



The Social and Labour Plan Series  
Phase 1: System Design  
Trends Analysis Report  
by the Centre for Applied Legal Studies

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# Contents

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I. Executive summary.....	6
II. Acronyms and glossary.....	8
III. Introduction.....	12
IV. Methodology.....	18
V. Introduction to the SLP system.....	23
VI. Role-players in the SLP system.....	33
VII. Trends observed in the study.....	38
1. Background information.....	38
2. Context.....	42
3. Nature and impact of mining company.....	50
4. Gender, race and class sensitivity.....	56
5. State of finality.....	60
6. Usability: form and structure.....	63
7. Inclusivity and transparency.....	65
8. Measures to address downscaling and closure.....	70
9. Housing allocations and development.....	73
10. Lack of communicable disease initiatives.....	75
11. Human resources development or education and training.....	75
12. Accountability.....	78
13. Implementability.....	81
14. Alignment.....	88
15. Financial provisions.....	90
VIII. Assessment of the system in light of findings.....	95
1. Adequacy of provision for community participation.....	95
2. Lack of distinction between greenfield and brownfield operations..	97
3. Inconsistencies between the MPRDA Regulations (40-46) and the Revised SLP Guidelines (2010).....	97
4. Critical details contained in guidelines rather than hard law.....	98
5. The adequacy of the definitions for key concepts.....	98
6. Clarity on level of detail of background information.....	100
7. Clarity on the process by which SLPs are compiled.....	100
8. Clarity on the roles and responsibilities of local government.....	101

9. The degree of provision for co-operative governance and regional co-ordination.....	101
10. Clarity on the role of traditional authorities.....	103
11. The problems with the amendment procedure.....	103
12. Inadequate provision for transparency.....	103
13. The sufficiency of parameters determining the financial provision and scale of SLPs.....	104
14. Transfer of public obligations to private bodies.....	105
15. Sanctions and recourse.....	105
16. Reporting.....	106
IX. Conclusions and recommendations.....	107
1. Recommendations.....	107
2. Going forward: Where to next for this project? .....	112
X. Endnotes.....	114

Due to the large amount of data collected and analysed for this report, please allow for a variance of between 1 and 4% in the statistics presented.

# I. Executive summary

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The legacy of mining in South Africa is one of stark disparity between mine workers and communities on the one hand, and mining management, financiers and shareholders on the other. Social and Labour Plans (SLPs) are one of the corrective measures chosen by the South African legislature to address this legacy.

Under this system, mining right applicants are required to draw up a set of undertakings to benefit mine workers and communities. These undertakings become binding on the approval of the mining right. However, there is mounting evidence of a stark disjuncture between the rhetoric in SLPs and the lived realities of mine-affected communities, who do not see the promised benefits of mining development materialising.

SLPs do not appear to cater for actual community needs, a sentiment that is echoed by mining communities throughout South Africa. At the most macro-level are critiques of the very manner in which the SLP system is conceived and the core assumptions underpinning it. These critiques maintain that the SLP system neither promotes long-term planning, nor incorporates sustainability considerations, preventing SLPs from serving their intended purpose. SLPs seem to be an unrefined tool for dealing with a complex and nuanced area involving a range of social, economic and environmental variables.

The Centre for Applied Legal Studies (CALs) has, for this reason, undertaken research into the effectiveness of the SLP system in meeting its objectives. This research is aimed at uncovering any failures of design and implementation, with the ultimate goal of suggesting measures to address these failures.

This particular report is the first of a series of publications. Its purpose is to present and analyse the findings of the first major stage of the research, which has been to study a sample of 50 SLPs to uncover trends at micro- (individual SLP design) and macro- (design of system) levels, in order to enhance understanding of these issues and suggest possible avenues towards addressing these challenges. These avenues will be elaborated in subsequent reports that will be informed by field research.

The structure of this report is informed by the findings of our assessment of the 50 SLPs. This report therefore comprises an identification of pervasive strengths and weaknesses in the 50 SLPs assessed, followed by an analysis of the features of the regulatory system which partially account for these trends. The main findings of the report are as follows:

First, the information on the background and context of the mining operation and its impact on affected communities tended to be vague and incomplete. Without an understanding of the affected community and the history of the mining operation it becomes impossible to predict impact. A second and directly related theme, was that SLPs on the whole did not clearly explain the nature and extent of the operation's impact. In particular, very few SLPs addressed negative impacts at all.

Third, there was a near-universal absence of acknowledgment of, and engagement with, the disparate impacts of mining on the lines of race, gender and socio-economic status. Fourth, a significant number of SLPs lacked evidence of finality and completion, for example, the absence of signed undertakings and the inclusion of some programmes without targets and timeframes. Fifth, we found a significant proportion of SLPs difficult to navigate on account of inconsistencies in form and structure coupled with a frequent failure to draft fully legible documents. Sixth, as social beneficiation instruments, one would expect SLPs to be rooted in the needs and aspirations of communities and workers.<sup>i</sup> However, we found that a vast majority of SLPs made no mention of the processes of consultation with communities in particular.

Finally, the majority of SLPs provided no evidence of clear mechanisms by which communities can hold companies accountable to their obligations. The overall thrust of our assessment of the regulatory system is that it is not capable of producing SLPs that can effectively contribute towards the transformative objectives as set out in the Constitution and mineral legislation. One reason for this is that the legal framework does not sufficiently regulate how SLPs are drawn up. In particular, it does not set clear requirements for the public participation of communities in the development of SLPs.

Further, this failure to provide a participatory framework extends throughout the life cycle of SLPs. The regulatory system does also not provide sufficiently clear contextual considerations by which the regulator can evaluate the adequacy of SLPs. The specification of the majority of SLP drafting requirements, including the background information regarding the mine and the community, in guidelines without legally binding status, further weakens the effectiveness of the regulatory framework. It should be noted that this analysis is limited to our desktop research of SLPs and does not yet include an audit on the implementation of SLPs. This second phase of the project may reveal additional deficiencies in the SLP regulatory system. Based on the problems identified, this report contains recommendations to guide the conversations required to achieve a more effective and inclusive system of social beneficiation in the mining sector. These recommendations can be grouped into five themes.

The first of these themes is the need for greater specificity and standardisation regarding the content of SLPs and the process by which they are compiled. Second, the binding status of the SLP system needs to be fortified through measures such as moving core content requirements of an SLP from guidelines to the regulations, which have binding status. Third, the regulatory system should expressly provide inclusive and transparent processes for worker and community participation throughout the life cycle of SLPs. Fourth, the framework needs to provide for structures of accountability both internal to the company and between the company and stakeholders. Finally, meaningful participation by communities requires that they are informed about the SLP process and have access to technical and social-scientific expertise that is equivalent to that enjoyed by mining companies. Mechanisms therefore need to be provided for addressing this gap. Consequently, a number of concrete interventions need to be made to ensure gaps are closed and the system is responsive to its intended beneficiaries, namely workers and communities.

## II. Acronyms and glossary

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### 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.' <sup>ii</sup>
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.
Decommissioning	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.
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 the attainment of socio-economic goal
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.

## III. Introduction

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The Centre for Applied Legal Studies (CALs) is a civil society organisation based at the School of Law at the University of the Witwatersrand, Johannesburg. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of academia and social justice. 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 intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way that makes creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations. CALs also incorporates other disciplines (such as film and social work) into its work and is conscious of the transformation agenda in South Africa.

The SLP 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 Programme adopts as the basic premise of its work that a healthy environment is critical for the development of all people, especially poor and marginalised communities who have limited options in choosing the environment in which they live. 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 the extractives industry.

This project builds on previous experiences of the CALs Environmental Justice Programme in its work on three distinct phases of the SLP development mining life-cycle. These are: (i) the design of an SLP; (ii) the implementation of an SLP; and (iii) the fulfilment of SLP obligations at the point of mine closure.

- 1. CALs' work in relation to SLP design:** In 2013 CALs provided expert assistance in support of a partner human rights law organisation during the design phase. A particular value of this work was the insight gained into the development of the SLP. The community, comprised of a number of villages, was engaging a mining company that wanted to mine platinum in the areas in which they were situated. CALs provided advice in relation to the possible social impacts of the mine, with a particular focus on how the SLP of the mine in question should be designed to address the forecasted social impacts. SLP. This work revealed the flaws in the SLP system in relation to the design phase of SLPs, especially with regard to community participation.
- 2. CALs' work in relation to SLP implementation:** Following the Marikana Massacre, CALs made submissions to the Marikana Commission of Inquiry on Lonmin's compliance with its SLP on behalf of the South African

Human Rights Commission (“SAHRC”). This submission provided insight into the implementation of SLPs and the methodology by which compliance could be evaluated. The Environmental Justice Programme benefited from partnership with SLP specialists Managing Transformation Solutions (MTS), who provided input on the SLP system and its challenges.

3. **CALS’ work in relation to mine closure:** In 2012 and 2013, CALS represented a community seeking to hold a large mining company accountable for its social, economic and environmental obligations occasioned by the closure of the mine. Failures of implementation and communication caused many undue hardships in the community. CALS therefore gained experience of the social, economic and environmental challenges associated with mine closure.

These experiences have unearthed the need for this broader SLP project, laying a foundation for examining the SLP system at a holistic level. To our knowledge, this is the first in-depth analysis of the South African SLP system from a legal and compliance perspective.

## 1. Context of the problem

Democratic South Africa inherited a profoundly unequal mining sector premised on the exploitation of the low-wage migrant labour of black South Africans.<sup>iii</sup> This inequality was facilitated by the dispossession of land, the levelling of land taxes and the reservation of higher paid jobs for white workers by colonial and apartheid administrations.<sup>iv</sup> The experience of mining was therefore one of wealth generation and opportunity for a white minority; and dispossession, exploitation and occupational disease for the black majority. 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.<sup>v</sup> Transformation of the mining sector therefore was a key objective of the first democratically elected governments in South Africa.<sup>vi</sup>

Transformation of the sector, and the entire economy, is also a constitutional imperative. A founding value of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) is ‘the achievement of equality’ which requires substantive equality to be realised.<sup>vii</sup> This means that all people living in South Africa are able to actualise and realise socio-economic rights and an environment conducive to health and well-being.<sup>viii</sup> Given the context of past and ongoing dispossession of communities in the mining process, substantive equality requires that this legacy be meaningfully addressed through changing the distributions of harms and benefits and enhancing the influence of communities in decision-making about the direction of development.

Justice for emerging black South African capitalists previously barred from participating in the business of mining and for mine workers who had been exploited were therefore priorities of South Africa’s first democratic administrations. At the same time, justice for black communities negatively impacted by mining activities was not given the same level of prioritisation. This was

due to the main parties in the negotiations being the government, the mining sector and organised labour. Mining communities were not recognised as a sector in government and business circles, and this failure is a severe deficiency of the mining regime that emerged out of these negotiations.

The culmination of these negotiations was the passing of the Mineral and Petroleum Resources Development Act ("MPRDA" or "the Act") in 2002, which came into effect in 2004.<sup>ix</sup> The overarching framework for the Act is informed by the vision of the Freedom Charter, which called for mineral wealth to be owned by all people in South Africa. The approach of the MPRDA is to vest mineral rights in the state, thereby allowing the state to act as custodian of the mineral wealth on behalf of all who live in South Africa.

A number of mechanisms are created in order to realise transformative objectives of increasing Historically Disadvantaged Person ("HDP") participation and ensuring that mining contributes to the development of affected communities.<sup>x</sup> Section 100(2) of the MPRDA requires the Minister responsible for minerals ("the Minister") to develop a charter 'that will set the framework, targets and time-table for effecting the entry of HDPs into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.'<sup>xi</sup> The results have taken the form of 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 ("Amended Mining Charter").

The second of these interventions is the creation of the social and labour plan ("SLP") system. The rationale behind this 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.<sup>xii</sup>

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 ("DMR") in respect of human resources and local economic development. On the granting of the mining right, these programmes 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.<sup>xiii</sup> 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 the life of mine.

It is within this context of pro-poor economic development and the mechanisms for wealth distribution that this research developed. We have at our disposal a mechanism designed to effect fair and proportionate distribution of the benefits of mining to all South Africans. And yet the system is not working. There is growing evidence that SLP obligations are often unmet. In responding to a question by a member of parliament ("MP") in the National Council of Provinces ("NCOP"), the Minister of Mineral Resources stated that as of 31 March 2015, a total of 240 mining right holders failed to comply with

their SLPs.<sup>xiv</sup> 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.

## 2. Aim of this report

CALS aims to interrogate whether the SLP system is achieving its aims and, if not, whether it is capable of achieving these aims through reforms addressing the design of this system and how it is implemented. To the extent that the system is capable of being reformed, CALS shall propose recommendations on how to improve its efficacy.

A critical indicator of the effectiveness of the system is the quality of the SLPs that are produced. This is so for a number of reasons. First, an SLP must be needs-sensitive, clear and workable as a necessary pre-condition for positive impacts from mining to be realised.<sup>xv</sup> Second, if the same types of deficiencies occur across numerous SLPs, it is likely that these are caused by problems at a systemic level.

This report therefore draws on an analysis of 50 SLPs in which we have sought to identify and explain trends regarding a number of indicators of soundness of design. While many of the systemic issues require empirical research that CALS is still in the process of conducting, one can also draw logical inferences between common deficiencies in SLPs and deficiencies in the framework legislation that allow for this.

This report, the first of a series, therefore aims to:

1. Identify trends in the design flaws of SLPs;
2. Illustrate the links between the deficiencies in the legislative system and deficiencies in the design of SLPs; and
3. Propose suggestions for reform to the legislative system and the design of SLPs to attenuate such design flaws.

On the publication of this report we aim to engage with all stakeholders who could use this report including communities, companies, parliament, investors, DMR officials responsible for approving SLPs and local government, with the hope that collectively we can deepen the understanding of the problems and facilitate the formulation of reforms or, if necessary, a better system.

## 3. Structure of this report

Chapter 2 explains the methodology used in researching and writing this report. This chapter will also explain how we arrived at our findings. One of the problems of the SLP system is that SLPs are not readily available. This speaks to a broader systemic problem with the system by which people in South Africa can access information held by government and the private sector through the Promotion of Access to Information Act ("PAIA").<sup>xvi</sup> For this reason, we have documented our experiences in seeking to access our sample SLPs.

Chapter 3 introduces the SLP system, explains the social and economic reasons for the system, the key legislative and policy instruments, the nature of the SLP model, the required contents of SLPs and the process of compiling and approving an SLP. The problems SLPs are required to address, including the unequal distribution of the harms and benefits from mining, are not exclusive to South Africa. For this reason we compare and contrast the salient features of the South African model with other countries with large extractive sectors.

Chapter 4 identifies the key role players without whom the SLP system cannot function. Having provided that context, the report moves to the main body of analysis in Chapter 5, where we identify the main trends that emerged from our research. This is organised by the themes that emerged from our analysis of the SLP sample and from our analysis of the legislative and policy instruments. Under each theme we present our findings on the quality of SLPs, which is followed by an analysis of the possible systemic causes of these problems at the level of the design of individual SLPs.

Chapter 6 constitutes an assessment of the SLP regulatory system in light of the report's findings. The report shall then, in chapter 7 propose a number of possible interventions to address some of these challenges. Some of these interventions primarily involve the legislature and executive, others communities, others Non-Governmental Organisations ("NGOs"), and still others the private sector. The suggested interventions will encompass change to legislation, regulations and policy, and the development of a toolkit to capacitate communities seeking to be involved in the SLP process and to enhance their efforts to hold companies and government accountable.

The report concludes by integrating the main findings and recommendations and providing a preview of CALS' forthcoming research and publications on SLPs. Having introduced the historical and organisational context that sparked this research and outlined the structure to be followed, this report shall now outline the methodology used in order to explain how we have arrived at our findings.



<b>THE SOCIAL AND LABOUR PLAN SERIES: PROJECT PLAN</b>	
<b>2014: ACCESS TO INFORMATION</b>	
PAIA Applications	Submit PAIA applications to the DMR and Mining Companies using physical and electronic methods of lodgement
<b>2015: DESKTOP ANALYSIS AND BEGINNING OF FIELD RESEARCH</b>	
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.
<b>2016: CONTINUATION OF FIELD RESEARCH</b>	
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 our report containing findings on the efficacy of SLPs in beneficiary communities and linking these to underlying issues of implementation.
<b>2017: STRATEGIC INTERVENTIONS</b>	
Develop Community SLP Toolkit	The toolkit will assist communities in understanding the SLP system, analysing SLPs and monitoring companies' compliance.
Workshops on research findings and SLP Toolkit	Conduct workshops with communities to capacitate them with legal knowledge and elicit ideas for an improved system as well as for the SLP toolkit.
Writing model SLP legislation and guidelines	Using our findings to develop model legislation for an improved mining social beneficiation system.
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 stakeholders on findings	Stakeholders will include communities, portfolio committees (Parliament), and officials responsible for SLPs (DMR), local government, mining companies and civil society.

## IV. Methodology

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This report needs to be understood as part of a phased project which moves from a trends analysis of a sample of 50 SLPs, to field research in a smaller sample of mine affected communities, to final recommendations for government and the development of toolkits for community use. Being the first in a series of project outputs, this report will focus on the first phase, i.e. the analysis of trends in the design of SLPs. This phase began with the selection of the mines/mining projects (SLPs apply to an individual mine) for which we would obtain SLPs. Our sample was designed, as far as possible, to provide for a range of mine sizes, company sizes (junior, medium and large mining companies), type of mineral and geographic location while remaining manageable given time and capacity limits.

### 1. PAIA Process

Gaining access to the SLPs in our identified sample was, in itself, an important part of the project as it illustrated some of the barriers to accessing the essential information, which directly affects communities. In requesting SLPs, we also sought to test the accessibility of SLPs to the public. This yielded information about the government and private sector views regarding the status of these documents. We obtained SLPs through simultaneously submitting physical PAIA requests to the DMR and electronic requests to companies using the South African History Archive's ("SAHA") online PAIA tracker. Due to the particular importance of SLPs being accessible to communities and workers, we have listed our main strategies, challenges and findings regarding the access to information work.

#### 1.1 Strategies

SLPs are records held by the DMR. In terms of PAIA, in order to request such an SLP, the requester must submit a Form A (requests for records held by a public body).<sup>xvii</sup> We therefore submitted the Form A request to the DMR. In addition, we simultaneously submitted a Form C request to each mining company. We did this for a number of reasons. First, the information is also held by the mining companies i.e. they must have an SLP for each mining right. Second, we were aware of the DMR practice of sending a 3rd party notice to mining companies in response to such a request. Simultaneous requests to the DMR and the company ensured that the company could begin processing the request prior to receiving the third party notice. Third, targeting both the mining companies and the DMR allowed us to test whether the companies and the DMR gave the same answer to our requests for SLPs.

From the beginning, CALS was conscious of the importance of effective communication and relationship building. This was due to our awareness of the tendency towards secrecy in government and the private sector and which sometimes manifests itself in suspicion of the intentions of requestors for information.<sup>xviii</sup> Thus we discussed every stage of the process with the DMR. Most importantly, before we submitted our request, we asked the department what form they would like the request to take. Following their ad-

vice, we submitted the DMR's departmental version of Form A in hard copy. The requests contained the following particulars of the information sought:

- The mine's current SLP and annual reports published pursuant to these SLPs;
- The name of the project for which the mining right was awarded and of which the SLP formed a condition; and
- The name of the mining company running the project and thereby responsible for the SLP.

The procedural and substantive requirements for requests for information held by a private body are slightly different from those required for information held by a public body. The most important difference is that when submitting an access to information request to a private body, applicants are required to show that the information is necessary for the exercise of another right, in addition to the right of access to information.<sup>xix</sup> This difference is reflected on the applicable form (Form C) which requires the requester to set out the rights to be exercised and the reasons why the information is required for the exercise of the rights. The argument linking the information to the exercise of the right needed to be cogent and relatively detailed.

CALS decided to submit our requests to mining companies electronically using the SAHA online system. This choice was made for a number of reasons. One factor was logistics. While all public requests were to be delivered to the same address (DMR), private requests needed to be addressed to each of the mining companies separately. Physical delivery would thus be highly time-consuming and costly. We were also interested in exploring the manner in which electronic requests were dealt with and, in particular, to enable us to share findings on how the SAHA PAIA request and tracking system worked.

### **1.2 Findings on the request process**

For ease of reference, our findings on the PAIA process are grouped under the following themes:

Levels of Compliance	60% of our requests to private bodies met with a response within the 30 day period, 30% elicited deemed refusals which is the term used in PAIA for the failure to reach a decision within the required period. One company requested that a non-disclosure agreement be signed before the document release.
Knowledge of PAIA	In the process of corresponding with the various companies, it became clear that knowledge of PAIA obligations varied greatly amongst companies. For example, while companies may refuse access to records on a number of bases, they are obliged under PAIA to receive, process and respond to PAIA requests within a 30 day period. The legal officer of one of the companies initially refused to give a contact person for submitting PAIA requests stating that they had been flooded with PAIA requests for information about company events. Other companies responded timeously to requests.

<p>Acknowledgment that SLPs are public documents</p>	<p>CALS encountered a diversity of views from within companies on whether SLPs were public documents. On one end of the spectrum were companies who informed us that we need not have resorted to PAIA since SLPs are public documents. On the other end of the spectrum, some companies were of the view that these documents contained such sensitive commercial, financial and environmental information that they could not be shared, even with such sensitive information redacted. In between were some interesting views. One company, for example, agreed to share the relevant SLP but refused to provide its annual SLP reports, on the basis that the latter contained confidential information and that, furthermore, as a private company (not listed on the JSE) its reports were not public.<sup>xv</sup> There is, however, nothing in the legislation that specifies that these reports should be confidential</p>
<p>Readiness to Release SLPs</p>	<p>Unlike so many requests for information submitted in the public interest, DMR did in fact grant our request. In contrast, as many as 47% of our requests to companies were met with a refusal whether deemed or express.</p>
<p>Quality of records management</p>	<p>Our experience with records management in the public sector was that, first, the location of documents often took a considerable time and, second, there was evidence of inconsistent standards of records keeping. For example while most DMR regions categorised information by company, one of the regions categorised information by farm name.<sup>xvi</sup></p>
<p>Effectiveness of systems for processing PAIA requests</p>	<p>With regards to the DMR, a key finding was that while access was granted by national DMR (Legal Services), there were discrepancies between the handling of access by the regions. For example, one of the Regional Managers believed, incorrectly, that following the submission of the national request, an additional PAIA request still needed to be submitted to the region. There was also a significant lack of uniformity in private sector processes especially with respect to the person who processes and approves the request. While we expected the requests to be handled by information officers, this was not the case for many of the companies. Many of the online PAIA manuals, as per companies' statutory obligations, gave incorrect contact details.</p>
<p>Accessibility of process</p>	<p>With regards to the DMR, our experience was positive in that access was ultimately granted. However, this was the result of considerable engagement. Maintaining this dialogue is relatively time-consuming, especially for individuals and communities whose cannot do so during work time. Further, the department's preference for physical submission is costly to communities residing far from DMR offices. Many of the mining companies adopted a very high threshold for justifying that information was required for the exercise of a right. This diminishes the prospect of successful requests for the majority of people who will not be trained in legal argumentation. Further, PAIA manuals tended to be buried deeply in websites and contained out-dated information on how to lodge a request.</p>

## 2. Formulation of an analysis instrument

As stated above, one of the problems with the SLP system is the lack of uniformity in the content of SLPs. This makes it very difficult to assess the extent to which SLPs are adequately designed. It was therefore important to develop an instrument by which SLPs could be assessed. Once we had completed the PAIA process, we began to develop an analysis instrument, into which standard SLP content and data could be inputted. The instrument was informed by the engagement with a variety of SLPs and previous work and engagement with industry specialists. It contained questions grouped under themes, which would test SLPs for the elements we believed to be critical for effective SLPs and for indications of context sensitivity, inclusivity and sound planning. These themes included, amongst others:

1.	The quality of information about the <b>history</b> of the mining operation.
2.	The <b>user friendliness</b> of the document.
3.	The <b>comprehensiveness</b> of the document (including whether it addressed all the items required by the regulations and guidelines).
4.	The <b>sensitivity</b> of the document to the environmental, social, cultural and economic context of workers and communities.
5.	The extent to which the SLP evidenced community and worker <b>participation</b> in its design and provided a framework for continued participation throughout the life cycle of the SLP
6.	The degree of <b>planning</b> for projects evident in the document.
7.	The clarity of the <b>divisions of responsibility</b> for the realisation of project milestones.
8.	Whether the <b>financial provision</b> accounted for all projects.

The instrument uses a system where each question is assigned a row and corresponding columns reflect:

1. the finding;
2. the evaluation of the extent to which the SLP met the requirement; and
3. a rating from zero to five, with five representing complete fulfilment and zero representing a complete failure to address the matter.

Due to the length and detail of the instrument, we also included a comments section at the end for a succinct summary of the most important findings organised under key themes. This comments section formed the main basis for our findings in this report. Drawing on the instrument we captured the answers to a number of questions into an excel spreadsheet. This was a lengthy exercise involving capturing over 4000 data points.

To refine the analysis in our report we invited a number of close partners in the NGO world, SAHRC and communities to workshop the findings and recommendations of the report. We gained valuable insights and we hope this report captures key questions and comments that were raised.

As we move into the next phase of the project, CALS also plans to draw on the instrument to develop a toolkit designed to be used by communities seeking to participate at different stages of the SLP life-cycle.

### **3. Ethics process**

Being part of the University, we were required to obtain ethics clearance for any interviews on 'human subjects'. The contents of ethics applications include consent forms, participation sheets explaining the aim and methodology of the project, and a project-specific questionnaire. Application to the Human Research Ethic Committee at Wits was successfully undertaken to gain approval to commence field research.

### **4. Field research**

In addition to our textual analysis, a core component of this project is field research, to obtain evidence of whether SLPs are having the intended impact on the target communities, how SLPs are being experienced by different role players (including communities, the DMR and company management), and the challenges of implementation. As our analysis of SLPs led to hypotheses about the design process (including the extent of community participation) the field research could also provide an opportunity for testing these hypotheses.

This will, due to limited resources and capacity, involve a smaller sample of SLPs. We have elected to follow a semi-structured interview approach, in which we develop a set of questions but also allow for the possibility of asking further questions based on the responses of interviewees. Although the first component of our field research was conducted in 2015, the results of this aspect of the project will be written up in a separate report once we have completed the full field research programme.

## V. Introduction to the SLP System

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SLPs can be viewed as part of a broader project aimed at addressing the legacy of colonialism and apartheid, reconstructing society along egalitarian lines, and building a sense of common nationhood which commenced with the founding of South Africa's first democratic dispensation in 1994 and which is signified by the term 'transformation'.<sup>xxii</sup> The mining sector has historically been both a central plank of the South African economy and a site of the system of racial wealth inequality.

As a consequence, the transformation of the mining industry has been a central imperative in constitutional South Africa. The democratically-elected parliament passed the MPRDA in 2002, which vests mineral rights in the state and seeks to use the state's power to grant mineral rights to advance transformation. It does so through promoting greater participation by historically disadvantaged persons ("HDP") in the mining industry and by introducing measures to ensure that mineral wealth results in tangible improvement in the lives of workers and communities. In the table on the page that follows, we have highlighted those MPRDA objectives that are directly of relevance to the SLP system.<sup>xxiii</sup> This is a testament to the extent to which the SLP system seeks to advance the objectives of the Act:

Given the depth of the social challenges in the sector, and the significant wealth of mining companies, it was decided that the mining sector should assume positive, developmental responsibilities that are ordinarily those of the government sector. The SLP system was the result.

The section below outlines the legal framework of this system. It will focus on three key issues of the regulatory framework, namely the aims of the system, how SLPs are formulated and what needs to be included in an SLP. When we refer to the SLP system we will be primarily referring to the objectives, obligations and mechanisms stipulated in the legislation, regulations and guidelines enacted under the MPRDA framework which specifically pertain to SLPs.<sup>xxiv</sup> At the same time we will take into account and refer to other relevant legislation, guidelines and policy where relevant to these obligations.<sup>xxv</sup>

a.	recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
b.	give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
c.	promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
d.	substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

e.	promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
f.	promote employment and advance the social and economic welfare of all South Africans;
g.	provide for security of tenure in respect of prospecting, exploration, mining and production operations;
h.	give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
i.	ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

### 1. Objectives of the SLP system

OBJECTIVES OF THE SOCIAL AND LABOUR PLAN SYSTEM		
Regulation 41 of the MPRDA	a.	To promote employment and advance the social and economic welfare of all South Africans.
	b.	To contribute to the transformation of the mining industry.
	c.	To ensure that holders of mining rights contribute towards the socio-economic development in areas in which they are operating".
Guidelines on Social and Labour Plans 2010	a.	To promote economic growth and mineral and petroleum resources development in the Republic.
	b.	To utilise and expand the existing skills base for the empowerment of HDSAs and to serve the community.

### 2. Legal and policy sources of the SLP system

The ultimate source of the SLP system is the MPRDA, the primary piece of legislation that governs mining in South Africa. The conditions that must be satisfied for the Minister to grant a mining right to the applicant include that the applicant is able to financially provide for the SLP and that granting the application will further the transformative objectives of the Act through measures such as the SLP.<sup>xxvi</sup> Compliance with the SLP is both a requirement for the renewal of mining right and an obligation of a mining rights holder.<sup>xxvii</sup> The holder is further obligated to submit annual reports to DMR on its compliance with its SLP ("annual SLP reports").<sup>xxviii</sup> While not expressly linked to SLPs, the MPRDA provisions on consultation in the mining right process also can be read into the framework.



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 Mineral and Petroleum Resources Development Regulations ("MPRDA Regulations") and the DMR's Revised Social and Labour Plan Guidelines of October 2010 ("2010 SLP Guidelines").<sup>xxxix</sup> The 2010 SLP Guidelines contain significantly more detail than the MPRDA regulations regarding the content and form of SLPs.<sup>xxx</sup> For example, with regards to content, the 2010 SLP Guidelines list an extensive range of indicators that should be included in the social and economic background section for local economic development ("LED").<sup>xxi</sup> With regards to form, the 2010 SLP Guidelines set out the layout for project plans including human resources and LED initiatives. Crucially, the only mention of the 5-year SLP cycle is in these guidelines, which provide for years 1-5 in their project plan layouts. The appropriateness of placing much of the form and content of SLPs in non-binding guidelines will be interrogated subsequently in this report since this dilutes the binding nature of the SLP system, which constitutes its strength.

The SLP system cannot be viewed outside of the context of the laws and policies enacted to promote the participation in the economy by HDPs. The key governing piece of legislation remains the Broad-Based Black Economic Empowerment Act ("BBBEE Act").<sup>xxxii</sup> There are also various Codes of Good Practice, which utilise a scorecard to assess entities' (within sectors) compliance with BEE. The Broad-Based Socio-Economic Charter for the South African Mining Industry ("Mining Charter") is the code of good practice applicable to the Mining Sector. Its specific objectives are contained in the following table.

<b>BROAD-BASED SOCIO-ECONOMIC CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY CODE OF GOOD PRACTICE</b>	
a.	Promotion of equitable access to the nation's mineral resources to all people of South Africa;
b.	Expansion of meaningful and substantive opportunities for all HDSAs to enter the mining industry and to benefit from the nation's mineral resources;
c.	Utilization of the existing skills base for the empowerment of HDSAs;
d.	Expansion of the skills base of HDSAs in order to serve the community;
e.	Promotion of employment and advancement of the social and economic welfare of mining communities and the major labour-sending areas;
f.	Promotion of beneficiation of South Africa's mineral commodities; and
g.	Enable social equity along with decent standard of living conditions <sup>xxxiii</sup>

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, nation-

al government's National Development Plan ("NDP") and National Growth Path (NGP) and, second, the integrated development plans ("IDP") of provinces and municipalities. 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.<sup>xxxiv</sup> 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 ("Municipal Systems Act").<sup>xxxv</sup>

Another dimension of developmental planning is spatial planning which aims to harmonise different forms of development through identifying nodes for particular forms of development. The newly enacted Spatial Planning and Land Use Management Act ("SPLUMA") constitutes the overarching legislative framework for spatial planning in South Africa with the aim of aligning spatial planning to constitutional development imperatives.<sup>xxxvi</sup> The overarching national policy framework is The National Spatial Development Perspective ("NSDP"), which aims to guide developmental planning at all levels of government towards alignment between infrastructure investment and development programmes.<sup>xxxvii</sup> The NSDP assists in co-ordination and co-operation through providing a shared planning methodology and by setting out principles to guide infrastructural and other development planning decisions.<sup>xxxviii</sup> One of these principles is that the government's social objectives will be most effectively realised through investing in infrastructure in 'economically sustainable areas with proven developmental potential.'<sup>xxxix</sup> This could translate into investing in the mining hubs across the country.<sup>xl</sup> The approach to government spending this policy leads to therefore links with provisions of the MPRDA pertaining to SLPs.<sup>xli</sup>

The SLP system is also in alignment with prior-existing labour law provisions addressing mine closure and retrenchments. Both the regulations and the guidelines provide for 'processes pertaining to downscaling and retrenchment.'<sup>xlii</sup> This is a vital component of the system given that mines operate for a finite period and the political, social, economic and environmental impacts of mine closure are significant.<sup>xliii</sup> The provisions require companies to develop measures to ensure the diversification of skills and economic sectors in order to minimise the negative impacts of mine closure. They also require mining companies to establish future forums with organised labour in order to anticipate and address the economic and social impacts of closure.<sup>xliiv</sup> The institution of the future forum and the objectives of minimising the economic impacts of closure had been introduced prior to the MPRDA Regulations and SLP Guidelines, through a National Economic Development and Labour Council ("NEDLAC") agreement, which was translated into guidelines.<sup>xliv</sup>

SLPs must also be viewed in the context of the codes of good practice regulating the ethics of companies. The overarching code governing South African Companies is the King Code of Governance Principles, now in its third iteration.<sup>xlvi</sup> King III applies to corporate entities in the private, public and non-profit sectors.<sup>xlvii</sup> Features of King III with particular relevance include its increased emphasis on sustainability and advocacy of integrated reporting

and, in particular, its espousal of a more inclusive 'stakeholder-based' model of doing business. Crucially it provides that reporting should include the engagements with all stakeholders.<sup>xlviii</sup>

### 3. How are Social and Labour Plans formulated?

SLPs are drafted by mining companies with an interest in mining in a particular area and are 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. Mining companies with rights granted under the pre-MPRDA system (old order mining rights) are also required to submit an SLP with their application for conversion of the old order right to a mining right under the MPRDA.<sup>xlix</sup> 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 5 years with new commitments until the mine closes.<sup>i</sup> 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.<sup>ii</sup> 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.<sup>iii</sup>

### 4. What needs to go into an SLP<sup>liii</sup>

#### 4.1 Summary of required content for SLPs

Regulation 46 of the MPRDA identifies the required content for all SLPs and is augmented by the 2010 SLP Guidelines. The following table summarises the mandatory sections in SLPs and the purpose each is meant to serve.<sup>liv</sup> While the table captures much of the rationale for and basic content of SLP sections, two of these, namely the human resources development and LED sections, merit brief elaborations as they constitute the main substance of SLPs.

Section Title	Core Objective(s) of the Section
Preamble Section 46 (a)	The preamble provides an overview of the mine's business plan for the next five (5) years
Human Resources Development Programme Section 46 (b)	The core focus of this section is to demonstrate how the operation will provide skills development opportunities to its workers and to community members. These should include the right mix of skills applicable within and outside of the mining sector to ensure improved employment prospects of workers and community members on the closure of the mine.
Local Economic Development (LED) Programme Section 46 (c)	This section must demonstrate how the mine will support and contribute to the socio-economic development of mining communities (both host communities and other labour sending communities) aligned to the relevant IDP. It should facilitate development of economic linkages to

	sectors other than mining to ensure that there are other sources of employment/ business opportunities during and after mine operations. The projects fall into two (2) main categories, as identified by the 2010 SLP Guideline namely, Infrastructure Development and Income Generating/Poverty Alleviation programmes. Provisions for housing and living conditions and nutritional welfare of the workforce are also required within this section of the document.
<b>Processes pertaining to management of downscaling and retrenchment Section 46(d)</b>	With the inevitable mine closure in mind, provisions are required by the mining right holders to assist mine workers to access employment/business 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.
<b>Financial Provision Section 46 (e)</b>	This section contains the budget for the implementation of all sections of the SLP.
<b>Undertaking and Communication Plan Section 46 (f)</b>	Mining right holders are required to provide a signed undertaking to deliver on the provisions of the SLP and to make it known to workers.

#### **4.2 The Human Resources and Development Programme**

Education is a critical component of human development. Improving access to education and skills levels is also vital for upward mobility in the economy. Skills training can bridge the gap between the skills levels of communities and the skills required by the mining company and advance the career progression of HDSA workers.

Education and training can also provide alternative work opportunities for communities who cannot be absorbed by the mining industry and for workers when mines close as they inevitably do. SLPs are therefore required to include programmes of training and skills development for both workers and community members. The following table sets out the minimum core elements that must be present in all SLPs' human resources development sections:

1.	Skills development plan including adult basic education ("ABET") but which should also include learnerships, core skills, portable (transferable) skills programmes
2.	Career progression plans for HDSA workers
3.	Mentorship plan
4.	Bursary and internship plans for learners
5.	Employment equity strategies and targets with focus on HDSAs in management and women in mining

### 4.3 Local Economic Development Programme

LED programmes are designed to ensure mining wealth is converted into the socio-economic development of communities. The regulations and 2010 SLP Guidelines provide for two broad types of programmes, namely infrastructural (basic services and infrastructure) and income generating projects (support for or the creation of local businesses or co-operatives). The LED section is comprised of a number of elements, which are set out in this table as defined in the regulations and 2010 SLP Guidelines.

<b>Social and economic background</b>	This section contains human development indices in the major labour sending areas and include levels of education and access to basic services. <sup>iv</sup> This is important because LED project formulation and planning requires knowledge and understanding of the context of the area and the needs of inhabitants. This should be informed by the socio-economic impact assessment conducted as part of the environmental impact assessment.
<b>Key economic activities in the area</b>	This section requires that the economic sectors in the area be identified and their contribution to the local economy and to local employment be specified. This assists in understanding linkages in the local economy, which are vital for the sustainability of businesses. It is also relevant to determining the market demand for various skills, which help inform the choice of portable skills to be offered.
<b>Impacts of mining operation</b>	The positive social and economic impacts need to be addressed in this subsection.
	The negative social and economic impacts need to be addressed in this subsection.
<b>LED Programmes</b>	A Needs analysis of the area must be provided. This should be informed by the municipal IDP.
	The LED section must include programmes designed to provide or upgrade infrastructure and basic services.
	The LED section must also include income generating projects, which refer to projects directed at either capacitating existing local businesses or setting up new businesses to be handed over to community members.
<b>Measures to improve housing and living conditions</b>	An assessment of workers' housing needs must be included.
	Measures to achieve the Amended Mining Charter targets for the conversion of hostels into single and family units must be included.
	Measures to facilitate home ownership by workers, as required by the Amended Mining Charter, must be included.
	Measures to improve health and nutrition of workers must be included.

### Procurement progression plan

This section details how the company will address the targets for procurement of capital goods, services and consumables from HDSA-owned or BEE companies defined in the Amended Mining Charter.<sup>lvi</sup>

## 5. South Africa's SLP system: a comparison with other countries' mine-community benefit schemes<sup>lvii</sup>

This Chapter will lay out the main findings from a comparative analysis of strategies for the social beneficiation of mining communities in six countries. There is a diversity of strategies in various countries where mining takes place. The strategies discussed in the chapter will be from South Africa, Nigeria, Australia, Papua New Guinea, Canada and Ghana. In choosing these countries we aimed to get a representative sample of countries with large extractive industries, traversing the Global South and the Global North.<sup>lviii</sup> In setting out the comparisons, the following will be examined: the legislative frameworks i.e. the type of regulatory model available; the sharing of responsibility between the mining companies and government; community participation and a brief assessment of how the South African SLP system fairs in comparison to the other countries.

### 5.1 Mandatory or voluntary nature of schemes

The South African SLP system is a mandatory rather than a voluntary approach to the social beneficiation of mine-affected communities. Legislation and regulations make the submission of an SLP a condition for eligibility for a mining right and once the mining right is approved, the developmental undertaking in the SLP becomes legally binding with a status akin to license conditions.<sup>lix</sup> In Canada, by contrast, while the practice is to conduct Impact Benefit Agreements between mine communities and mining companies, there is no specific piece of legislation requiring such agreements in the mining setting.<sup>lx</sup> The Canadian Constitution does, however, recognize a general duty to consult communities.<sup>lxi</sup>

Other countries such as Nigeria and Australia require agreements to be concluded between companies and communities.<sup>lxii</sup> In Australia agreements are required in terms of legislation pertaining specifically to the rights of the indigenous people such as the Aboriginal Land Rights (Northern Territory Act) of 1976 and the Native Title Land Act of 1993 which require mining companies to obtain an agreement with the communities who own the land. Where there are no indigenous communities identified, however, the decision to negotiate an agreement with the community is purely voluntary.<sup>lxiii</sup>

### 5.2 Licensing or contractual model

The South African SLP system is not founded on an agreement between mining companies and communities. Instead mining companies are supposed to draw up an SLP, *in consultation* with communities and municipalities.<sup>lxiv</sup> The SLP is then submitted to DMR. Many countries, including Nigeria, Papua New Guinea, Canada and Australia follow the approach of agreements between communities and mining companies whether regulated or volun-

tary. Papua New Guinea's Mining Act of 1992, is notable as it provides for several types of agreements. One of these, known as the Mining Development Contract ("MDC") is usually between the company and the state. The MDC identifies the type of infrastructural developments that will benefit the mine and community, for example public access rights and company obligations with respect to the operation, maintenance and management of the agreed infrastructure. The Minister is accorded the discretion whether or not to require an MDC and the factors s/he must consider include the size or distribution of a mineral deposit, the mining method, the infrastructure required and financial considerations.<sup>lxv</sup>

Another type, the Compensation Agreement is agreed to and registered before the mining company enters into the mining area.<sup>lxvi</sup> This agreement is between the landholder and the mining company. The conclusion of this agreement is required before the company can enter to carry out mining-related activity.<sup>lxvii</sup> Contract law is applicable to any breach.<sup>lxviii</sup> The weakness of a purely contractual model (without regulatory oversight), is that the content of the agreement will be determined by parties with very different resources and power bases, leading to a potentially skewed and unfair agreements.

### 5.3 Community participation

In South Africa, communities must, along with workers, municipalities and other relevant government stakeholders, be consulted in the process of designing an SLP. There is, however, less legislative clarity regarding the role of communities in the implementation, compliance monitoring and amendment of SLPs, as well as in the processes pertaining to decommissioning, downscaling and closure. In contrast to countries such as Australia and Nigeria, communities are not formal parties to an agreement. In theory the agreement approach, by affording communities the status as an equal partner in the negotiation process, increases their influence over the agreement. However, the experience in countries such as Papua New Guinea and Nigeria is that meaningful consultation often does not occur. Studies in Papua New Guinea, for example show that the power imbalances between communities on the one hand and mines and governments on the other often result in agreements that are not specific enough to be enforceable.<sup>lxix</sup> In Nigeria, there are studies showing that many communities do not know of the laws that protect them and that actual levels of community participation are low.<sup>lxx</sup> Another weakness of the legislation is its failure to provide for oversight by the Ministry over the process of identifying the communities and representatives for the purpose of negotiations.<sup>lxxi</sup>

### 5.4 Evaluation

The strength of the South African model is that it is mandatory, in contrast to countries like Canada and Ghana where it is discretionary. Further, it is preferable that the obligations under the South African SLP system are of a public rather than purely contractual nature, as this gives government the power and duty to pro-actively monitor and enforce compliance. Under the law of contract, an aggrieved party has to approach the court, which is costly to communities who are typically under-resourced. However, the negative consequence of not requiring the agreement of communities and

workers is that they will have less opportunity to influence the content of the plan that directly affects them. A way to combine the benefits of both approaches could be a hybrid model. This might involve the conclusion, under the oversight of DMR, an agreement between communities, workers and the mining company. Once approved, this agreement would become a condition of the mining right.

What was, however, notable from the literature, is that regardless of the model, participation is often limited, and agreements are often vague and not implemented.<sup>lxxii</sup> This is suggestive of a significant power imbalance and indicates that the capacitation of communities is as, or more, important than the particular regulatory model followed and constitutes the missing link in most jurisdictions. Transparency, rather than a deficit confined to the South African system, is characteristic of other jurisdictions as well and underscores the importance of unambiguous transparency requirements in the system. Not surprisingly, challenges in implementation and mechanisms of accountability and compliance monitoring were detected in several other countries such as Nigeria and Papua New Guinea.<sup>lxxiii</sup> This shows that, especially for contexts of extreme power imbalance and limited government capacity, accountability mechanisms such as auditing and enforcement need to be carefully designed and built into the regulatory framework.



## VI. Roleplayers in the SLP System

Like all regulatory systems, the SLP system is designed to achieve a positive social impact through mandating the allocation of resources 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 answer the following questions:

- (i) who are the main role players?;
- (ii) what are the roles and responsibilities of each role player?

This section will, therefore, introduce the role players critical to the functioning of the SLP system.

### 1. Identifying the key role players

The below table sets out, first, the primary role players without whom SLPs cannot be realised in any form, and, second, the secondary role players, who will typically be involved in aspects of the SLP but not necessarily in defining the basic structure of the SLP. The extent of secondary role players influence and involvement will vary according to the content of programmes chosen for the particular SLP. Finally, there is the category of tertiary role players, such as civil society, that do not have a formal role in the system but who may work in partnership with formal role players such as communities. It must also be noted that under the present legislative and policy framework, communities, trade unions, and traditional authorities are treated as secondary role players. However, we are firmly of the opinion that each of these is of comparable importance to the role players the law recognises as primary, namely the DMR, local government and mining companies.

Primary	Local government
	Mining companies and consultants
	The DMR
	Communities, community-based organisations and representatives
	Workers and trade unions
	Contract workers
	Traditional authorities
Secondary	Investors (Financial institutions and shareholders)
	Department of Labour ("DOL")
	Department of Environmental Affairs ("DEA")
	Department of Water and Sanitation ("DWS")

Secondary	Department of Basic Education
	Department of Human Settlements
	Department of Rural Development and Land Reform ("DRDLR")
	Department of Planning, Monitoring and Evaluation ("DPME")
	Relevant Provincial Departments
	Local Business
	Local Education Institutions
Tertiary	Civil Society/NGOs

### 1.1 Local Government (Municipalities)<sup>lxxiv</sup>

As the sphere of government mandated with the implementation of local economic development under the Constitution and legislation, local government (including local and district municipalities), has a central role to play in the implementation of the SLP system. To give strategic direction to these efforts, each municipality is tasked with drawing up integrated development plans ("IDPs") which is an 'inclusive and strategic plan for the development of the municipality.'<sup>lxxv</sup>

These need to be informed by consultation with communities so that IDP initiatives reflect the needs and priorities of communities. As a consequence, municipalities are required to establish LED forums to ensure the pooling of energies, resources and ideas of local stakeholders.<sup>lxxvi</sup> Municipalities should encourage community and civil society participation. Municipalities will also need to engage mining companies on LED projects to be included in the SLP so that there is alignment between SLPs and IDPs.<sup>lxxvii</sup> Due to their local knowledge and historical relationships in the area, municipalities are arguably the best placed government entities to observe the delivery or non-delivery of LED programmes in particular.

### 1.2 Mining Companies

While communities and workers are the main rights bearers under the SLP system, and the DMR and municipalities the main regulators, mining companies are the main duty bearers under the SLP system. Companies are required to design and implement programmes to ensure workers and communities obtain developmental benefits from mining. The first of these obligations is to compile and submit the SLP as part of the application for a mining right or the conversion of an old order right to a new order right.<sup>lxxviii</sup> Second, the mining right holder is required to deliver on each of the undertakings contained in the approved SLP.<sup>lxxix</sup> Third, the mining company is required to provide specific documentation pertaining to its implementation and compliance with SLP at particular intervals and this includes its annual compliance reports and SLP implementation plans.<sup>lxxx</sup> Where SLP programmes cannot be realised in their present form, the mining rights holder must obtain the consent

of the Minister for amendments.<sup>lxxxix</sup> It is vital that communities and workers are allowed a meaningful role in the decision-making regarding such changes to prevent dilution of commitments. Stakeholder engagement throughout the SLP life cycle is required.<sup>lxxxix</sup> 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.

Mineral deposits will typically host many mining projects and companies. The environmental, social and economic impacts associated with mining will be felt across the whole area and will not always be clearly traceable to a single mine and project. The result will be areas with particular spatial and developmental characteristics and shared problems. It is critical that there is co-ordination of the efforts of all role players in these ‘mining nodes’ aimed at planning mining development in the public interest and addressing negative impacts. This includes co-operation between companies, though the regulator should assume primary responsibility for ensuring this co-operation occurs. MTS observe that for all the industry rhetoric of co-operation, the actual climate between companies is characterised by ‘competitiveness’, secrecy and ‘negativity.’<sup>lxxxiii</sup> As a result the propensity of companies towards collaborating on strategy and implementation is minimal.<sup>lxxxiv</sup>

### **1.3 Roles and responsibilities of the DMR<sup>lxxxv</sup>**

As the competent authority for administration of the MPRDA, including SLPs, the DMR has the most significant role of national government departments. The DMR’s role is central throughout the SLP life cycle. First, it manages the mining right application process in which the SLP is submitted as part of the required application documentation.<sup>lxxxvi</sup> It is the relevant DMR Regional Manager that receives and processes the mining right application, which is then sent to the Minister for approval.<sup>lxxxvii</sup> In so doing the DMR must ‘timeously’ 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.<sup>lxxxviii</sup> Our SLP sample provided evidence of the latter, as some of the SLPs contained comments by the DMR regarding the deficiencies of the first version submitted. The DMR is required, in terms of the MPRDA, to facilitate public participation during the mining right application and, 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.<sup>lxxxix</sup>

Second, the DMR is responsible for monitoring compliance with and enforcing regulatory requirements including the approved SLP.<sup>xc</sup> This requires ‘receiving, reviewing and approving Annual SLP Implementation Plans’ and the annual reports on SLP compliance submitted by mining companies.<sup>xc</sup> On-site inspections are vital to verify compliance.<sup>xcii</sup> Where non-compliance is detected, the DMR must use its powers of enforcement including remedial actions, notices and, where necessary, the suspension or revocation of the mining right. Instances of mining rights being suspended or revoked for SLP non-compliance are not common but we are aware of some examples<sup>xciv</sup> Third, the DMR will need to collaborate with stakeholders to ensure SLPs are implemented.<sup>xcv</sup> This includes mediation and arbitration as well as partic-

icipating in future forums and any other multi-stakeholder bodies set up to implement SLPs.<sup>xcvi</sup>

### **1.4 Communities<sup>xcvii</sup>**

Along with mineworkers, the main intended beneficiaries of the SLP system are the communities residing in the vicinity of the mining area as well as communities from other major labour sending areas. Communities are acutely affected by the negative environmental, social and economic impacts of mining, and therefore need to be compensated for such harms and, further, to derive net benefits from mining. It is therefore critical that SLPs, and the IDPs that provide the developmental priorities, are based on the actual expressed needs and priorities of communities.

Community organisations need to be involved in the compiling of the SLP. Equally, they need to be involved in implementation planning, monitoring and evaluation, as well as the deliberations regarding any amendments to SLPs.<sup>xcviii</sup> Unfortunately, in the communities with whom we have engaged, it has emerged that consultation tends to only be with a very narrow group of stakeholders and typically most community members have not seen or been informed of the SLP.

It is critical that community organisations have, or are, capacitated with knowledge of their rights under the MPRDA and the SLP system, and the available avenues of recourse.<sup>xcix</sup> Where communities are organisationally fragmented, companies and government must engage with all organisations representing a significant sector/s within the community.

### **1.5 Trade Unions**

A central role-player is organised labour, which represents mine workers who, along with communities, are the main intended beneficiaries of the SLP system.<sup>c</sup> Similarly to community representatives, trade unions in the mining sector, including 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.<sup>ci</sup> They, therefore, play an important role in the design of SLPs. Further, they should play a role in monitoring compliance with SLP obligations, in particular those obligations (such as education and training and workers’ housing and living conditions) that focus on benefiting workers.<sup>cii</sup> Worker representatives also sit on the future forum, which plans for and responds to the economic and social consequences of downscaling and closure.<sup>ciii</sup> In fulfilment of this role, many trade unions have started to focus on sustainability issues and/or established transformation/SLP divisions.

### **1.6 Traditional Authorities<sup>civ</sup>**

The role of traditional authorities is critical when mining occurs in areas in which the land is subject to communal ownership. In such cases there is frequent tension between elected municipal structures and traditional authorities over the exercise of government functions. There is frequent contestation between rival traditional authorities in a single area. Very significantly,

there is growing contestation in rural South Africa over the extent to which traditional authorities are accountable to the traditional community in the exercise of their traditional authority. There are contestations between interpretations of customary law that favour royal prerogative over ones that emphasise an active role by community members in decision-making regarding communal land.

Two judgments in 2015 have supported accountability to the community over royal prerogative. In the *Bakgatla-Ba-Kgafela* Communal Property Association case, members of that community sought to register a communal property association in terms of the Communal Property Association Act in respect of land restored to the community in a land claim.<sup>cv</sup> The Chief and the Traditional Authority had opposed this. The members of the association had been successful in the Land Claims Court but the Traditional Authority had this judgment overturned in the Supreme Court of Appeal ("SCA").<sup>cvi</sup> This, in turn, was taken on appeal to the Constitutional Court. In a landmark judgment the Constitutional Court held that the association met the requirements for registration and should be registered as a permanent association.<sup>cviii</sup> It affirmed that the Act was designed to '...safeguard the interests of members of traditional communities and empower them to participate in the management of a communal property.'<sup>cviii</sup> In the same month, a full bench of the Eastern Cape Division of the High Court dismissed an appeal by the Premier of the Eastern Cape against a decision which set aside the decision by the Premier to recognise a new headman of the Cala Reserve. This headman had been appointed by the amaGcina Traditional Council despite the prior election of another headman by community members.<sup>cix</sup> The Court held that Section 18 of the Governance Act requires that the appointment of headmen be in accordance with the actual customary law practiced by the particular community and that the practice of residents of the Cala Reserve was to elect their headmen.<sup>cx</sup>

There is growing acknowledgment of the frequency with which traditional authorities assume control over ownership schemes as companies negotiate mining on communal land. We have been informed that in some communities decision-making occurs in a far less open and inclusive fashion when it relates to mining than is usually the case. These ownership deals impact in subtle and overt manners on the design, implementation and 'delivery' of SLPs.<sup>cxii</sup> A volatile situation is created when communities living in poverty see wealth flowing to traditional authorities and/or the mining company.<sup>cxii</sup>

### 1.7 Mining Contractors<sup>cxiii</sup>

A substantial proportion of mine workers are employed by contractors to mining companies. It is arbitrary to deny contract workers the same benefits as permanent workers given that a worker's status as a direct or contract worker has no bearing on his/her contribution to the mining enterprise. However, the legislation does not clearly define the obligations of contractor companies in relation to the implementation of the SLP. There is a lack of guidance on how to integrate the initiatives by contractor companies with the rights holder's SLP.<sup>cxiv</sup> MTS found that there is an unevenness between mining companies as to whether contractors are incorporated into the SLP planning process and the manner in which this is done.<sup>cxv</sup>

## VII. Trends observed in the study

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Our analysis of the 50 SLPs has provided us with insights into the common issues regarding the design of SLP documents and the overall system. We have detected a number of common problems in the design of SLPs, which we hypothesise, are symptoms of a range of problems in the SLP system. The trends analysis will be broken down into a variety of themes. These include background and context of mining operation; nature and Impact; gender, race and class sensitivity; state of finality; usability; inclusivity and transparency; housing allocation; human resources and education; accountability, implementability and alignment; and finally downscaling.

### 1. Background information

The quality of the background information about the company, the operation, and past social interventions plays a significant role in the reader's ability to make sense of and evaluate SLPs. As stated above, a core implicit aim of the SLP system is to compensate for the negative impacts experienced by communities as a result of mining. It is therefore important to have a sense of the physical footprint and the mining method. It is also important to understand how long the mine has been in operation and, especially if mineral rights were acquired under apartheid, how the company acquired rights over the land and from whom.

Another aim is to ensure companies contribute to the development of the areas in which they operate, going to the core of the social license to operate. It is therefore important to have information regarding the projected turnover of the operation to obtain a sense of whether the investment in communities and workers is commensurate with the size and impact of the mine. Finally, background information is critical for tracking past compliance with SLP commitments, especially as we are now in an era in which many SLPs are for the second five-year cycle. In this section we shall examine the extent to which SLPs provide sufficient background and context regarding the operation.

#### 1.1 Year zero scenario

The historical impact of operations is hardly ever acknowledged in SLPs. Many of the mines have been operating for decades, yet one will usually have to resort to external research to ascertain this. This also means there is seldom any information as to previous environmental and social impacts of the mining operation.<sup>cxvi</sup> This is a significant absence because part of the implicit reason for the existence of SLPs is to compensate for the negative impacts on communities. Historical background is also required to understand whether the mining operation is 'greenfield', meaning a new operation, or 'brownfield', meaning an existing operation. The needs will tend to differ between the two types of operations. For example population influx is more likely to be primary concern for greenfield operations than brownfield operations, which will already largely have recruited their workers.

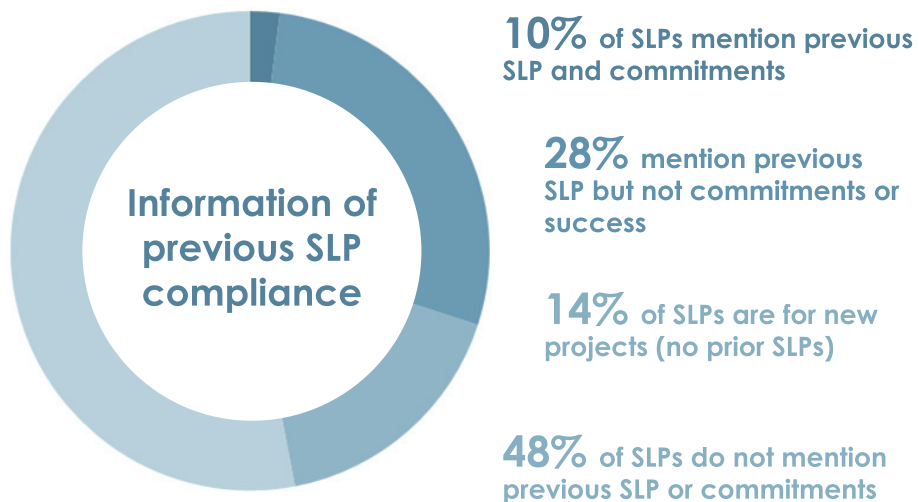
**Possible Explanation and Solution**

A possible explanation for the absence of historical information about mining operations is that such information is not expressly required by the law. In addition, the conversion of mining operations from old order to new order mining rights regulated by the MPRDA, in essence gave pre-existing operations a clean slate under the new regulatory system. This allowed companies to create the impression from the SLP that this was a new SLP without pre-existing impacts, relationships and interventions. The possible solution to this lacuna is prescribing the inclusion of detailed historical information in the regulations.

**1.2 Tracking compliance across SLP cycles**

We found that only 38% of SLPs made any sort of mention of previous SLPs and only 10% set out the obligations under the previous SLP. Although arguably pre-existing operations in 2004 were afforded a blank slate by the legislative changes, this reasoning cannot justify the failure to mention previous commitments under the current dispensation. It is important that these historical interventions are acknowledged so as to factor in previous commitments and plans in order to develop holistic and integrated developmental strategies.

The absence of information of previous commitments makes prior compliance difficult to track. It also makes it difficult to determine whether the SLP is providing additional positive impacts or merely (or primarily) meeting prior commitments, which were not honoured. Consider the example of a mine, which compiles an SLP, which runs from 2005 - 2009. It then submits a new SLP in 2009 that runs from 2010 - 2014. The problem is the new SLP like this might not make any mention of the SLP that operated from 2005 - 2009, and whether the programmes set out in the 2005 SLP were achieved or successful.

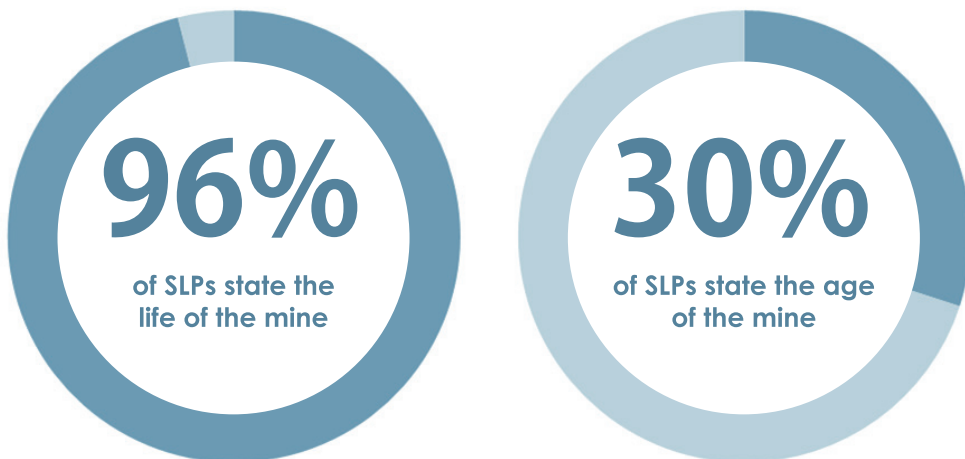


### Possible Explanation and Solution

There is an obvious advantage to not indicating whether previous SLP interventions were successful. This allows companies to represent unfulfilled prior commitments as fresh commitments, thereby conflating different SLP cycle undertakings. In the process, this enables a reduction in real benefits to workers and communities over the life of the mine. The possible solution in this case is for the DMR's practice of requiring 5-year progress reports to be formalised in regulations. Companies should also be required to draw on the progress report and list the outstanding commitments in the text of the SLP.<sup>cxvii</sup> This will provide a baseline for assessing the renewed SLP and provide an opportunity to track compliance across SLP cycles.

### 1.3 The age of mine tends not to be clearly indicated

While nearly all SLPs in the sample provided the life of mine (the number of years left of the mine's productive life), only a small number (30%) provided the age of the mine. This is not surprising as nowhere in the legislation, regulations or guidelines is this required. The age of the mine is important for other reasons than tracking SLP compliance such as assessing whether this is a greenfields or brownfields operation. This helps one locate the historical circumstances in which the mine emerged.



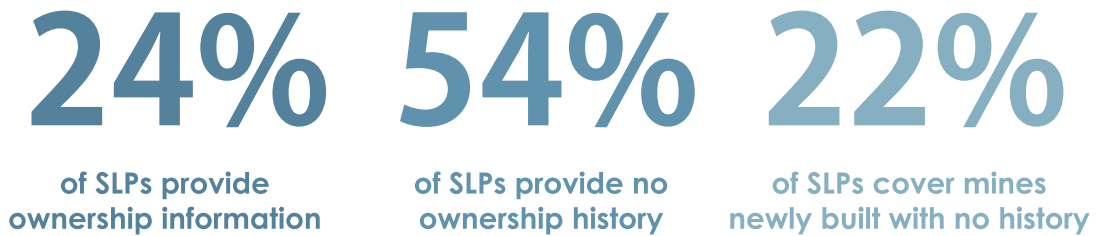
### Possible Explanation and Solution

The reasoning for this could purely be because this is not legislated. Not providing the age of mine further contributes to the impression of a year zero scenario. The solution is for the regulations to require the age of mine to be included in the preamble section.<sup>cxviii</sup>



### 1.4 The ownership history tends not to be provided

Information about ownership of the mining operation is important as it can provide a sense of which historical impacts the company is responsible for. It is important in determining responsibility for past impacts. We have found that only a minority (24%) of SLPs in our sample provided this.



#### Possible Explanation and Solution

The limited information about ownership in SLP pre-ambles could be linked to the fact that neither the regulations nor the guidelines require this. The solution is for the Regulations to require ownership history in the pre-ambble section.

### 1.5 Whether ownership structure clearly indicated

Ownership structure of corporations can be very complex, detailed and confusing to outsiders. Companies are commonly not made up of one simple entity but are mostly made up of a variety of sub-ordinate structures in which a variety of different entities can have a stake. Further, many mines are operated by joint ventures. Accountability to communities is hindered if there is no clarity on the company structure, the identity of shareholders and where the ultimate responsibility for SLP compliance lies.

There are instances in which parent companies and subsidiaries engage in responsibility shifting in relation to SLP commitments. Many SLPs do not have any information regarding the ownership structure of the company the mining right pertains to and of the group of companies. Where information is provided, though, this relates to the present ownership. This generally takes the form of a breakdown of the 26% BEE ownership as is required by the Mining Charter and Amended Mining Charter. This information is of particular interest given that mining operations are often either joint ventures or made up of a variety of shareholders.

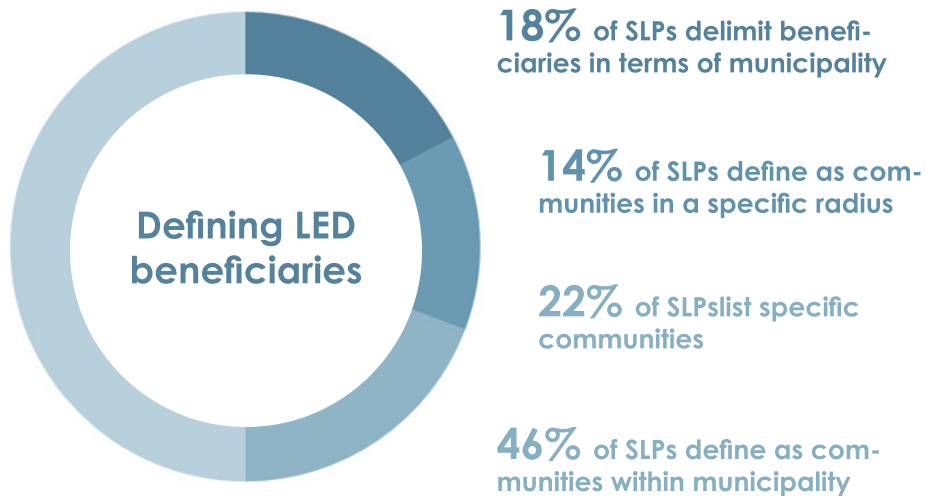
### Possible Explanation and Solution

Companies must clearly state the ownership structure of the mine and who is ultimately responsible. Our research demonstrated that this is often not done. This can in part be attributed to the fact that this is not legally required. A possible solution is to require, where there are Employee or Community Trusts/ownership structures in place, that these should be broken down and elaborated upon in terms of trustees, beneficiaries, form and frequency of contributions etc. Trusts and benefit sharing agreements are notoriously technical and difficult to understand. They need to be illustrated in a manner that can be understood by non-specialists as this encourages, transparency, accountability and inclusivity.

## 2. Context

### 2.1 Recognition and understanding of communities in SLPs

The vast majority of SLPs contained no clear definition of the communities they were supposedly designed to benefit. However, in relation to beneficiaries for specific LED projects, the pattern observed tended to mostly be a fairly even split between SLPs that didn't define the LED beneficiaries at all and those that used local and/or district municipality/s. A smaller proportion of the sample (14%) used a specified radius from the mine. A few SLPs did, however, expressly state that specific projects would be rolled out in particular villages or suburbs. The overall pattern indicates that a substantial proportion of SLP designers do not have a clear understanding of the most affected communities. This is evidenced by an inconsistency in beneficiary definition, which significantly impacts the ability of the operation to effect meaningful change.



### Possible Explanation and Solution

Defining a community is a notoriously difficult exercise as communities are not static and can be defined on a number of lines including being members of a traditional community or clan, geographical location and experience of a common harm. The first solution is expressly requiring inclusive community consultation by the mining company, which will compel companies to discover who the affected communities are. What would also be of use is if the guidelines provided listed factors that must be taken into account when defining a community. These factors could include but are not limited to proximity, environmental and social impact, and land ownership/land claims. Guidance should also be provided on the process for identifying beneficiary communities. Such guidance should take into account international standards and best practice regarding stakeholder engagement. Finally the regulations should require clear definitions of the broader community for the purposes of the SLP as a whole as well as for individual projects.

#### ***2.1.1 Tendency of SLPs to provide history of community***

Understanding the history of the community provides context and informs decision-making going forward, especially in relation to the needs analysis and social benefit strategies that need to be completed. Relevant history includes how and when the particular settlement emerged, any history of land dispossession under colonialism and apartheid, the history of politics in the area, the main economic activities and land uses over the years and immediately prior to the arrival of the mine.

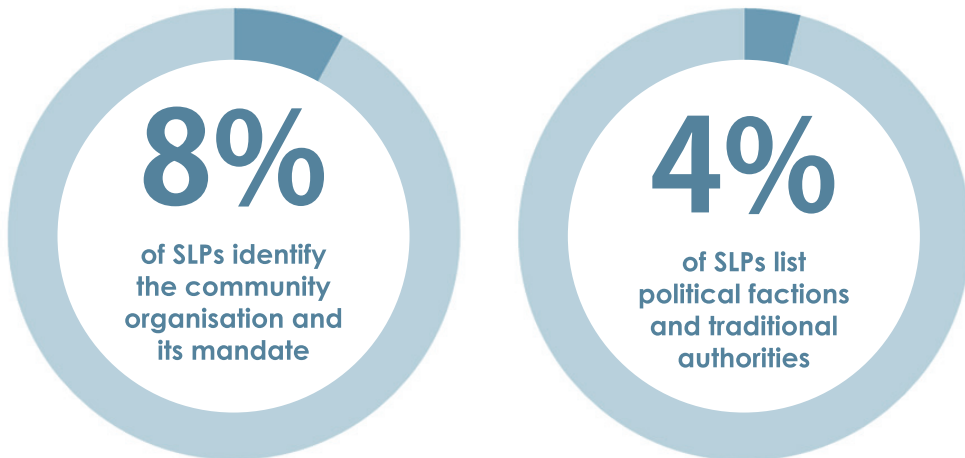
### Possible Explanation and Solution

It appears that many of the SLP authors fail to make the connection between the historical context and the needs of a community. A solution to this is prescribing that this assessment be undertaken during the social impact assessment ("SIA") phase and including this into the formulation of the SLP.<sup>cix</sup> Appropriate mechanisms to influence the content and standard of the SIA should be considered however in order to ensure the linkage between the two documents is entrenched. In the context of the SLP, the SIA should be used to identify opportunities, needs and appropriate project plans. More fundamentally, improved stakeholder engagement processes are required.

#### ***2.1.2 Tendency of SLPs to explain community leadership and organisation***

Studying and explaining the leadership structures and politics of an area are crucial to decision-making and how benefits are distributed within the community. It is critical that there is an understanding of the different political currents in the community, the interest groups that are implicated and the organisational form these distinctions take. It is also important to have an understanding of how widespread the legitimacy of various structures are, including civic associations and traditional authorities. Increasingly in customary land ownership systems, conflict is emerging between broader-based

organisations seeking more accountability and traditional authorities who wish to centralise power. In this research we have found a severe lack of clear credible information regarding leadership structures with only 8% of SLPs providing the community organisations consulted and their mandate. It is fair to say that not a single SLP has provided substantive information on the key organisations of the community and their source of legitimacy.



#### Possible Explanation and Solution

Often there is contestation over the legitimacy of traditional leaders and the extent to which the process of appointing these leaders should be democratic. These conflicts are heightened when mining companies arrive due to the promise of wealth. Unfortunately, in our many engagements with communities, as clients, and in our engagement with civil society coalitions, what emerges seems to be a persistent pattern of companies and government engaging with a narrow range of traditional leaders, whose legitimacy is often contested by the bulk of the people whom they claim to represent. A possible solution to this omission could be placing an obligation on the companies to detail the engagement with leadership structures. This could possibly include organograms of structures and mandates of traditional and political leadership in the area.

### ***2.2 SLPs do not provide clear, comprehensive accounts of social and economic circumstances of host and labour sending communities***

A particularly noticeable deficiency was the uneven extent and quality of background information of the areas applicable to SLPs. To cite a few examples, information on road infrastructure (present in 24% of SLPs), common health problems (present in 16% of SLPs), clinics (present in 22% of SLPs), schools (present in 24% of SLPs) and income distribution (present in 40% of SLPs) in the mining area and other sending communities were often not provided. Not having this information limits the author's ability to gauge the needs for particular basic services and infrastructure. If the SLP text does

not contain this information, it is impossible for the reader to assess whether an SLP is responding to the most pressing needs. Our assessment found that even less information was provided in respect of other labour sending areas.

#### Possible Explanation and Solution

The fact that understanding of the socio-economic context of the community is not being taken into account significantly impacts on the ability of the company to promote development in the area. The inference is that companies are not acknowledging the gravity of this obligation and the need to fulfil it in substance and not merely in form. The solution is to transfer the requirements for social and economic background information from guidelines to binding regulations. These provisions must identify and explain the link between the SLP background and the SIA. In addition, the regulations should specify that this information be updated every five years.

### 2.3 Completeness of data on human development

Accurate, complete and up-to-date information is critical as its absence leads to poor decision-making. The data used in SLPs is often incomplete and out-dated. Some SLPs contained census results compiled more than a decade previously. The over-reliance on census data can result in relatively out of date information, given that major censuses are only conducted every 10 years and the 'mini-census' is every 5 years.<sup>cx</sup> Very often data sets were incomplete. An example of an incomplete data set is providing the percentage of the adult population in the community that has matriculated without providing proportions within the population that have attained other levels of education including grade 10 and tertiary education.

# 40%

of SLPs provide complete data on income

# 46%

of SLPs did not provide information on income distribution

# 14%

of SLPs provide incomplete data on income distribution

#### Possible Explanation and Solution

SLPs need to be thorough, detailed and needs-responsive, yet without accurate data this task becomes very challenging. A reason for the limited data could be that data is notoriously difficult to come by as national data is frequently out of date and incorrect. This would require that companies would have to do their own assessments that are expensive and time consuming. A possible solution to these issues could be more frequent socio-economic assessments (possibly every three years) of mining related areas by the state in collaboration with mining companies and other stakeholders.

## ***2.4 Disaggregation of data by race and gender***

A gendered approach to decision-making can be facilitated by data that is disaggregated by gender in order to assess if there are socio-economic issues that disproportionately affect women. This can assist in designing programmes so that they can address gender disparities. Similarly, race data must be disaggregated in order to effectively address issues of racial injustice. Not a single SLP analysed disaggregated a significant proportion of the social and economic background information by race and gender.

### **Possible Explanation and Solution**

The reason for the absence of this information is simply that it is not an express legal requirement. The solution would therefore be to prescribe this in the regulations. Such information is readily available within the national census, and held by companies for employment equity purposes, and therefore should be included.

## ***2.5 Clear analysis of data sets presented***

Having access to accurate data, although a crucial aspect of the needs-based analysis, is only one aspect. Interpreting in the text of the SLP is also important, as this conveys a picture of conditions within the communities. Few of the SLPs analysed contained this contextualisation. Without such interpretation, the links between social phenomena, including those between essential services such as water, sanitation and housing are often not made.

### **Possible Explanation and Solution**

This analysis is possibly absent in SLPs because it is time-consuming and requires social science expertise. A possible solution would be to suggest this to companies in guidelines, thereby indicating that SLPs containing this will be more favourably viewed in the application process.

## ***2.6 SLPs do not evidence research beyond desktop analysis***

The vast majority of SLPs (96%) displayed no evidence that any field research took place, as the only information present was obtainable via desktop analysis often via Statistics South Africa publications.

### **Possible Explanation and Solution**

A possible reason for this trend is that field research, though crucial to understanding the community, is time consuming and requires specific expertise and training. Field research may also be intimidating for mining companies that are fearful of raising expectations particularly in green-fields operations. The solution is requiring some form of field research to be conducted in the process of designing SLPs. To reduce the burden such research could be co-ordinated with municipalities' existing developmental planning research.



**4%** of SLPs show evidence of the mine conducting its own community data collection

**96%** of SLPs are based purely on Stats-SA and other resources (e.g. Municipal IDP)

### **2.7 Extent to which SLPs acknowledge and incorporate the socio-economic assessment in terms of the EIA process**

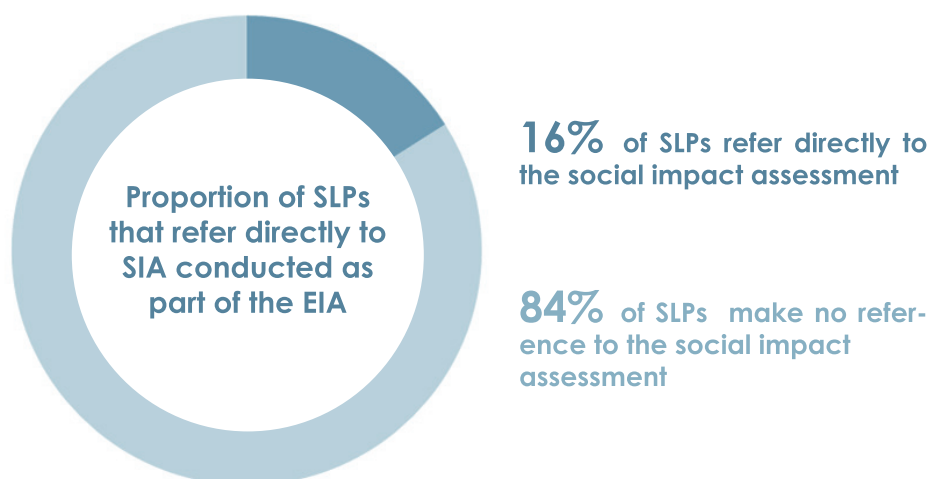
The Social Impact Assessment ("SIA") is required as part of the suite of assessments required to apply for a mining right. The SIA forms part of the EIA process, and attempts to review the social impact of the project and must specifically understand the social environment in order to do so effectively. <sup>cxxi</sup> The SIA is given less consideration than environmental impacts, and often takes the form of a handful of very general paragraphs. This impairs the effectiveness of SLP interventions that need to, at the very least, compensate for the harmful impact of the operation.

The reality is that most SLPs (80%) do not directly refer to the SIA. However, an additional problem is that SIAs may be out of date, especially where they were conducted as part of a mining right application some time before the SLP.

#### **Possible Explanation and Solution**

The main reason for the lack of reference to SIAs in SLPs might be that the links between environmental and social impacts are not well recognised in the mining sector. The lack of recognition leads to limited resources being devoted to SIAs, which in turn leads to weak SIAs that cannot meaningfully inform SLPs. In addition, SIAs are only legally required at the stage of the application for the license at the onset of the project while SLPs continue to be revised every five years and need to be based on accurate, up to date information.

A measure to address this disjuncture would be making it compulsory to update the social economic information every 5 years during the SLP renewal cycle. The SLP should therefore summarise the findings of the SIA to enhance the mine's positive impacts and to avoid and offset negative impacts. While the 2010 SLP Guidelines provide for SLPs to state the positive and negative impacts, this should be transferred to binding regulations.



#### Possible Explanation and Solution

The main reason for the lack of reference to SIAs in SLPs might be that the links between environmental and social impacts are not well recognised in the mining sector. The lack of recognition leads to limited resources being devoted to SIAs, which in turn leads to weak SIAs that cannot meaningfully inform SLPs. In addition, SIAs are only legally required at the stage of the application for the license at the onset of the project while SLPs continue to be revised every five years and need to be based on accurate, up to date information.<sup>cxxii</sup> A measure to address this disjuncture would be making it compulsory to update the social economic information every 5 years during the SLP renewal cycle. The SLP should therefore summarise the findings of the SIA to enhance the mine's positive impacts and to avoid and offset negative impacts. While the 2010 SLP Guidelines provide for SLPs to state the positive and negative impacts, this should be transferred to binding regulations.

### **2.8 SLPs do not devote equal attention to negative and positive social impacts**

In analysing SLPs it was found that the transparency and balance of the language used in SLPs with regards to harms and benefits is questionable. For example, of the 50 SLPs analysed, 34% exclusively mentioned positive impacts of the mining project while 40% did not address impacts at all. In most of the SLPs, the language reads more like advocacy for the project than an objective account of the social landscape and the interventions that are required in order to improve the status quo. This takes the form of devoting the majority of the discussion of project impacts to the positives such as employment and the stimulation of the local economy through mine expenditure. In fact, only a very small proportion had a discrete section devoted to the negative environmental, social and economic impacts of the mining operation on directly affected populations.



# 26%

of SLPs include potential negative effects of mine

# 40%

of SLPs do not mention impacts of mining

# 34%

of SLPs frame impacts only positively

### Possible Explanation and Solution

The reason for this is clear. A company is undertaking an application process in which the DMR is conducting a cost-benefit analysis of the project. Companies will therefore have an incentive to emphasise positive over negative impacts. First, the provision for the inclusion of negative impacts should be taken from the guidelines and included in the regulations, which are binding. Second, more creative ways of analysing negative impacts could be established. These could include engagement with communities on the aspects of their physical, social, and economic environment they particularly value and including these aspects in impact assessments. The reason for this omission is due to the lack of rigorous and robust group and one-on-one consultations with the host communities and value placed on the communities' perspective. The solution is providing details on requirements for consultation processes, the reporting of these processes and on how community inputs are used in the construction of the document. In addition, the insights of Regional Offices of the DMR into the priorities, spatial characteristics and environmental sensitivity of areas they administer, can be used to critically evaluate accounts of positive and negative impacts.

### **2.9 Extent to which SLPs acknowledge the intersection between environmental and socio-economic impacts**

Having a stable and prosperous social setting is inextricably linked to the stability and health of the ecology of an area. For example access to clean water is vital for survival, for watering crops and for sanitation. Only 10% of the SLPs analysed made the link between the importance of an environment and the well-being of the community impacted by the operation. Given that ecological considerations, on the one hand, and social and economic issues, on the other hand, are often still thought of as distinct, the legal framework should at least attempt to encourage more integrated thinking.

### Possible Explanation and Solution

A possible reason for this is that the SLP framework makes no direct reference to EIA (including the social impact assessment which forms a part of the former). This is contrary to the doctrine of integrated environmental management under the National Environmental Management Act ("NEMA") which entails a holistic understanding of the impacts on the surrounding environment and inhabitants and how these are managed.<sup>cxxiii</sup>

### Possible Explanation and Solution

SLP regulations should require SLPs take into account the findings of EIAs and subsequent environmental studies with respect to resultant LED projects as well as provisions for job creation, portable skills training and enterprise development at times of downscaling or closure. A possible indicator of how to use law to integrate ecological and socio-economic impacts is provided by the National Water Act's ("NWA") determination of the reserve, which contains two parts namely the human needs reserve and the ecological reserve.<sup>cxxiv</sup>

## **2.10 SLPs tend not to cater for projects in labour-sending areas (outside of mining area)**

The migrant labour system has and continues to have significant impacts on the communities from where migrant workers are recruited. These communities lose a considerable proportion of the economically active population. For this reason, it is a legislative requirement that SLPs contain LED initiatives targeted at major labour sending areas other than the mining area.<sup>cxxv</sup> As many as 36% of the SLPs analysed did not contain complete data on where company workers were from. Of the 50 SLPs examined we found that only 42% had projects in major labour sending areas other than the mining area, though it should be noted that in 22% of the SLPs workers were recruited exclusively or near exclusively from the mining area.

### Possible Explanation and Solution

The reason for this absence could be because the greater geographical distance of these communities, which mean these communities have less opportunity to hold mining companies accountable and therefore mining companies will less likely face pressure. In addition consulting and implementing programmes in areas far from the mine site presents greater logistical challenges. A contributing factor is also the absence of clear threshold percentage of the workforce from a particular area for its communities to be eligible as beneficiaries. This makes it easier for mining companies to avoid addressing these areas. The solution is therefore for the regulations to be clear on the threshold for a major labour sending area in order that areas do not get left out. Guidelines should also set parameters for determining the extent of interventions and resources to be committed to other labour sending areas in comparison to the local mining communities.

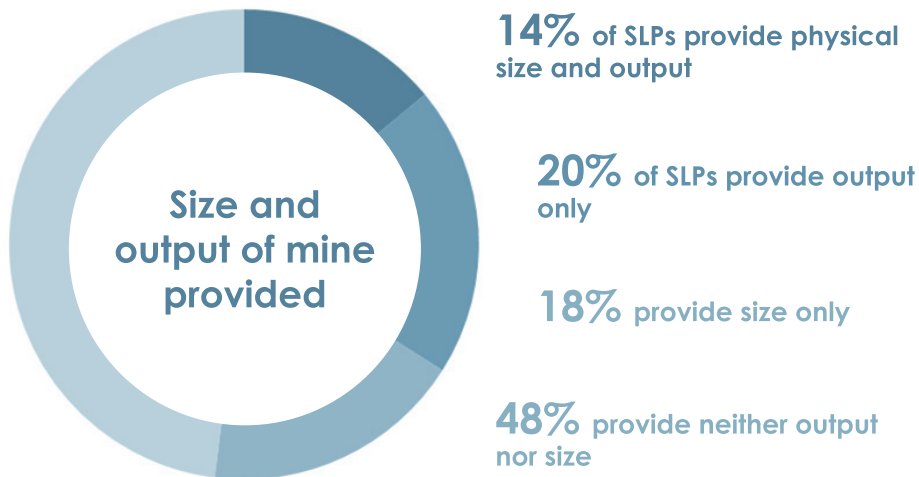
## **3. Nature and impact of mining company**

### **3.1 Tendency of SLPs to provide physical size and footprint of mining operation**

The size and physical footprint of the mine are one of the important factors in understanding the likely social and environmental impact of an operation. This is not to say that there is a simple linear relationship between size of mine and impact. Size of operation has a more direct bearing on

the breadth of impact whereas variables such as the particular mineral, the mining method and the capacity of the company to conduct sound environmental management play a greater role in determining the nature and intensity of impacts.

Therefore, not mentioning the size of the mine makes it more difficult for the author or reader of an SLP to understand the magnitude of the damage or harm that will be caused by the operation. Only 32% of SLPs provided the size of the operation.



#### Possible Explanation and Solution

A likely explanation for this is that while the DMR assesses SLPs in relation to the mining works programme, companies are reluctant to create expectations regarding projected scale of output given that this is likely to change with market conditions. A solution would be to make it a requirement in the regulations that companies put the projected output in the pre-amble to SLPs.

### 3.2 Tendency of SLPs to indicate mining method

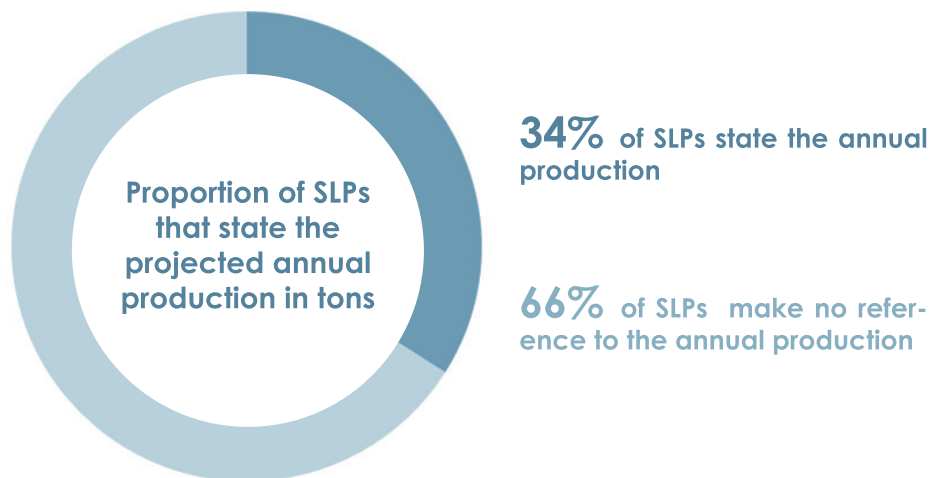
In respect of the impacts of a mine, it is important to know the mining method employed, as the method of mining has a significant impact on how the surrounding environment and people are affected. For example, open cast mining will tend to have a more adverse impact on the surface environment than underground mining. These impacts may include soil erosion, contamination of groundwater and dust pollution. All these impacts will be felt socially, for example in harm to local agriculture due to contamination of groundwater. Therefore it is critical that in consultations with communities and in EIA and SLP documents, companies should be clear about these methods and their impacts. SLPs are meant to pre-empt social impacts and address the corresponding harm through development programmes. The adequacy of these programmes cannot be fully evaluated without reference to the impacts.

#### Possible Explanation and Solution

A likely explanation for this is it is not required by law or prescribed in the 2010 SLP Guidelines. The simple solution is to legislate its inclusion.

### 3.3 Tendency of SLPs to indicate planned scale of production

Another factor that is significant in assessing SLPs is the extent of the scale of production and output. The planned output is indicative of the turnover of the mine and, in turn, the profits to be derived. This information is therefore important in assessing if the benefit to be derived by communities and workers is a meaningful share of the wealth derived from the minerals. Only 34% of the SLPs provide the projected annual output of the mining operation.



#### Possible Explanation and Solution

A likely explanation for this is it is not required by law or prescribed in the 2010 SLP Guidelines. The simple solution is to legislatively mandate its inclusion.

### 3.4 Limited information about contract workers in SLPs

The amount of contractors varies from mine to mine. One of the SLPs in the study showed that up to 95% of their workforce comprised of contract labour. It is vital that there is no discrimination against contract workers, which means that contract workers should receive the same benefits as workers who are directly employed. While the MPRDA envisages equal treatment of contract workers in SLPs, the SLP sample provides some reason to doubt that the law translates into intended outcomes. As many as 72% of SLPs did not provide a breakdown of contract workers and their origins though 26% contained an undertaking to subsequently provide this information. If the total number of jobs is not reflected (including contract workers), it presents a skewed sense of what proportion of the job opportunities are being made

available to local communities. In only 28% of SLPs was it unambiguous that contract workers benefited from at least some of the programmes targeted at workers. of the SLPs provide the projected annual output of the mining operation.

#### **Possible Explanation and Solution**

An explanation is that some companies may seek to reduce labour costs through the employment of contract workers on lesser terms than permanent employees. The solution is to integrate contractor liability as far as possible, fully incorporating contractor liability for successful SLP implementation.

### **3.5 Accurate number of workers**

A significant portion of an SLP involves measures, whether in the form of education and training or housing and living conditions, designed to enable an improved standard of living for workers. It is therefore vital for companies, in deciding on the scale of such initiatives, to have reference to the number of workers. The SLP of one project owned by a multinational company states that it is difficult to predict the amount of workers due to the fluctuating commodity price. Of the SLPs that were clearly for new operations, eight (53%) provided projected workforce numbers, six (40%) provided an undertaking to provide this information by a specified date and 1 (7%) contained neither the information nor an undertaking.

#### **Possible Explanation and Solution**

Forecasting is vital for informing the content and scale of programmes, yet there is no plausible explanation for such a deficiency. Companies might claim that it is impossible, especially for a greenfields operation, to predict with any certainty, the number of workers over the next 5 years due to the fluctuation of this ever changing figure. The DMR should use its power as regulator to ensure that no SLPs should be approved absent this information which is critical to the human resources development and housing components of SLPs in particular.

### **3.6 Direct negative impacts on community**

#### **3.6.1 Tendency to indicate whether relocations have occurred or will occur**

As an invasive activity, mining sometimes requires that people are displaced and relocated to a different area for the operation to be completed. This is occurring more often as mining companies enter rural parts of the country which have not previously been zoned for mining. Relocations have a profound impact on the affected community, including the uprooting of families. Communities may be exiled from areas with which they have a deep sense of belonging, which encompasses social, spiritual and economic ties. There therefore needs to be sensitivity to the significance of this harm. SLPs have a tendency to remain silent on whether relocations will or will not occur with only 12% providing such information.

### Possible Explanation and Solution

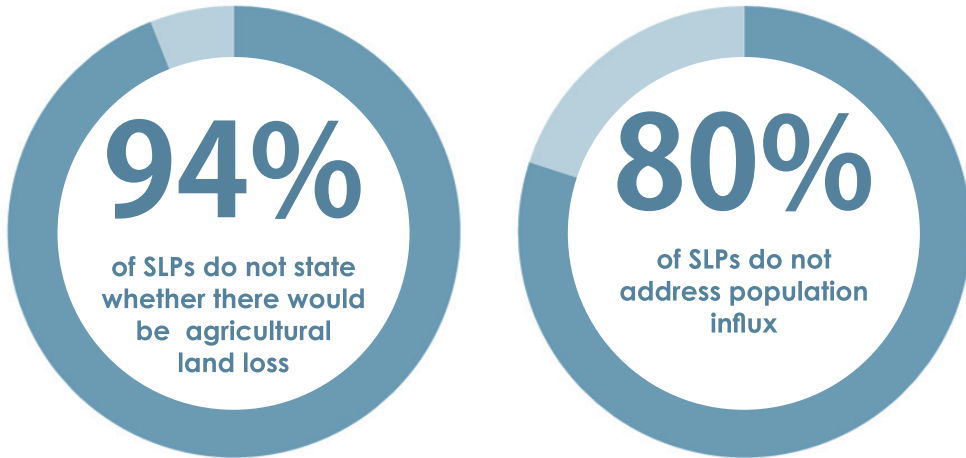
An optimistic interpretation of the absence of this information is that the vast majority of the mining operations in the study sample do not involve the relocation of people. It is also possible, however, that mining companies do not want to publicise the possibility that their operation will have this impact due to reputational risk. A further possibility is that the DMR does not advise on the inclusion of the relocation plan in SLPs. A final factor is that provision for this information is only contained in the guidelines, which are persuasive rather than binding, provide for the inclusion of this information. Due to the far-reaching impacts of relocation on the needs of communities and their relationship to the company responsible, it is critical that SLPs and relocation plans are aligned. The regulations should therefore provide that all SLPs indicate whether or not relocations have occurred or will occur. SLPs should also be required to refer the reader to any applicable relocation plan.

### **3.6.2 SLPs do not indicate whether loss of agricultural land has or will occur**

Agriculture plays a key role in the survival of rural communities. Where communities are dispossessed of such land, there is a strong case for commensurate and effective agricultural projects as part of the compensation for the negative impact of the mining operation. The importance of formal and informal agriculture to food security of the immediate and broader community must be acknowledged in the SLP. As is the case for relocations, SLPs can only provide a true net positive impact if all the negative social and economic impacts of mining are addressed. The reader of an SLP should, first, be provided with a breakdown of negative impact and, second, should be informed about the existence of measures to compensate for these impacts even if they are not outlined in detail in the SLP. They should also be informed where to find more information regarding these impacts. Only 6% of the SLPs analysed provided answers to the questions of whether loss of agricultural land had occurred or not and, if so, the scale and nature of land lost and the resulting impact. One of these SLPs provided that affected families must be reimbursed for any crop losses in their vegetable gardens and arable plots due to the resettlement process. This would be achieved through the valuator's assessment. The flaw in this approach is that the true value of consistent food security from land availability can never be truly quantified; the only true compensation can be compensation in kind, i.e. new and viable farming land.

### Possible Explanation and Solution

An optimistic interpretation of the absence of this information is that the vast majority of the mining operations in the study sample do not involve depriving communities of access to agricultural land and food security. It is also possible, however, that mining companies do not want to publicise the possibility that their operation will have this impact due to reputational risk. A likely factor, however, is that only the guidelines, which are persuasive rather than binding, provide for the inclusion of this information. The solution is to require companies to state whether or not loss of agricultural land will occur in binding regulations.



#### Possible Explanation and Solution

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### ***3.7 SLPs do not typically address population influx***

In mine-affected communities that are both poor and sparsely populated, the arrival of large scale mining, especially when there is the cumulative impact of many projects being rapidly launched, can lead to a large scale population influx as many people arrive in search of jobs. This can cause severe strain on public infrastructure, government services and housing among other impacts. This is especially the case for those greenfields mining projects that recruit much of their labour from far-afeld areas. The impact on the living conditions and way of life of existing communities is vast and often sudden. Influx, especially that induced by the mining company, needs to be anticipated and addressed in planning documents such as IDPs as well as in SLPs. Our research has shown that only 20% of the SLPs make any sort of reference to population influx, showing a distinct lack of integrated thinking and forward planning.

#### Possible Explanation and Solution

A likely factor for this absence in SLPs is that only the guidelines, which are persuasive rather than binding, provide for population influx to be addressed as an impact. A solution is to make this a legislative requirement. Further, the issue of influx can only be addressed through the co-ordination of efforts by all stakeholders in the mining nodes including all municipalities, mining companies, worker representatives, trade unions and communities. This shows the importance of multi-stakeholder planning structures.

### 3.8 Mines with multiple shafts and consolidated mining projects

The MPRDA, read with the MPRDA Regulations, requires mining companies to submit SLPs with each mining right application. SLPs therefore apply at the level of the mining right rather than the company. Mines sometimes have multiple shafts within a single mining right. In other cases, generally when a company's operations span a large mineral deposit, there will be separate mining rights and SLPs. Integration of programmes in areas such as infrastructure development is the most sensible approach to clusters of mines in a single area operated by the same company in order to avoid duplication and piecemeal efforts. However, the absence of clarity on the size of the cluster and which SLP expenditure is at a cluster level or additional to the specific mine, makes it easier for companies to double count expenditure at a cluster level by presenting each SLP as involving additional expenditure. In some of the instances of mining clusters, SLPs appear to be exact copies of each other.

#### Possible Explanation and Solution

This is enabled by the lack of legislative parameters on how clusters/consolidated projects are dealt with at the level of SLPs. Regulations should provide for consolidated SLPs and in such instances should require them to state the geographical boundaries of the cluster, identify which programmes were undertaken at a cluster or project level and explain the reasons for the choices made.

## 4. Gender, race and class sensitivity

### 4.1 SLPs do not tend to engage with the gendered impacts of mining

Read with the right to substantive equality contained in section 9 of the Constitution, the statutory objective of 'contributing to the socio-economic development of the areas in which they are operating' requires that companies do not perpetuate existing inequalities along the lines of gender.<sup>cxvii</sup> The arrival of a mine in a rural area typically has a disparate gender impact. Women have a patriarchal system imposed on them, involving ascribed gendered roles, which mean they are expected to fulfil certain roles such as the rearing of children and the maintenance of the household. Rural women, in rural areas are historically involved in growing crops and gathering food and water.

The arrival of a mine often makes these roles more burdensome, especially when the project involves acquiring arable land for mining. The consumption of water by mines and frequent pollution of local water sources often means that women are required to travel much further to access water, which combined with their other ascribed roles in the home, places them at a disadvantage in the labour market and serves as an obstacle to entrepreneurship. SLPs do not respond adequately to structures of inequality including gender in particular. SLPs do not tend to discuss how the pressures on water supply, roads and other infrastructure associated with mining heighten the difficulty of performing unpaid roles ascribed to women (including gathering water and firewood, cooking, cleaning and childcare).



### Possible Explanation and Solution

A likely underlying cause of this problem is a general absence of gendered analysis by SLP practitioners. In addition, as discussed above, negative impacts, particularly environmental impacts, are not usually addressed in SLPs. This, in turn, is possibly because the negative impacts to be addressed are only listed in the guidelines, rather than regulations. Solutions therefore might include requiring gender training as part of a qualification for SLP practitioners, making reference to gendered impacts in the list of negative impacts and transferring this list from guidelines to the legally binding regulations.

#### 4.2 Extent to which SLPs acknowledge barriers to participation by women in the sector

Mining has historically been a male-dominated sector hence measures must be put in place to address the barriers faced by women working in the sector. These barriers include harassment and violence underground as well as equipment designed for men, the absence of separate changing and toilet facilities, and discrimination in recruitment, promotions and salary. Most SLPs do acknowledge at least some of the barriers and contain some, albeit usually broadly formulated, initiatives to overcome them. They tend to focus more on recruitment and career progression rather than on the safety of women and workplace culture. Through our assessments we have found that not one of the SLPs assessed recognises and contains programmes and/or initiatives which deal holistically with economic, social, workplace and employment challenges specific to women, in addition, none of the SLPs examined provided for workplace safety, harassment and sensitivity for women. 38% of the SLPs only dealt with gender in relation to recruitment and employment and the same percentage only addressed gender through local economic development and other projects with women as majority or sole beneficiaries.



**38%** of SLPs only provide for some LED or other projects which have women as beneficiaries

**14%** of SLPs provide for some LED or other projects with women as primary beneficiaries

**10%** of SLPs do not deal with gendered impacts or barriers in mining at all

**38%** of SLPs only deal with gender in relation to recruitment and employment

### Possible Explanation and Solution

A possible explanation for the failure of many SLPs to address the barriers faced by women in the workplace is that the regulations and even the 2004 and 2010 SLP Guidelines do not identify and address these systemic and documented barriers. In fact, the 2010 SLP Guidelines no longer even refer to the 10% numerical target of women in mining, due probably to the failure of the Amended Mining Charter to address gender at all. More fundamentally, we observed that certain companies view sexual violence underground as a criminal justice issue and therefore solely a government responsibility. A part of the solution would therefore be to require concrete measures to address an open list of systemic barriers to the participation of women at all levels, including the barriers identified above. Furthermore, we suggest requiring DMR to consult the Department of Women before approving an SLP in the same way that they have to consult DEA and DWS regarding an EMP. Alternatively, we could lobby for the creation of a gender sub-unit within DMR's SLP unit.

### **4.3 Are gender, race (and class) acknowledged in SLP beyond employment equity targets?**

SLPs do not exist in a social vacuum. South Africa is a country whose historical legacy has produced a high level of income inequality and class differentiation and vast disparities on the grounds of gender and race. Disparities should be acknowledged in SLPs and LED projects, in particular, and should address these disparities. For example, if women were disproportionately employed in the agricultural sector and subsequent mining results in the loss of agricultural jobs, a possible LED intervention, subject to consultation, would be the establishment of new agricultural businesses with women as target beneficiaries. Many SLPs do not provide a gender profile of major labour sending areas (including local community) as part of the baseline socio-economic information as the SLP guidelines prescribe. However, it seems that the prevailing interpretation of 'gender profile' is simply the number of women and men in the target areas. Not a single SLP analysed disaggregated a significant proportion of the social and economic background information by race and gender.

### Possible Explanation and Solution

A contributing factor to the lack of acknowledgment of these disparities in SLPs is that the 2010 SLP Guidelines do not indicate the need for disaggregation, analysis of disparities and for LED projects to respond to these disparities. At the minimum, Guidelines should indicate the need for this analysis and for this to be incorporated into the needs analysis preceding projects. Another possible factor could pertain to the lack of standardisation of the expertise of designers of SLPs with the result that SLP teams do not always include people with the relevant social science expertise. If this is the case, measures recommended elsewhere, to provide guidance on the qualifications and experience required for drafting SLPs, could improve the sensitivity of SLPs to social and economic inequalities.

#### **4.4 Gender, race (and class) sensitivity of community engagement**

In community engagement throughout the SLP life cycle, the manner in which the company engages must be cognisant of the power dynamics both between the company and community and within the community. Making special efforts to consult with vulnerable groups is crucial to developing a fuller understanding of the social dynamics in the community, which is a pre-requisite to social interventions that have a meaningful impact on those in the greatest need.

Few of the documents disclosed how widely the mine consulted and how inclusive (with respect to gender, class, age etc.) the process was. As only 8% of SLPs explained the community organisations consulted and their mandates, it was generally not clear whether any consultation beyond local government structures took place at all. This suggests that it is a widespread pattern that power sensitivity of consultation tends to be minimal or at least minimally reflected in SLP text.

##### **Possible Explanation and Solution**

Given the existence of disparities of power within mine-affected communities that mirror those of broader societies and the need for the SLP to advance the condition of the most disadvantaged, it is critical that the voices of the most powerful groups do not drown out other voices. This means that measures must be made to ensure consultations are inclusive as possible and creates a safe space for vulnerable communities. Specialised meetings that would target these issues and provide a safe and constructive space to express views might in some circumstances be necessary. Another useful practice for designers of SLPs is power mapping.<sup>cxxvii</sup> This can assist in understanding these power structures in order for the author of the SLP to consult the appropriate leadership, based on an understanding of divisions and alliances.

#### **4.5 Are BEE procurement targets in SLPs designed to benefit local business?**

Procurement is an important lever for social transformation as companies can, in procuring from local HDP business, create demand for the goods and services of local companies operated by HDPs. This is especially the case if procurement targets include goods that are locally manufactured. The Amended Mining Charter therefore set specific targets for discretionary procurement of capital goods, services and consumable goods from BEE or HDP entities that subsequently were inserted into the 2010 SLP guidelines. Unfortunately, we found that a sizable proportion of SLPs did not indicate the presence and extent of local HDP procurement targets.

We found that 26% of SLPs contained clear targets for procurement from local HDP companies or individuals and 52% of SLPs declared a preference for local HDP businesses without providing targets. Those SLPs that did refer to local content targets varied with respect to whether there were targets or just a statement of intent, whether there were clear measures to achieve

significant local content and whether the goods/service vendors' names were indicated.

#### Possible Explanation and Solution

One of the likely reasons for the frequent absence of local procurement targets in SLPs is that the targets in the Amended Mining Charter require procurement from BEE entities but do not specify that these, or a proportion thereof, need to be local. The Charter also does not provide targets with respect to goods manufactured locally, thereby failing to promote local manufacturing. The solution is to address these absences in the next iteration of the Mining Charter.

#### **4.6 The BEE share (26%) is often not broken down**

One of the requirements for transformation under the Mining Charter and Amended Mining Charter is for the registered rights holder to have a 26% BEE shareholding. It is vital (though not a legal requirement) that this share is broadly shared amongst affected communities, that there is transparency as to how this share is broken down and that there is an accountable and transparent mechanism to ensure that community shares are managed for the broader community benefit. Unfortunately this shareholding is often not broken down in the SLP, especially when it comes to community portions.

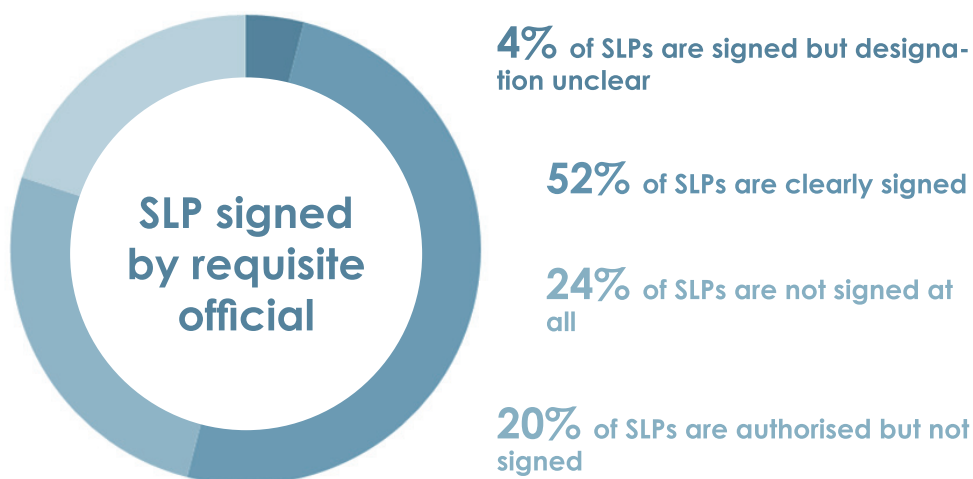
#### Possible Explanation and Solution

The most direct cause of the lack of information is that the 2010 SLP Guidelines do not require BEE ownership to be addressed in SLPs. More fundamentally, it should be noted that the Mining Charter specifies neither whether local/sending communities should benefit nor are there requirements for accountable and transparent structures for administering this share. An additional factor is that some of the share ownership deals may be contested. Part of the solution lies in requiring public disclosure of information about how the share is distributed and the structures set up to administer shares held by communities as a license condition. This should also be required in the SLP text.

### **5. State of Finality**

#### **5.1 Proportions of unsigned to signed SLPs in the sample?**

The mining right holder's signature of an SLP is critical since this constitutes evidence of the undertaking that becomes binding once the SLP is approved by the DMR. As many as 46% of the SLPs we examined were unsigned, which raises questions regarding the finality of the actual documents received by the department and whether companies perceive these obligations as binding. It can be argued that signing is required to formalise the SLP as an undertaking of the mining right holder. 20% of the SLPs examined were duly authorised by the designated authority but not signed. A further 4% of the SLPs were signed but the role or identity of signee was unclear.



#### Possible Explanation and Solution

These finding does not have a clear explanation. The most concerning would be that mining right applicants wish to circumvent the legislative intention that SLPs are binding. Questions raised include whether the unsigned and/or approved SLPs are still in draft format when submitted and, if so, are they constantly being amended without actually reflecting these changes in a revised document that receives the DMR's stamp of approval. A possible recommendation could be that DMR should not award a mining right until a final SLP has been submitted.

### 5.2 Finalisation of programme content, targets and timeframes

It is important that the SLP for each mining right is a finalised document as communities will tend to have more leverage if the formulation of the SLP occurs prior to the granting of the mining right. In a large proportion of SLPs submitted as part of a fresh mining rights application, many of the human resources development programmes do not specify the content or the numbers of people to benefit from these programmes. Sometimes this is justified on the basis that target numbers cannot be determined prior to the recruitment of workers. The same is the case for the housing and living conditions sections.

In many of these SLPs, a timeframe is provided for finalising these programmes (typically 6 months following the award of the mining right) and in some there is an outline of how the finalised programme will be developed (including consultation with potential beneficiaries). In several SLPs, however, there is no indication of when and how the programmes will be finalised.

Many of the SLPs are a third or even fourth draft, having been referred back by the DMR, indicating a significant review period. Surprisingly, even in some of these cases not everything was finalised. For example, one SLP had a procurement section that did not include a list of suppliers to fulfil procurement targets.

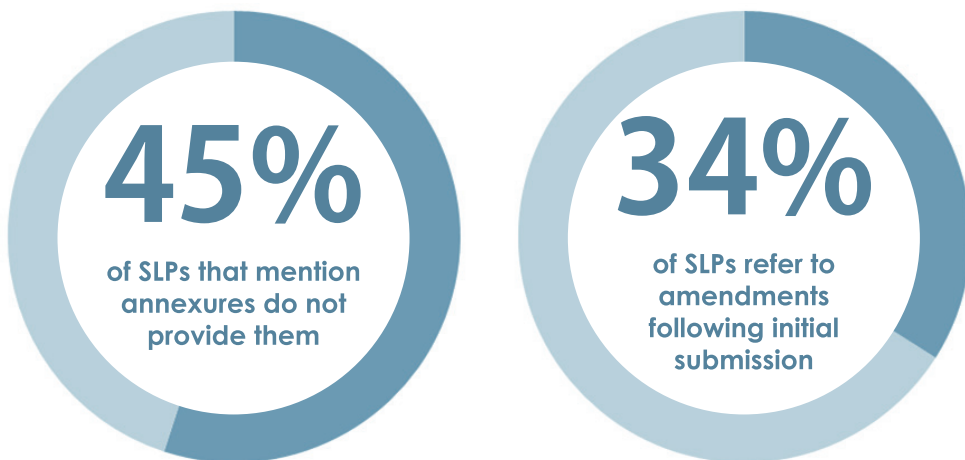
The reasons provided for the omission of targets did not always shed more light on the matter with some SLPs stating 'couldn't complete at date of submission.' In some cases the contents of projects are only to be identified following future negotiations with the community.

#### Possible Explanation and Solution

It is not certain why targets are sometimes omitted. A possible factor might be that for some mining companies, submitting the SLP earlier to obtain a mining right is a weightier consideration than the finalisation and completeness of data. It should also be acknowledged that from a company's point of view, concrete targets and timeframes require significant planning work. There are also benefits from a company point of view of not providing final targets as this makes it easier for companies to escape accountability. These findings also raise questions regarding the extent to which the DMR is upholding the standard of complete and finalised SLPs. The main solution would appear to lie in stricter enforcement by the DMR of the requirement to provide all the required projections and targets before the SLP is approved.

### 5.3 Whether annexures listed in table of contents or cited in SLP documents tend to be provided

It is critical that all SLPs that refer to annexures actually have them attached to the main document. Annexures are sometimes the place in which greater details such as policies, and sometimes even forms as required in the MPR-DA regulations, are to be found. 66% of the SLPs examined stated that some information was contained in annexures. Of the percentage of SLPs that utilised annexures, 45% either provided no annexures or only some of the annexures cited. Annexures are often used for some critical documents, such as Form T (procurement plan).



### Possible Explanation and Solution

Annexures may be excluded for more than one reason. In some cases the actual documents might not have been finalised. Another factor may be that some are perceived to be 'sensitive information' by companies and/or the DMR. The solution is making their inclusion in the publically available SLP text a legislative requirement, and a possible license condition.

## **5.4 Various amendments to the SLPs without reasoning**

The MPRDA, regulations and guidelines provide for the amendment of SLPs. To be effective, SLPs need to have the correct balance between rigidity and flexibility. One wants certainty of commitments to allow communities, workers and the broader public to hold a company accountable to its commitments. On the other hand, sometimes social and economic change or an unforeseeable problem will require amendments to the substance of or even the substitution of SLP programmes. The appropriate balance would be to continue to allow amendments but make changes of substance subject to the participation of communities and workers. 34% of the SLPs contained reference certain amendments that have taken place between finalised SLPs and additions made after submission. Justifications are not always given for these changes. A small number of SLPs have even referred to themselves as 'living documents.'

### Possible Explanation and Solution

These trends can be attributed to the lack of a clear procedure for amending SLP commitments. All the legislation and regulations state is that the consent of the Minister of Mineral Resources must be obtained. The form of this request and approval, public participation in the amendment process, and the requirement to indicate substantive amendments and their reasons in an updated SLP is not addressed. This can be addressed through the insertion in the MPRDA and/or the regulations of substantive and procedural requirements for SLP amendments.

## **6. Usability: form and structure**

### **6.1 Existence and adequacy of definitions**

A clear and comprehensive definitions section not confined to acronyms is critical to the understanding of readers who will not always be familiar with all technical and legal terminology used by mining companies. There are also numerous SLP concepts that are relatively unsettled or which need to be defined specifically for each SLP. Such concepts include 'major labour sending areas', and 'mine community.' These form the basis for identifying which communities are to benefit from SLP initiatives, especially in the context of LED programmes. Acronyms are not a substitute for a definition of terms which are used in a specific manner in SLPs and which much of the public, including communities, will not be versed. Further, many of the defini-

tions are even unclear or inconsistently used in the regulatory system, which amplifies the opportunity for confusion. A significant majority in the sample of SLPs did not include a definitions section. Our research has shown 28% of SLPs contained both acronyms and a list of definitions, 36.% contained only an acronyms section, 6% contained acronyms and definitions, and 30% contained neither definitions nor acronyms.

#### Possible Explanation and Solution

A possible reason for the frequent absence of definitions are that the concepts in SLPs are difficult to define and often highly context-specific. Further, there is at present no legislative requirement to define the terms. A definition section, in addition to an acronym section should be required in binding regulations.

### 6.2 Use of vague and generic terminology

It is important that project plans are described with sufficient simplicity, clarity and detail to ensure that readers from outside of the company are able to understand what the company is committing to, so as to be able to monitor implementation and hold the company to these commitments.

Project plans, which post-2010 tend to follow the guidelines table format closely, broadly describe the impact of projects, though often generic terminology such as 'sustainable livelihoods' and 'sustainable housing solutions' is used. This is particularly the case for income generating projects. Our impression is that there tends to be more specificity on infrastructure orientated projects which are often more straightforward in their outputs, for example the reticulation of 1000 households with running water.

#### Possible Explanation and Solution

This could just be an oversight with unintended consequences, yet it's possible that the use of vague and generic terminology could be used to confuse and obfuscate the proposed projects and outlined targets. Clear and consistent terminology must be advised in guidelines.

### 6.3 Whether SLP Infographics tend to be legible and understandable

Infographics play a critical role in presenting certain information in a more understandable manner for readers. A good example of this is location maps, which show the geographic setting of the mine, its proximity to human settlements and its footprint. Another example is career paths.

We found that nearly all SLPs contained some infographics, though the comprehensibility and legibility varied. Legibility was most often a problem in relation to maps and undertandibility in relation to career progression plans. Many of the former, in particular had been scanned with very low resolution such as to render them largely illegible. In most but not all, of the SLPs



(62%), tables, including human resources development programme targets and LED project plans, were legible. Some of the career progression plans proved difficult to understand because too much information was concentrated into a single page, with the result that the steps and paths towards different job titles were difficult to distinguish.

#### Possible Explanation and Solution

The source of this problem is not clear, though this might lie in careless drafting as a result of rushed applications. A role player servicing the industry has informed us that they have frequently encountered infographics that have been copied and relabelled from other operations' SLPs. A possible solution is a standard format for all infographics to be provided by the regulator to ensure consistency, legibility and understandability.

### 6.4 Varying lengths, detail and content of SLPs

It is vital that that all SLPs are of the same standard of comprehensiveness and thoroughness with respect to aspects including but not limited to social and economic background and clarity of programme objectives, beneficiaries, targets and timeframes. There were significant variations both with regard to comprehensiveness and attention to detail. Our experience was that the smaller, more junior miners, tended to have the less comprehensive and detailed SLPs.

#### Possible Explanation and Solution

There are many variables when it comes to mine community and worker beneficiation. Certain mines have different sizes, life spans and specific challenges. Part of the problem might lie in the fact that the more detailed parameters were contained in the guidelines, which do not have the status of binding legislation or regulations.

## 7. Inclusivity and transparency

The success of the entire SLP hinges on public participation, as no meaningful response to community needs can be formulated without an accurate understanding of who the community is, how it is structured and what the community's aspirations are at the level of individuals and the collective. The obligation of ensuring that the consultation process is effective falls directly on the mining company but must be overseen by government as the regulator. The process of stakeholder identification and community understanding is a crucial yet notoriously difficult exercise as all communities are heterogeneous.

One of the main concerns in this regard is the effectiveness of communication with communities. There are at least two frequent types of language barriers between consultants and communities. First, consultants will not always be proficient in the vernacular language of the community which will limit the effectiveness of communication. Second, the consultant will often

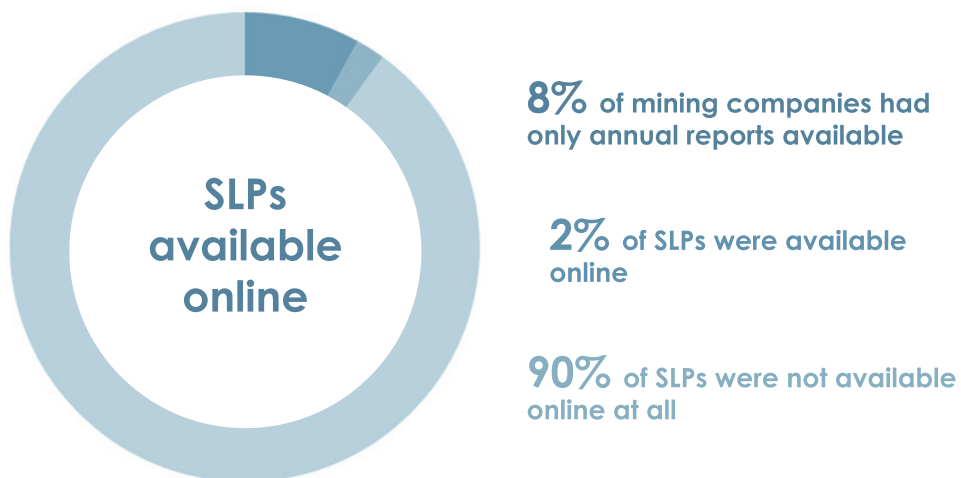
speak about the contents the specialised language of science and management and the framework of the process will often be explained in the specialist language of the law. Jargon-laden language can be used as a barrier to the full participation of communities who will not necessarily be versed in it. Inclusive consultation requires sincerity and the use of clear language that conveys an accurate picture of the likely impacts of the mining operation. The purposes behind the categories of SLP programmes required by the law and what communities could expect to receive from proposed programmes must be clearly stated. Regarding the latter, there must be an honest conversation about the nature of benefits (jobs, a school library etc), the extent of the benefits and the distribution of the benefits (who will benefit).

The role of traditional leaders can also be problematic, as they are often seen as mediators between companies and communities. In some instances traditional authorities have, without consulting their communities, reached agreements with mining companies on the communities' behalf. These decisions often have far-reaching effects on the rights and interests of community members. In these cases, traditional leaders have effectively served as a filter between the voices of the community and the mine.

### 7.1 How many companies provide their SLPs online?

It is crucial that community-based organisations are able to easily access SLPs without submitting a PAIA request as it is absurd to have a social benefit plan that is hidden from the beneficiaries and especially so where such a programme is meant to further transformation. As we explained in the PAIA section of this report, the process of obtaining SLPs using PAIA is time and resource-intensive and therefore a significant diversion of resources for many communities, who may be located far from the repositories of the information and have limited resources. For this reason, it is imperative that companies as well as the DMR, should place all SLPs on their websites.

Very few of the companies actually provided their SLPs on their online platform. We have found that only 2% of the SLPs and 8% of annual SLP compliance reports were readily available on company websites.



### Possible Explanation and Solution

The obvious reason is that companies see these commitments as confidential and somehow feel exposed to reputational risk. Possible solutions include the clarification in regulations of the public status of SLPs and annual compliance reports and a more comprehensive declaration by the Minister in terms of Section 15 of PAIA of the mining information that is publicly available.<sup>cxxviii</sup> Companies should be further required to store accurate and up to date SLP documents on their websites for the benefit of all stakeholders.

## 7.2 Lack of clarity on dissemination of SLPs

It must be acknowledged that, while internet access is increasing, not all community members will be users of the internet. Physical dissemination of the SLP text is therefore vital and SLPs should be lodged at central locations freely accessible to the public and with community-based organisations. It is equally important that full and accurate translations of SLP texts and user-friendly and understandable explanation of the commitments be provided in the languages spoken by affected communities. Alternative methods of communication, including community radio stations, are also required, especially where a substantial proportion of the community is not literate. We have to date, in our engagement with communities and with SLP specialists, never come across an instance of an SLP translated into the vernacular language of the community. None of the SLPs in this sample contained comprehensive dissemination plans of this nature and we did not find any reference to the translation of SLPs.

### Possible Explanation and Solution

The solutions should include the insertion into the regulations of a requirement for a context specific community dissemination plan as part of a broader community engagement strategy. This plan should include simplified, translated and understandable summaries of the SLPs, annual reports and 5 year review in addition to the complete texts. This strategy should also include the creation of awareness through other media such as radio, newspapers and social media.

## 7.3 Departmental Record Keeping

We encountered evidence of poor record keeping when one regional branch of the DMR informed us that the names of the mining company and project were not sufficient information and what was needed instead were farm names. This is information that the department can be expected to have more ready access to than the broad public. The same branch also asserted that granting access to the SLPs based on the particulars provided in our request would result in an undue burden on the resources of the region.<sup>cxxix</sup> This indicated that the SLPs were difficult to locate, which in turn raises questions regarding the quality of their record keeping. SLPs should be easily accessible for officials.

### Possible Explanation and Solution

The solution lies in an electronic database of all mining rights, conditions and constituent documents. An example would be a fully functioning South African Mineral Resources Administration System ("SAMRAD"). SAMRAD is an online application system that is designed to allow the public to view the locality of applications for rights under the MPRDA and applications for these rights.<sup>xxx</sup> It is still, however, not functioning properly and communities and NGOs seeking information are still compelled to lodge requests in terms of PAIA.

#### 7.4 Extent to which SLPs describe consultation in the design process

It is vital that SLPs explain the engagement process that has been conducted with communities and other stakeholders as the quality of engagement influences the accuracy of their understanding of the needs of the area. Without an accurate understanding of the local developmental imperatives, the SLP will not be capable of advancing them.

The only consultation referenced in the SLP sample tends to be with local authorities and traditional leadership. There is seldom reference to community structures and their mandates (only 8% of SLPs analysed). A further indication of a general failure to consult broadly is provided by the failure of most SLPs' LED sections to explain what the needs of the communities are as defined by the community members themselves. Only 4% of the SLPs indicated how the contents of local economic development was influenced by the expressed needs of community members as opposed to local government or traditional leadership. The degree of specificity on how consultation with government entities informed the SLP also varied.

# 8%

of SLPs describe community structures consulted and their mandates

# 38%

of SLPs mention engaging community structures but provide no details

# 54%

of SLPs make no mention of community structures consulted or their mandates

### Possible Explanation and Solution

A possible explanation is an assumption is that due to their formal democratic mandate, municipal governments fully represent all views and aspirations in the community. This allows them to bypass direct community consultation. One of the solutions is for the regulation to require all SLPs to contain a section detailing the manner and form of the public participation and consultation that has been undertaken by the company as well as the outcomes of that consultation. This must include the identification of community structures and who they represent. Failure to include this information should result in refusal to approve the SLP.

### 7.4.1 Summary of the needs and priorities as expressed by communities

Understanding and factoring in specific needs of communities is crucial to addressing developmental priorities. Communities have the right to determine their own developmental agenda and their opinions must be constructively and effectively considered and incorporated. To be effective an SLP should, as far as practicable and consistent with the IDP, reflect the expressed needs of members of the mine-affected communities (including mineworkers), as these are the people that SLPs are meant to serve. SLPs should therefore explain initiatives by reference to what communities have identified as priorities in addition to government policies such as IDPs.

Only 4% of the SLP sample explained how they were influenced by the expressed needs of community beyond government and traditional authorities. We found that 96% of the SLPs engaged with existing government structures and their plans such as IDPs. The needs-based analysis is one of the most important tools that feed into the background of the SLP construction yet only 18% of the SLPs contained a breakdown of the needs of the area in order of priority. Exactly half of the SLPs contained a list of needs without indicating the order of priority while 32% contained no needs-based analysis.



**18%** of SLPs contain a needs-based analysis ordered by

**50%** of SLPs contain a needs-based analysis with no clear order

**32%** of SLPs had no needs-based analysis



**20%** of SLPs only describe influences of government or traditional leadership

**4%** of SLPs were influenced by the expressed needs of communities beyond government and traditional leadership

**76%** of SLPs mention community consultation but do not explain who or why or how consultation was

### Possible Explanation and Solution

The project identification process may be accelerated through companies choosing projects from the municipality's list of LED projects that still require some degree of funding. Insofar as the company takes this approach, it is assuming that the municipality has consulted with the relevant community in their formulation and they indeed meet the socio-economic development priorities of the community.<sup>cxxi</sup> We have reason to believe this assumption does not always hold true as we have observed broken lines of communication between communities and their municipalities. This can potentially be addressed through formalising the process through which identified stakeholders, including communities and local government authorities, are engaged in the process of designing SLPs and the related process of designing IDPs. An avenue worth exploring would be the incorporation of the stakeholder consultation on SLPs into the annual review of IDPs, thereby promoting the alignment of both and enabling community participation to shape the IDP in a manner that that reflects their aspirations. This would ensure the imperatives of community driven SLPs and alignment with government development priorities are not in conflict.

#### **7.4.2 No plan for life cycle consultation**

For communities to have a say in the implementation as well as design of SLPs, it is critical that consultation continues throughout the life cycle of the mine in relation to SLP obligations. It is also important that affected communities and workers remain part of the SLP process since they are the stakeholders with the greatest investment in the fulfilment of SLP commitments. Unfortunately no SLPs in the sample provided the plan to consult with communities throughout the life cycle of the SLP.

### Possible Explanation and Solution

A possible explanation is that the regulations do not require a clear set of structures and processes for enabling life cycle participation of communities as a specific stakeholder. The legislative provisions framing consultative structures, such as future forums need to provide for communities to be included as equal members.

## **8. Measures to address downscaling and closure**

### **8.1 Failure to provide parameters for assessing whether mine is undergoing closure**

It is crucial that SLPs identify the main factors that will signal downscaling, decommissioning and closure as it is critical for accountability that interested and affected parties are able to easily ascertain whether these obligations are triggered. An example of a frequent source of confusion is lack of clarity regarding the status of multiple shaft mines when most but not all shafts have been closed. The danger is that the closure of the majority of shafts

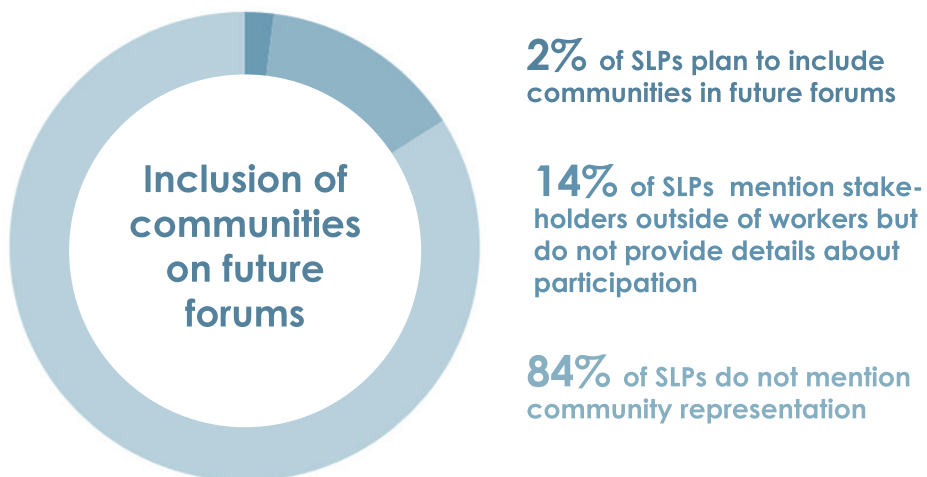
could have significant impacts that may not be addressed if the company still considers and represents the mine as open. Not many SLPs provided the total number shafts per mine and none indicated the number of shaft closures that would trigger downscaling and closure obligations.

#### Possible Explanation and Solution

A clear reason for this absence is the lack of specificity in the legislative framework regarding the circumstances triggering closure in the context of SLPs.

### 8.2 Lack of community inclusion on future forums

As discussed earlier, future forums are required to be established under the LRA and SLP framework in order to prevent job losses and plan for the economic impacts of closure, particularly in relation to retrenchments. Due to the far-reaching impacts of mine closure on an area, it is important that all directly impacted stakeholders have a forum to influence planning for closure. Currently, however future forums are only required to consist of representatives of employers and workers. It is therefore not surprising that 84% of the future forums in our sample did not include community representation. Future forums seem to be a missed opportunity, in that they offer a structure for consultation during the downscaling and closure phases, yet no community members are legally required to serve as representatives.



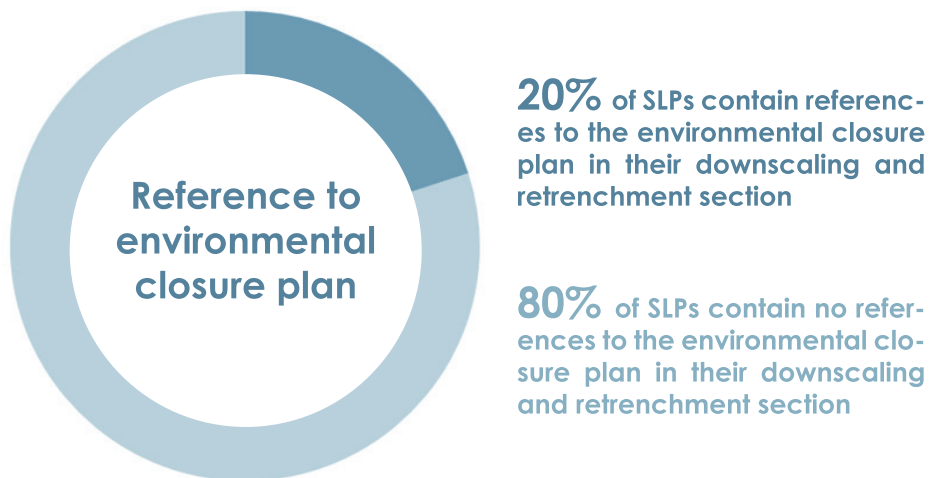
#### Possible Explanation and Solution

One reason for this failure is that the institution of future forum originates from collective bargaining at NEDLAC between management and trade unions. This, in turn, is reflective of the lack of recognition of communities as a stakeholder. Further, neither the Regulations nor the 2010 SLP Guidelines provide for the inclusion of community organisations on future forums. This should be corrected in any future legislative amendments.

### 8.3 Failure to integrate future forums with environmental closure planning

The environment is drastically altered during mining operations which involve significant excavations; the creation of deposits of mining waste and overburden; the removal of vegetation; the diversion of watercourses and other significant terrestrial disruptions. As a result, mining rights holders are required to put in place and implement a closure plan to address these issues. There is also a framework for addressing the socio-economic impacts of mine closure, with a focus on the 'economic' aspect and the impact of retrenchments and the withdrawal of the company from the local economy in particular. This does not mean that SLPs should focus on the environmental aspects of closure but rather that the SLP interventions to deal with social and economic closure should speak to and be aligned with the closure plan.

We found that future forums and other interventions related to mine closure in SLPs only focused on socio-economic priorities and are not mandated with taking into consideration environmental impacts associated with mine closure. This is significant, because the effectiveness of environmental rehabilitation may be undone by job losses which lead to alternative sources of livelihoods such as illegal mining. Integration of social and environmental closure is thus vital.



#### Possible Explanation and Solution

A more holistic, inclusive and transparent set of structures for life cycle participation by stakeholders in mining projects needs to be established in the MPRDA. The future forum would constitute one of these structures, which could also include, amongst others, environmental management committees.



## 9. Housing allocation and development

### 9.1 Provision of accurate information regarding workers' housing needs and the housing backlog

Housing is one of the most significant issues associated with mining, particularly when population influx due to a large mine coincides with an already-existing housing backlog in a community. It is therefore important that SLPs are informed by a detailed and accurate account of the state of housing infrastructure in the community and the housing needs of communities and workers. This is not usually the case.

#### Possible Explanation and Solution

SLPs tend to not provide the gap between workers' housing needs and that provided by the company as well as the extent of the housing backlog in communities. Part of the explanation lies in the former is not required and the latter is contained in Guidelines rather than binding legislation. Regulations should require that SLPs for new or expanding operations indicate how the employee housing and living conditions programme is designed. This is crucial in preventing or minimising the mining company's negative impact on the backlog in the mining community based on the current status of available dwellings for employees. Additionally this would indicate whether further houses are required to accommodate the workforce given the housing backlog in the community.

### 9.2 Lack of engagement with government housing plans for the area

All mining areas will be subject to housing strategies at a municipal, provincial and national level, including, for example, the strategy contained in the applicable IDP. These strategies contain an assessment of and solutions to problems and shortfalls in housing. It is critical that all mining companies in this regard support rather than conflict with these strategies. SLP programmes dealing with housing should therefore indicate how they fit into government housing strategies. We have found that most SLPs (72%) do not clearly explain how their plans to address the housing and living conditions of workers integrate into government plans.

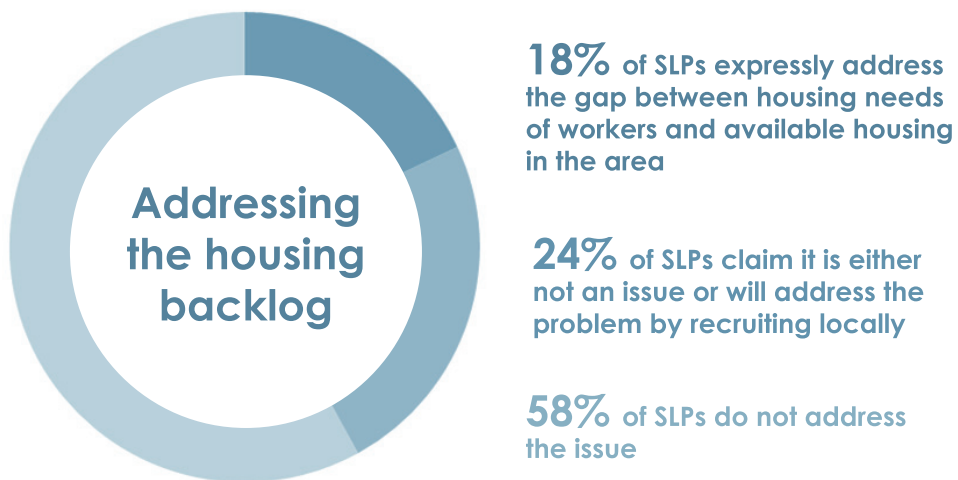


### Possible Explanation and Solution

The current regulations do not require such an alignment between government housing plans and SLPs housing and living strategies. The solution would be for regulations to require an explanation of how these closely associated plans and strategies align.

### 9.3 Lack of clarity on measures to promote home ownership

Whereas the conversion of all hostels to single and family units constitutes a clear deliverable under the Amended Mining Charter, SLPs are far less precise about how the obligation of promoting home ownership is to be met. A significant proportion of SLPs did not narrow down specific measures to promote home ownership. In a number of SLPs, these were limited to facilitating bank loans and government subsidies. In a minority of SLPs, the company undertook itself to facilitate home building and/or provide the home ownership subsidy out of its own finances.

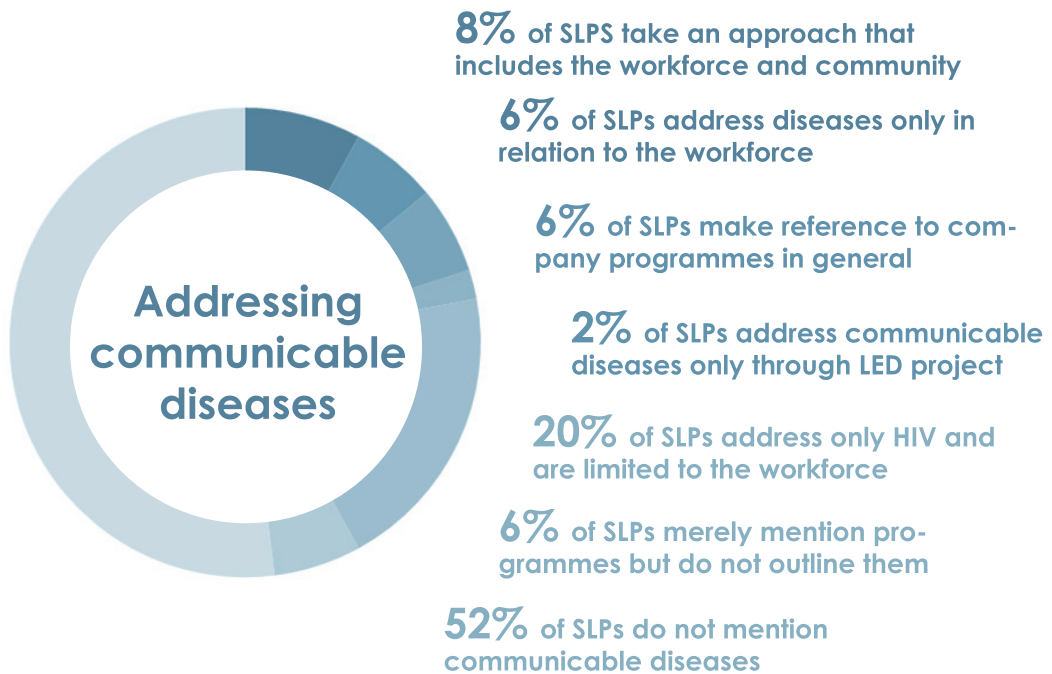


### Possible Explanation and Solution

A possible root cause for the lack of clarity in SLPs is the costs of building houses coupled with the complexities of designing an effective company housing scheme which include the differing and changing needs of workers. In addition, determining the housing needs and preferences of employees is complex, specific to each mine site but also shaped by the collective agreements reached between mining companies and trade unions. We were also informed, in discussion with government role players, that many mine workers earned above the maximum amount to qualify for government subsidy and that the Department of Human Settlements was looking to address this gap. What is required at a minimum is greater transparency in SLPs on how the particular housing priorities of the workers on site are aligned with collective bargaining agreement and local government priorities in addition to addressing the afore-mentioned subsidy gap.

## 10. Lack of communicable disease initiatives

One of the most important problems that SLPs may be required to address are severe communicable diseases such as HIV/AIDS and TB. It is important to note that mines are often the catalyst in an increase in exposure due to the population influx. In this sample, only 8% of SLPs took a holistic approach to communicable diseases that included both workforce and community interests. As many as 52% of SLPs contained no initiatives for dealing with communicable diseases.



### Possible Explanation and Solution

A possible contributing factor is that the SLP framework does not provide guidance on how communicable diseases are to be addressed in SLP. It is clear that there needs to be greater alignment between SLPs and legislation governing the health of workers and communities.

## 11. Human resources development or education and training

### 11.1 Selection criteria

The educational development that the mines offer are one of the most important social and economic interventions that the private sector can make, especially in areas where there are low levels of literacy and high levels of unemployment. SLPs tend to offer broad criteria for eligibility for bursaries and internships in particular.

Typical criteria included:

- 'deserving students';
- interested in mining-related education;
- children of workers; and
- learners in the broader community.

Human Resources / Education and Training programmes did not tend to refer to particular villages, suburbs or communities within municipalities. In addition, there tended to be little clarity on how initiatives were publicised in the broader community with only 16% of SLPs providing this information. This was especially the case for adult basic education training (ABET).



**38%** of SLPs include community education programme outside of bursaries

**24%** of SLPs include training only in relation to LED / infrastructure / income projects

**4%** of SLPs mention training programmes, but do not elaborate or explain

**34%** of SLPs do not deal with training in any capacity



**16%** Publicising training opportunities in the community

**16%** of SLPs provide how and where education programmes will be publicised in the community

**68%** of SLPs do not provide how programmes will be publicised / do not have any community training to begin with



**32%** of SLPs outline how human resources development / education programmes will be publicised to the workforce

**18%** of SLPs only mention that the mine will "communicate" or devise strategies to communicate to the workforce

**50%** of SLPs do not outline how human resources development/education programmes will be publicised to workforce

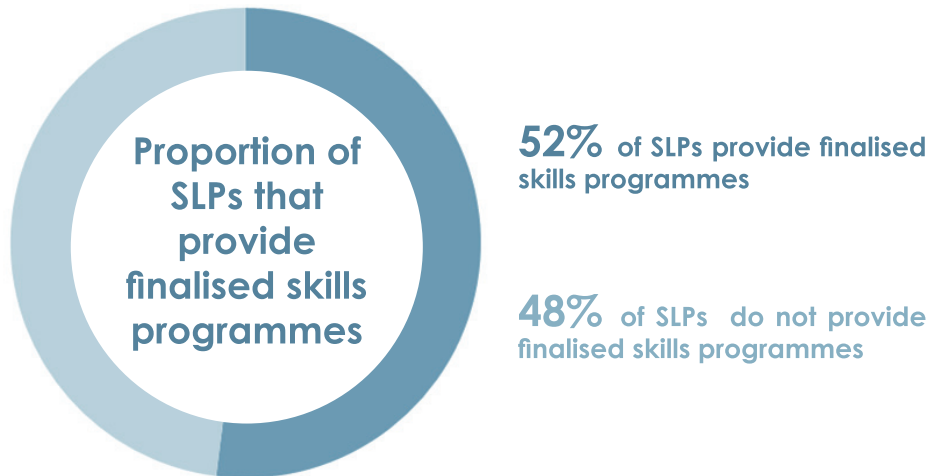
#### Possible Explanation and Solution

It is not clear from reading SLPs whether there is a plan that identifies steps for inclusion of communities in training programmes. When SLP opportunities are available, the process for enrolment should be clearly communicated in central public spaces. Examples might include advertising these opportunities on a local radio station and affixing notices in buildings frequented by the community including schools and post offices.

#### ***11.2 Do SLPs tend to provide clarity on how portable skills programmes are capable of equipping workers and communities for viable non-mining occupations?***

Equipping workers and communities with skills outside of mining disciplines provides opportunities for recipients of this training to determine their own career trajectory not restricted to the mining industry. The mining industry is notoriously uncertain when it comes to permanency of employment. Companies recognise that their operations have a limited life span and that demands of business could require a reduction in human resources in the future.

It is critical that the plan for downscaling and closure provides adequately for portable skills training to ensure that workers have the skills required to acquire an alternative job whether in mining or in other sectors.<sup>cxxxii</sup> This training should equip employees for work that is remunerated comparably, and preferably higher, than the job they are losing.<sup>cxxxiii</sup> The focus of LED and income generating projects should also be on areas that are not dependent or closely related to mining so as to increase their sustainability post-closure. There should be strong linkages between education and training programmes and infrastructure and income-generating projects.<sup>cxxxiv</sup> Just over half of the SLPs provided finalised portable skills programmes though the choice of the particular skills offered was seldom explained.



#### Possible Explanation and Solution

A possible explanation is that individual mining companies do not have an incentive for training workers for other jobs. A possible solution would involve government-funded training programmes focused on employability of mine workers post-closure, particularly with linkages to the previously noted environmental rehabilitation type projects as well as enterprise development.

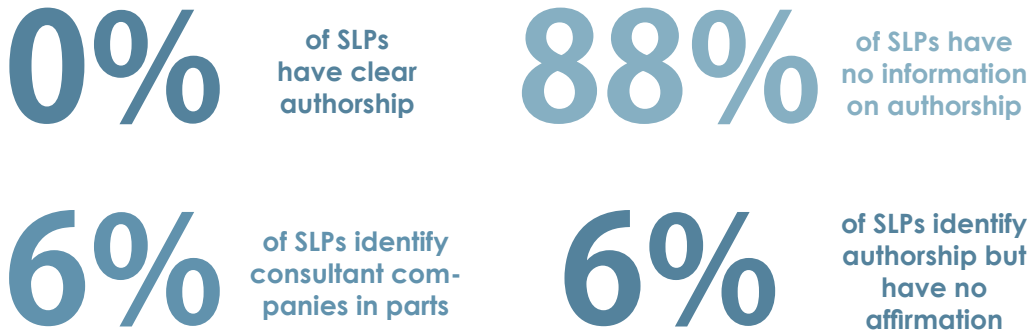
## 12. Accountability

### 12.1 Authorship of SLPs

In practice, we suspect that SLPs are frequently the consultant's idea of development more than the mining company's, let alone the community's idea that should drive SLPs. Given consultants role, it is critical that they are accountable to communities and other stakeholders. Whether the name, organisational affiliation, qualifications and experience of the consultant is provided has a direct impact on the accountability of the author, as an anonymous author could continue to provide substandard work and not be publicly sanctioned for it. Individual authors, whether consultants or mine staff, should be proud of their work and accountable for their submissions. It is vital that given the complexity of SLPs, the authors of SLPs have an understanding of socio-economic development and social dynamics.

The findings of this study are that none of the SLPs contains a clear identification of the author. 6% of the SLPs do, however, mention the consulting firms/companies that were involved in their formulation. In one case, there was reference to a consulting firm that did a 'socio-economic scan' of the host and sending communities. In that instance, the only tangible output by the consultant seemed to be a breakdown of the economic sectors in the host community and their economic contribution. One of the SLPs seemed to have been drawn up by a law firm in Johannesburg. Based upon the research of MTS, it seems that our concerns about whether the authors are suitably qualified are in some cases warranted. It was observed that there

were cases in which authors of SLPs are not versed in community engagement and socio-economic development. This can lead to the formulation of programmes that cannot be implemented within the 5-year period.<sup>cxxxv</sup>



#### Possible Explanation and Solution

A possible cause is the complete lack of requirements regarding the qualifications, experience and identification of the authors of SLPs. The regulations should be amended to address this and strict controls implemented. These will be discussed below as we look closer at the regulation of consultants.

### 12.2 The absence of a regulatory body for consultants

In order for the drafters of SLPs to be accountable, there should a professional body to which they report and are affiliated to. Having an overarching body would provide communities and workers impacted by poor SLPs an opportunity to report the respective person to the association. Additionally, such a body would perform a filtering function for companies seeking consultants of a high calibre. There was no evidence in any of the SLPs that authors were accountable to any external body. In our own personal interactions with both consultants and affected communities it has become apparent that there is no external line of accountability for consultants.

#### Possible Explanation and Solution

A solution would be to create a body to license, oversee and regulate local economic development practitioners in an analogous fashion to the Environmental Assessment Practitioners of South Africa (EAPASA).<sup>cxxxvii</sup> Alternatively the legislator could allow local economic development practitioners to sign up with EAPASA.

### 12.3 The absence of a uniform training curriculum for practitioners

An SLP is comprised of a variety of different sections, which require a myriad of skills in order to sufficiently draft an implementable and appropriate plan. It is therefore insufficient to have a single expert drafting an SLP. These

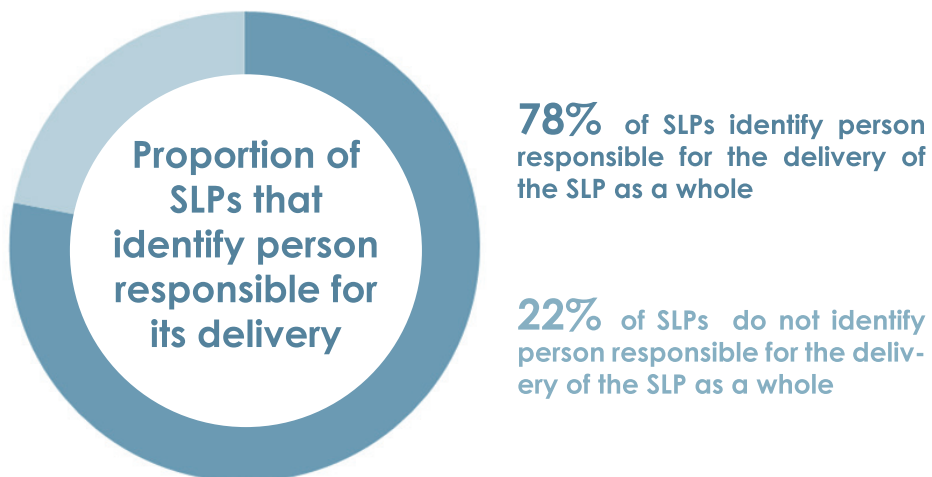
skills include developmental planning, social science, construction, mining, education, human resources and various others. SLPs are both a relatively new and highly polycentric, multidisciplinary and intersectional enterprise. Consequently, pooling and integrating the particular mix of skills required presents some challenges. The uneven quality of SLPs in the sample suggests the need for a uniform and compulsory curriculum for practitioners.

#### Possible Explanation and Solution

A universal curriculum should be developed and once finalised should become a pre-requisite to designing SLPs.

### 12.4 Internal accountability for delivery of SLP targets

To ensure the SLP is not merely a collection of paper commitments, it is important that structures be put in place within companies to ensure clear lines of accountability for the meeting of SLP commitments. Clarity regarding the person responsible would also assist DMR in monitoring compliance and setting up channels of communication with the right person at the company. Such structures may include the appointment of a full-time SLP manger.<sup>cxxxvii</sup> 78% of SLPs did follow the 2010 SLP Guidelines by providing the contact details of person chiefly responsible for the SLP but in 22% of these cases their designation was not provided. Most frequently, this person was the mine manager. With regards to the specific components of SLPs, the general pattern was for a significant proportion of SLPs to identify the person responsible for implementing human resources development programmes, while far fewer SLPs did this in relation to LED. Not surprisingly, the former tended to be managers within the HR department of companies. These findings raise questions about whether there is effective internal accountability for SLPs. Our concern may be warranted as internal commitment and accountability has been highlighted as an issue by SLP practitioners.<sup>cxxxviii</sup>





### Possible Explanation and Solution

As discussed above the absence of information regarding the responsible people, especially for LED projects may be indicative of a lack of clear and effective lines of accountability within companies. This, in turn, may reflect a relatively low priority being accorded to SLPs that might be associated with a view that SLP commitments are of lesser status than binding licence conditions. Pressure to create clearer lines of accountability could be brought to bear through requiring in the MPRDA regulations that SLPs provide the specific names and job titles of the person responsible for each major component and sub-component of the SLP. Accountability pertaining to reports might be fostered by requiring an SLP report, prepared by the designated person from the company to form a part of the regular reports to shareholders and to be presented at the AGM. Recommendations pertaining to the binding status of SLPs are dealt with under the headings dealing more directly with this issue.

## 13. Implementability

### 13.1 Conceptualisation of projects

#### 13.1.1 Evidence of project feasibility analysis rare

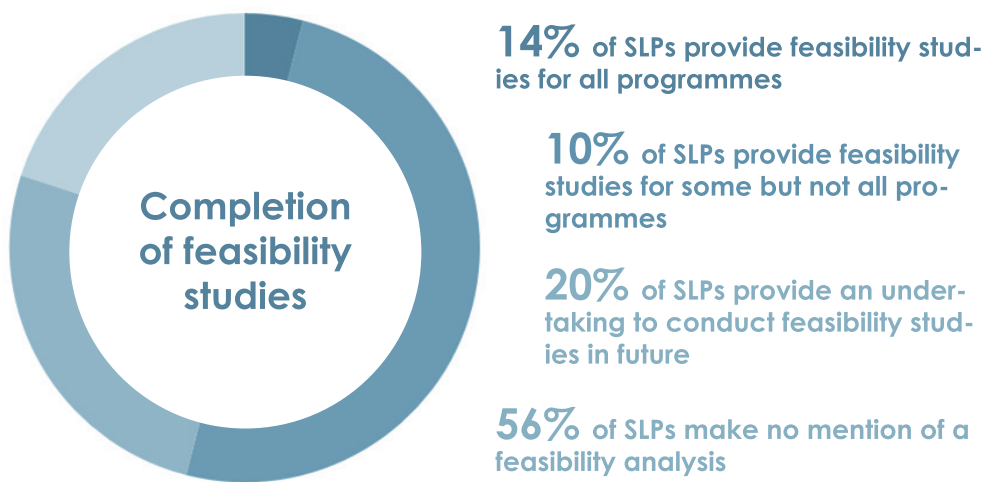
The viability of LED projects is dependent on early and comprehensive feasibility assessments. There should not be over-reliance on prior IDP project planning and/or stakeholder engagement processes. Planning of projects needs to clearly identify deliverables, timeframes, partners, service providers, beneficiaries, budget requirements and timing of expenditure and exit strategies.<sup>cxvix</sup> An example of the consequences of the lack of feasibility planning was provided in the expert affidavit submitted to the Marikana Commission of Enquiry.<sup>cxli</sup>

### Example

Company X proposed investment in a lavender farm in Mpumalanga as one of its LED Projects. The initial deliverable (year 1) was the completion of the feasibility assessment. A suitable specialist was engaged to complete this assessment which was completed in month ten (10) of year one (1). The assessment determined the project would have minimal viability and recommendations were made for both changes to the scope of the project as well as alternatives. The Company discussed this through several rounds of meetings within various parties and by the end of year two (2) it was decided to drop the project and look for an alternative project. This alternative was identified by quarter two (2) of the third year and a Section 102 was submitted. The projects eventually commenced in year four (4). These significant time delays due to inadequate planning resulted in three (3) of the five (5) years of the SLP without SLP project delivery or associated impacts.

In our SLP sample, only 14% stated that feasibility studies had been conducted for all their programmes; 10% stated that feasibility studies had been conducted for some of their SLP programmes; 20% stated that some sort of feasibility studies would be conducted in the future and; 56% of SLPs made no mention of any feasibility studies or assessments.

From this evidence, there is therefore reason to suspect that feasibility studies often do not precede project selection. This view is also given weight by the research of SLP specialists who have found that, where, mentioned at all, the investigation of market conditions and feasibility studies are typically deliverables to occur within the project cycle instead of having already been completed prior to the decision to include the project in the SLP.<sup>cxlii</sup>



#### Possible Explanation and Solution

The lack of these studies is possibly due to the brevity of the timeframe for applying for a mining right and related authorisations as well as costs associated with the studies, especially when companies have no guarantee that projects will be approved. More fundamentally, the fact that companies do not feel the need to complete feasibility studies for SLPs is indicative of a disregard for SLP obligations as the approval of a mining works programme, for example, without a prior feasibility study is, in contrast, uncommon. Further, SLP project feasibility cannot be meaningfully assessed without community and worker consultation. Lack of community consultation prior to SLP could therefore also be a contributing factor. Companies should be required under the Regulations to conduct a feasibility analysis prior to SLP approval and a required component of the LED and employee housing and living conditions sections of the SLP should be an explanation of the outcomes of feasibility analysis and the parameters for project feasibility.

### **13.1.2 Consistency of conceptualisation and terminology between different SLPs**

It is important that to facilitate comprehension and consistency, certain concepts in SLPs need to be standardised. An example of such a concept is 'labour sending area' which is crucial for identifying beneficiary communities as the MPRDA regulations provides for LED initiatives to target the area where the mine operates as well as any other major labour sending areas. At times 'labour sending areas' is used in contrast to local areas whereas in other SLPs labour sending areas are inclusive of all areas from which workers are sourced, including the local area.

A more serious impact of the uncertainty regarding the concept of labour sending areas is that many SLPs did not consistently contain programmes in labour sending areas other than the area in which the mine operated. Given that all areas from where workers are recruited are labour sending areas, a clearer distinction would be between the local area and 'other major labour sending areas.'

#### **Possible Explanation and Solution**

Some of the confusion is due to the inconsistency of terminology and lack of clear definitions in the regulatory framework itself. The Regulations, refer in different instances, to 'labour sending areas' and 'major labour sending' areas and define neither. The 2010 SLP Guidelines also uses both terms interchangeably. Its definition of labour sending areas is 'the areas from which a majority of mineworkers, both historical and current, have been sourced.' The problem with this definition is that many mines do not have one particular area from where over 50% of workers are recruited from. An additional source of confusion is that while the legislative framework is not clear about this, there are two bases for defining the beneficiary community. The first is based on direct impact of mining activities and this will be the local community defined in terms of proximity. The second is based on the areas from which significant proportions of workers have been recruited. These may overlap when the majority or a significant proportion of workers are recruited from the area surrounding the operation but does not always do so. The solution is that the regulations at least must specify both bases for identifying project beneficiaries and provide clear and workable definitions of local and labour sending areas. It should be clearly indicated that these two classifications are not mutually exclusive. In addition a standardised curriculum for SLP authors, as recommended under 12.3 above, would likely lead to more consistent use of terminology and concepts.

### **13.1.3 Clarity on the identification of beneficiaries**

The extent to which an SLP identifies the beneficiary communities is indicative of the extent to which the authors have consulted and understood the former. While several SLPs did not define LED beneficiaries at all, the general tendency was to define them in terms of local and/or district municipality/s. A smaller proportion of the sample used a specified radius from the mine. A

few SLPs did, however, expressly state that specific projects would be rolled out in particular villages or suburbs.

#### **Possible Explanation and Solution**

A possible explanation for the absence of definitions is that a substantial proportion of SLP designers do not have a clear understanding of the most affected communities. A possible solution might to indicate a process for identifying beneficiaries for SLPs as a whole as well as for individual projects. This process should be part of larger and legislatively required process of community consultation, stakeholder identification and mapping linked to a stakeholder engagement strategy.

### **13.1.4 Clarity of benchmarks for compliance**

When targets are set in SLPs, the mines must report on an annual basis to the regulator and their shareholders on their compliance with commitments. To fulfil their purpose targets need to be measurable and therefore clearly defined. If targets are vague or accompanied by caveats and loopholes, it will be difficult for companies to be ever found to be non-compliant, even if the results fall entirely short of the ostensible aim of the project. Many of the projects that that are proposed in the LED and HR Development sections tend to be outlines of proposed projects or 'concepts' rather than rigorously conceptualised and finalised programmes.<sup>cxlili</sup>

An example of a vague commitment is to 'develop a home ownership plan to facilitate sustainable housing solutions' at an unspecified date. An example of a caveat is to make the building of houses subject to future financing by a bank (that has not been secured yet). SLPs with such conditions should not be approved and the decision to approve such an SLP is arguably unlawful and vulnerable to being overturned. In our SLP sample, the lack of specificity seemed to be a particular problem in relation to income generating projects and home ownership schemes for workers.

#### **Possible Explanation and Solution**

The solution to this problem lies primarily in vigilance by regulators who decide to approve the SLPs submitted by applicants for mining rights. SLPs with vague benchmarks for compliance should not be approved.

## **13.2 Clarity of the division of roles and responsibilities for the implementation of SLPs**

### **13.2.1 Lack of clear division of roles and responsibilities between mining companies and other role players**

There are numerous parties and actors whose involvement is critical to the realisation of SLP commitments. A large subset of these role players are government structures. Government comprises numerous entities including local and district municipalities, provincial government, national government

and line departments in both provincial and national government. Co-operation is especially critical and challenging because some components of SLPs, infrastructural LED programmes in particular, involve the company assuming developmental responsibilities associated with government.<sup>cxliv</sup> It is crucial that the role players agree on a clear delineation of how each entity must discharge their duties.

The consequences of a failure to do so include confusion, shifting of responsibilities and the ultimate failure of the project. A school built under an SLP will, for example, not be viable where the company has not consulted the Department of Education about whether or not teachers are available to fill vacancies or has not engaged with the municipality on the provision of basic services such as water and electricity to the site. This example provided in the expert affidavit submitted to the Marikana Commission of Enquiry further illustrates the consequences of poor communication and demarcation of roles between the company and government:

#### Example

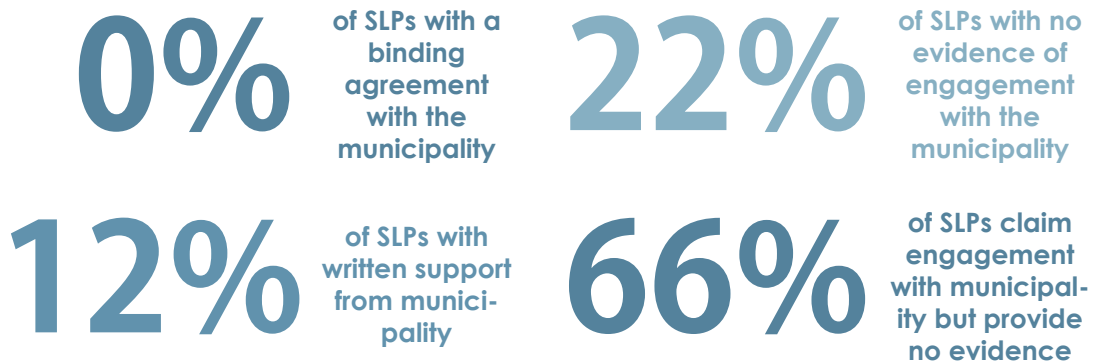
During Company X's consultations with a municipality in the Mpumalanga region, the municipality representatives insisted that they required new offices for a section of municipality. The company agreed to provide support through their LED programme within an infrastructural development project for the construction of the new offices. However at the hand-over of the project and the completed infrastructure to the municipality, the municipality had run into budget constraints and could not furnish the facilities with office equipment. The officials only commenced with the use of the facilities more than a year after completion. This example demonstrates the municipality's inadequate planning and financial management systems as well as an overt focus on benefits of mine investment for the municipality structure rather than their constituents, made worse by the resultant white elephant for an extended period of time.

SLPs do not tend to very clearly demarcate the roles, and responsibilities between mining companies, particular government entities, organised labour, communities and other stakeholders. Several of the projects provide for an agreement with the municipality or another government entity to occur in the future, which would presumably iron out roles and responsibilities.

In a small number of projects, however, there are clear statements that "it has been agreed with government that government will do x." Government structures are generally identified and there is provision for co-operation. In several instances, however, the terms of the co-operation does not seem to have been finalised. Our research has found that in our SLP sample none evidenced binding agreements with municipality, while 22% had no evidence of engagement with municipality at all. 12.% provided evidence of engagement with municipality and written evidence of support and correspondence (e.g. Letter of support of MOU). By far the largest group of SLPs (66%) were those that spoke of engagement with municipality, yet provided no evidence of engagement.

### Possible Explanation and Solution

The underlying challenge is that the SLP system brings mines into roles and responsibilities associated with government, leading to confusion of responsibilities and resistance on the part of the former to contributing constructively and proactively. This, in fact adds to the already existing confusion resulting from uncertainties in the framework for co-operative governance (between government entities). The processes for co-ordinating the efforts of role players in the SLP system need to be clarified. A key arena for co-ordination and delineation of roles and responsibilities would be the IDP design process. More clarity regarding the integration of SLPs into the IDP process is required. The annual reporting process also provides an opportunity for the co-ordination of government departments as the DMR can, for example, contact the Department of Basic Education to confirm whether arrangements have been made for teachers at a school built in terms of the SLP. It is not clear whether this method of verifying reports and communicating is used in practice.



### 13.2.2 Possible risks to project completion

Sound planning requires that foreseeable risks to project completion be identified at the outset so that they can be prevented through revisions to the plan or addressed through contingency plans. The failure to do so rigorously makes it more likely that projects will fail due to foreseeable risks. Only 12 % of the SLPs in the sample analysed expressly identified the risks to project completion.

### Possible Explanation and Solution

One of the underlying factors behind the frequent failure to specify risks to project completion is a failure to do feasibility analyses prior to the decision to adopt a project, which in turn might be influenced by the business imperative of getting the mining right application (including the SLP) finalised as soon as possible. Part of the solution might lie in inserting into the MPRDA regulations the requirement that particular types of projects (such as LED) include a description of the risks to project completion and the measures undertaken to avoid them materialising.



### 13.3 Timelines set for implementation of SLPs

The provision of timeframes for projects is necessary to provide a sense of how long these projects will take to be implemented. In this regard timeframes are critical for accountability to the regulator, to communities, workers and other stakeholders. On this issue, most of the SLPs in the sample fared somewhat better, in that most projects had timeframes of a sort. However, in many cases, the milestones were not described in significant detail. One example was the persistent failure to explain the process of handover to municipalities and communities.

#### Possible Explanation and Solution

There are many variables that have to come into effect for SLP projects to be delivered on time. The possible reasoning behind a minority of SLPs leaving some timeframes undefined is that tying the company to timeframes could put the operation in danger of not achieving the targets and risking non-compliance. The solution lies in sound and proactive planning by companies and for the DMR to refuse to approve any SLPs where dates for deliverables are not clearly stated

### 13.4 No clear exit strategy

To ensure that LED projects lead to sustainable economic development and sources of livelihood for communities, it is vital that projects such as businesses set up by the company to be transferred to the communities have a clear exit strategy that reduces the risk of dependence on the company.<sup>cxliv</sup> This should involve the creation of linkages to the non-mining local private sector as well as to the public sector.<sup>cxlv</sup> For example, if the business established is a waste paper facility, exit would require the establishment of a business relationship with companies that convert recycled paper into products, for example printing paper.

MTS observed that this was frequently neglected in project planning processes leading to the risk of dependency materialising.<sup>cxlvi</sup> This was born out

by our research in which we typically saw little evidence of a coherent exit strategy beyond a handover date to the community. In one example, we even observed what seemed to be a plan for community beneficiaries to pay back the costs invested in an agricultural programme.

#### Possible Explanation and Solution

Developing an exit strategy is a complex exercise with a lot of variables. What is critical is that companies undertake rigorous feasibility studies prior to the finalisation of the SLP that make sure the businesses proposed reflect the needs and priorities of communities and are compatible with the local economic landscape. The 2010 SLP Guidelines do provide for project plans to include exit strategies. The lack of clarity on exit strategies reflects insufficient vigilance on the part of the DMR in ensuring that this is meaningfully addressed.

## 14. Alignment

### 14.1 Alignment with government programmes

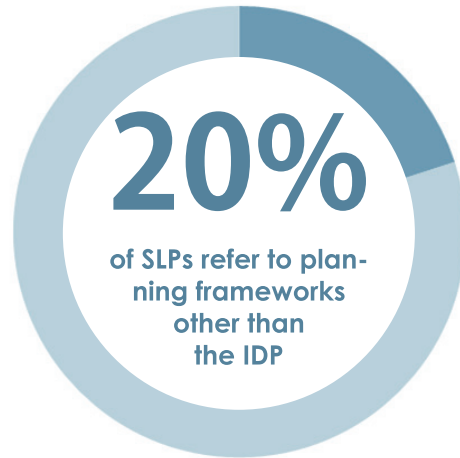
#### 14.1.1 Extent to which IDP and other relevant government policies, plans and priorities are clearly identified

The main sources for the content of the LED initiatives in the SLP should be the wishes of the community as expressed during consultations with the mine and its consultants and the municipality's Integrated Development Plan (IDP). In addition, SLPs must align with other legislative requirements and guidelines that compliment the objectives of the SLP including the Employment Equity Act ("EEA"), Basic Conditions of Employment Act ("BCEA") and the Broad-Based Black Economic Empowerment Act ("BBBEEA") to name a few. Further, in order for an SLP to operate successfully, it needs to be directly integrated with municipal and provincial spatial development frameworks ("SDF"), IDPs and other land use spatial planning instruments. Spatial planning aims to harmonise different forms of development through identifying nodes for particular forms of development. The instruments described above are all important as they are infused with policies and priorities of different spheres of government. Therefore if initiatives are not clearly identified and aligned with these predetermined pathways then regulatory approvals become a challenge. Our finding was that while the vast majority SLPs (88%) identified the applicable IDPs, far fewer (20%) identified other critical planning instruments.

#### Possible Explanation and Solution

An underlying cause is likely the lack of clear processes for aligning the processes for government development planning and mining company's planning in the form of SLPs. A possible solution is to make approval of SLPs contingent with the relevant legislation and spatial planning frameworks. Co-operation between local government, provincial government and the DMR will be critical. A curriculum for SLP authors should include training in the laws and processes with which the SLP design process must align.





**14%** of SLPs state projects chosen from existing IDP programmes

**58%** of SLPs state that programmes broadly align to IDP

**20%** of SLPs indicate IDP itself result of collaboration with mining company

**4%** of SLPs state that aligns with IDP but do not explain how

**4%** of SLPs do not mention of the IDP

#### **14.1.2 Extent to which SLPs explain the consultation process by which IDP priorities are translated into SLPs**

It is important that the processes of developing an IDP and SLPs within the municipality are integrated to ensure that SLPs by all mining companies in the area are part of a consolidated plan for LED that is spearheaded by local government. However, there is a risk that companies will dominate these engagements at the expense of directly affected communities and community-based organisations. In 58% of cases SLPs programmes were broadly aligned to IDP objectives while 20% of SLPs indicated that the company participated in the formulation of the municipal IDP.

In 14% the SLP states that projects were chosen from a list of existing IDP programmes. Very few SLPs (4%) do not mention the IDP at all or proclaim their alignment without explaining what the IDP says (4%). In none of these examples, however, was there any discussion of the role of directly affected communities in these processes.

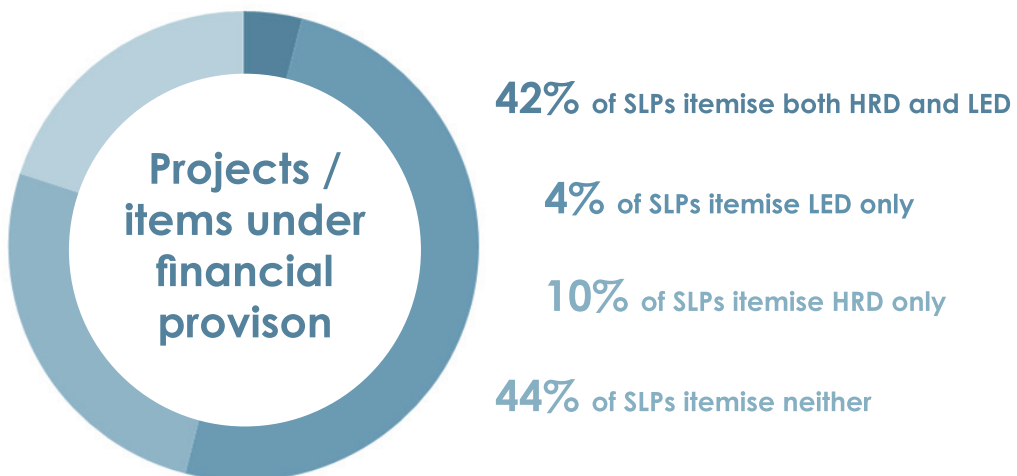
### Possible Explanation and Solution

Part of the problem might lie in the lack of a clear process for integrating SLPs into LED planning and for integrating the SLPs by different mines in the area. There therefore needs to be clearer processes and structures, possibly provided for in regulations. These processes must also place community participation at their centre. A possible contributing factor is that SLP regulations do not require a description of why and how a particular SLP programme was chosen. This should be required under the regulations.

## 15. Financial provisions

### 15.1 Do financial provisions for closure tend to be clearly itemised into specific components

Unless specific financial provisions are linked to specific line itemed project components, it is impossible for the outside reader to assess whether projects are adequately financed. A substantial proportion of SLPs did include each project item in the financial provision, though many were also limited to the overarching categories such as 'human resources development', LED, housing and living conditions and downscaling and retrenchment. In order for a reader to easily understand how the whole SLP is to be financed all projects should be included in the main 'financial provision' table. It is also vital for enabling public accountability, that the reader of the SLP does not have to total up the expenditure for the SLP themselves. 44% of SLP's financial provisions section did not provide a breakdown of the projects within SLP sections while a similar proportion (42%) provided an itemisation of both human resources development and local economic development.

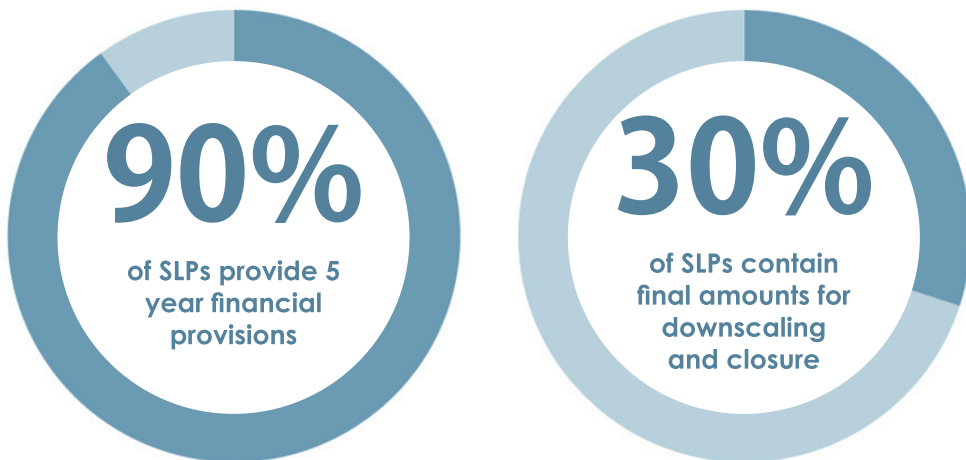


### Possible Explanation and Solution

The least charitable interpretation of this is that it sometimes reflects an intention to confuse and complicate the financial provision. Another explanation is that companies might want the flexibility to allocate funds only after the SLP has been approved. The solution is clearly requiring in the regulations that the financial provision section must list and total up each programme in the SLP as well as each main section of the SLP. The DMR should also not approve any SLPs that have not totalled up their financial provisions.

### 15.2 Financial provisions for life of mine v 5 year SLP cycle

It is important to provide the financial provisions for both 5 years and the life of mine to allow the reader the context of the monetary spend for the SLP and life of mine cycle. The majority of SLPs (90%) did provide 5 year financial provisions. Very few SLPs provided a life of mine financial provision, though a greater number of SLPs displayed the planned spend for the downscaling and retrenchment component specifically over the life of mine rather than over 5 years.

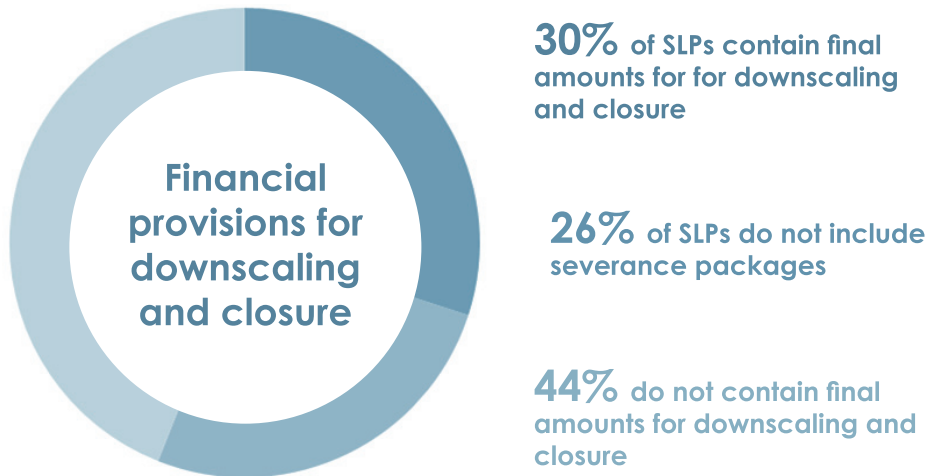


### Possible Explanation and Solution

The requirement in regulations should be that every project must have a five year financial provision but that, where finalised, life of mine financial provisions must also be in the SLP text.

### 15.3 Do SLPs tend to have a finalised financial provision for downscaling, retrenchment and closure?

An adequate financial provision of a finalised and certain amount is a pre-requisite for guaranteeing that the required funds will be allocated to programmes. Many of the financial provisions did not contain the final amount for downscaling and closure. Many had certain conditions and caveats to their use such as large percentages of the funding being subject to obtaining funding from third parties.



#### Possible Explanation and Solution

A possible explanation is that either SLPs are not sufficiently complete to finalise the financial provision or that companies do not budget fully for SLPs prior to their mining right application. Part of the solution lies in vigilance by the DMR which should not grant mining rights if there is any reason to suspect spending commitments are subject to caveats and/or haven't been secured.

### 15.4 Conflation of financial provisions for mining operations forming part of a cluster

Financial provisions are often conflated with those of a whole cluster of operations in an area, which can create the impression that the total expenditure on SLPs is far higher than it is in reality. In our analysis, up to 9 mines seemed to have been double counted in this manner to the potential detriment of communities and workers. This conflation creates confusion for those trying to assess the SLP, making it difficult to evaluate which expenditure is for the cluster as a whole and for the specific mining right.

### Possible Explanation and Solution

One possible explanation is that in certain instances there may be deliberate double counting which makes it more likely that SLP expenditure for clusters will be smaller than is commensurate with the overall scale of activities. This is enabled by the lack of legislative parameters on how clusters/consolidated projects are dealt with at the level of SLPs. Regulations should provide for consolidated SLPs and in such instances should require them to state the geographical boundaries of the cluster, which programmes were undertaken at a cluster and project level and why such a decision was made. The DMR also needs to look very carefully for signs of double counting and should withhold approval and/or suspend mining rights where this is detected.

### 15.5 Linking the commodity price to the fulfilment of commitments

In some SLPs there are conditions or caveats at the end of the final financial provisions that state that the company cannot be expected to fulfil all the obligations set out in the SLP if the commodity price for the mineral concerned falls below a certain threshold. A small number of SLPs state that expenditure is based upon 1% of after tax profit. In one instance it was stated that if profits turn out to be higher than projected, LED commitments would increase but they would not decrease if the opposite was to occur.

The obligations should never be to subject to a price as this can allow mining companies to easily escape their obligations to provide benefits that are commensurate with the negative impacts of mining on communities, which will not vary with the commodity price. Allowing this is also to treat SLP obligations as permissive rather than a compulsory legislative requirement for which the company should budget. Our research has shown that 20% of SLPs directly link their fulfilment of their SLP commitments to the commodity prices, further 10% link commitments to the feasibility/financial viability of projects, moreover 22% of SLPs spend is related directly to profits/cash flow which would be affected by commodity prices. 48% of SLPs, however, did not mention a link between obligations and commodity prices.



**20%** of SLPs explicitly link their commitments to commodity prices

**10%** of SLPs qualify commitments in terms of feasibility / financial viability to company

**22%** of SLPs relate spend directly to profits or cash flow which would be affected by commodity prices

**48%** of SLPs do not explicitly mention a link between obligations and commodity prices

### Possible Explanation and Solution

A possible explanation for the minority of SLPs that link fulfilment to commodity prices is a view that profits should always take precedence over the social license to operate, even where developmental undertakings form part of a company's compliance with the law. The existence of these caveats also shows that, at times, the DMR allows them. There is therefore the need for vigilance on the part of the Department in seeing to it that SLPs with this type of caveat are never approved.

## VIII. Assessment of regulatory system in light of findings

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In the previous section we identified a number of recurring defects in the SLP sample. Where deficiencies are not confined to isolated cases, the logical inference is that there are common, systemic factors that produce these outcomes. The bulk of the possible causes, including communication between municipalities and mining companies, require further research. At this point we are best placed, given our expertise, to examine the links between our findings and the legal framework. This chapter will therefore take some of the key findings discussed above and identify attributes and absences in the legal framework that are among the contributing factors in the pervasive deficiencies in SLP design.

### 1. The adequacy of provision for community participation

#### 1.1 The adequacy of notice requirements

One of the most severe deficiencies of the SLP regulatory framework is the lack of guidance on the role of communities and workers with the former, in particular, being overlooked. Neither the MPRDA nor the Regulations mention community participation in the context of SLPs. The only direct mention of community participation is the statement in the 2010 SLP Guidelines that 'The Mine or Production Operation must, through consultation with communities and relevant authorities, produce a plan.'<sup>cxlvii</sup>

The MPRDA and Regulations provide a consultation process to follow in the application for rights and permits. These are expanded upon (though not significantly) in the DMR Consultation Guidelines. The requirements are significantly less detailed than in the NEMA EIA regulations. Notice provisions are critical, as the breadth of interested and affected parties reached through notice determines the possible inclusivity of the participation process. The requirements in the MPRDA Regulations are only the following:

- Notice must take place either at the office of the Regional Manager, or the relevant designated agency that is accessible to the public.<sup>cxlvi</sup>
- The form of notice may be either publication in the applicable provincial gazette; notice in the magistrate's court in the applicable magisterial district; OR advertisement in a local or national newspaper that circulates in the area of the application.<sup>cxlix</sup>

The result is that many interested and affected persons may not see or hear the initial notice. This contrasts with the far more extensive requirements for notice in relation to environmental matters regulated under NEMA and the EIA regulations. These, for example, require proactive measures to be undertaken in the event that interested and affected persons may not be able to read the notice on account of lack of resources, disability or illiteracy. Another point of contrast between participation under the MPRDA and under

NEMA is that the former does not indicate what information interested and affected parties must be provided with to ensure there is a level playing field with regards to access to information.<sup>cl</sup>

Further, neither the MPRDA nor the MPRDA Regulations expressly provide for this process to be followed specifically in relation to SLPs. This shows the need to align the requirements for all public participation processes relating to mining and to adopt the more rigorous standard set in the EIA regulations. The new single environmental management system means that public participation with respect to environmental assessment is now governed by the 2014 NEMA EIA regulations. Socio-economic and environmental issues are deeply intertwined hence the importance of alignment of processes.

Given the complexity of SLPs in relation to design, implementation and monitoring, separate but complimentary regulations for SLPs are warranted. These regulations should specify the consultation process for SLPs. The general consultation standards in the MPRDA regulations should, however, also be strengthened to align with those in NEMA.

### ***1.2 Inclusivity of participation***

In our engagement with mine-affected communities, we have observed a tendency of mining companies to consult with a narrow range of local stakeholders who are typically the most powerful within the community. It is therefore important that provisions regulating consultation attempt to counteract this through expressly requiring that consultation be conducted with a broad range of stakeholders, and through adopting an inclusive definition of communities.

The DMR Consultation Guidelines do contain definitions for the concepts of 'interested and affected parties' and 'community' more specifically. The best feature of these definitions is that the community is not treated as equivalent to traditional leadership. However, the DMR Consultation Guidelines could be clearer that a diverse and representative range of groups and organisations within the community should be consulted. It is also problematic to relegate this to guidelines rather than binding regulations. Further, as stated above, it is not expressly stated that these provisions in the guidelines are applicable to SLPs specifically. The solution would, again, involve specifying the requirements for inclusivity of consultation in specialised SLP regulations, as well as in the general standard for consultation in the MPRDA regulations.

### ***1.3 Participation in the design of SLPs***

It was found that very few SLPs explain the process of consultation that was followed with communities, hence it is not clear that in these instances meaningful participation occurred. In addition, even fewer SLPs indicated how the expressed needs and priorities of communities shaped the selection of projects. This should be seen in the light of communities regularly stating that broad-based consultation on SLPs does not occur. A community for whom CALS provided assistance in relation to SLPs had to, through their lawyers, write a series of letters before even obtaining the SLP to comment on. This can, in part, be attributed to the lack of a clear and robust process in the framework legislation and policies. As stated above, the binding com-



ponents of the SLP framework, namely the MPRDA and regulations, do not clearly prescribe the consultation of interested and affected parties to the extent required in the EIA process.<sup>cli</sup> The only express provision requiring community consultation in the SLP design process is contained in the 2010 SLP Guidelines which does not go further than stating that the rights holder must prepare a plan through consultation with the community.

There is therefore no clear process for communities to participate in the defining of programmes that are designed to benefit them and mineworkers. What information communities should be provided with, and when, is not specified. Significantly, there is no general requirement that SLP texts set out the needs identified by workers and community members, explaining how projects are designed to address these needs.

### **1.4 Participation in the implementation of SLPs**

The present regulatory framework is largely silent on participation in the implementation of SLPs, with the exceptions of workers' housing and future forums discussed above. There is no provision for a formal role by elected community representatives in structures tasked with implementing SLPs. There is also no provision for regular reporting back to the broader community on the progress made in fulfilling the undertakings in the document. The Act and Regulations should require structures to facilitate regular communication and the continual involvement of community members in the implementation and monitoring of SLP programmes. Approvals of the SLP for the next cycle should be conditional on evidence of this being provided to the DMR.

## **2. Lack of distinction between greenfield and brownfield operations**

As MTS have argued, there is an important distinction between 'greenfield operations', which are operations in their 'infancy' and 'brownfield operations' which are operations already at a 'matured stage' at the time of the mining right application.<sup>clii</sup> MTS submitted that greenfield operations will need to focus more on addressing skills deficits within the mining community and supplier development.

Brownfield operations, in contrast, will have an existing workforce. There will therefore need to be an emphasis on on-going improvements to workers' education and skills levels. At present, neither the regulations nor guidelines, expressly address the difference between the two types of mining operations. The result is that relevant considerations may be excluded and irrelevant considerations included in particular SLPs. The significant differences discussed above may warrant different templates for each stage of the mining life cycle.

## **3. Inconsistencies between the MPRDA Regulations (40-46) and the Revised SLP Guidelines (2010)**

Two key findings discussed above were inconsistencies in how programmes were categorised and which objectives were pursued or ignored. These findings, it will be shown, are linked to a number of deficiencies in the regu-

latory system, including a lack of alignment between the applicable regulatory instruments.

We noticed, for example that while the MRPDA regulations require mining companies to undertake measures towards the target of 10% representation of women in core mining activities, not all SLPs addressed this target. This can probably be attributed to the fact that the Amended Mining Charter and the 2010 SLP Guidelines, which were published to align SLPs to the Charter, make no mention of this target or any specific targets relating to women (they just refer to the 40% HDP representation in management). At a deeper level this can be linked to a systemic failure of legislation and policy to accord significance to gender transformation in the sector.

#### **4. Critical details contained in guidelines rather than hard law**

A noticeable feature of the SLP system is that many important aspects of the content of SLPs that should be in binding regulations are instead found in the 2010 SLP Guidelines which do not enjoy binding status. These include:

- The requirement to consult the community in developing the SLP;
- Information regarding the background of the mining operation;
- The types of social and economic background information required;
- The inclusion of information on positive and negative impacts; and
- The types of human resources development programmes that should be pursued.

It must be remembered that the SLP system constitutes a key mechanism for redressing historical inequalities in the mining sector. By making it a condition for the right to mine, it is clear that the legislator intends this to be a binding system in accordance with the importance of these objectives. Guidelines can serve an important function as they can assist different stakeholders in understanding the practical details of how to exercise their rights and discharge their obligations. However the effect of relegating much of the content and process to soft law guidelines is that much is left to the discretion of mining companies. The most important of these is undoubtedly the requirement to consult with community members which is a pre-requisite for a system that serves communities. In this regard, the MRPDA Regulations compare unfavourably to the NEMA EIA Regulations, which contains a thorough list of the information required in Environmental Impact Reports (“EIR”) and the programmes to be included in Environmental Management Programmes (“EMPR”).<sup>cliii</sup>

### **5. The adequacy of the definitions for key concepts**

#### **5.1 Community**

One of our findings is that definitions of the beneficiary community/s are not always directly provided in SLPs. The most common approach is to locate a mining company within a local municipality/s and/or a district municipality. In a few instances, SLPs defined the community as all falling within a specified radius of the mine. The danger of this approach is that if drawn haphazardly, the line can split the community into those who fall on the right and

wrong side of the line. It can also mean some communities who fall within several mines 'radiuses' benefit significantly over those who may be on the periphery of these lines. The resultant socio-economic investment can then be imbalanced within a region and more likely to be unsustainable when the mines in a region close.

It is therefore worth evaluating whether the legal framework provides sufficient guidance for mining companies to identify communities. The MPRDA defines 'community' as 'a coherent social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law.' The DMR Consultation Guidelines add the qualifier that communities are historically disadvantaged persons. While the definition of community is narrow and refers to customary communities, there is a broader definition for 'interested affected persons' that encompasses a wide range of stakeholders.

With regard to concepts as fluid and context-sensitive as 'community' and 'interested and affected parties', it is important that legislation does not fall into the trap of detailed one-size-fits-all formulations. What might improve matters is, first, to require more detailed reporting on community consultation and, second, for SLPs to expressly identify the particular groups of beneficiaries for each programme and the reasons for selecting the beneficiaries. It might also be useful to set out a toolkit for identifying the communities and interested and affected parties for the purposes of the SLP and the beneficiaries for the purpose of each programme. Such a toolkit would contain the criteria for beneficiary communities, including proximity and impacts as well as directions on how to identify communities. This could be a component of a DMR toolkit on consultation with communities or be included in amended SLP guidelines.

## **5.2 Labour sending areas**

South Africa has a long history of a migrant labour system, in which many of the workers on mines have been recruited from the historical homelands, other provinces and neighbouring countries. These areas, such as the Eastern Cape, continue to suffer from the loss of economically active people. It is critical that SLPs contain programmes to benefit communities outside of the mining area who contribute a significant proportion of their labour. Our research found that there is often a failure to adequately define all the major labour sending areas for permanent and contract workers.<sup>cliv</sup>

It is notable that the concept of 'labour sending areas' is not defined in the MPRDA or regulations. In the regulations, it is stated that the SLP must contain infrastructure and poverty eradication programmes in the areas in which the mine operates and in 'major sending areas.'<sup>cliv</sup> The 2010 SLP Guidelines defines labour sending areas 'as areas from which a majority of mineworkers, both historical and current are or have been sourced.' An additional source of confusion is that while the legislative framework is not clear about this, there are two bases for defining the beneficiary community. The first is based on direct impact of mining activities and this will be the local community defined in terms of proximity. The second is based on the areas from which significant proportions of workers have been recruited. These may

overlap when the majority or a significant proportion of workers are recruited from the area surrounding the operation but does not always do so.

While the regulations appear to treat labour sending areas as distinct from the mining area, the guidelines do not view labour sending areas in opposition to the concept of mining areas but instead include areas where workers are recruited, regardless of whether it is in the mining area. It is not clear whether 'area' refers to municipalities or cities, towns and villages. Further, in many cases there will be no single area from where a majority of workers are recruited. It would make more sense to indicate a lower percentage threshold for constituting a major labour sending area as well as a more specific description of the areas that constitute labour sending areas. Another significant issue relates to companies with major labour sending areas outside of South Africa. Though this is not expressly addressed in the regulations, it would appear that labour sending communities outside of South Africa would be eligible to benefit from LED initiatives.

### **5.3 Classification of LED projects**

The MPRDA regulations divide LED programmes into infrastructure and poverty eradication projects (the language of the regulations) while the 2010 SLP Guidelines alternately use the phrase 'poverty eradication' and 'income generating' to describe what appears to be the same type of project. Sometimes 'enterprise development' is discussed as distinct from these two programmes. In this case, the reason for the inconsistencies is fairly clear: there is no definition in the regulations or even the guidelines of what constitutes each category of LED project. Therefore clear definitions of the main LED project types need to be provided in the Act or the regulations.

## **6. Clarity on level of detail of background information**

The regulations and the 2004 SLP Guidelines, while requiring the LED section to be prefaced by social and economic background information (baseline social and economic information), did not specify which information is to be included. The 2010 SLP Guidelines represented a significant improvement in that there is now an extensive list of the types of social and economic information that the DMR would expect. However, as discussed elsewhere, it would be preferable if these requirements would be contained in binding regulations. There are also still limitations to the list in that information about the historical formation of the relevant community/s and the organisational dynamics of the community is not provided for.

## **7. Clarity on the process by which SLPs are compiled**

### **7.1 Clarity on when feasibility studies must be undertaken**

One of the findings discussed above was that most SLPs either did not discuss feasibility analysis at all or stated that feasibility studies would be conducted within the project life cycle. It is problematic to approve SLPs on the basis of projects not based on any feasibility analysis. It should be noted that neither the regulations nor even the guidelines provide an indication of when feasibility studies should be conducted. This is a gap that should be closed in any future regulatory reform.

## **7.2 Clarity on the parties to be consulted**

It was found that few of the SLPs provided a clear indication of which communities and interested and affected persons / organisations were consulted. This can, in part, be attributed to the lack of direction provided in the MPRDA, Regulations and 2010 SLP Guidelines. The Act and/or the Regulations should require that SLPs explain the organisations and sectors of the community that were consulted in order to incentivise inclusive consultation.

## **7.3 Authorship of SLPs**

It was observed that only a small minority of SLPs provided any information about who the authors were. Typically the reader of an SLP is not provided with any information about whether the SLP was designed 'in house', the name of the consulting company, the name of the authors, their qualifications and the nature of their experience. This is not surprising because, in contrast to EIAs, there is no express requirement in the regulatory framework that information about the author must be included. Neither is there guidance on what qualifications and experience is required to be eligible to design an SLP. Both need to be specified in the regulations and, in this, the Department can draw on the requirements in the afore-mentioned EIA regulations.<sup>clvi</sup>

## **8. Clarity on the roles and responsibilities of local government**

Given the role of municipalities in LED planning and the delivery of basic services, it is critical that a working relationship between municipalities and mining companies that lasts throughout the mine life cycle is formed. This co-operation is especially critical to the success of LED projects. An example is that, where the mine commits to a housing project, municipal input will be needed with regards to the water and sanitation requirements. However, the legislation does not indicate the role of local government in designing SLPs beyond requiring LED programmes to be in line with the municipal IDP. Nor does it clarify the role of local government in implementing and monitoring SLPs. Clear roles and responsibilities are crucial to the success of any project that requires significant co-operation between role players. Failure to closely regulate the interface between SLPs and IDPs risks allowing the more powerful mining companies to override the priorities of the lesser resourced municipalities.

## **9. The degree of provision for co-operative governance and regional co-ordination**

### **9.1 Co-operative governance**

The successful fulfilment of SLPs does not only require collaboration between companies and government, but also requires co-ordination between local, provincial and national government and between departments and agencies. For example, LED programmes involving the building of houses will require approval by local and district municipalities and will need to be overseen by the Department of Human Settlements and the DMR.

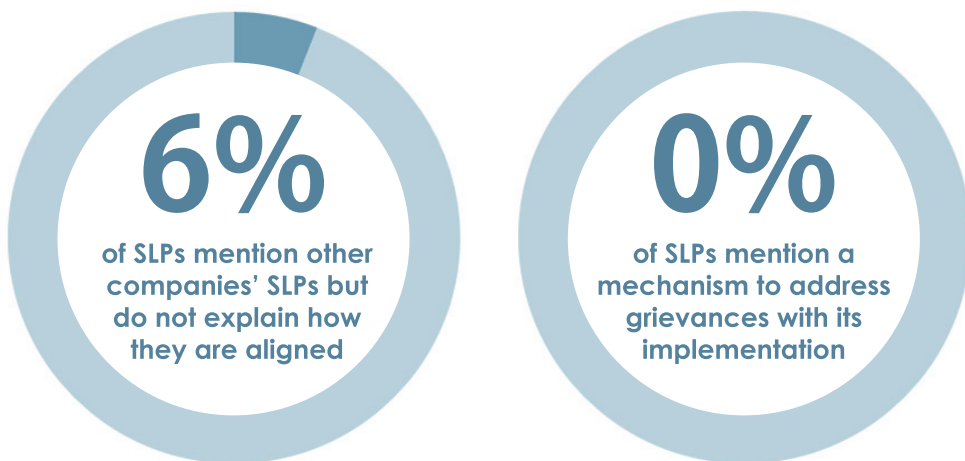
There are therefore two forms of co-operative governance that must occur, first, vertical co-operative governance between the three spheres of government and, second, horizontal co-operative governance between different departments and agencies. While there is a constitutional and statutory framework for vertical co-operative governance, there is no equivalent framework for horizontal co-operative governance.<sup>clvii</sup> The MPRDA and regulations do not improve matters as they provide no guidance on the relationship between government entities in the design and implementation of SLPs.

## 9.2 Regional co-ordination

It is vital that SLPs take a regional and cumulative perspective on the impact of SLP initiatives. Mining areas are organised by the location of mineral deposits. For example, the Western Limb of the Platinum belt (in the North West Province) has attracted several mining companies. It is therefore artificial to view the impacts of each mine, with regards to mining activity and social interventions, in isolation. For example, if several SLPs in an area already significantly address educational infrastructure while ignoring roads, it makes more sense for subsequent SLPs to focus on roads. Further, transport and other infrastructure need to be conceived as part of broader networks.

A finding of the research was that few SLPs evidenced an awareness of the efforts of other mining companies operating in the same region. While the IDP process should promote this co-ordination, it is not clear whether companies are using this opportunity to engage in co-ordination. This, however, is to be expected due to companies' position as competitors in a market economy. Each company will want to take sole credit for initiatives to enhance their reputation instead of contributing to a regional benefit strategy. The default approach of companies will not likely be co-operation.

For this reason it is important to have a clear framework for promoting co-ordination of efforts and a cumulative approach. This can be advanced by clearer regulation of the role of companies in the IDP formulation process and possible provisions for regional SLPs.



## 10. Clarity on the role of traditional authorities

The role of traditional authorities is uncertain in the regulatory framework. The power of traditional authorities varies greatly from community to community. Some traditional authorities play the role as gatekeepers for communities in consultations with mining companies on issues such as community benefit schemes and the disposal of community land to allow mining. We are, however, not in a position to provide concrete solutions to these issues that require further study. We will address this substantively in the forthcoming report on the implementation of the SLP system.

## 11. The problems with the amendment procedure

The only requirement for a company to amend its SLP is to obtain the consent of the Minister.<sup>clviii</sup> There is therefore no application form for SLP amendments, no requirement to specify reasons for amendments, no required supporting documents, no requirements for publicising amendments, and no right of mine workers and communities to participate in the amendments process. Amendments to SLPs can have a significant impact on the extent of the benefits that communities and mine workers enjoy. If ministerial consent is garnered, programmes can be significantly downscaled from those that formed the basis for the granting of the mining right. For example, the promise of the electrification of 800 homes can be whittled down to 80 homes without notifying the community. It is therefore important that those most impacted by amendments to SLPs are afforded an opportunity to respond to amendments before they are approved by the DMR.

There is evidence that this lack of a formalised and transparent procedure for amendments is allowing for the dilution others and ourselves have identified as a risk. MTS observe that there is a pattern of failure of right holders to conduct additional stakeholder consultation on revised projects.<sup>clix</sup> They observe that this goes against the requirements of the legislation, results in 'disjointed' SLPs and, most seriously, leads to the loss of trust amongst stakeholders.<sup>clx</sup> As to the first of these, it is our hypothesis that, while non-consultation on amendments is certainly against the spirit of the law, the ambiguity of the letter of the law enables this breach of the transformative objectives of the MPRDA and SLP system.

## 12. Inadequate provision for transparency

### ***12.1 SLP regulatory framework does not adequately promote access to information***

SLPs are designed to benefit workers and communities. Each SLP constitutes the fulfilment of statutory obligations on companies to develop and implement projects in the public interest. Consequently the plans need to be publicly available and easily accessed. Our experience in seeking to access SLPs discussed earlier provides evidence that there are significant barriers in accessing SLPs. The legislation needs to be assessed in the light of the culture of secrecy that still pervades much of the private sector, of which CALS' experience in obtaining the documents is just one example.<sup>clxi</sup>

Legislators should start from the assumption that a large proportion of mining companies will not, of their own accord, provide these documents to the public. Viewed from this perspective, it is unfortunate that there are no positive obligations on the rights holder or the DMR to make SLPs publicly available. In fact, neither the MPRDA nor the regulations state unambiguously that SLPs are public documents. This should be rectified in any future amendments to the MPRDA and regulations. SLPs should also, be included by the DMR in their list of automatically available documents published in terms of Section 15 of PAIA and this availability must be free from restrictions regarding who can see the documents and which parts of the document are included.

### **13. The sufficiency of parameters determining the financial provision and scale of SLPs**

For SLPs to achieve their objects of compensating stakeholders for negative impacts and ensuring mining rights holders meaningfully contribute to the development of the areas in which they operate, there need to be clear parameters to ensure each SLP makes a commensurate contribution based on impacts, needs and scale of operation.

The regulatory framework does not provide any guidance on, first, what constitutes adequate commitments and second, what constitutes an adequate level of expenditure. Such a framework is important for ensuring small companies are not invested with the same development obligations as larger companies while ensuring all companies make a meaningful contribution commensurate with the impact of their operations and their capacity.

There are a number of possible parameters that can be used to determine the scale of SLP commitments and expenditure. First, projected turnover or profit could be part of the consideration, given that an underlying aim of the system is to ensure that workers and communities enjoy a greater share of the benefits that are derived from the extraction of minerals. A small number of SLPs did state that the financial provision for SLPs was derived from a specified percentage of before tax or after tax profits. The risk of this approach is that unless prohibited in regulations, it could allow companies to easily justify cutting back on SLP expenditure. It is therefore important that regulations clearly proscribe the reduction of SLP commitments due to lower than projected profits.

The size of the parent company (i.e. wealth or value) is also a possible consideration. It would seem to make sense that the required contribution of a company be informed in part by the capacity of the company to deliver. Possibly the most important consideration, especially for members of affected communities not employed on the mine is the scale of the social, economic and environmental impact. Impacts would encompass the severity and the scope (how many affected) of the impacts. The number of workers and their skills level is also an important consideration with regards to education and training. In this regard, the gap between the skills of community members and the requirements of the company may also need to be bridged to maximise the creation of local jobs. Due to the differing objectives advanced by each section of an SLP, it would be appropriate for the weighting of such factors to vary.



As can be seen from this discussion, the determination of what constitutes sufficient SLP undertakings is not a one-dimensional or mechanical exercise. The decision on whether SLP commitments are sufficient should not, however, be left to the capricious exercise of unguided discretion given the importance of the objectives served by the SLP system to people's rights. In *Dawood*, a leading case on discretion afforded by legislation, the Constitutional Court held that 'The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers.'<sup>cbxii</sup> There should be a multiple parameter rubric for assessing sufficiency and the particular considerations that come into play. This rubric should provide weighting of factors for the different sections of SLPs.

#### 14. Transfer of public obligations to private bodies

At an even more fundamental level, the very decision to (partially) transfer the state's developmental responsibility to the private sector is a very significant step that requires critical assessment. The constant shifting of developmental responsibility to the private sector is blurring the line between the obligations of government entities and the private sector. As the Constitutionally-mandated body responsible for LED, municipalities should be at the forefront of all LED and planning decisions.<sup>cbxiii</sup> Municipalities must be involved in all aspects of local development and ensure its alignment to municipal IDPs. There seems to be an invariable uncertainty between companies and local municipalities concerning the responsibility to provide basic services in mine affected communities. The main victims of this impasse between business and government are communities who, as a result, are unable to hold anyone to account and are left without guaranteed long-term investment. SLPs should be required to expressly define the roles and responsibilities of all stakeholders in each project deliverable.

#### 15. Sanctions and recourse

A central issue of implementation is the question of accountability. Where accountability is absent, noble promises may go unmet. Accountability requires that the state impose sanctions when companies fail to deliver on their license obligations such as SLPs. While, in theory there are repercussions for failure to deliver on SLP targets, in practice these seldom materialise. The MPRDA does empower the Minister to revoke or withdraw licenses for non-compliance with SLPs but we are aware of only two instances in which a mining right was withdrawn partially as a result of the mine's non-compliance with its SLP.<sup>cbxiv</sup> On the face of it, it would therefore appear that mining companies are not being held accountable for their SLP commitments.

Part of the problem is that nowhere in the regulations or guidelines is it stated what level of fulfilment of targets is considered non-compliance. For instance, in our experience, a 60% achievement of a target is seen as acceptable while only a complete and systematic failure to realise the SLP as a whole is regarded as non-compliance. This should therefore be rectified in future amendments to the Act or Regulations. Another problem is the absence in the Act and Regulations to specify recourse mechanisms for workers and community members who are aggrieved with the manner in which the SLP is implemented. Any amendments to the Act and Regulations therefore need to provide for formal grievance mechanisms in relation to

SLP commitments and which need to clearly specify both the structures and the process.

## 16. Reporting

The quality of SLP reporting itself is an implementation rather than a design issue, one that will be addressed in the forthcoming report on implementation. However, the incorporation of clear indicators of success into project plans and the development of effective and reliable internal reporting mechanisms is an issue of design that impacts on implementation.<sup>clxv</sup> This is vital to ensure that the company itself can monitor its own progress and that it is in a position to report accurately to all stakeholders and to government. Accurate reporting is also a pre-condition for the DMR, communities, workers and shareholders to hold companies accountable. Reports also need to be accessible to the public. Regulations should require that reports be made publicly available and in appropriate formats and languages for the relevant communities. These formats include websites and areas accessible to communities, such as the office of the local municipality.

# IX. Conclusions and Recommendations

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There is growing opposition amongst communities and workers throughout South Africa and the Global South to the manner in which the benefits resulting from mining are shared.<sup>clxvi</sup> This report forms part of a greater project aimed at assessing whether the SLP system is succeeding in its stated objectives of 'promot[ing] employment and advanc[ing] the social and economic welfare of all South Africans', 'contribut[ing] to the transformation of the mining industry' and 'ensur[ing] that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating'.<sup>clxvii</sup> As the first stage in this process, this report documents the findings resulting from the analysis of a sample of 50 SLPs to gain a sense of the main issues and trends in relation to the quality and implementability of SLPs.

The overall thrust of our findings is that the regulatory system is not currently producing SLPs that can effectively contribute towards the afore-mentioned objectives. First, there was a lack of clarity and consistency in the definitions of critical concepts such as community. Second, present laws and regulations do not sufficiently regulate how SLPs are drawn up. In particular there is an effective absence of a framework for public participation of communities in the compiling of SLPs. The result has been clearly apparent in the failure of nearly all of the study sample SLPs to provide evidence of direct consultation with communities and explain how this informs the content of programmes. Further, this absence of clear participation requirements extends throughout the life cycle of SLPs. There is also a lack of sensitivity and engagement with the local context, as illustrated by social and economic background sections that are based purely on desktop research and often with incomplete data sets.

Consequently, a number of concrete interventions need to be made to ensure gaps are closed and the system is accountable to its intended beneficiaries, namely workers and communities. Many of these are legislative in nature and include clearer provisions on participation, access to information and a new framework which requires the agreement of all stakeholders (including communities and workers) prior to approval. Other interventions, however, can be achieved by communities in partnership with NGOs and other civil society organisations. For example, CALS plans to develop a toolkit to assist communities in planning engagement with companies and government role players in the SLP process and to capacitate communities to play an active role in monitoring compliance with SLP commitments that is supplementary but not in conflict with government's role.<sup>clxviii</sup> The urgency of achieving social justice in the mining sector requires far-reaching change in which communities and workers must be afforded the space to be central participants.

## 1. Recommendations

In making recommendations a delicate balance needs to be struck between clear and firm parameters and the need for accommodating dif-

ences in mining impacts, projected output of the mine and the needs of communities.

### ***1.1 Require agreement with companies, communities and organised labour as a condition for approval of SLPs***

To be truly responsive to the needs of communities and workers, consultation is not sufficient. To increase the leverage of workers and communities, their agreement should be expressly required. This is not to suggest a movement to a private law contractual approach. Instead once the required agreement is reached on the SLP, it should be submitted to the DMR for approval as a binding license condition as is presently required. What we are suggesting is a hybrid approach that combines elements of community benefit agreements with the regulatory oversight that characterises the present SLP system. To ensure alignment between IDPs, community aspirations and SLPs, such agreements should be pursued as part of the annual IDP review process.

### ***1.2 Develop clear requirements for participation by workers and communities throughout the SLP life cycle***

The MPRDA and/or the regulations should clearly provide that both workers and communities should play a continuous role in the formulation, implementation, monitoring and reporting, and amendment of SLPs as well as during downscaling and closure. The Act, Regulations and Guidelines should indicate the project stage at which consultation should commence. Future forums, which currently include company management and worker representatives, should be required to include community representatives as well. Further, there should be an inclusive multi-stakeholder body to oversee the implementation of the SLP throughout the project life cycle. All structures, including the future forum should form part of an umbrella of multi-stakeholder bodies, which collectively ensure oversight by the public over all aspects of the mining operation with significant implications for the right of the public. This umbrella structure can also serve the role of integrating social and environmental considerations, especially at closure. The basic template for such a structure already exists in the form of environmental monitoring committees (EMCs) which are increasingly being utilised by the DEA via license conditions, especially in areas of environmental sensitivity.<sup>cixix</sup>

### ***1.3 Require stakeholder map in SLPs***

It is important that SLPs are transparent regarding who the company considers to be stakeholders for the purposes of consultation on the SLP. It is also critical that a mapping of stakeholders should be done at the outset of the community engagement process to ensure engagement is as inclusive as possible. This should be presented in a usable and reader-friendly way such as via a map of key stakeholders.

### ***1.4 Require more detailed background information on the mining operation***

A prevailing theme of the findings was the limited background information in SLPs and the impression created of a year-zero scenario. To correct this two

legislative interventions are required. First, the content for the background to the mining operation should move from guidelines to binding regulations. Second, this list should be augmented to include information such as the age of the mine, ownership history, present ownership structure, the status of prior SLP commitments, the physical size of the mining operation and the planned annual output.

### ***1.5 Augment requirements for social and economic background information and move from guidelines to binding regulations***

While the social and economic background information provided for in the 2010 SLP Guidelines is quite thorough, not all of this information is always found in SLPs. This information should set out in regulations so that complete information is perceived as binding. This section could also be enhanced through requiring information regarding the history of the community and qualitative analysis as well as data.

### ***1.6 Integrate environmental considerations into the section on impacts of the mining operation***

SLPs should be required to incorporate into the 'impacts of the mining operation' sections, those impacts on the physical environment detected in the EIA studies that have a clear and direct link to social and economic well-being. The required components of this section, including negative impacts such as relocations of people and loss of agricultural land, should be specified in regulations rather than guidelines. Further, even when such impacts are not foreseeable, the company should state that these impacts do not apply to the operation.

### ***1.7 Require the updating of social and economic background information***

To ensure SLPs are informed by up to date information, the updating of social and background information should be required, possibly before the commencement of each 5 year SLP cycle.

### ***1.8 Require complete information and clear targets before approving SLPs***

We observed a number of SLPs with missing information (including annexures), unclear targets and targets with caveats. This renders SLPs more difficult to enforce and hampers accountability to communities and other stakeholders. The DMR should exercise its power to refuse to approve SLPs that exhibit these characteristics and should not issue mining rights till the SLP is satisfactory.

### ***1.9 Insert local content requirements into HDP procurement programmes***

To ensure that HDP/BBBEE procurement targets serve as a mechanism for stimulating the local economy, the next iteration of the Mining Charter and the Guidelines should require targets for procurement of locally manufactured goods and from local HDP/BBBEE suppliers.

### **1.10 Greater detail on the correct process for amending SLPs**

The MPRDA regulations should provide for a formal process for substantive changes to SLP commitments as well as criteria guiding the Minister's decision on whether an amendment is substantive and whether it should be approved. There should be a form for applying for amendments of substance and consultation with workers, communities and municipalities should be required. If the recommendation for requiring the agreement of communities and workers on the SLP were adopted, their agreement should also be required for amendments. If approved, interested and affected parties should be notified.

### **1.11 Greater clarity on the right of access to information in relation to SLPs**

The Act and the regulations should state in no uncertain terms that SLPs, annual compliance reports and amendments are public documents that cannot be treated as confidential by mining companies. Further, companies should be required to publish SLPs on their websites and to lodge physical copies of SLPs in centres accessible to community members. SLPs should also, be included by the DMR in their list of automatically available documents published in terms of Section 15 of PAIA, and this availability must be free from restrictions regarding who can see the documents and which parts of the document are included. The Regulations should require a dissemination strategy for SLPs as part of a broader strategy for life cycle consultation.

### **1.12 Regulate consultants responsible for drawing up SLPs**

It is vital that legislation effectively regulate who designs SLPs and the manner in which this occurs. Legislation should provide guidance on the appropriate forms of expertise and experience that should be possessed by the project lead and the team responsible for drafting the SLP. Each SLP should, as is the case for EIAs, be required to provide the name of the author, their affiliation, their qualifications and experience as well as an affirmation of their independence and compliance with ethical standards. Their core ethical obligations should be defined in regulations. Further, SLP consultants should be required to join the body for environmental assessment practitioners or a new body should be created. It is vital that membership of either body is a requirement for working as an SLP consultant. Further, there should be a programme of compulsory training for SLP consultants that would include community engagement, gender and race awareness, developmental economics and social justice and constitutionalism.<sup>clxx</sup>

### **1.13 Training and qualifications for officials assessing SLPs**

Those regulating these documents receive a certain standard of training and require certain experience and/or qualifications as they will ultimately be the drivers in the ramped up regulatory machine around SLPs and really need to have the appropriate understanding to achieve the required results. This training must include an approach to communication characterised by sincerity and simplicity and a receptiveness to the different forms of language communities use to describe their social and physical environment.

### ***1.14 Provide guidance for co-operative governance and the regional co-ordination of stakeholders***

The MPRDA and/or regulations should set out the processes of consultation and agreements between mining companies and government authorities, especially between mining companies and municipalities. Further, SLPs should provide mechanisms to ensure regional co-ordination between mining companies, municipalities, communities and stakeholders in mining nodes where there are multiple mining projects anticipated. One way to do so would be to expressly incorporate SLP planning into the IDP process. IDPs, it must be remembered, constitute the overarching plan for development in the area. To ensure that communities are at the centre of this process, a possible approach would be to require alignment of the timing and processes of annual IDP reviews with community consultation on SLPs. Community consultation on SLPs would, therefore, become an integral part of the IDP process.

### ***1.15 Clearer definitions of key concepts***

Our finding was that a number of concepts were used inconsistently across SLPs. These included labour sending areas, communities and beneficiaries. More attention needs to be paid to these specific concepts as the failure to do so is to the detriment of the beneficiaries.

### ***1.16 Clarify the role of contractors***

The legislation should specify the role of contractor companies in relation to SLP programmes.

### ***1.17 Develop framework for determining contribution of companies to various SLP initiatives***

There needs to be more transparency regarding the parameters for determining what constitutes a sufficient level of investment in the various components of SLPs for a particular project. This framework would have to factor in sector, wealth of rights holder (and/or holding company) as well as projections regarding the size of workforce, output and impacts. The weighting of these factors would need to vary between the sections of the SLP as each of these focuses on achieving different objectives.

### ***1.18 Designers of SLP factor in inflation***

We recommend that all SLPs explain how financial provisions for each project factors in inflation in order to reassure stakeholders that this is taken into account in project planning.

### ***1.19 Measures to address underspending on SLP commitments***

A significant problem raised by government officials is that companies frequently underspend on their SLP financial provisions. It is not clear that these surpluses are channelled back into the community. Measures should therefore be put in place to deter underspending and ensure communities and

workers receive the benefit of the entire SLP financial provision. An example of a possible measure would be requiring all monies not spent to be channelled into LED programmes in local municipalities IDPs. Harsher and more stringent regulations are required to act as sanctions for underspending as these commitments need to be directed to mine community and workers' development and returned into the company fiscus.

### ***1.20 Develop SLP toolkit for communities***

From our engagement with communities it appears that levels of knowledge regarding the contents and process of the SLP system are uneven. Without this knowledge, communities' level of participation in the SLP system will be low. Capacitation of communities is therefore critical. Before any mining rights are approved, communities should be invited to rights and SLP training. Civil society can contribute to this effort through developing a toolkit for communities that explains their rights, the questions to ask at public consultation meetings, and the processes to follow for commenting on SLPs and for following up on compliance.

### ***1.21 Industry wide toolkit for mining companies***

Standardisation of the quality of SLPs might also be served if key role players develop an industry wide template document, which can assist smaller, less experienced and less resourced mining companies.

### ***1.22 Establish funds for capacitation of communities and for portable skills training***

It can be safely assumed that companies do not have an incentive for either capacitating communities to improve their bargaining position with the company nor training workers for other jobs. A possible solution would involve the establishment of funds, in which companies and government contribute to achieve both aims. There have already been calls from civil society and communities for a fund to be set up to provide communities with access to mining and environment related expertise which could include local economic development specialists. A fund for training communities in transferable skills so that they are employable post-mining is also a possibility. A common syllabus could be developed that draws on pedagogical approaches that enable knowledge production by communities.

## **2. Going forward: Where to next for this project?**

This report represents the first instalment of a broader SLP project concerned with identifying the effectiveness of the SLP system in design and implementation and, on the basis of our findings, proposing interventions to address the realities of mine-affected communities. We hope to provide all role players with recommendations on how to use their sphere of influence to improve the system or work towards a better system. This report has identified common flaws in the design of SLPs and linked these to deficiencies in the regulatory system. Following the publication of this report, we will engage with stakeholders including communities, the DMR and companies on the findings and recommendations. These engagements and formal interviews



will lay the foundation for the next phase of our project, which will examine the implementation of the system. We will also consult communities on the changes they would like to see in the SLP system, and in order to develop a generally applicable toolkit for communities seeking to participate in SLPs. Finally we intend to synthesise all our findings and recommendations, including the recommendations by community members, into a comprehensive report on the design and implementation of the SLP system. At the end of this project we hope to disseminate our findings to the main role players for their consideration.

20 years following the attainment of democracy, social justice in the mining sector remains an unmet promise. Across South Africa, workers and communities are mobilising in response to the slow pace of change. Bold and swift measures to break the cycle of inequality are both a constitutional imperative and a necessity for the sustainability of the mining sector.

## Endnotes

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- <sup>i</sup> B Meyersfeld 'Myth of Mining' (unpublished manuscript) 2.
- <sup>ii</sup> *Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 at para 58.
- <sup>iii</sup> M Legassick 'Capital accumulation and violence' (1974) 3 *Economy and Violence* 253; H Wolpe 'Capitalism and cheap labour-power in South Africa: From segregation to apartheid' (1972) 1 *Economy and Society* 425.
- <sup>iv</sup> *Ibid.*
- <sup>v</sup> 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.
- <sup>vi</sup> For an account of the process by which the MPRDA was developed and the thinking of government and the mining industry see FT Cawood 'The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa' *Journal of the SAIMM* (January/February 2004) 53.
- <sup>vii</sup> Section 1 (a) of the Constitution (founding provisions).
- <sup>viii</sup> The environmental right is contained in Section 24 of the Constitution. The socio-economic rights comprise: the rights to housing (Section 26); healthcare, food and water and social security (Section 27) ; rights of children (Section 28); and the right to education (Section 29).
- <sup>ix</sup> Act No. 28 of 2002.
- <sup>x</sup> This is the term used in the MPRDA. The MPRDA Regulations and SLP Guidelines refer to historically disadvantaged South Africans (HDSAs).
- <sup>xi</sup> This shows inconsistency in the law, between the MPRDA's approach of historically disadvantaged persons and the approach in the MPRDA regulations and Charter which limits the concept to South Africans.
- <sup>xii</sup> Required by Sections 46 (b) and 46 (b) of the MPRDA Regulations respectively.
- <sup>xiii</sup> Section 20 (d) of the Mineral and Petroleum Resources Development Amendment Bill expressly provides for a review of the SLP every 5 years. This bill was, however, referred back to the National Council of Provinces in January 2015. Its future remains uncertain.
- <sup>xiv</sup> 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.
- <sup>xv</sup> Workability will need to be determined from a number of angles including the communities needs and objectives and the implementation capacities of mining companies. These factors will be discussed at length later in this report.
- <sup>xvi</sup> Act No. 2 of 2000.
- <sup>xvii</sup> The forms for PAIA requests are contained in the PAIA Regulations though some government departments have made departmental versions of the forms. GN.R 223 as amended by GN. R. 187, GN. R. 1244 and GN. R. 466.
- <sup>xviii</sup> For example, the PAIA Civil Society Network, in its shadow report of 2014, found that 56.5% of the public sector requests and 50% of private company requests by civil society organisations recorded by its members were either refused outright or deemed refusals. PAIA provides that the failure to take a decision within the specified time constitutes a deemed refusal of a request in terms of the Act. Section 27 (public bodies) and 58 (private bodies) of PAIA.
- <sup>xix</sup> Section 50 (1) (a) read with Section 52 (3) (d) of PAIA.
- <sup>xx</sup> There is, however, no basis in PAIA for this distinction between public (listed) and private companies. The distinction is between public (i.e. state or quasi-state bodies) and private bodies (i.e. all private sector bodies whether JSE listed or not).
- <sup>xxi</sup> Mining sites are typically located on properties already owned and which are

cally farms, albeit not always operational as such.

<sup>xxii</sup> This understanding of transformation is drawn from that of Albertyn and Goldblatt (1998), which was endorsed by the third Chief Justice under the democratic dispensation, Justice Pius Langa (Langa CJ, 2006). C Albertyn and B. Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 South African Journal on Human Rights 248 ; Langa CJ 'Transformative constitutionalism.' (2006) 17 Stellenbosch Law Review 351.

<sup>xxiii</sup> These are set out in section 2 of the MPRDA.

<sup>xxiv</sup> *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 9.

<sup>xxv</sup> *Ibid* at 9.

<sup>xxvi</sup> 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.

<sup>xxvii</sup> 24 (3) (c) and 25 (2) (f) of the MPRDA respectively.

<sup>xxviii</sup> Section 25 (2) (h) of the MPRDA.

<sup>xxix</sup> 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.

<sup>xxx</sup> This, it must be noted, is the second iteration of the guidelines. The original, 2004, guidelines were, however, far less detailed and did not add much to the regulations. For this reason, the 2004 SLP guidelines will not be discussed in detail for the purposes of this study.

<sup>xxxi</sup> The required content of SLPs will be addressed below.

<sup>xxxii</sup> No. 53 of 2003.

<sup>xxxiii</sup> MTS (note xxiv above) at 17.

<sup>xxxiv</sup> *Ibid* at 12. National Development Plan 2030: Our future - make it work, 15 August 2012.

<sup>xxxv</sup> Act No. 32 of 2000. IDPs are regulated by Chapter 5 of the Municipal Systems Act.

<sup>xxxvi</sup> Act No. 16 of 2003.

<sup>xxxvii</sup> MTS (note xxiv above) at 13.

<sup>xxxviii</sup> *Ibid* at 13; National Spatial Planning Perspective, 2006.

<sup>xxxix</sup> MTS (note xxiv above) 13.

<sup>xl</sup> *Ibid*.

<sup>xli</sup> *Ibid*.

<sup>xlii</sup> 46 (d) of the Regulations and Section 5 of the 2010 SLP Guidelines.

<sup>xliiii</sup> MTS (note xxiv above) 22.

<sup>xliiv</sup> *Ibid* at 22-23.

<sup>xliv</sup> NEDLAC is '...a representative and consensus-seeking body' comprised of government, organised labour and organised business which aims to 'reach agreement through negotiation and discussion.' NEDLAC Founding Declaration. <http://new.nedlac.org.za/wp-content/uploads/2015/09/Founding-documents-and-protocols-20151.pdf> The guidelines in question are the Social Plan Guidelines, 1999.

<sup>xlvi</sup> Institute of Directors in Southern Africa (2009) 'King Code of Governance Principles' (King III).

<sup>xlvii</sup> MTS (note xxiv above) 14.

<sup>xlviii</sup> *Ibid*.

<sup>xlix</sup> Section 7 (2) (f) of Schedule II 'Transitional Arrangements' to the MPRDA.

<sup>l</sup> 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 5 year periods in its project plan templates.

<sup>li</sup> Section 25 (2) (h) of the MPRDA.

<sup>lii</sup> Section 47 (1) (b) read with Section 25 (1) (f) of the MPRDA.

<sup>liii</sup> Convert into flow diagram.

- <sup>liv</sup> Adapted from MTS (note xxiv above) Table 2: Summary of prescribed contents of an SLP and core objectives per section
- <sup>lv</sup> 'Labour sending areas' is the term used in the Regulations and Guidelines to refer to the areas from where workers are recruited, including but not confined to, the mining area.
- <sup>lvi</sup> Whilst left out of the 2010 SLP Guidelines, the preferential procurement requirements of the SLP remain a core focus of DMR in adjudicating SLP submissions and AR progress.
- <sup>lvii</sup> This section is based on the research of Nkhosivile Shongwe, an intern at CALS.
- <sup>lviii</sup> The United Nations Development Programme (UNDP) defines the global south as 'developing countries that are located primarily in the Southern Hemisphere.' [http://ssc.undp.org/content/dam/ssc/documents/exhibition\\_triangular/SSCExPoster1.pdf](http://ssc.undp.org/content/dam/ssc/documents/exhibition_triangular/SSCExPoster1.pdf) . The Global North refers to the wealthiest countries which are primarily, but not exclusively, located in the Northern Hemisphere.
- <sup>lix</sup> Sections 23 (1) (e) , 23 (1) (h) and 24 (3) (c) of the MPRDA.
- <sup>lx</sup> Ramsey Hart, MiningWatch Canada and Dawn Hoogeveen 'Introduction to the Legal Framework for Mining in Canada' (2012) available at: <http://www.mining-watch.ca/article/introduction-legal-framework-mining-canada> .
- <sup>lxi</sup> Ibid.
- <sup>lxii</sup> Nigerian Mineral and Mining Act of 2007
- <sup>lxiii</sup> Ciaran O'Faircheallaigh & Tony Corbett 'Indigenous participation in environmental management of mining projects: The role of negotiated agreements' (2005) 14 Environmental Politics 634.
- <sup>lxiv</sup> 2010 SLP Guidelines.
- <sup>lxv</sup> Part IV Section 18 of the Papua New-Guinea Mining Act (1992).
- <sup>lxvi</sup> The Papua New Guinea Mining Policy, Part 6 (4) (a).
- <sup>lxvii</sup> Part VII Section 155 of the Papua New Guinea Mining Act
- <sup>lxviii</sup> The World Bank Mining Communities Development Agreements: Practical Experiences and Field Studies (2010) 39.
- <sup>lxix</sup> Martin Macintyre 'Modernity, Gender and Mining: Experiences from Papua New Guinea' in Kuntala Lahiri-Dutt (ed) Gendering the field: towards sustainable livelihoods for mining in mining communities (2011);
- <sup>lxx</sup> Ruth Tene Natsa 'Enforcing CDA will enhance Devt in Host Mining communities' the Leadership 20 November 2014.
- <sup>lxxi</sup> Ibid.
- <sup>lxxii</sup> Natsa (2014); The World Bank (2010) 48.
- <sup>lxxiii</sup> The World Bank (2010) 22, 24 ,46.
- <sup>lxxiv</sup> MTS (note xxiv above) 42-43.
- <sup>lxxv</sup> Integrated Development Plans are regulated by Chapter 5 of the Municipal Systems Act.
- <sup>lxxvi</sup> MTS (note xxiv above) 42.
- <sup>lxxvii</sup> Ibid at 43.
- <sup>lxxviii</sup> Section 23 (1) (c) of the MPRDA; (note xxiv above) at 39.
- <sup>lxxix</sup> Section 24 (3) (c) of the MPRDA; MTS (note xxiv above) 39.
- <sup>lxxx</sup> Section 25 (2) (h) of the MPRDA; MTS(note xxiv above) 40.
- <sup>lxxxi</sup> Section 102 of the MPRDA read with Section 44 of the MPRDA Regulations; MTS Consulting (note xxiv above) at 40.
- <sup>lxxxii</sup> MTS (note xxiv above) 40.
- <sup>lxxxiii</sup> Ibid at 52.
- <sup>lxxxiv</sup> Ibid at 52.
- <sup>lxxxv</sup> See DMR's Strategic Plans and Annual Reports as cited in MTS (xxiv above) 41.
- <sup>lxxxvi</sup> MTS(note xxiv above) 49.
- <sup>lxxxvii</sup> Ibid.
- <sup>lxxxviii</sup> MTS (note xxiv above) 40.
- <sup>lxxxix</sup> Sections 10 and 22 (4) of the MPRDA.
- <sup>xc</sup> MTS (note xxiv above) 41.
- <sup>xc i</sup> Ibid.
- <sup>xcii</sup> Ibid.
- <sup>xciii</sup> In terms of Section 93, Section 47 and Section 93 (b) (ii) of the MPRDA respectively.

MTS (note xxiv above) 41.

<sup>xciv</sup> 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/](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 License Bloomberg Business (7 August 2015). <http://www.bloomberg.com/news/articles/2015-08-07/south-africa-lifts-suspension-of-glencore-optimum-s-mine-license>.

<sup>xcv</sup> MTS (note xxiv above) 41.

<sup>xcvi</sup> Ibid.

<sup>xcvii</sup> 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.

<sup>xcviii</sup> MTS also envisage such a role for communities. At 43-44.

<sup>xcix</sup> Ibid at 43.

<sup>c</sup> Organised labour refers collectively to the trade unions in the South African mining sector.

<sup>ci</sup> MTS (note xxiv above) 45.

<sup>cii</sup> Ibid.

<sup>ciii</sup> Ibid.

<sup>civ</sup> Ibid at 44-45.

<sup>cv</sup> *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC).

<sup>cvi</sup> Ibid paras 12 - 16.

<sup>cvii</sup> Ibid paras 51-52.

<sup>cviii</sup> Ibid para 30.

<sup>cix</sup> *Premier of the Eastern Cape and others v Ntamo and others* 2015 (4) All SA 107 (ECB).

<sup>cx</sup> Ibid paras 80-83.

<sup>cx i</sup> MTS (note xxiv above) 82.

<sup>cxii</sup> Ibid.

<sup>cxiii</sup> Ibid at 45-47.

<sup>cxiv</sup> Ibid at 84.

<sup>cxv</sup> Ibid at 60.

<sup>cxvi</sup> See discussion by MTS (note xxiv) 24.

<sup>cxvii</sup> Where there are no outstanding commitments, this should also be stated in the SLP text.

<sup>cxviii</sup> Required in terms of Section 46 (a) of the MPRDA Regulations.

<sup>cxix</sup> The social impact assessment is a required component of environmental impact assessments that must be conducted under both the MPRDA and NEMA before a mining right and environmental authorisation can be granted. It examines the foreseeable positive and negative social impacts of mining. Appendix 3 Section 2 (c) of the 2014 NEMA EIA Regulations.

<sup>cxx</sup> This trend was also noticed in the SLP affidavit by MTS at 24.

<sup>cxxi</sup> The EIA Regulations require social and economic impacts to be included. Na-

tional Environmental Management Act Environmental Impact Assessment Regulations, 2014GN. R. 982 (2014 NEMA EIA Regulations). The MPRDA Regulations, which governed environmental impacts of mining until December 2014 also required that EIAs and Environmental Management Programmes (EMPRs) addressed social and economic impacts.

<sup>cxxii</sup> This is mentioned by MTS (note xxiv above). At 24.

<sup>cxxiii</sup> Act No. 107 of 1998.

<sup>cxxiv</sup> The National Water Act defines the reserve as 'the water required to protect the aquatic ecosystems as well as the essential needs of individuals served by the resource. Preamble to Part III of the National Water Act No. 36 of 1998.

<sup>cxxv</sup> 46 (c)(iii) of the MPRDA Regulations.

<sup>cxxvi</sup> 41 (c) of the MPRDA Regulations.

<sup>cxxvii</sup> Power mapping is a graphic representation of relationships, networks / influence.

<sup>cxxviii</sup> Section 15 of PAIA requires competent Ministers to annually publish a list of the documents within their department for which no access to information request is required to obtain access.

<sup>cxxix</sup> It must be noted that Section 45 (b) of PAIA does provide that access to a record may be refused if 'the work involved in processing the request would substantially and unreasonably divert the resources of the public body.' It is, however, the burden of the public body to show that processing the request involves a diversion of resources that is unsubstantial and unreasonable. This did not apply to our request as access had already been granted by the department.

<sup>cxix</sup> <http://portal.samradonline.co.za/forms/login.aspx?ReturnUrl=%2fdefault.aspx>.

<sup>cxixi</sup> MTS (note xxiv above) 57.

<sup>cxixii</sup> MTS (note xxiv above) 35.

<sup>cxixiii</sup> While against the interests of mining companies such training is crucial in preventing the creation of joblessness and poverty post-mining.

<sup>cxixiv</sup> MTS (note xxiv above) 36.

<sup>cxixv</sup> Ibid at 53.

<sup>cxixvi</sup> Although EAPASA is not functioning satisfactorily, in part due to delays in Ministerial recognition as a mandatory body akin to the Law Society or the Health Professionals Council of South Africa, a binding professional body remains a promising way of regulating practitioners that has worked in a number of sectors.

<sup>cxixvii</sup> MTS (note xxiv above) 36-37.

<sup>cxixviii</sup> MTS (note xxiv above) 61-62.

<sup>cxixix</sup> Ibid 59.

<sup>cxli</sup> Ibid 58.

<sup>cxlii</sup> Ibid.

<sup>cxliii</sup> Ibid.

<sup>cxliiii</sup> And which are state responsibilities under the South African Constitution.

<sup>cxliv</sup> MTS (note xxiv above) 59.

<sup>cxlv</sup> Ibid.

<sup>cxlvi</sup> Ibid.

<sup>cxlvii</sup> The 'plan' being the SLP.

<sup>cxlviii</sup> Section 3 (2) of the MPRDA Regulations.

<sup>cxlix</sup> Section 3 (3) of the MPRDA Regulations.

<sup>cl</sup> The 2014 EIA Regulations require that the public participation process '...provide access to all information that reasonably has or may have the potential to influence any decision with regard to an application unless access to that information is protected by law...'. Further every environmental authorisation must contain a requirement that the environmental authorisation, any reports, and any plans be available for inspection and copying as well as on the website of the right holder (if the holder has a website). Sections 40 (2) and 26 (h) of the 2014 EIA Regulations respectively.

<sup>cli</sup> Since December 2014, the environmental impacts of mining is to be regulated under NEMA albeit with the DMR as the competent authority.

<sup>clii</sup> MTS (note xxiv above) 24.

<sup>cliii</sup> NEMA EIA Regulations 2006, 2010 and 2014.

<sup>cliv</sup> This was also a finding of the expert affidavit in the Marikana Commission of Enquiry. MTS (note xxiv above) 55.

<sup>clv</sup> 46 (c)(iii) of the MPRDA Regulations.

<sup>clvi</sup> Section 13 of the 2014 NEMA EIA Regulations sets out requirements for environmental assessment practitioners (EAPs) and specialists. These include independence, expertise in conducting EIAs or specialist studies and the requirement that their work be conducted in an objective (impartial manner). Section 14 sets out processes for the disqualification of EAPs. All reports submitted to the DEA must contain details of the EAP who prepared their report and their expertise ('including a curriculum vitae). GN. R. 982.

<sup>clvii</sup> The Constitutional framework for co-operative governance is set out in Sections 40-41 of the Constitution though co-operative governance informs the overall design for the three spheres of government. The National Executive is addressed in Chapter 5, Provinces in Chapter 6 and Local Government in Chapter 7. Co-operative governance is given further content by legislation most notably by the framework act for co-operative governance, the Intergovernmental Relations Framework Act No. 13 of 2005.

<sup>clviii</sup> Section 102 of the MPRDA read with Section 44 of the MPRDA Regulations.

<sup>clix</sup> MTS (note xxiv above) 62-63.

<sup>clx</sup> MTS (note xxiv above) 63.

<sup>clxi</sup> For example, the PAIA Civil Society Network, in its shadow report of 2014, found that of the PAIA requests to the private sector recorded in which the timeframe for response had expired, 50% were either express refusals or deemed refusals. PAIA Civil Society Network Shadow Report 2014 9.

<sup>clxii</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at para 48.

<sup>clxiii</sup> Section 153 (a) of the Constitution read with Schedule 4 part B. and Schedule 5 part B.

<sup>clxiv</sup> 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. [http://www.moneyweb.co.za/mny\\_sens/crd-central-rand-gold-limited-review-and-setting-aside-of-decision-to-cancel/](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 License' (7 August 2015). <http://www.bloomberg.com/news/articles/2015-08-07/south-africa-lifts-suspension-of-glencore-optimum-s-mine-license>

<sup>clxv</sup> MTS (note xxiv above) 69.

<sup>clxvi</sup> There has been a growing mobilisation as manifested in the emergence of new coalitions of mine-affected communities, protest action and proposals for systemic change. In South Africa, networks to co-ordinate the efforts of mine-affected communities, most notably the Mining Environmental Justice Community Network of South Africa (MEJCON-SA) and Mining Communities United in Action (MACUA). A coalition of mine-affected communities and NGOs (the MPRDA Coalition) produced the Berea Declaration of 26 March 2015. This declaration called for a new mining dispensation characterised by, among other hallmarks, free prior and informed consent before any mining activity, for a greater proportion of mining revenue to be channelled into local economic development and an end to the secrecy in the mining sector.

<sup>clxvii</sup> Regulation 41 of the MPRDA Regulations.

<sup>clxviii</sup> In the landmark *AMSA v VEJA* judgment, in which a community environmental justice organisation sought access to a large steel manufacturer's masterplan for addressing pollution, the SCA (Navsa J) held that: 'It is clear, therefore, in accordance with international trends,[6] and constitutional values and norms, that our legislature

has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment.' *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA).

<sup>clix</sup> The environmental authorisation for the Vele Colliery, which is near the Mapungubwe Cultural Landscape, one of the world's most significant World Heritage Sites, for example required the establishment of an EMC and sub-committees.

<sup>clxx</sup> This draws on the approach to communication put forward by Victor Munnik in discussions around knowledge and power in environmental management.

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