations distinguishes between amendments of the environmental authorisation and environmental management programme (i) where no change in scope occurs or where there is a change in ownership or the transfer of rights and obligations; and (ii) where a change in scope occurs. In the first instance, the competent authority that issued the authorisation has jurisdiction to decide the amendment and no public participation process is required. This is

contentious as regards change of ownership or transfer of rights and obligations as interested and affected parties may have a material interest in, for example, an operation being sold from a multinational company to a more junior miner. In the second case (change of scope), the rights holder must compile a report of the proposed changes and submit the report to a public participation process as defined and agreed to with the competent authority, provided that the process must be 'appropriate to bring the proposed change to the attention of potential registered interested and affected parties, including organs of state, which have jurisdiction in respect of any aspect of the relevant activity.' Theoretically this provides another avenue for contestation and resistance, however, the participation here is conducted after the process of identifying the impacts of the proposed amendment, and the integrity of the process is a function of the Minister of Mineral's discretion. Like public participation conducted prior to the granting of the right, if therefore appears to guarantee nothing more than a 'right to comment'.

(c) Complaints regarding enforcement

The SES establishes a new avenue for civil society to intervene when it is believed that a 'compliance monitoring and enforcement function' has not been implemented or has not been adequately implemented. In this instance, 'complainants' may write to the Minister of Mineral Resources, submitting information supporting the complaint (s 31D (5) NEMA). The Minister must presumably reply (though there is no legal duty or legally constrained time limit in which to do so). If the complainant is dissatisfied with the Minister's response he or she may submit the complaint, supporting information and history of engagement with the Minister of Mineral Resources to the Minister of Environmental Affairs (s 31D (6) NEMA). On receiving such a complaint, the Minister of Environmental Affairs must consult with the Minister of Mineral Resources, leading to a situation where either the former 'assists or supports' the latter in his compliance and monitoring function, or directs environmental management inspectors (as opposed to the environmental management resource inspectors) to undertake the function directly (ss 31D (7)(8) NEMA).

In a circuitous, indirect way this provision could theoretically protect wetlands, biodiversity and ecological infrastructure if the lack of compliance and monitoring was impairing such. It is one of the 'co-operative governance' mechanisms discussed by the parliamentary portfolio committee prior to the introduction of the SES. Nevertheless, it does institute civil society as a watchdog of sorts in respect of the compliance and monitoring function.

(d) Directives

The regulatory framework for mining allows for various orders to be issued to prospecting and mining rights holders where there is a lack of compliance with the conditions of the right. These include the Minister of Mineral Resources' power to recover costs in the event of urgent remedial measures (s 45 MPRDA), the Minister of Environmental Affairs' or MEC's responsible for the environment to issues directives under s 28 of the NEMA, and the power of responsible authorities to issue directives under s 19 of the NWA. These are further discussed in s 3.2.4 below.

(e) Environmental audits

The 2014 EIA regulations cementing the SES have formalised an environmental audit requirement that now includes a public participation component. For the period during which an environmental authorisation is valid, a holder must ensure that compliance with the conditions of the authorisation is audited (reg. 34(1) EIA Regulations). An environmental audit report, which must be prepared by an independent person with relevant auditing expertise, must be submitted to the competent authority. The environmental audit report must include 'verifiable findings' both of the holder's performance against the provisions of the authorisation,

as well as on the provisions themselves to sufficiently provide for the avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity (reg. 34(2) EIA regulations). Where the findings indicate insufficient compliance with the environmental authorisation or insufficient mitigation of impacts, the holder must submit recommendations to amend the associated environmental management programme in order to rectify the shortcomings identified in the environmental audit report (reg. 34(4) EIA regulations). Such recommendations must have been subjected to a public participation process (reg. 34(5) EIA regulations). These provisions regarding environmental auditing also apply to the auditing of closure plans.

The need for ongoing independent environmental auditing of an environmental authorisation situates environmental assessment within a resilience paradigm: Instead of a 'once-off' assessment of impacts with holder-initiated amendments thereafter, the regulations require an independent assessment that examines not only compliance, but the ability of the plan itself to mitigate impacts. This is a positive development. The need for public participation also creates an additional avenue for contestation and resistance, but is subject to the same caveat voiced regarding other points of public participation in the mining licensing process.

(f) Suspensions and Withdrawals

Section 47 of the MRPDA allows the Minister of Mineral Resources to suspend or cancel any prospecting or mining right in the following circumstances: (i) the holder (or owner of previous works) is conducting any prospecting or mining operation in contravention of the MPRDA; (ii) the holder has breached any material term or condition of such right; (iii) the holder has contravened any condition of the environmental authorisation; and (iv) the holder has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under the MPRDA (s 47(1) MPRDA). A process must be followed whereby the holder must is given an opportunity to respond and to take specified measures to remedy any contravention, breach or failure (s 47(2)(3) MPRDA). If the rights holder fails to do so the right may in fact be suspended (s 47(4) MPRDA). Powers of suspension and withdrawal are also conferred upon the Minister of Mineral Resources in terms of the NEMA, in this instance linked to the issuing of compliance notices on the part of environmental management inspectors or environmental management resources inspectors. If a person fails to comply with a compliance notice the inspector must report the non-compliance to the Minister or MEC (as the case may be), who may then revoke the relevant authorisation and take any 'necessary steps', the costs of which may be recovered from the person who failed to comply (s 31N (2) NEMA). The EIA regulations also provide the competent authority with a more direct suspension power: Where the authority has reason to believe that the authorisation was obtained through fraud, non-disclosure or material information, or misrepresentation of a material fact (reg. 38). In the case of water use authorisations or entitlements, ss 54 and 55 of the NWA allows the responsible authority to suspend or withdraw entitlements. Like the provisions in the MPRDA and NEMA this power must be exercised with due regard to procedural fairness.

Suspensions and withdrawals may protect wetlands, biodiversity and ecological infrastructure by compelling the rights holder to desist from actions that impair their integrity. The primary actor in this regard is the State. However, in each case directives may be contested by the rights holder as well, which not infrequently leads to judicial review of the decision (see the *Harmony Gold* cases mentioned in s 3.2.4 below). This may delay preventive and remedial action, with the exception of directives issued under the NEMA where lodging an appeal against a directive does not suspend its effect.

(g) Public participation at closure

Prior to the establishment of the SES, the issuing of a closure certificate involved only government officials – the Regional Manager, Chief Inspector of Mines, and 'each government department charged with the administration of any law which relates to any matter affecting the environment' (s 43(5) MPRDA). Now however, the EIA listed activities include the decommissioning of any activity that requiring a closure certificate under s 43 of the MPRDA. Additionally, the listed activities include a form of deemed closure, i.e. where the throughput of activities associated with a prospecting right, mining right or mining permit have reduced by 90% or more over a five-year period. In this case, an environmental authorisation is also required, unless the competent authority agrees in writing that such reduction of throughput does not constitute closure (List 1: Activity 22, EIA regulations). This new authorisation requirement therefore expands the range of public participation processes already required for mining licensing.

(h) Criminal proceedings

The MPRDA, the NEMA and specific environmental management Acts such as the NWA, NEMWA, NEMAQA and NEMBA establish a number of statutory offenses. The nature of the offences and the prescribed level of penalties differ from Act to Act. While the National Prosecuting Authority would ordinarily prosecute such offenses, any of these statutory offenses could also be the object of a private prosecution initiated in terms of s 33 of the NEMA. To the best of our knowledge such a private prosecution in the environmental field has never been launched. Criminal proceedings do not necessarily protect ecological infrastructure, as the damage would already have been done. However, successful prosecutions may have a deterrent effect on other operators in the same field.

1.1.3.4 Contestation outside of the licensing relationship

Sections 28 of the NEMA and 19 of the NWA were passed to establish a statutory duty of care in relation to the environment and water resources respectively. The obligation not to cause significant pollution or degradation of the environment or of water resources attaches to everyone with a material relationship to the land and, at least in the case of NEMA, expressly applies retrospectively. As such, for purposes of the authorities exercising their powers to require the undertaking of reasonable measures to prevent the pollution or ecological degradation, it is not necessary that any form of licensing relationship with the polluter should exist. These sections also allow the authorities to step in, taking reasonable measures themselves, and then to recover costs from an even wider range of persons. In the case of the NEMA provision, some level of citizen participation is envisaged through s 28(12), which allows any person to give the authorities notice of its intent to apply to a court for an order directing the authorities to exercise their powers under s 28, presumably this is intended as a mechanism to galvanise the authorities into action. The series of cases around the Harmony Gold matter (*Harmony Gold Mining Company Limited v Free State, Department of Water Affairs and Forestry* 2005 JDR 0465 (SCA); *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs & others* [2012] ZAGPPHC 127 (29 June 2012); *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs & others* 2014 (3) SA 149 (SCA)) have demonstrated the power of s 19 of the NWA to hold polluters to account, even where they have severed all ties with the land in question, provided that the directive is issued whilst the polluter still maintains a relationship to the land as owner, lessee or user. Like many of the other forms of contestation and resistance described in s 3.2.3 however, ss 28 and 19 are 'back-footed', helping the authorities and civil society to deal with pollution and ecological degradation to wetlands, biodiversity and ecological infrastructure where this has mostly already occurred.

1.1.4 Conclusions and recommendations

From the review above it appears that the establishment of the SES has strengthened the frame for resistance and contestation by improving the legislative basis for access to

information, requiring public participation in amendments of environmental authorisations, formalising the need for environmental audits that audit not only compliance but the capacity of the plans in question to protect ecological integrity, formalising the need for public participation upon mine closure, allowing any person to submit complaints regarding enforcement, and allowing for appeals to be submitted to the Minister of Environment. There is also hope that the newly-instituted Water Tribunal will play a significant role as a forum in which the merits associated with the grant of water use licences can be contested.

In other aspects, however, the legal framing does not allow for vigorous or effective resistance and contestation. This is particularly evident prior to the decision to prospect or mine being taken. Section 10 objections, resistance associated with access to land, and reliance on the Maccsand principle to align prospecting and mining authorisations with land use planning requirements have so far proved to be ineffective to balance prospecting and mining with the imperatives of protecting wetlands, biodiversity and ecological infrastructure. Resistance and contestation at this point is more imperative than at the stage at which extraction has already been authorised, as it affords a different form of protection of the natural landscape.

While the use of the rights articulated in the Bill of Rights and the constitutional principle of legality could be used to challenge the parts of the legal frame that are weak, this is a drawn out and risky process, unfairly placing the burden of reform on civil society.