

**ENVIRONMENTAL RIGHTS AFFORDED TO RESIDENTS AFFECTED BY MINING ACTIVITIES:  
A CASE STUDY IN HONDEKLIP BAY**

by

FARZANA MOHOMED

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SUPERVISOR: PROF W BRAY

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**Summary:**

Whilst the mining industry has stimulated the economic growth of South Africa, its activities have also impacted on the social and environmental well-being of the communities and ecosystems in which it operates. Environmental degradation often severely affects the livelihoods of people in rural areas, who are often impoverished. Hondeklip Bay, a small fishing community in the Northern Cape, has been affected by the mining activities of the adjacent Hondeklip Bay Mine. The purpose of this paper is to identify whether impoverished residents affected by the detrimental effects of mining activity have rights to enforce the protection of their environment. These environmental rights pertain to an environment that is safe and not harmful to one's health and well-being. Environmental obligations of the mines as illustrated in terms of applicable legislation, and legal recourse available to the residents affected by the infringement of their environmental rights are furthermore explored.

**Key Terms:**

environmental rights; health; well-being; Hondeklip Bay; ecological degradation; mining; rehabilitation; public interest; sustainable development; pollution; residents

## **Abbreviations**

African Charter	African Charter on Human and People's Rights, 1982
Air Quality Act	National Environment Management: Air Quality Act 39 of 2004
APPA	Atmospheric Pollution Prevention Act, 45 of 1965
Constitution	Constitution of the Republic of South African, 1996
DEAT	Department of Environmental Affairs and Tourism
DME	Department of Minerals and Energy
DWAF	Department of Water Affairs
EIA	Environmental Impact Assessment
EMP	Environmental Management Programme
EMPR	Environmental Management Programme Report
Minerals Act	Minerals Act 50 of 1991
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	National Environment Management Act 107 of 1998
NGO	Non-Governmental Organisation
NWA	National Water Act 36 of 1998

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## 1. Outline of the study

The transformation of South Africa from an essentially agricultural to a modern industrial economy began in the 19<sup>th</sup> century with the discovery of diamond and gold deposits. Mining, in which South Africa has an exceptional geological endowment, has remained at the heart of the economy in the 20<sup>th</sup> century.<sup>1</sup>

In the last decade, South Africa on average, produced up to fifty-five different minerals from over 713 mines and quarries, and exported mineral commodities to 87 countries.<sup>2</sup>

In respect of diamonds alone, it has been computed that 75 per cent of the world's diamonds have been produced in Africa with more than 1.9 billion carats worth an estimated \$US 158 billion mined. In 2003, South Africa had produced 11.1 million carats.<sup>3</sup>

Such mining activity, *inter alia*, has resulted in the development of a modern, diversified industrial economy.

Whilst the mining industry has stimulated the economic growth of South Africa, its activities have also impacted on the social and environmental well-being of the communities and ecosystems in which it operates. Mining activity has been renowned to negatively impact on the environment harming, *inter alia*, soil, water, human health, the built-up environment, plants and animal life.<sup>4</sup>

Environmental degradation continues to impose a significant burden on companies, the public and government. Although companies are becoming increasingly aware of the incidence and the implications of their actions, many companies have as yet to take reasonable measures to prevent or remedy the effects of such degradation. This degradation often severely affects the livelihoods of people in rural areas, whose

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<sup>1</sup> Segal "A Perspective on the South African Mining Industry in the 21st Century". <<http://www.bullion.org.za/Publications/segal.PDF>>, last visited on 16 February 2006.

<sup>2</sup> Hollard "Mining and environment not mutually exclusive" <[http://www.miningweekly.co.za/min/views/columnist/hollard\\_T/](http://www.miningweekly.co.za/min/views/columnist/hollard_T/)>, last visited on 16 February 2006.

<sup>3</sup> Mbendi "Africa: Mining - Diamond Mining – Overview" <<http://www.mbendi.co.za/indy/ming/dmnd/af/p0005.htm>>, last visited on 16 February 2006.

<sup>4</sup> Ferreira, du Plessis and van der Walt "A licence to mine, *audi altarem partem* and NEMA" (1999) 6 SAJELP at 243.

incomes are on average low. Such people depend heavily on natural resources to meet their needs.<sup>5</sup>

Hondeklip Bay, a small fishing community in the Northern Cape, can be classified as a rural area that relies on its natural resources to sustain its relatively impoverished community. It was, until recently, associated with a diamond mine that has subsequently closed. Issues on mine rehabilitation and the mitigation of environmental degradation have been raised by the residents of Hondeklip Bay. They have vigorously voiced their environmental concerns to relevant authorities, the associated mining company as well as community organisations in the hope that the issues of environmental degradation will be dealt with satisfactorily. This community does not have the financial resources to undertake legal action to compel the Hondeklip Bay Mine to address their concerns.

The purpose of this paper is to identify whether impoverished residents affected by the detrimental effects of mining activity have rights to enforce the protection of their environment.

Section 2 deals with concerns raised by residents of, and visitors to, the Hondeklip Bay area, *inter alia*, aesthetic and economic well-being, physical safety and health.

The protection of one's right to an environment that is economically sustainable and not harmful to one's safety, health and well-being is explored further in Section 3.

Section 4 deals with the nature of the environmental rights and the question whether they afford any protection to the residents of Hondeklip Bay.

The statutory provisions stipulating the obligations placed on the mining companies pertaining to their duty to ensure that they protect the ecosystems, prevent the loss of biological diversity and avoid or minimise pollution are discussed in Section 5.

In Section 6 it is argued that the statutory provisions are inadequate, and that measures should be created for the affected community to be able to exercise their rights. Persons/entities who contravene such rights, must be punished. This section also

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<sup>5</sup> Hollard *op cit* n2.

relates to the question whether the residents of Hondeklip Bay have *locus standi* to approach the court for enforcement of these rights.

Concluding remarks are contained in Section 7.

With regards to the literature review, the researcher analysed primary records such as text books, journal articles and legislation. Secondary sources such as correspondence, website discussion forums, company information and emails were also reviewed to extract relevant information and to determine the nature of relevant issues.

The researcher conducted interviews with applicable persons, and ultimately summarised the results in order to conclude on the issues under question. Information has been received from one of the mining companies adjacent to Hondeklip Bay. This company has not been identified as the issues dealt with in this dissertation are relevant to mines in general.



## **2. Environmental concerns raised by the residents of Hondeklip Bay**

### **2.1 Background to the Hondeklip Bay situation**

Hondeklip Bay is a small fishing town in northern Namaqualand on the Cape West Coast, established as a trading station in 1846, by Captain Thomas Grace who had discovered a small natural harbour in this area. He also found a big gneiss rock resembling a dog (“hond”) which inspired him to name the place “Hondeklip Bay”.

It became the preferred harbour of export for copper ore until the harbour in Port Nolloth was developed in the 1800s. Diamond-mining operations started in the area in 1970 and constitutes the core business of mines in that area of the Northern Cape, namely the exploration and marketing of alluvial diamonds.<sup>6</sup>

### **2.2 Environmental concerns of the residents and visitors of Hondeklip Bay**

Farms Hondeklip and portions of the adjoining farm Avontuur are characterised by a series of large excavations and overburdened dumps, a legacy from the mining operations.<sup>7</sup>

One of the mining companies adjacent to Hondeklip Bay has applied to the Minister of the Department of Minerals and Energy (DME) for mine closure. The mine averred that, with the exception of the plant tailings dump, which is still being re-processed, as well as the re-vegetation of the overburdened dumps, rehabilitation at Hondeklip Bay has in most part been completed in accordance with the approved Environmental Management Programme (EMP) in terms of Minerals Act 50 of 1991 (Minerals Act). Therefore it is evident that the mine will be closed pending its rehabilitation obligations.

Some of the residents in Hondeklip Bay are unimpressed with the efforts of the mining company regarding its rehabilitation efforts. They are apprehensive that the mine’s application for closure will be approved without the mined environment being appropriately rehabilitated.

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<sup>6</sup> Hough “History of Hondeklip Bay” <<http://www.hondeklip.co.za/history.htm>>, last visited on 13 October 2005.

<sup>7</sup> *Ibid.*

In 2002, correspondence from the Chief Representative of the Hondeklip Bay Community Forum was transmitted to the General Manager of the Hondeklip Bay Mine setting out the concerns of the Hondeklip Bay community, namely:

- the adverse response from tourists and visitors to Hondeklip Bay regarding the “state of total destruction and non-rehabilitation at the mine”;
- the existence and implementation of the EMP;
- the time period set aside for land rehabilitation;
- costs set aside for complete rehabilitation; and
- the alleged neglect by the Hondeklip Bay Mine in performing its rehabilitative obligations.<sup>8</sup>

The Hondeklip Bay Mine responded to the above concerns.<sup>9</sup>

The Chief Representative of the Hondeklip Bay Community Forum, not satisfied with the response received from the Hondeklip Bay Mine, filed a formal complaint with the office of the Director of Mineral Development in Kimberley. The community was dissatisfied with the Hondeklip Bay Mine’s indication that it intended to conduct minimal rehabilitation and not a complete 100 per cent backfill of all dumps and excavations.<sup>10</sup> The Director was requested to impose and/or insist on a 100 per cent backfill as well as a complete rehabilitation policy.

A discussion forum was established on a website, <<http://www.dlist.org>>, regarding the rehabilitation of the mine adjacent to Hondeklip Bay as well as other mining companies in the Richtersveld area.<sup>11</sup> Concerns were raised in the discussion forum regarding the standard of rehabilitation that would be conducted by the Hondeklip Bay Mine and whether it would suffice.<sup>12</sup>

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<sup>8</sup> Letter dated 9 October 2002 from Chief Representative of the Hondeklip Bay Community Forum to the General Manager of the mine.

<sup>9</sup> Response from the General Manager of the Mine to be discussed in Section 5 below.

<sup>10</sup> 15 May 2003, the Chief Representative Hondeklip Bay Community Forum filed a formal complaint with the office of the Director of Mineral Development.

<sup>11</sup> <<http://www.dlist.org/list/conflict.cfm>>, last visited 13 October 2005.

<sup>12</sup> Magerman “Re: Rehab by the communities” <<http://www.dlist.org/list/conflict.cfm>>, last visited 13 October 2005.

A visitor to the area, proclaiming to be an expert in landscape restoration made the following observations about the mined area:<sup>13</sup>

- The mining holes are deep and sand piles are steep and high;
- The area is susceptible to wind erosion;
- The sand piles are too steep for any seed to have the ability to root without toppling over and uprooting itself. The high wind factor will also make seeding difficult; and
- The lack of water along with extreme temperatures and offshore winds makes this a very harsh climate which will make the vegetation of the area a challenging task that will not be possible without human intervention and physical land restoration.

Another visitor to the area was struck by the major alteration of the landscape, resulting from the dumping of waste earth from diamond extraction, maintaining that the size and steepness of the sand piles would inhibit the growth of vegetation, therefore making the process of natural rehabilitation unlikely within reasonable timescales.<sup>14</sup>

## **2.3 Conclusion**

It is apparent from the above discussions and correspondence that the large excavations and sand-piles around Hondeklip Bay, affect the aesthetics of the area. The unsightly landscape could impact negatively on tourism thus affecting the economy of Hondeklip Bay.

The alleged lack of and/or inadequate rehabilitative efforts by the Hondeklip Bay Mine could lead to ecological degradation of the ecosystems. The dust from the steep unvegetated slopes has either resulted in, or could result in, atmospheric and water pollution. The surface areas are potentially hazardous due to deep unfilled holes.

Therefore it is evident that the mining activities and lack of rehabilitative efforts by the Hondeklip Bay Mine could adversely impact on the residents' rights pertaining to their aesthetic and economic well-being, physical safety and health.

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<sup>13</sup> Clough "Messages in Capacity building and skills enhancement for community participation in mining developments Discussion Area" <<http://www.dlist.org/list/conflist.cfm>>, last visited 13 October 2005.

<sup>14</sup> Metcalfe "Re: Transhex's Corporate Social Responsibility" <<http://www.dlist.org/list/conflist.cfm>>, last visited 13 October 2005.

### 3. Environmental protection to residents of Hondeklip Bay

The mining industry has the potential to endanger human health and safety as well as the physical environment. The State is required to establish a regulatory framework that minimises the above dangers without imposing excessive cost burdens on the mining industry and thereby jeopardising its economic viability.<sup>15</sup>

Has the State established a regulatory framework which will ensure that the residents of Hondeklip Bay are afforded an environment that is economically sustainable, safe and not harmful to their health and well-being?

The Constitution of the Republic of South Africa, 1996 (the Constitution), and key legislation such as National Environmental Management Act (NEMA),<sup>16</sup> and the Minerals and Petroleum Resource Development Act (MPRDA),<sup>17</sup> are examined to ascertain the extent of environmental protection afforded to residents of the country. Below is a framework of the key provisions that pertain to South African environmental law. The relevant sections will be discussed in context later in Section 4.

#### 3.1 The Constitution

The legal source of environmental law in South Africa is to be found in the Constitution. In fact all law must be interpreted within the context of the Constitution.<sup>18</sup>

It has been cited that when the African National Congress came to power in 1994 “at the time of South Africa’s first truly democratic election, there was an immediate commitment to rewrite the country’s entire Statute Book... this was a thoroughly understandable objective, and given the importance of the mining sector, it was evident that there would be specific and urgent focus on mining policy reform as part of the wider legislative transformation process.”<sup>19</sup>

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<sup>15</sup> White Paper on Minerals and Mining Policy for South Africa promulgated in Government Gazette No. 19344 of 20 October 1998.

<sup>16</sup> Act 107 of 1998.

<sup>17</sup> Act 28 of 2002.

<sup>18</sup> Henderson *Environmental Laws of South Africa*, Volume 1 (2005) at 1-3.

<sup>19</sup> Diliza “Understanding the New South African Mining Environment” <[http://www.lbma.org.uk/conf2004/3A.c.diliza\\_LBMAConf2004.pdf](http://www.lbma.org.uk/conf2004/3A.c.diliza_LBMAConf2004.pdf)>, last visited on 21 February 2006.

The post-apartheid government's commitment to legislative transformation pertaining to environmental protection was evidenced by the inclusion of an environmental clause in the Bill of Rights of the Constitution, namely section 24.

Section 24 of the Bill of Rights prescribes that:

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The negative phrasing of section 24 (a) could imply that the section only contains a certain minimum standard of environmental quality instead of a positive right.<sup>20</sup> Even though it might be deemed to be a minimum standard the fact that it is included of the section in the Bill of Rights uplifts the right to a fundamental human right and in fact to the highest legal level in the hierarchy of legal norms in the country. Furthermore the express inclusion of these rights in the Constitution should remove the ambiguities in respect of the rights and duties associated with the environment.<sup>21</sup> This right will be explored below in Section 4 in respect of the rights afforded to the residents of Hondeklip Bay.

Section 24 (b) sets out the main objectives and constitutional obligations of the State to secure the rights of individuals through reasonable legislative and other measures. It contains socio-economic characteristics linking economic development with environmental rights. The legislative measures would confer obligations on the Hondeklip Bay Mine to ensure that the environment is protected. Section 24 (b) will be discussed in section 5 which deals with the obligations placed on the Hondeklip Bay Mine.

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<sup>20</sup> Glinski "Public Interest Environmental Litigation in South Africa" <<http://www.saep.org/Interns/IntPro/intpro99/Glinski/Glinski%20Paper.doc>>, last visited on 20 March 2007.

<sup>21</sup> Gutto "Environmental Law and Rights" <[http://www.chr.up.ac.za/centre\\_publications/constitlaw/pdf/32-Enviromental%20Law%20and%20Rights.pdf](http://www.chr.up.ac.za/centre_publications/constitlaw/pdf/32-Enviromental%20Law%20and%20Rights.pdf)>, last visited on 20 March 2007.

The Constitution further provides for horizontal application in that it prescribes that the Bill of Rights binds natural and juristic persons if, and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right.<sup>22</sup>

Apart from the environmental right in section 24, everyone also has a right of access to information held by the State as well as any information that is held by another person and that is required for the exercise or protection of any rights.<sup>23</sup>

Chapter 3 of the Constitution pertains to principles of co-operative governance, ensuring *inter alia* that legislation required to protect environmental rights should be introduced in a manner that is efficient, effective indicating mutual trust and good faith between government departments.<sup>24</sup>

The Constitution therefore demonstrates concepts of responsible mining by empowering people with a right to an environment that is not harmful to their health, and an environment that is protected for present and future generations. It has also ensured that government introduces legislation to protect the environment, prevent pollution and ecological degradation, promote conservation, secure ecologically sustainable development,<sup>25</sup> and the use of natural resources while promoting justifiable economic and social development. The promotion of accountability in the form of access to information, and co-operative governance in all relevant government departments, is also addressed in the Constitution.<sup>26</sup>

Therefore constitutionally speaking, the residents of Hondeklip Bay are afforded rights to an environment that is not harmful to their health and well-being, as well as access to information to protect these rights.

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<sup>22</sup> S8 of the Constitution.

<sup>23</sup> S32(1)(a) of the Constitution.

<sup>24</sup> Mol and Mbalo "South African Legislation: The first step in the right direction" presented at the Conference on Environmentally Responsible Mining (2001), <<http://www.bullion.org.za/Departments/Environment/EnvirResponsConf2001/Conference.htm>>, last visited on 14 March 2006.

<sup>25</sup> NEMA defines sustainable development as the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.

<sup>26</sup> *Op Cit* at n23.

### 3.2 The National Environmental Management Act 107 of 1998 (NEMA)

In terms of section 24(b), a duty is placed on the State to enforce the environmental rights as provided for in section 24(a) of the Constitution. It is evident that NEMA is a product of the prescripts of section 24 (b) of the Constitution in that reasonable legislative measures were taken by the State to further national environmental interest by laying down institutional structures and legal mechanisms to champion the environmental cause.<sup>27</sup>

NEMA is considered to be framework legislation developed by the Department of Environmental Affairs and Tourism (DEAT) for integrating good environmental management policies applicable to all organs of state and to ensure that these organs of state maintain the principles listed in NEMA to guide them during the exercise of any functions which may affect the environment. NEMA is considered to be the cornerstone of all environmental legislation.<sup>28</sup> In fact the environmental rights entrenched in the Constitution have been cited *verbatim* in the preamble of NEMA, thus affording it constitutional credence.

To benefit from the protection afforded by NEMA, it has to be ascertained if the Hondeklip Bay area falls within the description of “environment” as defined by NEMA.

The environment, according to NEMA is defined as:

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

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<sup>27</sup> Glazewski *Environmental Law in South Africa* (2005) at 135.

<sup>28</sup> *Ibid* at 137.

Hondeklip Bay consists of *inter alia*, land, water, atmosphere and plant and animal life. The environmental definition in NEMA has however been expanded to include aesthetic and cultural properties that influence human health and well-being. Whether these conditions influence the well-being of the community of Hondeklip Bay will be explored in the following section that deals with the rights of these residents.

### **3.3 The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)**

As a result of the commitment to reform the mining industry the MPRDA, administrated by the Department of Minerals and Energy, was promulgated to *inter alia*, enforce environmental protection and the management of the impacts of prospecting and mining in South Africa.

The preamble of the MPRDA, affirms the State's obligation to, *inter alia*, protect the environment for the benefit of present and future generations, and ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.

The MPRDA deals with the obligations of the mining companies in dealing with, for example, pollution and ecological degradation that could be harmful to one's health and well-being but does not deal with the rights of the community per se. Therefore the relevant sections pertaining to the obligations imposed on the Hondeklip Bay Mine will be discussed in Section 5 below.

### **3.4 Conclusion**

The Constitution entrenches the right to an environment that is not harmful to one's health and well-being, and through reasonable legislative measures to, *inter alia*, prevent pollution and ecological degradation and to promote justifiable economic and social development.

Section 24 is re-inforced by NEMA as it is included *verbatim* in the preamble. NEMA further defines the term environment which includes aesthetic and cultural properties.



Although the MPRDA does not contain specific rights afforded to communities affected by mining activities, it does specify the obligations that the mining companies are compelled to take to ensure that the environment is protected for the benefit of present and future generations, as well as to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.

Therefore the South African law has acknowledged the right to an environment that is not harmful to the health and well-being of a person, a protected environment that includes aesthetic and cultural properties that influence human health and well-being. An environment that promotes sustainable economic development is similarly acknowledged and protected. These are the rights that the residents of Hondeklip Bay contend are being affected by the activities of the Hondeklip Bay Mine.

The nature of these rights will be examined in the next section.

## 4. The environmental rights of the residents of Hondeklip Bay

### 4.1 An environment that is safe and not harmful to one's health

It is common cause that mining activities severely impact on the environment. The soil, water, human health, built-up environment, air, plants and animal life are all affected by the mining processes.<sup>29</sup>

Diamond mining, in particular, requires extensive explosions to remove rock, soil and vegetation in order to reach mineral deposits which are found in the ore beneath the earth surface. The explosives contain a mixture of ammonium nitrate and fuel oil, which apparently pollute the environment. The explosions as well as the stone mining and rock crushing cause dust which results in air pollution. Water is used to cool the drilling machines, to wash away deposits of waste rock and to suppress dust caused by the explosions and drilling. This results in water pollution.<sup>30</sup>

The environmental impact differs depending on the mining activity and the different stages of mining. For example, the environmental damage in the prospecting and exploration phase may be less than the damaged caused during the extraction or metallurgical phase.<sup>31</sup> The Hondeklip Bay Mine has completed the extraction phase which could have resulted in the following damage:

- destruction of vegetative cover;
- loss of topsoil;
- major landform changes;
- human safety hazards;
- a reduction in water quality standards due to acidic mine drainage;
- leaching of heavy metals;
- air pollution from dust; and
- solid waste accumulation (tailings and waste rock).<sup>32</sup>

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<sup>29</sup> Mabiletsa and Du Plessis "The impact of environmental legislation on mining in South Africa" (2001) *SAJELP* at 186.

<sup>30</sup> Zlatkov, D "Environmental Consequences of Diamond Mining" <[http://www.dimitar.net/documents/ib/Geo\\_-\\_Environmental\\_Consequences\\_of\\_Diamond\\_Mining.htm](http://www.dimitar.net/documents/ib/Geo_-_Environmental_Consequences_of_Diamond_Mining.htm)>, last visited on 8 August 2006.

<sup>31</sup> Glazewski *op cit* n27 at 457.

<sup>32</sup> Glazewski *op cit* n27 at 457.

Therefore it is evident that water and air pollution are concomitant to mining activities. The mining activities conducted by the Hondeklip Bay Mine would not be an exception to this premise.

The residents and visitors of Hondeklip Bay have confirmed that the extraction phase has resulted in the destruction of the vegetation and has radically transformed the landscape of the area. Loss of vegetation and topsoil has affected the air quality, and the water quality standards have been reduced due to acidic mine drainage.<sup>33</sup>

However, the impact of air and water pollution on the ill-health of the residents of Hondeklip Bay has not been established to date.

Clarification on what activities constitute an environment that is detrimental to one's health is not defined in any statutory provisions. These activities have, however, been amplified by our courts and foreign jurisprudence. For example, a company involved in wood-burning which resulted in smoke and "offensive and noxious" gases was found to have contributed to air pollution. The Court held that the air pollution infringed its neighbours' right to an environment which is not detrimental to their health and well-being.<sup>34</sup>

Internationally, however, there is a body of law that supports the premise that communities affected by mining activities or proposed mining activities, need not demonstrate the link between ecological degradation and an unhealthy environment. In the State of Uttar Pradesh in India, the Court found that the impending mining of limestone quarries would result in the degradation of the environment and would deprive the residents from living in a healthy environment. The limestone quarry operators were ordered to cease mining despite the large sums invested in the mining operations. The Court held it is a "price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance".<sup>35</sup>

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<sup>33</sup> *Op cit* n13 and n14.

<sup>34</sup> *Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another* 1996 (3) SA 155 (N).

<sup>35</sup> *Rural Litigation and Entitlement Kendra v Uttar Pradesh* 1985 AIR (SC) at 652.

In the above case no evidence of activities harming the health of the residents was submitted as the mining operations had not as yet taken place. It was found that the cessation of the mining operations would prevent any foreseeable “hazard to the residents, their cattle, homes and agricultural land and undue affectation of air, water and environment.”<sup>36</sup> The Indian Court did not rely on tangible injury caused by the mining activity but made an order to prevent foreseeable injury.

In a case study on diamond mining in Angola, it was found that the mining activities degraded the surrounding land by increasing atmospheric pollution, contaminating surface and ground water and increasing soil erosion and leaching. This affected the health of the inhabitants in the region, which was apparently evidenced by the fact that most residents were suffering from sickness and disease related to contaminated drinking water supplies.<sup>37</sup>

Bruch et al, in citing Indian and Peruvian case law, have concluded that the constitutional rights to health could be violated without any specific allegations of injury. Protection may be sought when ongoing behaviour is detrimental or likely to be detrimental to the environment despite the fact that no direct injury on human health had been proven.<sup>38</sup>

In South Africa, the position on whether the courts will accept the premise that ill-health is resultant from pollution without evidence of direct injury is unclear. In the *Woodcarb* case,<sup>39</sup> the Court relied on the testimony of expert witnesses to demonstrate that the smoke caused the emission of noxious and poisonous gases which resulted in air pollution which was found to be a risk to the health of the neighbouring residents.

Even though it might be common cause that diamond mining activities result in pollution and that pollution is detrimental to one’s health and well-being, as decided in the *Woodcarb* case,<sup>40</sup> it might still be necessary for the residents of Hondeklip Bay to substantiate their claim that the activities of the Hondeklip Bay Mine have been

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<sup>36</sup> *Op cit* n35.

<sup>37</sup> “Angola’s diamond mining case issue”, <<http://www.american.edu/ted/angdiam.htm>>, last visited on 27 April 2006.

<sup>38</sup> Bruch, Coker & Arsdale, “Breathing life into fundamental principles: implementing constitutional environment protections in Africa” 2000 (7) *SAJELP* at 41- 44.

<sup>39</sup> *Op cit* n34.

<sup>40</sup> *Op cit* n34.

detrimental to their health and/or that there is a reasonable apprehension that the activities constituted a danger to their physical or psychological health.

#### **4.2 An environment that not harmful to one's well-being**

Residents and visitors to the Hondeklip Bay area have noted the major alteration of the landscape caused by the mining excavation. Apart from the aesthetic concerns, there is a genuine concern that the unsightly landscape will affect tourism and, as a consequence, the economy of Hondeklip Bay.<sup>41</sup>

It has to be ascertained whether aesthetics and economic well-being are rights that should be afforded legal protection. This would require clarity on the definition of "well-being". Section 24(a) of the Constitution amplifies one's right to an environment that is not harmful to one's well-being. The term "well-being" is not defined and Glazewski affirms that although it is not easy to impart an exact legal definition to "well-being", it is suggested that the term implies that the environment has an instrumental value, in that, not only does it secure benefits such as good health and food but also tourist-related income and the protection of cultural objects of intrinsic value. The ambit of a right to "well-being" is potentially limitless and is relative to the nature and personality of the person asserting this right.<sup>42</sup>

Kidd linked aesthetics to well-being, when he examined the *McCarthy* case.<sup>43</sup> The applicants were aiming at preserving the ambience in the suburb which they claimed would detrimentally be affected by further commercial development.<sup>44</sup> Kidd averred that it would be difficult to establish how further commercial development would result in harming one's health, but it may well be that such a development would be harmful to one's well-being. He extended the term "well-being" to include the aesthetic dimension of the environment, whereby the idea of a "sense of place" of a quiet suburb would most probably be harmed by excessive development.

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<sup>41</sup> *Op cit* n8, n13 and n14.

<sup>42</sup> Glazewski *op cit* n27 at 77.

<sup>43</sup> Kidd "Suburban aesthetics and the environmental right" (1999) 2 *SAJELP* at 262.

<sup>44</sup> *McCarthy case and others v Constantia Property Owner's Association and others* 1999 (4) SA 847 (C).

It is admitted that the South African courts have yet to define the concept of well-being. Well-being could refer to spiritual well-being caused by an unspoiled view, park-land, or an urban green lung. It could also relate to noise levels, emissions, haze and odours that while not harmful to a person's health could increase the discomfort level in an area.<sup>45</sup>

There have been a number of South African court cases that support the notion that environmental considerations should be accorded appropriate recognition and respect in the administrative processes of the country.<sup>46</sup> Although the court did not make reference to "well-being" as referred to in section 24 (a), concerns of spirituality, aestheticism, and therapeutic qualities of an area with established fauna and flora were considered.<sup>47</sup>

It is evident from foreign [and international] case law that protection of *inter alia*, aestheticism is recognised.

In the United States of America, a petitioner with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country", brought a suit to restrain federal officials from approving an extensive skiing development in a National Forest.<sup>48</sup> The petitioner had to demonstrate that it had suffered or had been adversely affected by a legal wrong. The injury alleged by the petitioner was that the proposed development would change the aesthetics and ecology of the area and that it "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."<sup>49</sup> The Court confirmed that the above may amount to an "injury in fact" and proclaimed that aesthetic and environmental well-being, like economic well-being are important ingredients of the quality of life, and should be afforded legal protection through the judicial process.<sup>50</sup>

A complaint was brought before the African Commission on Human and People's Rights against the State of Nigeria by two Non-Governmental Organisations in respect of the

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<sup>45</sup> Stein & Tucker "Environmental rights in the Bill of Rights: An opportunity to develop the South African environmental jurisprudence" (1997) *HRCLJSA* at 23.

<sup>46</sup> *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 719 (SCA).

<sup>47</sup> *Ibid* at 715.

<sup>48</sup> *Sierra Club v Morton* 405 U.S. (1972) at 727.

<sup>49</sup> *Ibid* at 735.

<sup>50</sup> *Ibid*.

infringement of *inter alia* articles 16 and 24 of the African Charter on Human and People's Rights (African Charter) in the Niger Delta. These articles provide that every individual has a right to enjoy the best attainable state of mental and physical health and that all peoples have the right to a satisfactory environment.<sup>51</sup>

It was alleged that the military government of Nigeria had been directly involved in oil production through the State oil company and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.<sup>52</sup> The impact of oil operations in the Niger Delta were taking its toll on the inhabitants in the form of incessant oil spills and the disposal of toxic wastes into the environment and local waterways. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.<sup>53</sup>

The Commission held that not only was the environment degraded but that it was defaced by the "destruction of all beauty and variety" and that it is "as contrary to satisfactory living conditions and development as the breakdown of fundamental ecologic equilibrium is harmful to physical and moral health".<sup>54</sup> The Commission found accordingly that the Federal Republic of Nigeria was in violation of the said articles of the African Charter and appealed to the said government to ensure protection of the environment, health and livelihood of the people of Ogoniland.<sup>55</sup>

It is evident from foreign case law that aestheticism and economic interests are considered to be vital for the well-being of communities affected by adverse environmental developments. The South African courts have as yet to decide on whether aesthetics and financial interests can be linked to one's well-being.<sup>56</sup> However, as the Constitution has made provision for the consideration of international law (a must) and foreign law (optional),<sup>57</sup> when interpreting the Bill of Rights, the findings made

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<sup>51</sup> *Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v. Nigeria* (2001), Communication No. 155/96 at paragraph 52.

<sup>52</sup> *Ibid* at paragraph 1.

<sup>53</sup> *Ibid* at paragraph 2.

<sup>54</sup> *Op cit* n51 at paragraph 53.

<sup>55</sup> *Op cit* n51 at paragraph 72.

<sup>56</sup> Financial interests would include tourist related income or the depreciation of property values.

<sup>57</sup> S39 (1) (b) and (c) of the Constitution.

in the *Sierra Club* and the *SERAC* cases can be used in interpreting section 24 (a) of the Constitution. This will have the effect of expanding the meaning of well-being to include *inter alia*, aspects of beauty, spirituality and economic interests.

### **4.3 Conclusion**

Notwithstanding that direct injury pertaining to the health of the residents of Hondeklip Bay may not be evident, the residents may have a successful claim in proving that their well-being has been affected by the unsightly excavated mine dumps which have affected the aesthetics of the area. The residents are entitled to a clean and undisturbed environment for peace of mind as well as economic benefits such as tourist related income.

Converse to the *rights* of the residents to an environment that is not harmful to their health and well-being, is the *obligation* on the Hondeklip Bay Mine to ensure that its mining activities have not resulted in harm to the residents of Hondeklip Bay. These obligations and other duties of the Hondeklip Bay Mine will be dealt with next.



## **5. The environmental obligations of the Hondeklip Bay Mine**

### **5.1 The South African Constitution**

The Constitution makes provision for environmental protection through legislative or other measures. Section 24 (b) refers to the duty imposed by the right to have the environment protected.

It is common cause that the section 24 (b) imposes a duty on the state to provide environmental quality in the form of reasonable legislative measures. This application is vertical at best. Ferreira maintains that it may be possible to compel private-law juristic persons to protect the environment through “other measures”, a phrase which has been included in section 24 (b). This would bring this part of the right in the ambit of a private law relationship and therefore horizontal application would be applicable.<sup>58</sup> Therefore, the addition of the words “other measures” could result in the responsibility of environmental protection extending to private-law juristic entities such as the Hondeklip Bay Mine to also affect measures to protect the environment.

The debate on whether environmental protection has vertical and/or horizontal application is a moot point, since the post-1994 democratic government has taken up the challenge of promulgating reasonable legislative measures in an effort to protect the environment by means of NEMA. Section 24 (b) of the Constitution has been cited verbatim in the preamble of NEMA and will be examined further below under the duties imposed on mining entities.

### **5.2. Obligations of the Hondeklip Bay Mine in terms of NEMA**

#### **5.2.1 Duty in terms of the principles of NEMA**

The disturbance of the ecosystems, ecological degradation as well as pollution by the Hondeklip Bay Mine has resulted in or is likely to result in environmental harm to the health and well-being of the residents of Hondeklip Bay.

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<sup>58</sup> Ferreira “Constitutional values and the application of the fundamental right to a clean and healthy environment to the private-law relationship” (1999) *SAJELP* at 177.

The principles of NEMA which form the basis of the said Act, stipulates that the disturbance of ecosystems, loss of biological diversity and pollution should be avoided or, if not possible, should be minimised and remedied.<sup>59</sup>

The Court has found that the principles which were included in NEMA were to create a framework to guide organs of state, as defined in the Constitution,<sup>60</sup> to formulate environmental policies or to draft and adopt environmental implementation and management plans.<sup>61</sup> It was further found that the principles do not make provision for rights and obligations; “instead it sets out principles expressed at times in abstract rather than concrete terms”.<sup>62</sup>

As these principles are to guide organs of state in formulating policy and not to create rights and duties, they are not applicable to private-law juristic entities such as the Hondeklip Bay Mine.<sup>63</sup> The organs of state do, however, have a responsibility of ensuring that these principles are included in their policies and plans. This is done by, *inter alia*, promulgating legislation which contains protective environmental measures. Legislation that has included environmental principles include, *inter alia*:

- MPRDA - the principles of NEMA serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA;<sup>64</sup> and
- National Environment Management: Air Quality Act 39 of 2004 (Air Quality Act) - the interpretation and application of this Act must be guided by the principles of NEMA.<sup>65</sup>

The National Water Act 36 of 1998 (NWA), was promulgated prior to NEMA and as such the principles of NEMA are not referred to in this Act. However, as all organs of state have a responsibility to use the principles as a guide, the interpretation and application of this Act should be in accordance with the said principles.

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<sup>59</sup> S2(4) of NEMA.

<sup>60</sup> S 239 (1) of the Constitution defines as “organ of state” as follows:

- a. any department of state or administration in the national, provincial or local sphere of government; and
- b. any other functionary or institution -
  - i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - ii. exercising a public power or performing a public function in terms of any legislation.

<sup>61</sup> *Minister of Public Works and others v Kyalami Ridge Environmental Association and others* 2001 (7) BCLR 652 (CC).

<sup>62</sup> *Ibid* at 68.

<sup>63</sup> S2(4) of NEMA.

<sup>64</sup> S37(1) of MPRDA.

<sup>65</sup> S5(2) of the Air Quality Act.

## 5.2.2 Statutory duties of NEMA applicable to the Hondeklip Bay Mine

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law, or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.<sup>66</sup>

The above section extends a statutory duty of environmental protection to private-law juristic persons, a provision which had not been apparent in terms of section 24(b) of the Constitution and the principles of NEMA under section 2.<sup>67</sup>

Every “person” who causes or has caused pollution/degradation is liable to minimise or rectify such dangers.<sup>68</sup> The complexity in mineral cases is that the person responsible might not necessarily be the owner of the land where the mining activities took place. Traditionally the common law principle on land ownership entails that the owner of land is the owner of not only the surface of the land but everything legally adherent thereto and also of everything contained in the soil below.<sup>69</sup> Therefore the owner of the land would also be the owner of the minerals found in the soil. In the late nineteenth century the concept of severance, in which the ownership of the land and the mineral rights could be separated was promulgated in the Deeds Registry Act 47 of 1937.<sup>70</sup> Thus statute law departed from the common law principle in that the ownership of mineral rights had been separated from the ownership of the land. This could result in the owner of the land not necessarily being the owner of the mineral rights.

Even if the owner may own the land and the mineral rights, the owner may not prospect, remove, mine, explore for and produce any mineral without the authorisation from the State.<sup>71</sup> The Hondeklip Bay Mine would have been the holder of the mineral rights before it could begin mining operations. Therefore any pollution or ecological

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<sup>66</sup> S28(1) of NEMA.

<sup>67</sup> The principles of NEMA (Section 2) are applicable to organs of state.

<sup>68</sup> *Op cit* n66.

<sup>69</sup> “Mining and Mineral Sector Strategy For the Northern Cape Province” <<http://www.northern-cape.gov.za/ncpgds/mining/>> last visited on 1 October 2006 at page 32.

<sup>70</sup> *Ibid* at 32.

<sup>71</sup> S 5(4) of MPRDA.

degradation liabilities would be the responsibility of the mine, even if it is not the owner of the land.

NEMA has resolved any ambiguity pertaining to the persons to be held liable for pollution/ecological degradation by extending the net of culpability to include the following category of persons, namely: the owner of the land; and/or the person in control of the land; and/or any person that has the right to use the land in which any activity or process was undertaken; or any other situation exists which causes or has caused significant pollution or environmental degradation.<sup>72</sup> The *Bareki* case,<sup>73</sup> confirmed that even an owner or possessor of land who has not been responsible for such pollution or degradation has an obligation to take reasonable corrective measures.

The above section,<sup>74</sup> is applicable to future mineral right holders as well as to any “person” who has “caused” significant pollution in the past. The Hondeklip Bay Mine, as an entity that has control of the land and who has a right to use the land is the responsible “person” who has the duty of taking measures to prevent, stop, minimise or rectify pollution or degradation caused at the Mine.

However, the retrospectivity of this liability on the polluter is not indefinite. The *Bareki* case,<sup>75</sup> referred to the liability of an asbestos mine which had been operational prior to the commencement of NEMA, namely 29 January 1999. The Court decided that retrospectivity would entail an unfairness that Parliament could not have intended. According to the representative of the Hondeklip Bay mine,<sup>76</sup> they submitted a closure plan to the DME in June 2002. Therefore the mine would have been operational prior to June 2002. As it is after the commencement of NEMA, the Hondeklip Bay Mine is obliged to take corrective measures for the pollution or degradation caused from 29 January 1999.

The Court further stated that the duty or obligation for taking corrective measures is a strict one. Therefore the Hondeklip Bay Mine will not have any statutory defences to an

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<sup>72</sup> S28(2) of NEMA.

<sup>73</sup> *Bareki NO and Another v Gencor Ltd and others* 2006 (1) SA 432 (T).

<sup>74</sup> S28(2) of NEMA.

<sup>75</sup> *Op cit* n73.

<sup>76</sup> *Op cit* n8.

action to oblige it to take corrective measures for pollution and degradation caused from 29 January 1999.

### **5.3 Obligations on the Hondeklip Bay Mine in terms of mining legislation**

The first Act to regulate the control of mining operations was the Mines and Works Act 12 of 1911, which was subsequently replaced by the Mines and Works Act 27 of 1956. The latter Act was in time repealed by the Minerals Act. The MPRDA has repealed the Minerals Act and provides for a more comprehensive treatment of environmental protection.

The applicability of the above-mentioned legislation to the Hondeklip Bay Mine was examined in light of correspondence between the Hondeklip Bay Mine and the Hondeklip Bay Community Forum.

The Chief Representative of the Hondeklip Bay Community Forum had written to the mining representative regarding its rehabilitation efforts.<sup>77</sup> On 25 November 2002 the Hondeklip Bay Mine responded to the said letter stating the *inter alia* following:

- The Hondeklip Bay Mine has an EMP for the Hondeklip Bay Mine and it was approved by the Department of Minerals and Energy (DME) in 1995, and was implemented immediately thereafter.
- In 2001, a specialist-consulting group was appointed to research the geometry (shape) of the overburden dumps in order to enhance the stability of that environment.
- These recommendations have been endorsed by the DME and other authorities, and will be implemented once the DME approves the mine closure plan that was submitted in June 2002.
- Small-scale sloping of overburden dumps was in fact already being executed as part of the operational activities;
- The mine intended to offer the rehabilitation as an open tender whereby members of the local community were offered an opportunity to participate in that tender process for the further rehabilitation of the Hondeklip Bay area;

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<sup>77</sup> *Op cit* n8.

- The mining company has commenced with backfilling of excavations long before the promulgation of the Minerals Act; and
- The mining company is aware that it is a legal requirement to rehabilitate dumps and holes in such a way that safe, stable, and pollutant-free land remains.

The following year, on 28 November 2003, the Hondeklip Bay Mine once again responded to the concern maintaining the following:<sup>78</sup>

- Mining in Hondeklip Bay has been in existence for the past 30 years.
- Before 1992 there was no legal requirement for the EMP described above, although a rather elementary rehabilitation plan was in existence.
- Nevertheless, rehabilitation (sloping of dumps and backfilling of old excavations, where feasible at the time) had been done concurrently with mining.
- There are, however, older excavations that were not backfilled. This can be ascribed to such factors as either being too distant from an overburden-producing open pit or that the excavation still had to be expanded in all directions.
- Incomplete backfilled excavations are currently being made safe by sloping the sidewalls and supplying them with a safety beam around the perimeter.
- Overburden dumps are being stabilised by sloping, contouring and seeding. The most feasible and stable dump geometry has been researched and defined by a specialist civil engineering consulting group.
- The rehabilitation at Hondeklip Bay is being done in accordance with the approved EMP and a closure plan, which is largely based on the requirements of the approved EMP. The EMP was approved in 1995, and the Closure Plan was submitted to the DME in July 2002.

The Hondeklip Bay Mine avers that it continuously revised the EMP that had been approved in 1995 to ensure that they were still in line with current mining operations. The revisions were done in consultation with regulatory authorities and other stakeholders and took into account the provisions of the MPRDA. An environmental implementation system had been developed and provided for regular monitoring of the activities that had potential environmental impacts.

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<sup>78</sup> DList discussion forum as on 22 November 2003.

The Hondeklip Bay Mine alleges to have complied with its statutory and regulatory requirements in respect of its environmental obligations. The veracity of this statement will be examined below.

### **5.3.1 Pre-MPRDA obligations**

The Hondeklip Bay Mine EMP was approved in 1995, almost 10 years prior to the promulgation of the MPRDA.<sup>79</sup> Therefore the applicable provisions would have been in terms of the Minerals Act. Even though the Minerals Act was repealed by the MPRDA, the mining authorisation and extraction of the minerals took place under the auspices of the Minerals Act and as such these provisions will be examined further.

No mining activity could take place unless an authorisation was issued by the Regional Director: Mineral Development.<sup>80</sup> The Director would only issue such an authorisation if he was satisfied with the manner in which the Hondeklip Bay Mine intended to rehabilitate disturbances of the surface which would have been caused by its mining operations. The applicant would also have to demonstrate that it had the ability and could make the necessary provision to rehabilitate such disturbances of the surface.<sup>81</sup>

After obtaining the authorisation, but before commencement of the mining activities, the Hondeklip Bay Mine was required to submit an Environmental Management Programme Report (EMPR) to the Director of Mineral Development. The EMPR would have to include an environmental impact assessment (EIA),<sup>82</sup> and an indication of how the impact would be managed. After obtaining approval of the EMP, it was incumbent on the Hondeklip Bay Mine to monitor and perform assessments of the EMP on an ongoing basis.<sup>83</sup>

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<sup>79</sup> The MPRDA became operational on 1 May 2004.

<sup>80</sup> S5 of the Minerals Act.

<sup>81</sup> S9 of the Minerals Act.

<sup>82</sup> Peckham "Environmental Impact Assessments in South African Law" (1997) 4 *SAJELP* at 114 defines EIA as an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development principles.

<sup>83</sup> S39 of the Minerals Act.

The rehabilitation programme which would be included in the EMP would consist of a step-by-step guide for rehabilitation measures, which would be revised through the life-cycle of the mine to effectively deal with changing circumstances.

The Hondeklip Bay Mine claims to have an EMP approved in 1995. Therefore it follows that a mining authorisation had been obtained, an EMPR had been approved and that the DME had been satisfied that the above obligations of the mine had been fulfilled.

### 5.3.2 Obligations in terms of the MPRDA

The MPRDA which repealed the Minerals Act was promulgated to make provision for, amongst others, equitable access to and sustainable development of the nation's mineral and petroleum resources. One of its objectives is to 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.<sup>84</sup>

The above objective is given credence by the fact that the Minister will only grant a mining right if the applicant can demonstrate, *inter alia*, that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment.<sup>85</sup> As a consequence, the renewal of such a right is dependent on the applicant reporting on the extent of its compliance with the requirements of the approved EMP,<sup>86</sup> the rehabilitation to be completed and the estimated cost thereof.<sup>87</sup>

The above provisions are applicable to entities obtaining mining rights under the MPRDA. However, the Hondeklip Bay Mine had not applied for a mining right in terms of the MPRDA, but under the Minerals Act. At the time the legislators were faced with the issue that this mine and others in a similar position, were bound by the provisions of the Minerals Act. As this Act would be repealed by the MPRDA, the enforceability of the provisions of the first Act would become void. The solution was to create a provision that would entitle holders of, *inter alia* mining authorisations, to convert their old rights

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<sup>84</sup> S2(h) of the MPRDA.

<sup>85</sup> S23(1)(d) of the MPRDA.

<sup>86</sup> S39 of the MPRDA.

<sup>87</sup> S24(2) and S24(3)d of the MPRDA.



under the Minerals Act to new rights under the MPRDA. Such a right was referred to as an old order mining right.<sup>88</sup> The MPRDA confirms that any old order mining right in force immediately before this Act took effect, continued to be in force subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued. Upon the conversion of the old order mining right and the registration of the mining right into which it was converted, the holder of the mining right under the Minerals Act was said to be the holder of an old order mining right in terms of the MPRDA.

Therefore the Hondeklip Bay Mine would have become the holder of an old order mining right and was subject to the terms and conditions under which it had obtained the mining authorisation in terms of the Minerals Act. Consequently, it had to comply with the provisions of its EMP, which it states to have done.

This would mean that the Hondeklip Bay Mine had agreed to:

- Manage all environmental impacts in accordance with its approved EMP.<sup>89</sup>
- As far as it is reasonably practicable, rehabilitate the environment affected by the mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.<sup>90</sup>
- Take responsibility for any environmental damage, pollution or ecological degradation as a result of his or her mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.<sup>91</sup>

The Hondeklip Bay Mine would have obtained authorisation on affirming to perform the above responsibilities. However, the DME had the right to cancel or suspend the authorisation if the holder *inter alia* contravenes any section of the MPRDA or contravenes the approved EMP.<sup>92</sup> Nevertheless, if the permit has been suspended or

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<sup>88</sup> An old order mining right according to the definition in the MPRDA means any mining lease, consent to mine, permission to mine, claim licence, mining authorisation...in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted.

<sup>89</sup> S38(c) of the MPRDA.

<sup>90</sup> S38(d) of the MPRDA.

<sup>91</sup> S38(e) of the MPRDA.

<sup>92</sup> S47(1)(a) of the MPRDA.

cancelled, the holder of the permit will still be liable for any environmental liability, pollution or ecological degradation.<sup>93</sup>

The mining authorisation has not been cancelled or suspended as the Hondeklip Bay Mine is in the process of applying for a closure certificate. The Hondeklip Bay Mine claims to have complied with its statutory and regulatory obligations in terms of its approved EMP and states that it is on track to closing the mine.

This implies that the DME would have to be satisfied that the conditions of the authorisation are being met, failing which it would have taken steps to ensure compliance.

The Hondeklip Bay Mine contends that it is complying with the rehabilitation commitments in terms of the approved EMP. However, the residents and visitors to the area are unconvinced that the mine is performing its rehabilitation obligations.

#### **5.4 Obligations in terms of the National Environment Management: Air Quality Act**

Mining activities generate dust which can have serious health implications, particularly when the mine is situated near an urban development. As discussed above, dust from explosions, stone blasting and rock-crushing is prevalent in diamond mine operations.<sup>94</sup>

Fortunately, the exposure of dust from diamond mines has not been proven to have the severe effects of, for example, asbestos mining. Studies have, however, shown that communities exposed to air pollution in the form of asbestos fibres, treatment plants and open asbestos dumps, suffer from respiratory diseases, ranging from shortness of breath to lung cancer. Even though the dust from diamond operations is not as hazardous as the dust fibres emitted during asbestos mining, dust pollution from mining activities has been seen as a serious health risk. As a result there have been statutory provisions to prevent such pollution.

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<sup>93</sup> S43(1) and S43(3) of the MPRDA.

<sup>94</sup> *Op cit* n29.

The previous Atmospheric Pollution Prevention Act, 45 of 1965 (APPA) included sections pertaining to the control of pollution in the form of dust, which is usually prevalent in mining areas. If the mining area was declared a dust control area, the entity performing the industrial activities resulting in the dust pollution, had to use the best practicable means to prevent such dust from causing a nuisance to people in the vicinity.<sup>95</sup> The Air Quality Act has repealed the APPA and was promulgated to reform the law regulating air quality to protect the communities exposed to air pollution as well as the environment by providing reasonable measures for the prevention of pollution and ecological degradation.<sup>96</sup> In terms of the Air Quality Act, the Minister has to introduce steps to prevent nuisance by dust or any other measures aimed at the control of dust.<sup>97</sup> There is an additional provision pertaining to mining companies in respect of rehabilitation.<sup>98</sup>

Within a period of five years, prior to the cessation of the mine, the owner of the mine is obliged to notify the Minister of, *inter alia*, any plans that are in place or in contemplation for the rehabilitation of the area where the mining operations were conducted after mining operations have stopped and the prevention of pollution of the atmosphere by dust after those operations have stopped.<sup>99</sup>

Therefore, the Hondeklip Bay Mine would have had the obligation of using the best practicable means to prevent the nuisance caused by dust in terms of the APPA. In terms of the Air Quality Act, it must notify the Minister of how it intends to prevent pollution by dust after its closure as well as comply with any steps regulated by the Minister in controlling dust pollution.

According to the residents and visitors to Hondeklip Bay, the mining activities have left sand piles that are steep and high and susceptible to wind erosion.<sup>100</sup> Therefore the obligation of the Hondeklip Bay Mine to prevent nuisance by dust to the surrounding communities must be examined by the DEAT in terms of the above-mentioned provisions.

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<sup>95</sup> S 28(1) of APPA.

<sup>96</sup> *Ibid.*

<sup>97</sup> S32 of the Air Quality Act.

<sup>98</sup> S33 of the Air Quality Act.

<sup>99</sup> S33 of the Air Quality Act.

<sup>100</sup> *Op cit* n13.

## 5.5 Obligations in terms of the National Water Act 36 of 1998 (NWA)

Water pollution constitutes a threat to the health of all things living and has the potential of affecting the availability of water if its usage is not regulated.

The owner or person in control of the water resource has the responsibility of avoiding pollution of the water resource. Such a person has strict liability in respect of any damage caused by such pollution for the clean-up and remedial expenses and for any benefit that the person has derived from the pollution.<sup>101</sup>

Even though the Hondeklip Bay Mine had commenced activities prior to the promulgation of the NWA, the mine has to comply to certain provisions to protect the water resources, namely:

- Submit a copy of the EMPR to the Department of Water Affairs (DWAF).<sup>102</sup>
- Determine construct, maintain, operate and confine a clean water system at the mine to avoid spillage into a dirty water system and vice versa for a period of at least 50 years.<sup>103</sup>
- Take reasonable measures to prevent water containing waste from entering any water resource.<sup>104</sup>
- Ensure that all pollution control measures are in place when the mine ceases to operate.<sup>105</sup>

There is no evidence that the residents are suffering from the effects of water pollution. But these effects could materialise years later. The State has made provision for the maintenance of clean water systems for a period of 50 years. Therefore, even if the mine closure is successful, the obligation to maintain the water resources still rests with the mining company for years to come.

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<sup>101</sup> S20 of the NWA.

<sup>102</sup> NWA – Regulations on use of water for mining and related activities aimed at the protection of water resources at Regulation 2(2)(a).

<sup>103</sup> *Ibid* at Regulation 6.

<sup>104</sup> *Ibid* at Regulation 7.

<sup>105</sup> *Ibid* at Regulation 9.

## **5.6 Conclusion**

The Constitution makes provision for environmental protection through legislative or other measures.

The essence of the constitutional provisions is echoed in the principles of NEMA. The principles of NEMA although not prescriptive have been encompassed in subsequent legislation dealing with environmental provisions, such as the MPRDA and Air Quality Act.

It is evident that the legislature created provisions to protect the ecosystems, prevent the loss of biological diversity and the avoidance or minimisation of pollution.

The Hondeklip Bay Mine, despite operating prior to most of the legislation currently in place, has obligations in terms of the said legislation to ensure that it manages all environmental impacts in accordance with its approved environmental management programme, rehabilitates the environment affected by the mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development and takes responsibility for any environmental damage, pollution or ecological degradation as a result of its mining operations. Specific conditions have been incorporated in legislation such as the MPRDA, Air Quality Act, the NWA pertaining to rehabilitation, air as well as water pollution.

The residents have the right to an environment that is not harmful to their health and well-being and the Hondeklip Bay Mine has the obligation to not only ensure that its operations contribute to such an environment but also that they prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The residents of Hondeklip Bay are convinced that the Hondeklip Bay Mine is not complying with its environmental obligations. The residents have a constitutionally entrenched environmental right which has been expounded in subsequent legislation. However, this community is an impoverished one and even though they do have these

rights, it is doubtful that they will have the means to protect these rights. In the next section it will be ascertained if the residents are capable of enforcing their environmental rights and ensuring that the Hondeklip Bay Mine complies with its obligations.

## 6. Legal recourse available to the residents of Hondeklip Bay

### 6.1 Legal standing of the residents of Hondeklip Bay

The residents of Hondeklip Bay have a right to an environment that is not harmful to their health and well-being.

The Hondeklip Bay Mine has obligations in terms of the Constitution, NEMA, MPRDA, Air Quality Act and the NWA, amongst others, to ensure that they prevent or minimise pollution and ecological degradation. Furthermore the Hondeklip Bay Mine has a duty to rehabilitate the mined area.

Should the residents wish to enforce their rights, they might have to take legal recourse. However, before the merits of a case are examined, the court must be satisfied that the person/entity bringing forth a suit has legal standing (*locus standi*) to appear before the said court.<sup>106</sup> To ascertain *locus standi*, the courts must determine if the person/entity claiming relief has sufficient interest in the matter and has to indicate that they were adversely affected. To demonstrate sufficient interest, the plaintiff's legal right or recognised interest must be direct and personal.<sup>107</sup> Therefore, traditionally speaking, persons wishing to claim relief in the interests of the public, could not acquire *locus standi*. This would be detrimental to the cause of the residents if each of them has to demonstrate a direct and personal injury.

The Constitution now has made provision for public interest litigation in the form of section 38. It empowers the following persons to obtain redress from a competent court if that person's right has been infringed or threatened, namely:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

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<sup>106</sup> Kidd *Environmental Law : A South African Guide* (1997) at 27.

<sup>107</sup> *Moltke v Costa Aerosa* 1975 (1) SA 255 (C).

Therefore residents of Hondeklip Bay could either act in their own interests, in respect of a group, association or members. Furthermore anyone acting in the public interest can also approach a competent court for the protection of their constitutional rights. If the residents are however unable to prove an infringement of their constitutional rights, they could acquire *locus standi* through common law if the cause of action would be in the interest of the public, as discussed in the court case below.

In a court case where the cause of action was in respect of a contravention of a statute pertaining to the erection of cottages on the Transkei Wild Coast, and not an infringement of a constitutional right, the court held that where a statute imposes an obligation on the State to protect the environment in the interests of the public, that a body promoting environment conservation should have *locus standi* at common law to apply for an order compelling the state to fulfil its obligations.<sup>108</sup>

In addition to the constitutional and common law recourse to acquire *locus standi* in respect of public interest litigation, NEMA now has certain provisions that empower the public to enforce their environmental rights by providing that any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA or any other statutory provision concerned with the protection of the environment or the use of natural resources.<sup>109</sup>

Persons whose rights have been infringed have legal standing to enforce their rights in terms of section 32. They can proceed to litigate in:

- a. That person's or group of persons' own interest
- b. The interest of, or on behalf of, a person who, for practical reasons, is unable to institute such proceedings
- c. The interest of or on behalf of a group or class of persons whose interests are affected
- d. The public interest, and
- e. The interest of protecting the environment.<sup>110</sup>

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<sup>108</sup> *The Wildlife Society of Southern Africa & others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & others* 1996 (3) SA 109.

<sup>109</sup> S32 (1) of NEMA.

<sup>110</sup> S28 (1) of NEMA.



Therefore if the residents or any person would like to enforce their right to impose a duty on the mine to take measures to rectify significant pollution and degradation in Hondeklip Bay, they will have legal standing in terms of the above section.

Consequently, it can be concluded that the *locus standi* provisions in the Constitution, NEMA or common law are not restricted to individuals who have shown injury, prejudice, or damage of a right peculiar to themselves but is afforded to any person/entity who may want to enforce their environmental rights irrespective of whether that person/entity is adversely affected by the alleged infringement of their rights.

## 6.2 Recourse by residents in terms of NEMA

It is contended that the inclusion of the *locus standi* clauses in the Constitution and NEMA was due to the following reasons:

- People may not be in a position to approach the court for relief in that they may be unsophisticated.
- Financial constraints may play a role especially where persons are impoverished.
- The judicial process may be another factor in that it can be emotionally traumatic and time consuming.<sup>111</sup>

A group action was brought against Cape PLC, an English asbestos mining company that had been involved in operations in the Northern Cape. The cause of action was in respect of the wrongful and unlawful breach of duty of care which exposed the employees and local communities to harmful levels of asbestos, resulting in asbestos-related diseases. It was decided that the case should be argued in England as the plaintiffs would not obtain legal aid in South Africa as legal aid cover is not provided for personal injury claims. Most of the residents in that community were indigent and would thus not be able to afford an attorney to pursue their interests. It was further contended that South Africa did not have the technical and legal expertise for such a complex case. The South African courts were known to be conservative in awarding general damages compared to countries such as England.<sup>112</sup>

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<sup>111</sup> Cheryl "Standing to enforce fundamental rights" *SAJHR* (1994) at 49-50.

<sup>112</sup> Spoor "The Cape asbestos claims: the implications for the South African mining industry" *Journal of the Mine Ventilation Society of South Africa* (2001) at 90.

Although the effects of diamond mining have not been proven to be as detrimental to the health of the surrounding local communities, it is common cause that the health and well-being of the Hondeklip Bay residents will be affected and that they would have a basis for a public litigation suit similar to the claimants of the asbestos case. In the asbestos case above, the litigants had the opportunity of litigating in England which was perceived to be more favourable to public interest litigators in terms of cost as well as technical expertise. Since the Hondeklip Bay Mine is a South African mining company, the residents will not have the benefit of litigating in England. The difficulties of litigating in South Africa as described by the litigants in the asbestos case are characteristic of the problems facing the residents of Hondeklip Bay as they may be indigent and not have the financial resources to approach the courts for protection of their environmental rights.

Litigation costs frequently present a practical impediment to bringing public interest cases. This is due to the fact that in most cases the poorest or most marginalised people are usually affected by environmental degradation. They usually do not have the “financial resources to challenge a large corporation or their government, particularly in a potentially long, complicated, and expensive case.”<sup>113</sup> There is also the fear that if unsuccessful the applicant in such a case might have a costs award against them.<sup>114</sup>

In South Africa, the application for costs for public interest litigation does not seem to have been tested in the environmental context as yet. However in a matter involving the contravention of provisions in the Marine Living Resources Act 18 of 1998, the contraveners, namely the Hout Bay Fishing Company, agreed to pay the legal costs incurred by the DEAT as well as the fine imposed by the prosecution for overfishing lobster and hake.<sup>115</sup> The matter was settled out of Court and as such no judgment was made pertaining to costs. However, the contraveners acknowledged their indebtedness to the State in respect of the investigation and legal costs and volunteered to reimburse the same for these costs.

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<sup>113</sup> *Op cit* n37 at 86.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Mail and Guardian* article “Hout Bay fishing firm fined R40-million”. <<http://www.chico.mweb.co.za/mg/za/news.htm>>, last visited on 31 October 2005.

It is evident that if costs were not an issue, the residents of Hondeklip Bay may be more inclined to challenge the mining company and enforcing the environmental law provisions. In some countries, for example the United States, statutory provisions allow for successful public interest plaintiffs to recover attorneys' fees and other related costs in terms of their private attorney general doctrine.<sup>116</sup> The court will award fees if: the action has resulted in enforcement of an important right affecting the public interest; a significant benefit has been conferred on the general public or a large class of persons; and the necessity and financial burden of private enforcement makes the award appropriate.

In South Africa, similar provisions have now been included in NEMA and this will make it more cost-effective and affordable for the residents of Hondeklip Bay to approach the court. NEMA provides that the courts will not award costs against any person/group of persons that had sought relief in respect of a breach/threatened breach of any statutory provision concerning the protection of the environment or the use of natural resources even if such a person/persons failed to obtain the relief sought.<sup>117</sup> The Court must be of the opinion that the person/persons:

- acted reasonably out of concern for the public interests; or
- in the interest of protecting the environment; and
- had made due efforts to use other means reasonably available for obtaining the relief sought.

Costs are typically an inhibiting factor in bringing public interest actions. The provisions in NEMA have the potential of significantly improving the applicant's position where, in the past he may have been reluctant to litigate due to the onerous costs awards that could accompany the unsuccessful outcome of a case.

### **6.3 Conclusion**

The residents of Hondeklip Bay will be acting in the public interest, as well as in the interest of the environment, should they wish to litigate against the mining company in

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<sup>116</sup> The private attorney general doctrine was codified by the California legislature in 1977 as § 1021.5 of the California Code of Civil Procedure.

<sup>117</sup> S32 (2) of NEMA.

respect of the protection of their environmental rights to health and well-being. They have the requisite *locus standi* and if it is evident that they had sought relief in respect of the protection of the environment or the use of natural resources, the courts may grant an application to not award costs against the residents, even if their action is unsuccessful.

## 7. Concluding remarks

The substantial benefits of mining cannot to the economy be underestimated. In South Africa it has contributed considerably to the national economy and has resulted in the establishment of the country's secondary industries. The residents of Hondeklip Bay would have been rewarded financially for their involvement in the mining activity during its operating phase. However, the mine has since become in-operational and is pending closure.

The residents have been left with the remnants of a once thriving mine. It is today considered to be an "eye-sore" to residents and visitors in the area who have indicated that the excavations and sand-piles around Hondeklip Bay, affect the aesthetics of the area.

The alleged lack of and/or inadequate rehabilitative efforts by the Hondeklip Bay Mine could lead to ecological degradation of the ecosystems and has either resulted in, or could result in, atmospheric and water pollution.

The Constitution which fundamentally altered the legal environment in South Africa, and which can be considered to be the legal source for environmental law in South Africa, entrenches the right to an environment that is not harmful to one's health and well-being. Obligations pertaining to, *inter alia*, the prevention of pollution and ecological degradation and the promotion of justifiable economic and social development through reasonable legislative measures have also been incorporated constitutionally. The constitutional provision is re-inforced by NEMA as it is included *verbatim* in the preamble.

Therefore the residents of Hondeklip Bay have a right to a protected environment which includes aesthetic and cultural properties that impact on human health and well-being. An environment that promotes sustainable economic development is similarly acknowledged and protected.

Notwithstanding that direct injury pertaining to the health of the residents of Hondeklip Bay may not be evident, the residents may have a successful claim in proving that their well-being has been affected by the unsightly excavated mine dumps which have affected the aesthetics of the area. The residents are entitled to a clean and undisturbed environment for peace of mind as well as economic benefits such as tourist related income.

It is evident that the legislature created provisions to protect the ecosystems, prevent the loss of biological diversity and the avoidance or minimisation of pollution.

The Hondeklip Bay Mine, despite operating prior to most of the legislation currently in place, has obligations in terms of the said legislation to ensure that it manages all environmental impacts in accordance with its approved environmental management programme, rehabilitates the environment affected by the mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development and takes responsibility for any environmental damage, pollution or ecological degradation as a result of its mining operations.

The residents of Hondeklip Bay are convinced that the Hondeklip Bay Mine is not complying with its environmental obligations thus affecting their environmental rights. However they do not have the financial resources to enforce these rights.

Should they wish to litigate against the mining company in respect of the protection of their environmental rights they will have the necessary *locus standi* by means of the Constitution, in that they will be acting in the public interest, as well as in the interest of the environment. NEMA has further created a provision that if these residents sought relief in respect of the protection of the environment, or the use of natural resources, the courts may grant an application to not award costs against the residents, even if their action is unsuccessful.

The Hondeklip Bay Mine has indicated that it has submitted an EMP that has been approved by the DME. The mine would be obliged to manage all environmental impacts in accordance with its approved EMP, rehabilitate the environment which has been

affected by the mining operations to its natural or predetermined state, and take responsibility for any environmental damage, pollution or ecological degradation as a result of its mining operations.

In terms of the Air Quality Act, the Hondeklip Bay Mine must notify the Minister of DEAT on how it intends to prevent pollution by dust after its operations as well as comply with any steps regulated by the Minister in controlling dust pollution.

In terms of NWA the Hondeklip Bay Mine has to take reasonable measures to prevent water containing waste from entering any water resource and to ensure that all pollution control measures are in place when the mine ceases to operate.

To ascertain if the Hondeklip Bay Mine is complying with the obligations in terms of the MPRDA, Air Quality Act and NWA, the residents must at the outset review the EMP in the possession of the DME and the plans and/or other documentation submitted to the Minister of DEAT in respect of the Mine's effort to control water and air pollution.

The information can be obtained by the residents in terms of the Constitution,<sup>118</sup> as well as the Access of Information Act.<sup>119</sup> If upon the review of the information, it is found that the Hondeklip Bay Mine is in contravention of its statutory obligations, the regional representative of the DME and DEAT must be informed of same. The said representatives have a duty to ensure that the mine complies with its statutory obligations.

If the Hondeklip Bay Mine fails to comply with its obligations and it impacts on the health and well-being of the residents, they may be compelled to resort to legal measures to obtain compensation for any such infringements.

Massive strides have been made in the environmental sphere by the South African government to promote an environment that is not harmful to the health and well-being of its residents. Extensive legal measures have been created to ensure that mining companies adhere to the environmental prescripts of the country. If the environmental

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<sup>118</sup> S(32)(a) of the Constitution.

<sup>119</sup> S(11) of the Promotion of Access to Information Act 2 of 2000.

rights and obligations are not enforced, the legitimacy of such environmental laws becomes questionable.

“However, with some notable exceptions, there has been little tangible or quantifiable improvement in the effective implementation of these laws or in the state of the environment itself. Proper interpretation and implementation of environmental laws, together with accelerated sustainable economic growth to address unemployment and poverty, are the challenges to which South African society must now respond more energetically than it has done in the past.”<sup>120</sup> This is one challenge the author believes, must be undertaken by the Hondeklip Bay residents affected by the mining activities.

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<sup>120</sup> Henderson “Some thoughts on distinctive principles of South African environmental law” 2001 *SAJELP* at 184.



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