



# Changing Corporate Behaviour

## The Mapungubwe Case Study A Research Report

by the Centre for Applied Legal Studies

February 2014

This publication was made possible by a grant from the Raith Foundation

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Legal Studies



## Acknowledgements

The Centre for Applied Legal Studies (CALS) wishes to thank all those who have supported the work outlined in this research report. In particular, CALS would like to thank our funding partners at the Raith Foundation for their insights and financial assistance. Without the resources they have provided, research in this area would not have been possible.

CALS is also grateful to the following individuals and organisations for their valued contribution to the work outlined here:

### Colleagues from CALS

Louis Snyman  
Robert Krause  
Megan Geldenhuys  
Bonita Meyersfeld  
Lisa Chamberlain  
Kirsten Whitworth

### Other organisations

CALS is also indebted to the Save Mapungubwe Coalition for their continued support.



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## 1. Executive Summary

Mapungubwe hill served as the capital of the ancient Mapungubwe Kingdom situated on the Limpopo and Shashe river confluence between South Africa, Botswana and Zimbabwe. Standing on the rocky outcrop where kings looked out onto their kingdom and the teeming wildlife is a unique and healing experience. The area has received international recognition for this combination of heritage and ecological significance. In 2008, an Australia-based mining company, called Coal of Africa (CoAL), saw another and conflicting value namely the rich coal seam that runs beneath the Limpopo River and under the World Heritage Site. In response to this planned development, the Save Mapungubwe Coalition (the Coalition) was formed, and it explored a wide range of strategies to safeguard the heritage and ecological value of the site.

The Mapungubwe story, which spans 5 years, thus provides a valuable source of insights into how the competing values and needs of environmental justice can be managed. This report captures the lessons of the Coalition campaign with a view to inform the work of civil society organisations seeking to change the environmental rights practices of mining companies, for mining companies; seeking to improve their environmental rights record and their relationship with civil society; and for all interested in business and human rights. Against the backdrop of the applicable norms and laws, this report tells the story of the Mapungubwe project in relation to three forms of engagement, namely litigation, bilateral negotiations and multi-lateral engagement. Each has constituted strategies for bringing about a change in corporate behaviour. The effectiveness of each of these interventions is assessed and the key lessons drawn out.

## 2. Introduction

### 2.1. AIMS OF REPORT

The reality of today's global society is that we live in an economically driven world in which the influence of corporations increasingly rivals that of our governments and heads of state. The strength of nations is determined by their economic power and the strength of a country's economy is contingent on a thriving and dynamic business sector. In South Africa, corporate activity has played multiple roles in the country's history. From facilitating the growth of the Dutch East India Company, to founding the global giant, the Anglo American Mining Company, South Africa has seen a diversity of corporate conduct. Unquestionably, the history of business practices in South Africa is inextricably linked to racial inequality and apartheid, evidenced by a mining sector embedded in a system of economic and racial inequality. Corporations in South Africa have witnessed the perpetuation of an



economically disenfranchised majority, amplifying the socio-economic segregation established under colonialism and entrenched by the oppressive apartheid regime.

Today, the economic status quo remains largely unchanged, with the allocation of wealth remaining in the hands of an empowered minority. Is it the responsibility of corporations, both national and multinational, to deconstruct systemic inequality, or is this the purview of the state? Is profit-making independent of social development? Is there a new approach to corporate responsibility or is it, ultimately, business as usual? The growing support for mitigating climate change, understanding population growth and managing resource scarcity indicates a shift in company values. Has this change in ideology tamed the wanton pursuit of profit in favour of a greater consciousness of sustainability? Or have large corporations simply become more skilled at hiding behind an illusion of best practice while continuing to disregard human rights centred development<sup>1</sup> and sound environmental management? Regardless of your point of view, it is increasingly important to recognise and understand the drivers of corporate behaviour and the imperatives underlying the corporate project, including reputational damage, shareholder liability and profit maximisation.

One of the most important questions in the area of business and human rights is: how human rights activists and business reconcile their seemingly divergent interests. This report aims to utilise the lessons of practice to inform the principles of corporate social and environmental accountability. The establishment of a mine next to a world heritage site (WHS) and the response of a diverse coalition of civil society organisations provide an opportunity in this case study to analyse the effectiveness of various strategies used in bringing about a change in corporate behaviour and to extract the lessons learnt for future use.

For civil society, this report aims to present and analyse a menu of strategic options available for engaging with corporations. For corporations, this report aims to provide sources of new ideas for addressing the challenges associated with meeting its human rights obligations, particularly in relation to invasive forms of development and associated land use conflicts. For the international community, this report is intended to contribute to the debate around business and human rights, using this case and its economic context as a framework for understanding and developing theory. Having set out the aims and nature of this report, the next step is to provide a brief introduction to the Centre for Applied Legal Studies (CALS) environment and mining programme and to core principles informing our work.

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<sup>1</sup> Filme-Wilson states that 'the human rights-based approach to development puts human rights at the heart of human development. It sets the achievement of human rights obligations as an objective of development aid and integrates human rights principles into the development process.' E Filme-Wilson 'The Human Rights-Based Approach to Development: The Right to Water' (2005) *Netherlands Quarterly of Human Rights* 23 (2) 213.



## 2.2. CALS, HUMAN RIGHTS, ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT

The environmental right, often referred to as a third generation right, is often misunderstood as a luxury, protecting fauna and flora to the detriment of poverty alleviation. This is a fundamental myth. Environmental justice is a precursor to the eradication of poverty. It is at the foundation of the right to water; the right to education; the right to dignity.

CALS is a civil society organisation based in the School of Law at the University of the Witwatersrand, Johannesburg, committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALS' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. CALS seeks to achieve this through three methodologies namely research, advocacy and strategic litigation, all of which were used in the Mapungubwe Project.

CALS's environmental justice and development programme seeks to realise the environmental right contained in section 24 of the South African Constitution as it applies to the extractives sector, and through environmental legislation and regulations. Too often overlooked is the fact that section 24, rather than being a right of the environment itself is instead a *human* right to an environment 'not harmful to health and well-being.' Environmental degradation poses a multitude of threats to health and well-being, threatening access to water, food security and livelihoods. The impact of this degradation is most acutely felt by people living in poverty, in particular by mine-affected communities. Any conception of environmental accountability divorced from human rights is therefore grossly inadequate.

There is a clear need to infuse compliance with human rights standards – which includes environmental justice – into the culture and conduct of the corporate sector, not only because of the extent to which the behaviour of the sector influences the realisation of human rights, but also because of the potential for human rights violations to multiply if left unchecked.

CALS draws extensively on the paradigm of 'environmental justice' which has emerged from grassroots activism for social justice in relation to the environment. Environmental justice consists of a distributive dimension, in that the benefits and burdens of the development of the environment must be equitably shared and a procedural dimension, in that those directly affected communities must be enabled

to participate in decisions that will have a long term and resulted in effective change in the state of poverty.<sup>2</sup>

While environmental justice is still an emerging paradigm confined primarily to the worlds of social movements, NGO's and academics, today sustainable development is the dominant framework of global society in relation to the environment that has been formally adopted at the level of the UN.<sup>3</sup> 'Sustainable development' is in essence the requirement that development meet the needs of the present generations without compromising the ability of future generations to meet their needs. Sustainability requires the harmonisation of environmental, social and economic imperatives through the integration of each in all planning and decision-making.<sup>4</sup>

This report stems from the experiences and knowledge gained from the sustained engagement with the Australian multinational company CoAL in relation to the Mapungubwe Project. These experiences have led to some invaluable lessons learnt through an adaptive and proactive methodology in a matter which is groundbreaking in both the global and South African context. This case study is well-suited to analysing the prevailing corporate culture and identifying the ways it can be influenced through the legal and institutional safeguards as well as the strategies pursued by civil society. Through analysing the strategies and deriving lessons from this critical assessment we aim to aid civil society partners and corporations in achieving more fruitful engagement on social issues.

Before delving into the case study, however, it is necessary to introduce the key international and domestic rules and principles providing the standards for evaluating the conduct of CoAL and the terrain on which the campaign to hold the mine accountable took place.

## **2.3. CORPORATE ACCOUNTABILITY – THE GLOBAL LANDSCAPE**

### **2.3.1. INTRODUCTION**

There are few pursuits in the world today which do not, to some extent, bear traces of corporate influence. Access to food, housing, roads and transport services require the involvement of various corporate entities. The reach of business has grown and developed to the extent that billions of people globally rely on corporations to

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<sup>2</sup>These two dimensions have been distilled from the various understandings discussed in the literature For analyses of environmental justice movements and differing conceptions of its aims see S Forster 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement' 1998 86 *California Law Review* 775; H Stacy 'Environmental justice and transformative law in South Africa and some cross-jurisdictional notes about Australia, the United States and Canada' 1999 *Acta Juridica* 36.

<sup>3</sup>See K Morrow 'Rio +20, the Green Economy and Re-orientating sustainable development' 14 *Environmental Law Review* 279, 280-281.

<sup>4</sup>This understanding has been adopted at the UN Conference on Environment and Development. See *Ibid*.

sustain their lives. This reliance has given corporations a degree of power and authority to shape economies and policies.

The global nature of this power has triggered the attention of global bodies and international lawyers. International law identifies the state as the primary duty bearer and protector of the rights of individuals. While the precise contours of the international legal framework are hotly debated, the dominant view is that international law does not bind corporations. This is problematic given that 41 of the world's 100 largest economies are corporations.<sup>5</sup> Given this immense influence over people's lives, mechanisms of accountability need to evolve. However, legal initiatives to build a culture of corporate accountability and to shift some of the burden of protecting the rights of the individuals onto companies have been a relatively recent development. It is imperative that the law addresses this shift in power through a suitable system of governance which acknowledges the *actual* roles each actor plays in the new system. As matters stand, the dominant mode of regulation stems from voluntary associations and concepts of corporate social responsibility.

### **2.3.2. THE UNITED NATIONS BUSINESS AND HUMAN RIGHTS FRAMEWORK**

The UN's official framework for determining the human rights obligations of corporations is known as the 'Ruggie Framework' after Professor John Ruggie, tasked by the United Nations Human Rights Council with defining the parameters for the human rights obligations of corporations. The framework rests on three main pillars, namely: the state's duty to protect individual rights, including protection against abuse from non-state actors; second, the responsibility of corporations to respect human rights, essentially to 'do no harm'; and finally, the ability for victims to access remedies where rights have been violated. It is on these three pillars that the current body of business and human rights norms rests.

These Guiding Principles were endorsed by the Human Rights Council, therein establishing the first global standard for corporate accountability.<sup>6</sup> It has been through this process that the foundations for a business and human rights framework have been laid. It is now up to states themselves to critique and assess the Guiding Principles for implementation on a domestic level, with the idea that this will result in a binding body of law with which corporations operating in a state must comply.

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<sup>5</sup> Transnational Institute 'The Global 0.001%' (2011) <http://www.tni.org/sites/www.tni.org/files/download/infographic-corporatepower.pdf>.

<sup>6</sup> <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

### 2.3.3. STAKEHOLDER THEORY

Another important framework for viewing the social obligations of corporations is provided by Freeman's stakeholder theory which has become widely endorsed since its formulation in 1984.<sup>7</sup> It seeks to replace the view that managers hold a duty only to shareholders in a company (stockholder theory), with the idea that managers have a fiduciary duty to all stakeholders. Freeman defines stakeholders as 'those groups who have a stake in or claim on the firm. It specifically includes suppliers, customers, employees, stockholders, and the local community, as well as management in its role as agent for these groups.'<sup>8</sup>

The stakeholder theory contends that, just as shareholders are entitled to demand certain actions from management, stakeholders have a logically identical claim, though the content of the claim is different for each stakeholder: owners want higher financial returns, while employees want higher wages and better benefits, and the local community desires improved infrastructure and a better overall social impact.<sup>9</sup> Freeman further contends that when these relationships become imbalanced, the survival of the firm is at risk. Ultimately, the idea is that a corporation should be managed in the interests of all its stakeholders, which include employees, financiers, customers, suppliers and communities.<sup>10</sup> It is the meaningful acceptance by each of these stakeholders that gives companies their social license to operate.

The Mapungubwe Project offers opportunities to test whether this theory is honoured in practice. The issue of meaningful stakeholder participation arises before mining begins and, in particular, in the public participation process adopted in the regulatory decision-making by government and in the conduct of the mine once mining begins. Under heading 3.5 below, we evaluate the public participation process conducted using stakeholder theory as a benchmark.

### 2.3.4. CORPORATE SOCIAL RESPONSIBILITY AND THE BUSINESS CASE FOR RESPECTING HUMAN RIGHTS

Corporate Social Responsibility (CSR) refers to voluntary initiatives by companies with the declared aim of respecting or promoting human rights and social welfare. The underlying principle is that corporate entities can no longer act as economic actors detached from broader society, but must have regard to social, political and environmental issues which may affect, or be affected by, business operations. The International Institute for Sustainable Development (IISD) confirms that CSR is now firmly rooted in the global business agenda.<sup>11</sup> However, the scope and nature of

<sup>7</sup> RE Freeman *Strategic Management: A Stakeholder Approach* (1984); RE Freeman 'A stakeholder theory of the Modern Corporation.' In TL Beaucamp and NE Bowie *Ethical Theory and Business* 6ed (2001) 56.

<sup>8</sup> Freeman 'A Stakeholder Theory of the Modern Corporation.'

<sup>9</sup> Ibid.

<sup>10</sup> Ibid at 48.

<sup>11</sup> See <http://www.iisd.org/business/issues/sr.aspx>.

CSR is uncertain.<sup>12</sup> There are two competing assessments of CSR: on one hand, there has been a rapid and marked global shift in the conceptualisation of the role of the corporation. Profit maximisation and shareholder value are no longer the only benchmarks of a successful business. On the other hand, there are concerns about the adequacy of this type of voluntary self-regulation and the extent to which sustainable practices have been adopted. Critics argue that CSR is predominantly about the image the company projects. Often, companies with the most devastating impacts have developed sophisticated communication techniques to present their message of corporate commitment to environmentalism and human rights.<sup>13</sup>

For the most part, the practical driver remains profit and many companies are motivated by the 'business case' for socially responsible behaviour. The business case essentially entails minimising negative impacts and maximising positive impacts, which are said to favourably increase profits, at least in the long run. The business case for socially responsible business practices, as shown below, is vividly illustrated by the experience of CoAL, whose Johannesburg Stock Exchange (JSE) share price has been on a downward trajectory since 2010, due in part to its non-compliance with environmental law as highlighted in the media by the Coalition campaign.

## 2.4. SOUTH AFRICAN LAW GOVERNING HUMAN RIGHTS OBLIGATIONS OF MINING COMPANIES

The following is a brief introduction to the current South African legal landscape. It is important to set out the legal framework in order to understand the regulatory context in which both the Coalition and CoAL have operated. A core component of the Mapungubwe Project has always involved testing the effectiveness of these laws and structures as mechanisms for civil society and mine-affected communities to hold companies – and government – to account. Therefore, it is important to determine both whether there has been legal compliance and also whether the law, in fact, achieves its objectives of environmental justice.

There are numerous legislative requirements on companies to make a positive contribution towards society and, in some cases; these impose human rights obligations on corporations.<sup>14</sup> The Constitution places explicit obligations upon juristic persons in the Bill of Rights, which include corporations to comply with those

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<sup>12</sup> N C Smith 'Corporate Social Responsibility: Not whether but how?' Centre for Marketing Working Paper no. 03-107, 2013, 2.

<sup>13</sup> R Hamann & P Kapelus 'Corporate Social Responsibility in Mining in Southern Africa: Fair accountability or just greenwash?' *Development* 47(3) (2004) 86.

<sup>14</sup> South African corporations are required to comply with section 8 of the Constitution, section 7 of the Companies Act 71 of 2008, and Regulation 28 of the Pension Fund Act, all of which speak to imposing responsible investment inputs into investment decisions.

obligations in the Bill of Rights relevant to their activity.<sup>15</sup> The ability to hold corporate actors directly liable for human rights violations is a progressive step in recognising the role of business as a vehicle for social benefit and a bearer of human rights obligations while being a for-profit venture. The South African Companies Act<sup>16</sup> is probably one of the most advanced pieces of legislation in terms of corporate accountability for human rights. The purpose of the Companies Act includes to promote compliance with the Bill of Rights and to reaffirm the concept of the company as a means of achieving economic and social benefits.<sup>17</sup> Regulation 28 of the Pension Fund Act<sup>18</sup> requires South African asset investment managers to take into account the long-term sustainability of investments and, in particular, to consider the effect of environmental, social and good governance practices on the profitability of the proposed investment. Asset managers are therefore required to fully analyse potential investments and take human rights implications into account.

## 2.5. SOUTH AFRICAN GUIDELINES AND PRINCIPLES GOVERNING THE HUMAN RIGHTS OBLIGATIONS OF MINING COMPANIES

In addition to these legislative requirements, South Africa has adopted the King III Report (King Code), a Code of Good Practice aimed at business which specifically sets out principles relating to corporate citizenship and stakeholder protection, as well as the triple bottom-line<sup>19</sup> approaches to investment decision making. The King Code sets out, amongst other things, the duty of good faith that a director owes to the company, which encourages the development of a company as having more than a wholly profit-driven purpose.<sup>20</sup> The Code of Responsible Investing in South Africa (CRISA) is an additional initiative which asserts that company values should be measured in more than financial terms, and should recognise the sustainable factors that allow a company to prosper.<sup>21</sup>

Finally, South Africa's Johannesburg Stock Exchange (JSE) has imposed a Socially Responsible Investment (SRI) Index, which has provided an increased focus on corporate sustainability in South Africa, as well as Listing Requirements that impose a duty to report on social and compliance standards as set out in the King Code. This

<sup>15</sup> Section 8(2) provides for the horizontal application of the Bill of Rights, meaning that corporations can be held liable for a breach of the Constitution.

<sup>16</sup> Companies Act No 71 of 2008.

<sup>17</sup> Section 7 of the Companies Act No 71 of 2008.

<sup>18</sup> Pension Fund Act 24 of 1956.

<sup>19</sup> The phrase "the triple bottom line" was first coined in 1994 by John Elkington, the founder of a British consultancy called Sustainability. His argument was that companies should be preparing three different (and quite separate) bottom lines. One is the traditional measure of corporate profit—the "bottom line" of the profit and loss account. The second is the bottom line of a company's "people account"—a measure in some shape or form of how socially responsible an organisation has been throughout its operations. The third is the bottom line of the company's "planet" account—a measure of how environmentally responsible it has been. The triple bottom line (TBL) thus consists of three Ps: profit, people and planet. It aims to measure the financial, social and environmental performance of the corporation over a period of time. Only a company that produces a TBL is taking account of the full cost involved in doing business. See *The Economist* 'Triple Bottom Line' 17 November 2009.

<sup>20</sup> I Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) *South African Mercantile Law Journal* 329.

<sup>21</sup> <http://www.iodsa.co.za/?page=crisa>.

is one of the first responsible investment indexes on a national market, and is one of the reasons that the World Economic Forum (WEF) Global Competitiveness Report ranked South Africa first out of 148 countries for regulation of securities exchanges for the fourth consecutive year.<sup>22</sup> The JSE Listing Requirements impose a duty on its listed companies to report on their social, environmental, health and ethical performances, as well as to provide information on their efficiency of risk management and internal controls, and to disclose their degree of compliance with the King Report. Apart from this duty, the SRI Index has developed criteria to measure the triple-bottom-line performance of companies on the FTSE/JSE All Share Index. Those companies who meet the criteria are thereafter lauded for being socially responsible organisations that embody the prerogatives of the King Code. These two indices provide a level against which a corporation is able to measure its social, environmental and good governance initiative and obtain financial support for these sustainability efforts. However, the reports by companies on its SRI record are not publicly available and, in fact, are not always available to shareholders. This precludes the effectiveness of the system as a source of leverage as the public is denied the information required to hold companies to their commitments to the JSE.

Having set out available mechanisms and principles for holding companies accountable, we shall now proceed to tell the story of Mapungubwe, Vele Colliery and the strategies by which a coalition of NGOs have held the mining company and government accountable to their environmental rights obligations.

### 3. The Save Mapungubwe Coalition Emerges in Response to Vele Colliery

#### 3.1. DESCRIPTION OF MAPUNGBUWE

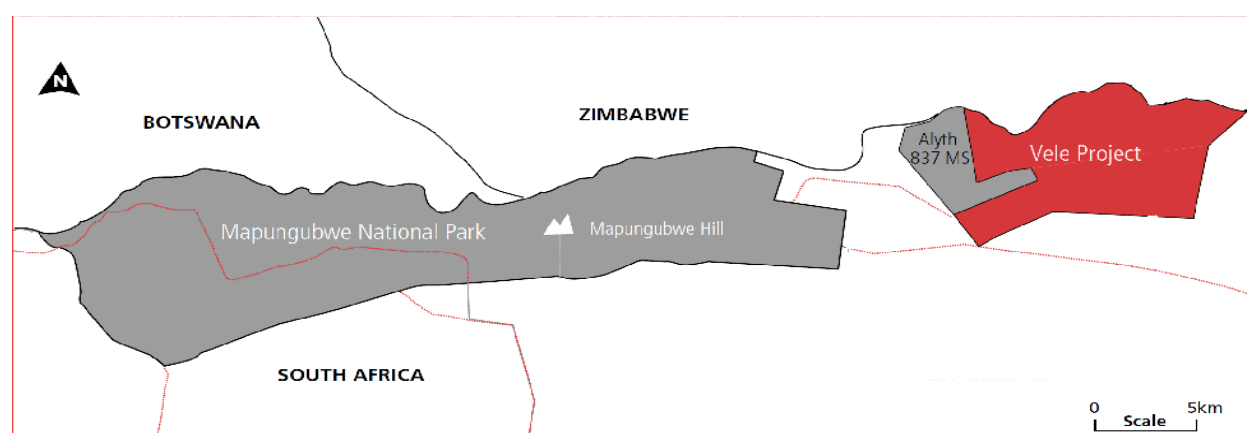


Fig 1: CoAL of Africa Vele Project map. [www.coalofafrica/our-business/operations/operation-vele](http://www.coalofafrica/our-business/operations/operation-vele)

<sup>22</sup> [http://www.jse.co.za/About-U/Media/Press-Releases/Full-Story/13-09-12/WEF\\_Global\\_Competitiveness\\_Report\\_2013-2014\\_South\\_Africa\\_ranks\\_first\\_in\\_regulation\\_of\\_securities\\_exchanges.aspx](http://www.jse.co.za/About-U/Media/Press-Releases/Full-Story/13-09-12/WEF_Global_Competitiveness_Report_2013-2014_South_Africa_ranks_first_in_regulation_of_securities_exchanges.aspx).



Nearly 1000 years ago,<sup>23</sup> overlooking the confluence of the Limpopo and Shashe rivers, there stood a flourishing kingdom. Centred in the area around Mapungubwe Hill to the South of the confluence, Mapungubwe was Southern Africa's first modern state and an integral part of a global trading network in ivory and gold that stretched as far as China. In 2008, a company of Australian origin, known as Coal of Africa (CoAL), applied for a mining right on land less than 7km to the North East of the boundaries of the Mapungubwe Cultural Landscape. This mine represented a threat both to the heritage value of the site and to the water supplies on which local and downstream users depend.

Mapungubwe's heritage and historical value is incalculable. The kingdom is a symbol of pride for Africans and challenges the colonial discourse which constructs pre-colonial Africa as an isolated and static continent. The material remains of this kingdom are a rich resource for archaeologists, historians, sociologists and economists in search of insights into the rise and fall of civilisations and how societies adapt to climate change. For Ga-Machete, Balemba, Vhangona and other communities, it is the resting ground of their ancestors. Mapungubwe's value to the world has been recognised in its inscription by the United Nations Economic Social and Cultural Organisation (UNESCO) as a WHS.<sup>24</sup>

### 3.2. POSSIBLE IMPLICATIONS OF THE MINE ON WATER SECURITY

The northern part of the Limpopo Province is rich with sites of extreme ecological sensitivity as well as largely untapped mineral deposits, creating an inherent conflict over land use possibilities. This conflict is exacerbated by the importance of the heritage resources in the area, water scarcity,<sup>25</sup> and the fact that Limpopo has been identified in the National Development Plan (NDP) as a key source of fuel for South Africa's growing energy needs.<sup>26</sup> At the same time, the region has a primarily agricultural economy<sup>27</sup> which, like mining, places heavy demands on the limited water supply.

The possible impact on water resources, in particular, has been a cause for concern, and may be felt by downstream as well as local water users. The human consequences could include job losses for employees on commercial farms and a decline in the number of communities able to support themselves through subsistence and/or small-scale commercial agriculture. Thus, environmental injustices risk being magnified as already poor communities could be further

<sup>23</sup> UNESCO 'Mapungubwe Cultural Landscape – Description'. Accessed at <http://whc.unesco.org/en/list/1099/>.

<sup>24</sup> The Mapungubwe Cultural Landscape was inscribed as a WHS in 2003 as per the the World Heritage Convention which is incorporated into South African Law via the World Heritage Convention Act 43 of 1999.

<sup>25</sup> Vhembe District Municipality 2012/2013-2016/2017 *Integrated Development Plan 3*.

<sup>26</sup> National Planning Commission *National Development Plan 2030 – Our Future Make it Work* 211-212.

<sup>27</sup> Limpopo Department of Agriculture Vhembe District Profiles. [www.lda.gov.za](http://www.lda.gov.za).

impoverished. As soon as they became aware of the severity of the threat posed by the proposed mining development, local stakeholders and environmental NGOs began to mobilise in response.

### 3.3. LOCAL STAKEHOLDERS AND CALS BECOME AWARE OF THE VELE MINING RIGHTS APPLICATION

Largely unbeknownst to the public, CoAL obtained a prospecting right in respect of land adjacent to Mapungubwe. As they prepared to apply for a mining right, public awareness grew and civil society organisations came together. The Mapungubwe Action Group (MAG) was formed by local residents in response to the proposed mining project at Vele.<sup>28</sup> MAG contacted the conservation NGO Endangered Wildlife Life (EWT), who registered as an interested and affected party and became actively involved in commenting on the draft environmental impact studies by CoAL. EWT played an instrumental role in bringing together the group of NGOs would become the Coalition. Organisations that submitted comments included the Association of Professional Architects of Southern Africa (ASAPA), which was concerned that mining posed a threat to the heritage value of Mapungubwe. The Coalition soon grew to include Birdlife South Africa (Birdlife), Wilderness Foundation (Wilderness), the World Wide Fund for Nature South Africa (WWF-SA) and Peace Parks Foundation (Peace Parks).

As the initial form of engagement pursued by Coalition organisations entailed using the public participation process to raise their concerns, what follows is a brief evaluation of that process using stakeholder theory as a yardstick for meaningful participation and consultation.

### 3.4. STAKEHOLDERS SIDE-LINED: A FLAWED PUBLIC PARTICIPATION APPROACH

As discussed above, the stakeholder theory holds that directors of a company owe a fiduciary duty towards all sectors of society who stand to be significantly affected by its activities. For companies to discharge this duty they must have an understanding of the likely impact of their activities on stakeholders and any alternative approaches the affected public believe would avoid or mitigate negative impacts. This is not possible unless all stakeholders are afforded the

<sup>28</sup> Its objectives enshrined in its constitution are:

- 2.1 To protect and maintain the environmental integrity of the area around Mapungubwe and its environs for current and future generations (see Appendix 1 for map of delineated area).
- 2.2 To ensure that all development and other matters in and around Mapungubwe and its environs are to the benefit of the inhabitants and concerned persons.
- 2.3 To provide inputs into any decisions, planning, development or other matters affecting the Mapungubwe area and its environs in any way.
- 2.4 To promote ecologically sustainable development and use of natural resources
- 2.5 To promote sustainable and justifiable economic and social development
- 2.6 To take action in any situation which may influence the stated objectives or which may affect the Mapungubwe area and its environs.

opportunity to participate meaningfully in decisions that affect them. The requirement of the Mineral and Petroleum Resources Development Act (MPRDA)<sup>29</sup> and National Environmental Management Act (NEMA)<sup>30</sup> for participation by interested and affected parties (I&APs) in the EIA/EMP processes in the form of public meetings and the submission of written comments can therefore be seen as a vehicle for the realisation of stakeholder theory in relation to impact of mining on the rights of the public. However merely allowing public participation in form does not fulfil the corporation's obligations to its stakeholders. The company's approach in these engagement processes must be characterised by inclusivity, transparency, good faith and a willingness to adjust plans in the light of comments by stakeholders.

Against this standard, CoAL's approach to public participation fell short in several respects. First, some local stakeholders, including the Balemba community,<sup>31</sup> were never consulted.<sup>32</sup> Second, the often terse responses to serious concerns and objections raised about the draft EMP and the mining project by civil society groups and even government departments like the then-Department of Environmental Affairs and Tourism (DEAT), and the near absence of adjustments in the final EMP showed a company prepared to disregard the rights and interests of stakeholders.<sup>33</sup> To cite one example, CoAL did not address EWT's concern that bird species to be impacted by the mine site could not be relocated.<sup>34</sup>

As the mining company failed to give sufficient regard to the rights claims of its stakeholders, these stakeholders organised into the Coalition and turned to the law to safeguard these rights.<sup>35</sup> In the next section, the Coalition's litigation strategy, the story of the interventions undertaken and the lessons that can be learned will be discussed.

## 4. Litigation

### 4.1. WHAT THE COALITION SOUGHT TO ACHIEVE – LITIGATION STRATEGY AND OBJECTIVES

The initial aim of the Coalition's litigation strategy was to stop the development of Vele Colliery. Allowing open cast coal mining to take place adjacent to a WHS<sup>36</sup> would set a dangerous precedent for the area, signalling that even the most

<sup>29</sup> Section 22 (4) (b) of the MPRDA; Regulations 49 (5), 50 (f) of the MPRDA Regulations.

<sup>30</sup> Regulations 27(a)-(c) and 28 (1) (g)(i)-(iv) of the NEMA EIA Regulations (18 June 2010).

<sup>31</sup> Who are amongst several communities that trace their ancestry to the Mapungubwe Kingdom.

<sup>32</sup> To the knowledge of the Coalition there is no record of the Balemba community being consulted by CoAL,

<sup>33</sup> These civil society groups included MAG, EWT and ASAPA.

<sup>34</sup> Para 484.1 of the Interdict Application Founding Affidavit (Interdict FA).

<sup>35</sup> The formation of the Coalition will be addressed in the forthcoming volume on Mapungubwe.

<sup>36</sup> The Vele project involves both open cast and underground mining. Limpopo Coal Company (Pty) Ltd: Vele Colliery Project: Environmental Management Programme' 1.3 Detail Project Description.

environmentally sensitive sites would be available to mining companies without robust safeguards. In fact, the mine would have fallen within the UNESCO-recognised buffer zone, were it not for an inexplicable diversion on its north-eastern boundary.<sup>37</sup> If the border were to follow a consistent trajectory, Vele Colliery would fall within the buffer zone. This exclusion has attracted much attention at an international level.<sup>38</sup>

Mining would likely also place a significant strain on the limited water supply already used by the agricultural and tourism sectors, potentially leading to job losses. Although often painted as hardened opponents of all mining, Coalition members tried to adopt a position that was always nuanced. It advocated a considered approach to where and how much mining would be conducted, while being opposed to mining near sites of the highest heritage value and ecological sensitivity. However, since the outcomes of litigation are always uncertain, the Coalition was prepared for the possibility that it would not be able to stop the development. Under this scenario, the Coalition resolved that it would take all necessary steps to ensure that CoAL operated with all the required licenses and that license conditions adequately minimised and addressed environmental impacts, and that CoAL would be held accountable for any non-compliance. Litigation, even if unable to stop the mine, could convince the company to revisit its environmental practices and apply for amendments to licenses that failed sufficiently to protect heritage, biodiversity and water resources.

The experimental, multi-pronged approach of the Coalition was reflected in the manner in which it approached litigation. The Coalition lodged internal appeals against a range of decisions including the approval of the EMP; the approval of the mining right; and (later) the granting of the water use license and the environmental authorisation, enlisting a team of experts to critique each aspect of the EMP and the studies on which these were based. The main aspects included public participation that was not sufficiently inclusive; the threat to the unique sense of place; the impact on the scarce water resources; and the manner in which it addressed possible impacts on jobs in the agricultural and eco-tourism sectors. Simultaneously, the Coalition approached the High Court to interdict CoAL from conducting mining or mining-related activities pending the outcome of the internal appeals.<sup>39</sup>

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<sup>37</sup> See UNESCO Mapungubwe World Heritage Site Nomination Figure 5 Properties for inclusion in the Mapungubwe Cultural Landscape. [http://whc.unesco.org/en/list/1099/multiple=1&unique\\_number=1277](http://whc.unesco.org/en/list/1099/multiple=1&unique_number=1277)

<sup>38</sup> UNESCO recommended that South Africa clarify the boundaries of the buffer zone. Mission Report of the World Heritage Committee of UNESCO (January 2012).

<sup>39</sup> Mapungubwe Action Group and Others v Limpopo Coal (Pty) Ltd. and Minister of Mineral Resources. Unreported Case No 10/3014. Founding Affidavit.

## 4.2. PROCESSES REQUIRED PRIOR TO MINING

Before discussing the different prongs of the litigation, a brief explanation of the licenses and authorisations required prior to mining that were the subjects of the Coalition's challenges is in order.

A mining right must be granted by Department of Mineral Resources (DMR) before mining can take place. The approval of a mining right is subject to the applicant satisfying a number of conditions. These conditions pertain to the financial viability of the project as well as its socio-economic and environmental sustainability. An additional set of authorisations are required. First, mining activities may not commence until the environmental management programme (EMP) has been approved by the DMR.<sup>40</sup> All industrial processes that involve water uses are subject to the National Water Act and require an integrated water use license<sup>41</sup> (IWUL) in order to be legal.<sup>42</sup> Mining invariably includes activities such as the construction of roads and the large scale removal of vegetation which are listed in terms of NEMA<sup>43</sup> as requiring authorisation.<sup>44</sup> The National Heritage Resources Act<sup>45</sup> requires heritage impact assessments (HIA) and pursuant heritage management plans to be approved by the Department of Environmental Affairs (DEA) as part of the EIA process. The latter requirement is especially important in the case of Mapungubwe. Waste management activities and air quality management are required by the National Environmental Management: Waste Act<sup>46</sup> (NEMWA) and the National Environmental Management: Air Quality Act<sup>47</sup> (NEMAQA) respectively and each require their own set of licenses subject to the processes that will be undertaken on the site.

## 4.3. LICENSES ACQUIRED BY COAL

CoAL acquired the following licenses from the DMR, the Department of Water Affairs (DWA) and DEA in respect of Vele Colliery:

- Mining Right granted by the DMR on 29 January 2010 and effective from 19 March 2010 until 18 March 2040;
- IWUL granted by DWA on 29 March 2011 and effective until 28 March 2016;
- Rectification in terms of section 24G of NEMA granted by DEA on 5 July 2011;
- Revised IWUL granted by DWA on 17 August 2011 effective until March 2016.

<sup>40</sup> Sections 22 and 39 of the MPRDA.

<sup>41</sup> Section 21 of the National Water Act 6 of 1998.

<sup>42</sup> Mines are also required to comply with regulations on water use for mining and related activities as regulated by GN 704 in GG 20119 of 4 June 1999.

<sup>43</sup> Section 24(2) of NEMA.

<sup>44</sup> NEMA Provides for the Minister to issue publish listing notices. The activities cited are listed in NEMA Regulations 386 and 387.

<sup>45</sup> Act 25 of 1999.

<sup>46</sup> Act 59 of 2008.

<sup>47</sup> Act 39 of 2004.

The section 24G rectification is central to the Mapungubwe story. This section allows entities who have unlawfully conducted NEMA-listed activities without the required environmental authorisation to apply to the DEA for authorisation of that conduct upon payment of an administrative fine and a full description of the conduct. What has been problematic is the interpretation favoured by various government departments. They have taken the position that a successful section 24G application nullifies criminal liability for contraventions of NEMA in the period between the commencement of listed activities and the granting of this authorisation.

This is precisely what happened in the case of Vele Colliery. CoAL applied for an environmental authorisation for NEMA-listed activities such as the large scale removal of indigenous vegetation and the construction of roads.<sup>48</sup> The DEA refused CoAL's application. CoAL nevertheless proceeded unlawfully with some of these activities. The DEA issued a compliance notice with respect to listed activities. CoAL applied for rectification under section 24G and paid the fine. On 5 July 2011 the DEA granted CoAL its section 24G authorisation, permitting CoAL to resume these activities.

The Coalition's multipronged approach entailed challenging each of the above licenses and authorisations as they were granted.

#### 4.4. SUMMARY OF LITIGIOUS INTERVENTIONS

A significant part of the Coalition's litigation involved internal appeals to government departments<sup>49</sup> due to the requirement to exhaust internal remedies prior to approaching the superior courts to review a government decision.<sup>50</sup> In the context of the granting of the mining right and of the approval of the EMP, this meant an appeal to the Minister of Mineral Resources; in the context of challenging the issuing of the IWUL, this meant an appeal to the Water Tribunal; and in the context of challenging the section 24G rectification, this meant an appeal to the Minister of Environmental Affairs.

The central focus of and trigger for the Coalition's litigation was DMR's granting of the right to mine within kilometres of the Mapungubwe WHS given its sensitive characteristics. In contrast to the other prongs of litigation, Coalition organisations lodged individual appeals to the DMR, each with a slightly different focus.

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<sup>48</sup> Rectification in terms of section 24G of NEMA for Vele Colliery, 5 July 2011.

<sup>49</sup> And, in the case of the IWUL, the Water Tribunal.

<sup>50</sup> Section 7 (2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) requires litigants to exhaust internal remedies before approaching the superior courts for judicial review of the decision. This requirement is re-iterated in section 96 of the MPRDA.

Key grounds of these appeals were:

- the decision maker did not have the necessary facts before her that would enable her to take a decision on the application due, *inter alia*, to the absence of proper consultation with interested and affected parties and communities, and the non-finalisation of the EMP;<sup>51</sup>
- the decision-maker lacked the requisite authority to grant the mining right;<sup>52</sup> and
- the mine would result in unacceptable pollution and ecological degradation to the environment.<sup>53</sup>

Like the interdict application, the mining right and EMP appeals were protracted legal battles with several answering, replying and replicating submissions.

A further appeal lodged with the DMR pertained specifically to approval of the EMP. A requirement for the granting of a mining right under the MPRDA,<sup>54</sup> the EMP sets out the measures to be taken to prevent and mitigate the environmental impacts identified in the mandatory EIA.<sup>55</sup> The appeal attacked the EMP and the EIA on various grounds including insufficient public participation and the sensitivity of the Mapungubwe site.<sup>56</sup> The crux of the appeal was that the EMP relied on incomplete information about local conditions and provided for inadequate mitigation measures.<sup>57</sup>

Following the decision by the DWA to award the water use license, the Coalition filed an internal appeal against this decision to the Water Tribunal.<sup>58</sup> The supporting affidavit (Water Appeal)<sup>59</sup> was a detailed document disclosing 17 grounds of appeal covering both the decision itself and the process preceding it. The grounds on which particular emphasis was placed included:<sup>60</sup>

- The preliminary reserve<sup>61</sup> determination was based on flawed information and had been conducted without the required delegated authority;<sup>62</sup>

<sup>51</sup> Para 8.1. of Mapungubwe Action Group's Mining Right Appeal.

<sup>52</sup> At para 8.2 of MAG's Mining Right Appeal.

<sup>53</sup> Ibid at para 8.3.

<sup>54</sup> Section 39 of the MPRDA.

<sup>55</sup> Impacts include including water, biodiversity, dust and noise and social aspects.

<sup>56</sup> Notice of Appeal in terms of Section 96(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (EMP notice of appeal) Executive Summary.

<sup>57</sup> EMP notice of appeal paras 57-51.

<sup>58</sup> The Water Tribunal is an independent body created in terms of Chapter 15 (sections 146-150) of the NWA to hear appeals against the decisions in terms of this act by responsible authorities, agencies and water management institutions this Act.

<sup>59</sup> Affidavit in Support of the Notice of Appeal in terms of section 148(1)(f) of the National Water Act, 1998 (Act 36 of 1998) (Water Appeal).

<sup>60</sup> Para 106 of the Water Appeal.

<sup>61</sup> The National Water Act defines 'the reserve' as 'the quantity and quality of water required:

- (a) to satisfy basic human needs by securing a basic water supply, as prescribed under the Water Services Act, 1997 (Act No. 108 of 1997)
- (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource.'



- The impacts on other water users were not taken into account;<sup>63</sup> and
- An inadequate public participation and consultation process was followed.<sup>64</sup>

However, due to the changed circumstances outlined below, the Coalition would soon put all legal proceedings on hold to pursue a negotiated agreement with CoAL. While, following the exit from the memorandum of understanding (MoU) in September 2012,<sup>65</sup> the Coalition was theoretically free to pursue the water appeal, it faced another hurdle due to the dissolution of the Water Tribunal by the Minister of Water and Environmental Affairs in a decision later set aside as *ultra vires* by the North Gauteng High Court.<sup>66</sup> The reconstituting of the Water Tribunal is a process that was, at the time of writing, still underway.<sup>67</sup>

The last of the internal appeals was the appeal against the decision of the DEA to grant CoAL's application for rectification in terms of section 24G of NEMA. However, like the IWUL appeal, this was soon suspended due to the onset of negotiations between the Coalition and CoAL.

While pursuing internal remedies within the DMR and DWA, the Coalition sought an interdict to prevent any environmental degradation occurring while these processes commenced. In theory, the interdict procedure can help bridge the gap between the protracted legal process and the speed at which irreversible environmental damage can occur.<sup>68</sup> The interdict application itself, however, turned into an equally drawn out process with replying and replicating papers being filed as the mine sought to use its greater financial resources<sup>69</sup> to exhaust the Coalition's resources and play for time which, in the absence of an interdict and, especially following the granting of its water use license in March 2011, was on its side. The extent to which the South African courts help or hinder the prevention of environmental injustices will be critically discussed in more depth in the forthcoming report on structures.<sup>70</sup>

While litigation was the organising strategy during this period, it was not the only avenue pursued for bringing about changed behaviour. Aware of the power of public opinion, the Coalition worked to generate public awareness through a targeted media campaign. This consisted in part of traditional forms of public

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<sup>62</sup> A serious flaw was that the basic human needs component of the reserve was determined on the basis of inaccurate apartheid-era population data. Para 106.1 of the Water Appeal.

<sup>63</sup> This ground was based on *inter alia* an inadequate assessment of the background water quality. Water Appeal paras 226-235.

<sup>64</sup> 106.16 of the Water Appeal.

<sup>65</sup> The MoU and the negotiations process are described in the next section.

<sup>66</sup> *Exxaro Coal (Pty) Ltd and Another v Minister of Water Affairs and Another* (63939/2012) [2012] ZAGPPHC 354 (7 December 2012).

<sup>67</sup> Nominations for members of the tribunal were received by August 2013. To facilitate the development of an effective tribunal committed to the purpose of the environmental right and the NWA, CALS nominated a Wits School of Law academic as a member.

<sup>68</sup> The submissions and annexures alone for the Mining Right and EMP appeals alone numbered 10 files.

<sup>69</sup> CoAL, for example, appointed a multi-national law firm, who briefed two teams of counsel.

<sup>70</sup> Court procedure and jurisprudence will be examined.

advocacy such as press releases. Coalition press releases provided a counter-narrative to those issued by CoAL by explaining the significance of mining near Mapungubwe, and disseminating 'bad news stories' including new legal challenges by the Coalition and enforcement action taken by authorities against the mine for non-compliance. The Coalition also harnessed the power of film to produce a series of three short documentary clips, each showing a different perspective on the value of Mapungubwe and the threat posed by mining.

## **4.5. ACHIEVEMENTS OF LITIGATION STRATEGY**

### **4.5.1. DAMAGE TO COAL'S SHARE PRICE**

While the steady decline of Coal's JSE share price occurred due to a range of factors including a weak global coal market, its overestimation of the quality of the coal below the ground, and enforcement action taken by government, the Coalition's campaign contributed to the cauldron of troubles undermining confidence in the company, and this achieved most acutely during the litigation phase. The Mapungubwe Project therefore provides some evidence in favour of the hypothesis that unsustainable practices by companies compromise their profitability. The two main links between unsustainable practices and lost profits are the threats of closure and reputational damage. There are two main agents who can bring these threats to fruition: regulators who can take enforcement action and civil society who can litigate against the company and create negative publicity.

Below is an illustration of the effects which both positive and negative publicity can have on a listed company's share price. The influence of both state and non-state actors is clearly evidenced by the volatile nature of CoAL's share price and the correlation between dips in the share price and damaging information. An example is evident in the cumulative impact of negative events resulting from the combination of government enforcement and litigation by civil society that occurred between 28 April and 23 August 2010. This four month period saw the Coalition's lodging of its EMP appeal and associated press releases and the successive issuing by DEA of pre-compliance and compliance notices, the latter of which was publically reported.<sup>71</sup> This same period saw CoAL's share price drop from 1696 to 911.<sup>72</sup>

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<sup>71</sup> 'Announcement: Interaction with the Department of Environmental Affairs' (6 August 2010).

<sup>72</sup> Share price tale generated at [www.coalofafrica.com/investors-and-media/share-price-information](http://www.coalofafrica.com/investors-and-media/share-price-information)

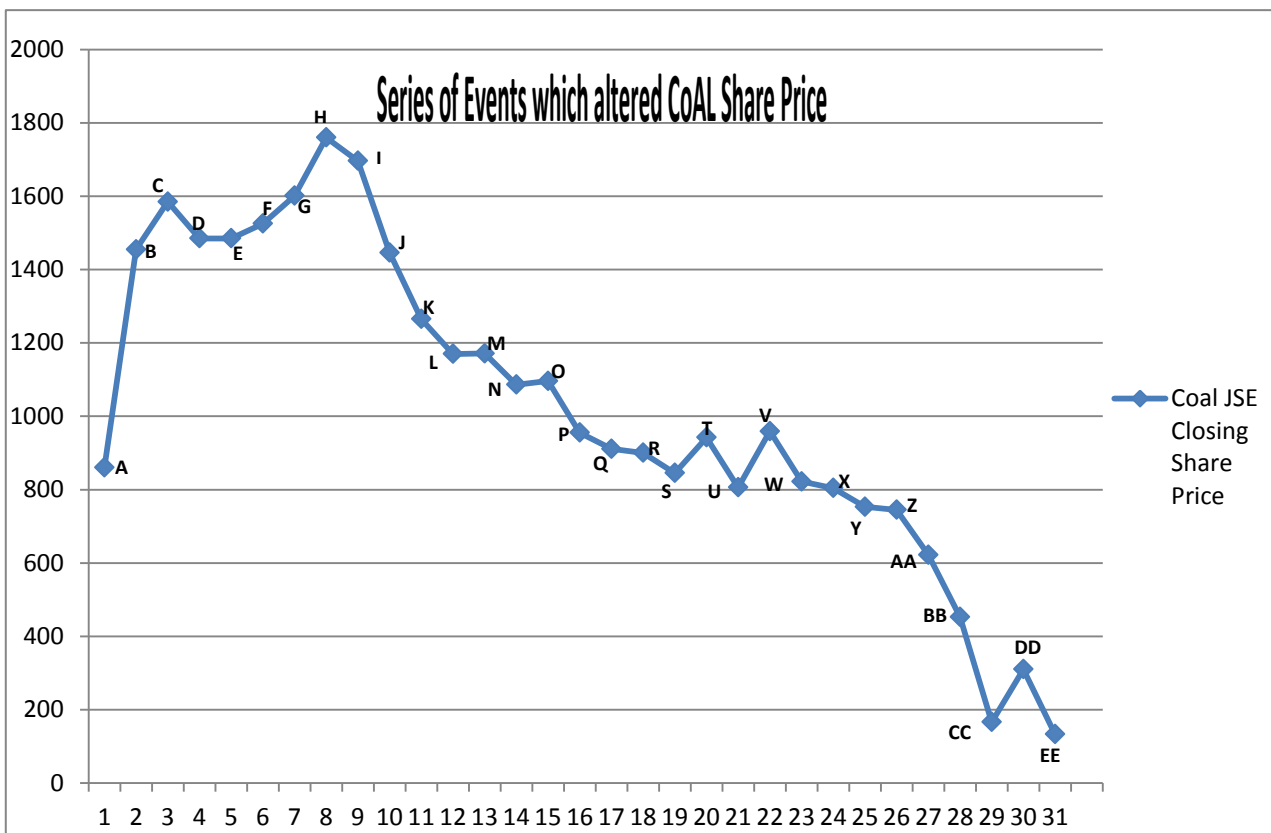


Fig 2: CoAL share price chart based on information generated from CoAL website.<sup>73</sup>

<sup>73</sup> [www.coalofafrica.com/investors-and-media/share-price-information](http://www.coalofafrica.com/investors-and-media/share-price-information).

<b>Event</b>	<b>Date</b>	<b>Pro</b>	<b>Event</b>	<b>Share Price</b>
<b>A</b>	06/11/2008	MR application	Limpopo Coal applied for mining right	860
<b>B</b>	29/01/2010	MR application	Director-General granted the mining right	1455
<b>C</b>	02/02/2010	MR application	SENS Report confirmed mining right was granted	1585
<b>D</b>	19/03/2010	EMP	Mine Environmental Management approved the EMP	1485
<b>E</b>	19/03/2010	MR appeal	Clients lodged appeals against the mining right	1485
<b>F</b>	22/03/ 2010	MR	CoAL announce granting of new order mining right	1525
<b>G</b>	07/04/ 2010	NEMA	DEA refused Coal's application in NEMA authorisations	1601
<b>H</b>	16/04/2010	NEMA	Limpopo Coal lodged notice of intention to appeal against DEA's decision in re NEMA authorisations	1760
<b>I</b>	28/04/ 2010	EMP appeal	Clients lodged appeal against the approval of the EMP	1696
<b>J</b>	12/05/2010	MR appeal/EMP Appeal	Coalition issue press release on appeals	1446
<b>K</b>	18/06/ 2010	NEMA	DEA issued a revised pre-compliance notice to Coal	1265
<b>L</b>	2/08/ 2010	Interdict	Coalition issues press release announcing interdict application	1170
<b>M</b>	03/08/2010	Interdict	Interdict application served on Bowman	1171
<b>N</b>	05/08/2010	NEMA	DEA issued Compliance Notice	1086
<b>O</b>	06/08/2010	NEMA	CoAL announce Compliance Notice	1096
<b>P</b>	11/08/2010	Interdict	Limpopo Coal served Notice of Intention to Oppose interdict application	955
<b>Q</b>	23/08/2010	NWA	DWA issues directive to Limpopo Coal to cease all unlawful water activities	911
<b>R</b>	01/09/2010	NEMA	Coal announce that has ceased activities as result of DEA and DWA action and retrenchment of 596 employees	900
<b>S</b>	29/03/ 2011	WULA	Water use licence granted by DWA	845
<b>T</b>	29/04/ 2011	WULA	Coal requests DWA to amend its water use licence	942
<b>U</b>	05/07/ 2011	NEMA	DEA approved section 24(g) application #1	809
<b>V</b>	6/07/ 2011	NEMA	Coalition issue press release on approval of 24(g) appl	959
<b>W</b>	28/07/ 2011	WULA	Clients filed water appeal	822
<b>X</b>	29/07/ 2011	WULA	CoAL announce suspension of water use license (as consequence of appeal)	804
<b>Y</b>	04/08/2011	NEMA	CoAL announce steps to re-open the colliery following 24 (g) approval	735
<b>Z</b>	17/08/2011	WULA	DWA grants amended water use licence to	745

			Limpopo Coal (no public participation)	
<b>AA</b>	24/11/2011	Negotiations	Joint media briefing between the Coalition and Coal	662
<b>BB</b>	06/06/ 2012	Negotiations	Coalition issues statement on the progress of negotiations and why it was necessary to extend the deadline for concluding the Memorandum of Agreement (MoA)	453
<b>CC</b>	07/12/2012	Withdrawal from Negotiations	Coalition issues press statement announcing its withdrawal from Memorandum of Understanding (MoU)	166
<b>DD</b>	22/01/2013		CoAL announces temporary halt in production at Vele due to flooding	310
<b>EE</b>	15/10/2013		CoAL issues press statement announcing the cessation of production at Vele, the retrenchment of employees and the board approval for R220 million expansion plans	133

Fig 3: Timeline of events and related closing share prices.

#### 4.5.2. COAL FORCED TO TAKE THE COALITION SERIOUSLY

Litigation made it clear to CoAL that civil society would not passively acquiesce to mining in a sensitive area and to the utilisation of sub-standard EIA studies and licensing conditions. Moreover the quality and detail of the Coalition submissions were as a result of an organised alliance. Litigation, together with the Coalition's public advocacy, thus forced CoAL to take the Coalition seriously and brought it to the negotiating table.

In addition to the achievements of litigation, a number of lessons can be derived from the Coalition's experience of litigation. These will be identified under the next sub-heading.

#### 4.6. LESSONS THAT CAN BE DERIVED FROM LITIGATION

Another outcome of the litigation process was the lessons and insights that were gained. Some of these lessons pertain to litigation strategy and are discussed here. Others however, relate to areas such as structures of governance and community engagement and will therefore be dealt with in subsequent chapters of the broader study.

##### 4.6.1. ORGANISE BEFORE THE MINE IS A FAIT ACCOMPLI

Regardless of whether your first prize is to stop a project or simply to ensure the best practicable environmental practices by the mining company concerned, the earlier that communities and NGOs organise, and familiarise themselves with the project details, the better. This is because the more that has been invested by the mine, and the closer to completion of the mining infrastructure, the more reluctant that courts will have to set aside approvals or interdict activities. Even where the goal is not to close the mine, the potential to do so constitutes an important source of leverage.

#### **4.6.2. THE COSTS AND BENEFITS OF A MULTI-PRONGED LITIGATION APPROACH**

There are many benefits to the multi-pronged approach to litigation employed by the Coalition. At the outset of litigation, litigants are often not in a position to identify the weakest parts of a company's EMP. The initial process of challenging every component provides litigants with an opportunity to identify the key issues, while leaving the way open to pursue litigation in relation to flaws in the EMP that may later become apparent. Pursuing several internal appeals can also generate a wealth of experience to inform future litigation. Valuable insights can be gained about how different departments make decisions, the manner in which internal appeals are handled, and the relative receptivity of different departments to various types of arguments. This information can ultimately be used to inform the decisions taken by civil society organisations and coalitions on how much time and resources to devote to internal appeals.

At the same time, this multi-pronged approach has its costs. Running simultaneous cases is highly time, energy and resource intensive for NGOs and non-profit law clinics which do not have the capacity of corporations and large commercial law firms. In this instance, a systematic secondary assessment (of the EIA reports) commissioned by the Coalition, in particular, was very costly and time consuming. Focusing scarce resources on a narrow range of impacts constituting the most severe threats, such as heritage and water, focusing the court's attention and would channel valuable resources in a singular direction.

#### **4.6.3. THE IMPORTANCE OF THE URGENT INTERDICT IN THE PREVENTION OF MINING**

The Coalition took a strategic decision not to take its interdict application on urgency. This is primarily because it would be difficult to convince the court that the impending commencement of a mining project would lead to such imminent and irreversible harm to environmental rights so as to justify urgent court proceedings. In relation to the 'balance of convenience' requirement for issuing an interdict, there is a challenge in communicating the significance of environmental impacts that are, at times, hard to quantify, in relation to the tangible and calculable costs to a mining company that result from the cessation of mining operations.<sup>74</sup> However, the longer the matter is taken to resolve the more work will be done (and capital invested) on the mine site, and the harder the balance of convenience argument will be to win. Urgent interdicts are thus an important tool, but entail convincing the court to develop its notion of urgency for the environmental context.

Over the course of 2011, a number of shifts occurred which combined to render the closure of the mine a less likely outcome. These developments, as set out in the next

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<sup>74</sup> In essence, the balance of convenience leg of the argument entails convincing the court that the costs of allowing the activity in question to continue exceed those that would result from halting the activity.

subsection, paved the way for a decision by the Coalition to employ a new strategy and pursue negotiations with CoAL.

## 5. Negotiations

### 5.1. REASONS FOR NEGOTIATIONS

By October 2011, crucial changes had occurred on a number of fronts which led the Coalition to review its strategy, and which shifted the strategic calculus in favour of negotiations with CoAL.

#### 5.1.1. CHANGING POSITIONS OF GOVERNMENT DEPARTMENTS

There were the changing attitudes of government departments. At the time litigation commenced, the DMR supported the mining development, as evidenced by its approvals of the mining right and EMP, while the DEA publicly opposed the development (as evidenced by the comments submitted by the DEA to the DMR in the course of the mining right application process). The position of DWA was less clear. During 2011, both the DWA and the DEA granted licenses to CoAL for Vele Colliery – an IWUL<sup>75</sup> and a section 24G rectification respectively. The result was that the regulators were now united in support of the mining development next to the Mapungubwe WHS.

#### 5.1.2. LIKELIHOOD OF SUCCESSFUL CHALLENGE DECLINED AS MINE NEARED COMPLETION

Developments on the ground made it more difficult to obtain the relief sought from courts. As construction of the mine site neared completion (production would commence in January 2012), the mine looked increasingly like a *fait accompli*.

For the court to issue an interdict, an applicant needs to satisfy the court:

- that there are prima facie grounds for a succeeding in the underlying matter;
- that irreparable harm will result unless the interdict is granted;
- that there is no alternative remedy to prevent the harm; and
- that the balance of convenience favours the issuing of the interdict.

In essence, the balance of convenience leg of the argument entails convincing the court that the costs of allowing the activity in question to continue exceed those that would result from halting the activity. There are a number of challenges associated with arguing the balance of convenience in environmental matters. It is

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<sup>75</sup> Issued on 29 March 2011. The operation of the water use license was automatically suspended with the Coalition's filing of its water appeal on 28 July 2011, as is the usual course of events, but the Minister used her discretion to lift the suspension within 3 months (on 18 October). The Coalition submitted lengthy submissions as to why the exercise of her discretion was not appropriate in this particular case.



critical to communicate effectively the significance of environmental impacts that are at times hard to quantify, in relation to the tangible and calculable costs to a mining company that result from the temporary cessation of mining operations. In addition, the more drawn out the court process becomes, the more difficult it is for an applicant to win the balance of convenience argument due to the percentage of construction completed and the resulting cost borne by the mining company.

The precautionary principle contained in NEMA offers a potential solution to these challenges. The principle provides that owing to the irreversibility of environmental impacts which, further, affect generations yet to be born, a position of caution must be taken where uncertainty exists in relation to environmental impacts.<sup>76</sup> Where there is significant evidence that the business and environmental case both have comparable weight, the balance should be tilted in favour of the environment.

### **5.1.3. LITIGATION RESOURCE INTENSIVE**

The ongoing legal challenges placed an extraordinary burden on both the Coalition, given the limited capacity of the constituent civil society organisations, and CoAL, given its poor financial state. It was not in the interests of CoAL to haemorrhage its resources through costly legal representation. Additionally, as we have seen, the degree of organisation displayed by the Coalition in both its litigation and its public advocacy forced CoAL to take notice of it as a determined and rational actor that had to be engaged. In these circumstances, Coalition had reason to believe that an agreement with CoAL could set a benchmark for best practice in relation to managing and mitigating the impacts of coal mining and related activities on the environment, specifically including the impact on water and heritage resources, not only for Vele Colliery but for all future mines.

As a consequence, following much deliberation, the Coalition took a decision on 20 October 2011 to suspend litigation and pursue a dialogue with CoAL aimed at securing revised license conditions and the setting of a best practice precedent for coal mining. In particular, the Coalition sought a peer review of the groundwater EIA study and revisions to the Integrated Water Use Licence (IWUL) in accordance with accurate information. This study contained incorrect factual assumptions and methodologies.<sup>77</sup>

## **5.2. OBJECTIVES OF THE COALITION IN PURSUING NEGOTIATIONS**

In essence, negotiations represented a new methodology for achieving the same underlying objective of litigation: considered decision-making by state role-players in relation to the environmental impacts of mining and compliance by companies with

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<sup>76</sup> Who are consequently unable to represent their interests and assert their rights.

<sup>77</sup> An example of such an assumption was that the seasonal Limpopo River was a perennial river. Carin Bosman 'Comments on Water Use License Application: Limpopo Coal Company: Vele Colliery' (November 2009).

the laws designed to prevent or mitigate these impacts. The main outcome sought by the Coalition was the improvement of the conditions contained in both the EMP and the IWUL, which in some cases entailed additional research by CoAL into the impact on mining. It was hoped that Vele and the Coalition could set a best practice precedent both for meaningful engagement with civil society and for a mine binding itself to environmental management commitments, over and above, what was legally required.

### 5.3. STRUCTURE OF THE NEGOTIATIONS

Discussions between the Coalition and CoAL during November 2011 yielded a Memorandum of Understanding<sup>78</sup> (MoU) which identified the issues for negotiation, laid down rules and principles for the negotiation, and set 31 January 2012 as the deadline for the conclusion of a Memorandum of Agreement (MoA)<sup>79</sup>. The agreement was announced at a joint media briefing by the Coalition and CoAL on 24 November 2011. The focus areas included:

- Additional research on the impacts of mining and related activities on the environment, water resources and heritage resources;<sup>80</sup>
- Agreeing on amendments to the EMP and IWUL;<sup>81</sup> and
- The conditions for the Coalition's participation on the Environmental Management Committee (EMC).<sup>82</sup>

Negotiations soon commenced, structured into bilateral teams on different subject areas. Each subject area had a lead negotiator who, together with the designated team members, developed a plan of action (POA) for the specific subject matter. The Coalition were initially optimistic about the prospects for success and excited about what appeared to be a novel and more receptive approach taken by a mining house towards civil society which, it was hoped, would set a precedent for a changed approach in the sector. Unfortunately this initial optimism was not to last.

### 5.4. REASONS FOR THE BREAKDOWN IN NEGOTIATIONS

During the winter of 2012 the Coalition made a series of discoveries which led it to re-evaluate its trust in CoAL as a *bona fide* negotiating partner. First, during the negotiations CoAL had agreed to commission an independent expert to conduct a wetland and riparian study for Vele Colliery. The draft of this report detailed impacts on water courses that were not covered by the IWUL and not disclosed to the

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<sup>78</sup> Signed on 24 November 2011.

<sup>79</sup> The MoU was essentially an agreement to negotiate, while the MoA would contain all the details of the mutually agreed licenses that were necessary.

<sup>80</sup> Clause 4 of the MoU.

<sup>81</sup> Clause 4b of the MoU.

<sup>82</sup> Clause 4c of the MoU. The meaning of EMCs will be explained below.

Coalition, and confirmed many of the Coalition's earlier concerns on the impact on the water resources.<sup>83</sup> Second, at a site visit conducted on 10 July 2012 under the auspices of the EMC, the Coalition discovered the presence of a dam that had not been authorised. Finally, the Coalition was advised by the DWA on 28 August 2012 that it had served CoAL with a compliance letter during June 2012 and had advised it to apply for authorisation. Additionally, CoAL did not seem to be achieving tangible progress in negotiations, evidenced by the fact that many agreed-upon deadlines were not met.

Having lost trust in CoAL and concerned that it could not be party to an agreement in the absence of material information, the Coalition took a decision to exit the MoU. The Coalition notified CoAL in September 2012 that it was withdrawing from the MoU.<sup>84</sup>

## 5.5. ACHIEVEMENTS OF NEGOTIATIONS STRATEGY

While the negotiations did not produce a MoA, many valuable lessons were learnt and relationships built. From a position of antagonism during litigation, a far more co-operative climate was created, allowing valuable insight into the operation of CoAL that would have been difficult to achieve from the outside. Moreover, the negotiations presented the NGOs as organised, efficient and persistent, evidenced by the cohesive nature of the Coalition and its unified stance.

## 5.6. LESSONS THAT CAN BE LEARNT

### 5.6.1. THE IMPORTANCE OF LITIGATION AS A SOURCE OF LEVERAGE

Such negotiations need to be approached with caution. The presence of positive incentives towards reaching an agreement with civil society organisations, namely an enhanced reputation, should not be downplayed. However, if there are no consequences attached to companies' failure to negotiate in good faith, to reach an agreement that genuinely protects environmental rights and to implement the agreement, there is a danger that the negotiations process may be used to quash rather than resolve environmental problems. In particular, companies may use negotiations and agreements as a form of 'greenwashing'<sup>85</sup> to deflect attention from ongoing unlawful conduct and environmental rights violations, and to divert the energies of civil society organisations.

<sup>83</sup> Wetland Consulting Services (Pty) Ltd 'Wetland and Riparian Assessment: Integrated Water Use License Implications – Vele Colliery' sections 6, 7.2.

<sup>84</sup> Save Mapungubwe Coalition letter to CoAL (3 September 2012).

<sup>85</sup> The term 'greenwashing' refers to misleading publicity by companies designed to give the outward impression that their practices are environmentally sustainable. It was coined by the researcher and environmental activist Jay Westerfeld in response to hotel chains placing placards calling for towel reuse to save the environment in spite of highly wasteful practices by the sector. Jim Motivalli 'A History of Greenwashing: How Dirty Towels Impacted the Green Environment' *Daily Finance.com* (12 Feb 2011).

One source of leverage available to civil society to bring companies to the negotiating table, but also to negotiate in good faith and implement an agreement, is litigation or the threat of litigation. This is the case, even in the environmental sector where litigation, as discussed earlier, very often does not result in the relief sought. Regardless of the outcome, litigation can lead to significant reputational harm as the company is forced to defend its environmental practices, and allegations by civil society are given more weight by their preparedness to litigate. It may thus prove more beneficial for the company to negotiate and implement an agreement that imposes higher standards of environmental management than it would have wanted, than to fight the matter out in the courts.

## 5.7. THE BREAKDOWN OF TRUST FORCES A STRATEGIC RE-EVALUATION

With the revelation that CoAL had withheld material information, and the Coalition's decision to withdraw from the MoU, the calculus again changed. Negotiations no longer offered a realistic avenue for achieving the Coalition's objectives. Litigation was costly and time intensive. There was no real possibility of closing a mine that had already commenced operations (in January 2012).<sup>86</sup> As a consequence, the Coalition entered into deliberations on new methodologies for achieving its established goals in the changed circumstances. The strategy arrived at was multilateral engagement on the EMC.

## 6. Multilateral Engagement on the EMC

### 6.1. DECISION TO PARTICIPATE ON THE EMC

The new vehicle was soon identified in the form of the Vele Colliery Environmental Management Committee (EMC). The EMC is a multi-stakeholder body set up in terms of both the section 24G Environmental Authorisation<sup>87</sup> and the IWUL<sup>88</sup> to monitor the mining company's compliance with the conditions of these licenses and authorisations. The structure consists of a plenary body (the EMC) and two sub-committees – the Heritage and Biodiversity Sub-Committee (HBsC) and the Water Monitoring Sub-committee (WMsC) tasked with monitoring compliance with the environmental authorisation (in relation to heritage and biodiversity) and the water use license respectively.

The Coalition had initially agreed to participate on the EMC as an observer pending the finalisation of a negotiated agreement. This approach was taken because the EMC was a creature of, and sought to monitor compliance with, the same water

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<sup>86</sup> 'CoAL starts production at Vele, finds buyer for Holfontein' *Mining Weekly* (31 January 2012). <http://www.miningweekly.com/article/coal-starts-production-at-vele-finds-buyer-for-holfontein-2012-01-31>.

<sup>87</sup> Clauses 9.1-9.3 of the IWUL.

<sup>88</sup> Clauses 17-18 of the Environmental Authorisation.

and environmental authorisations which were in contention. This meant that active participation risked being perceived as acceptance of the same conditions negotiations were entered into to improve. However, by September 2012, the calculus had shifted. As we have already seen, litigation was not, at that point, a viable alternative to negotiations. In addition, due to the insights into how CoAL works and how to negotiate with it gained through negotiations, the Coalition was now in a better position to take advantage of the opportunities presented by the EMC.

Coalition participation on the EMC was both a potentially fruitful alternative avenue for achieving existing objectives and one with the potential to set an important precedent for a more inclusive and effective system for monitoring the compliance of mining companies with their environmental obligations. First, the EMC Constitution contained objectives including monitoring compliance and promoting 'improved decision-making and environmental practices' that were closely aligned with those of the Coalition.<sup>89</sup> Second, participation on the EMC would in and of itself constitute an achievement, marking the first time civil society had served on such a body. The model has great promise given its potential to be a proactive (i.e. prevent non-compliance) vehicle for inclusive multi-stakeholder governance, where the perspectives of a wide range of stakeholders (the mine, government departments and agencies, affected communities, civil society and experts) can be brought to bear to ensure full compliance and the soundest environmental practise and broad participation. However, this potential has been underutilised as most EMCs are run primarily by the mine concerned, with limited government involvement. Participation by the Coalition on the EMC could thus unlock the potential of EMCs as vehicles for genuinely inclusive and effective compliance monitoring.

For these reasons, the members of the Coalition concluded that full participation in the EMC constituted the best strategy for realising its goals in the changed circumstances.

## **6.2. THE COALITION ATTAINS FULL MEMBERSHIP OF THE EMC, THEREBY GIVING CIVIL SOCIETY A SEAT AT THE TABLE OF GOVERNANCE**

In preparing the groundwork for membership, the Coalition engaged with some of the government departments represented on the EMC. When one recalls that the previous year, the Coalition had been engaged in litigation against the departments, and that the DEA had that year revised its stance from one of opposition to acceptance of Vele mine, the importance of rebuilding relationships becomes clear. Having established through these engagements that it was likely to

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<sup>89</sup> 'Vele Colliery in Musina, Limpopo Province, Environmental Management Committee (EMC) Terms of Reference' (EMC TORs) 2.Objectives.

receive support for its participation, the Coalition requested full membership. At the EMC meeting held on 31 October 2012, members voted to accept the Coalition as a full member, giving civil society, for the first time, a seat at the table in such a multilateral engagement forum.

During the initial 18 months of its operation, the focus of the EMC was on establishing its protocols and procedures and developing a working relationship between members. Building relationships of trust was a particular challenge for the Coalition who, the previous year, had also been involved in litigation against CoAL, and had just withdrawn from a negotiations process with CoAL whose outcome was the breakdown in trust between the two parties. The Coalition was thus highly strategic, seeking to show other participants, through consistent attendance and informed inputs, that it was not a solely oppositional actor, but possessed the focus and expertise to play a constructive, and invaluable, role in the running of the EMC. Coalition members also curtailed their public advocacy to demonstrate their good faith and commitment to constructive participation.<sup>90</sup> At the same time, the Coalition consistently sought to hold the EMC to its mandate,<sup>91</sup> calling for the highest standards of transparency and information sharing,<sup>92</sup> full, accurate and timeous reporting, and demanding explanations for evidence of non-compliance.

In addition to building relationships, this period saw the translation of the EMC from the text of the terms of reference into a living institution. Battles were fought over the EMC's breadth of jurisdiction, the relationship between the main EMC and the sub-committees, the format of environmental compliance reports, the circulation of information, and even its logos. This initial period was one of considerable frustration for the Coalition, as it often experienced difficulty in convincing many members to advocate for rigorous compliance. The tide has, however, turned.

### 6.3. THE COALITION GAINS ACCEPTANCE ON THE EMC

By August 2013, a noticeable shift could be observed on the EMC which had begun to move away from a focus on procedure to the substance of its compliance monitoring mandate. At the August meeting of the main EMC, for example, the bulk of the discussion concerned CoAL's compliance with a wide range of environmental obligations, including the conclusion of a biodiversity offsets agreement, the improvement of infrastructure to respond to future floods, and routine environmental management issues such as waste management and the prevention of erosion.

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<sup>90</sup> The only Coalition press release during this period was its announcement that it had withdrawn from the MoU.

<sup>91</sup> EMC TORs 'Mandate'.

<sup>92</sup> EMC TORs 'Mandate'.

Further questions were asked about the decision to halt production at Vele, whether this was care and maintenance or scaling down, and whether the new plans would require amendments to environmental authorisations and the IWUL. This change could be attributed in part to the organic process by which the mandate, procedure and customs of an institution take shape. However, there was also evidence of a growing acceptance of the Coalition and appreciation of its professional and constructive role. Some representatives have expressly recognised the important contribution of the Coalition. Coalition representatives have also increasingly been joined by government representatives in scrutinising CoAL presentations and responses to questions.

The definitive achievement, and the clearest signal of change, however, came with the nomination of a Coalition representative, Lisa Chamberlain of CALS, to the position of Chair of the main EMC at that meeting. This would not be possible without the acceptance of the Coalition as a pivotal member of the EMC by the majority of members. The Coalition's rapid move from a peripheral to central role on the EMC promises to clear a path for other civil society Coalitions to play a similar role in other environmental oversight institutions.

#### **6.4. ACHIEVEMENTS OF EMC STRATEGY**

While the path has often been steep and strenuous, the Coalition has carved itself a place on the EMC, and is now in a position to play a pivotal role in a multi-stakeholder governance forum. It has played a driving role in increasing the level of scrutiny of CoAL's compliance record. The EMC has exercised its power to make recommendations to secure improved environment practices from CoAL, including improved planning for accidents and emergencies. It has further consistently raised the importance of participation by mine-affected communities in decisions affecting their lived environment.

#### **6.5. LESSONS LEARNED ON THE EMC**

In the same manner as the Coalition's previous strategies, its experience on the EMC was one of learning. Some of the lessons learned can be applied to other civil society organisation/coalitions serving on oversight bodies. These include:

##### **6.5.1. CIVIL SOCIETY CAN PLAY A CONSTRUCTIVE ROLE IN GOVERNANCE**

Civil society is often regarded by other sectors as having a short attention span and lacking both the capacity and the will to play a constructive role from within public institutions, rather than an oppositional role from without. The quality and consistency of the Coalition's contributions to the EMC and sub-committees challenge these assumptions about the nature of civil society, and its role in governance.



### 6.5.2. THE IMPORTANCE OF CONSISTENCY OF MESSAGING

Much of the effectiveness of the Coalition on the EMC can be attributed to its articulation of consistent positions and its constant reminders to EMC members of unresolved issues. This has been made possible through regular and consistent communication between members.

### 6.5.3. THE IMPORTANCE OF RECORD KEEPING

Committee minutes are of vital importance as they contain members' undertakings and committee resolutions against which members are held to account. However, there is always scope for important statements and undertakings to be left out. Therefore it is imperative that representatives on such bodies take thorough minutes of their own, focusing in particular on their areas of concern, against which the official drafts of the minutes can be checked.

Having identified specific lessons that the Coalition has learned at each stage of the engagement, there remain a number of additional insights into changing corporate behaviour flowing from the Mapungubwe Project as a whole.

## 7. Lessons learned regarding changing corporate behaviour

### 7.1. FACTORS THAT LED TO VELE'S TEMPORARY CLOSURE

On a preliminary assessment, the overall prospects for Vele Colliery appeared favourable. The coal below the ground (in the Northern Tuli seam) seemed to be semi-soft coking coal suitable as an input in the manufacture of steel as well as thermal coal suitable for power generation.<sup>93</sup> The thermal coal would be used for the proposed Mulilo power station to be built close to Vele and was the subject of an offtake agreement with CoAL.<sup>94</sup> The limited capacity of the Provincial government<sup>95</sup> would insulate CoAL from close scrutiny of its environmental practices and EMP.<sup>96</sup> This absence of scrutiny would enable CoAL to get approval for its project without *meaningfully* consulting interested and affected parties (as is required by the MPRDA).

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<sup>93</sup> Coking coal, also known as metallurgical coal is one of the key inputs for the production of steel as its make-up maximises the productivity of blast furnaces due to its capability of generating extreme heat. It is for this reason the most valuable form of coal. World Coal Association website. [www.worldcoal.org/coal/uses-of-coal/coal-steel/](http://www.worldcoal.org/coal/uses-of-coal/coal-steel/).

<sup>94</sup> 'An offtake agreement' refers to an agreement by a power producer to buy fuel from a particular supplier.

<sup>95</sup> In 2011, for example, five of the province's departments were placed under national administration in terms of section 100 (1) (b) of the Constitution.

<sup>96</sup> While the ultimate decision to approve a mining right application lies with the Minister, the substantive decision-making process occurs at a provincial level (in the office of the Regional Manager).

Subsequently, however, several of these assumptions<sup>97</sup> turned out to be overly optimistic. Once mining commenced, it became clear that the coal was of a lower grade than believed and unsuitable for coking. The Mulilo project was stalled at its inception<sup>98</sup> and the global price for thermal coal remained low.<sup>99</sup> Further, once local stakeholders (landholders initially) found out about the project, organised opposition soon emerged in the form of the Coalition. The mine, as a consequence, became subject to a litigation campaign and the attendant negative publicity (albeit offset by CoAL's own media campaign). During the same period CoAL faced enforcement action from the DEA and the DWA which issued a compliance notice and a directive respectively.

CoAL has run at a loss since the final quarter of 2012 due to this combination of factors.<sup>100</sup> Needing to raise further capital to fund further activity, CoAL put a halt to all production at Vele for an 18 month period starting from June 2013.

Few of these developments were entirely unforeseeable, given the inherent risks of the sector and the location. The story of Vele therefore provides a cautionary tale for mines commencing projects based on superficial, best-case scenario planning.

## 7.2. THE BENEFITS OF A DIVERSE COALITION

It is important that diverse coalitions be mobilised to pool the greatest amount of local knowledge, technical expertise, capacity and energy in engagement with the mining companies regarding their environmental impacts. The Save Mapungubwe Coalition is an example of such a diverse coalition including environmental NGOs with expertise in water governance (especially WWF) and biodiversity (EWT, Birdlife and Wilderness), heritage practitioners (ASAPA) and local knowledge (MAG). This expertise has enabled the Coalition to obtain a holistic understanding of the environmental impacts of the mine and has also enabled the Coalition to play a highly constructive role in interrogating reports by CoAL at the main EMC and sub-committee meetings.

## 7.3. THE BENEFITS OF THE DUAL LEGAL REPRESENTATION MODEL

Another aspect of the experimental nature of this project was the model of dual representation established by the co-operation of CALS and the Centre for Environmental Rights (CER) who both served as the Coalition's attorneys of record. This represents a departure from the standard model of representation by a single firm of attorneys. In the course of this project, several advantages to this approach for environmental litigation emerged. First, it allows limited resources to be pooled by

<sup>97</sup> Albeit not the presumption regarding DMR approval.

<sup>98</sup> 'Vele-linked coal-fired power station placed on hold' (2 July 2010) *Creamer Media's Engineering News*.

<sup>99</sup> Infomine 'Historical Coal Prices and Price Chart' <http://www.infomine.com/investment/metal-prices/coal/all/>.

<sup>100</sup> 'CoAL reports another Loss' *Fin 24* (5 March 2013).

public interest organisations. Second, it allows for the combining of different forms of legal expertise in the environmental sector. Third, it allows for a robust discussion on how to implement an agreed strategy.

The CALS-CER partnership, distinguished by collegial respect, frank discussion and unwavering support, was a success in providing the Coalition with the legal support required to sustain a protracted campaign.

#### **7.4. COMMUNITY PRESSURE IS THE KEY TRIGGER FOR CHANGE IN CORPORATE BEHAVIOUR**

One of the most widely accepted axioms of political science is that political and economic elites will not alter their behaviour in a more socially responsible direction unless pressured to do so by society. As Habib argues,<sup>101</sup> accountability of elites occurs only when there is uncertainty about whether they will still be able to advance their interests through behaving in the same manner.<sup>102</sup> Although social movements will always involve cross-class and cross-sectoral alliances, directly affected communities must be at the centre of campaigns directed at the social and environmental practices of mines.

Mine-affected communities are potentially the main agents of change for various reasons. First, there is a unique relationship between the mining company and these communities, as the former will extract mineral wealth from the land occupied or owned by community members.<sup>103</sup> Second, as the people that will experience the most acute harm and rights violations from mining-related environmental degradation, mine affected communities also have the greatest interest in improved environmental practices by the mines. Further, as one of the world's most mineral rich countries, existing or prospective mines dot the South African landscape, with large numbers of communities who are or will soon be experiencing some or all of the severe impacts associated with mining<sup>104</sup> (removals, loss of livelihood, health problems associated with water and air pollution).

For communities to play this role, however, a number of conditions must be met. First, communities where mining projects are still at a prospecting stage must be fully informed about what the likely impact of mining development on their living conditions will be. Second, communities must have a working knowledge of the public's rights (and mining companies' obligations) in terms of the Constitution, NEMA, the National Water Act and the MPRDA and other applicable laws. Third, communities should be prepared for the tactics employed by some mines to co-opt influential members of the community and to create a climate of suspicion. Fourth,

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<sup>101</sup> Albeit in a discussion about holding political rather than economic elites accountable.

<sup>102</sup> A Habib *South Africa's Suspended Revolution: Hopes and prospects* (2013) 55-56.

<sup>103</sup> Or on land nearby to land owned or occupied by community members.

<sup>104</sup> Removals, loss of livelihood, health problems associated with water and air pollution.

communities need to know the different avenues of recourse for violations of environmental rights. Fifth, communities should organise into coherent structures which are representative of the diversity of the community and adopt a clear position in relation to the prospective mine.

The relationship between communities and Vele mine, though not discussed in depth in this report, has been an important focus of the CALS Mapungubwe project and will be addressed further in the forthcoming report on community engagement.

## **7.5. MINING COMPANIES OFTEN WORK TO PREVENT STRONG COMMUNITIES EMERGING THROUGH 'DIVIDE AND RULE' TACTICS**

One of the main obstacles to developing sustained partnerships with some of the affected communities in the campaign to protect Mapungubwe has been the clear divisions within communities and community structures. This problem has, moreover, been to both a greater and lesser extent, a feature of the bulk of the mining and environment matters in which CALS has been involved. It is inevitable that the members of a community, in which there are a plurality of world views and differentials in gender and class, will not all respond in unison to the multiple and intersecting risks and opportunities associated with the arrival of a mine. However, there appear to be a number of tactics employed by many mining companies that seem designed to fragment the community, and even to subvert independent community organisations. At times, structures initiated by ordinary community members are not included in the community participation processes that precede the approval of the mining right.

The approaches by mining companies in engaging with communities will be discussed in greater depth in the forthcoming report entitled 'The Policy of Community Engagement.' This behaviour is both a form of corporate behaviour that needs to change and a barrier towards working towards substantive improvements in the environmental practices of mining companies.

## **7.6. REFRAMING THE PUBLIC DISCUSSION ABOUT MINING, DEVELOPMENT AND THE ENVIRONMENT**

### **7.6.1. THE PREVAILING PUBLIC DISCOURSE IS UNRECEPTIVE TO ENVIRONMENTAL JUSTICE CLAIMS**

The state of public discourse is of particular importance to changing corporate behaviour, as movements ultimately gain their strength from the support of the public. The present public discussion about mining, development and the environment is primarily between advocates of greater state involvement in the mining sector (from compulsory beneficiation to nationalisation) and a more private sector-orientated approach. Both approaches seek to maximise mineral production, ignoring the costs paid by the vulnerable for un-moderated mining development.

At the root of prevailing views are particular understandings of the environment and development that serve to short-circuit the discussion on mining and the environment. First, as environmental justice theorists have observed, the environment is conceived as something “out there” in preserved, demarcated areas such as the Kruger National Park visited primarily by affluent South Africans, and far removed from the reality of ordinary South Africans.<sup>105</sup> The environment, on this narrow conception, does not include the air that communities breath, the water that they drink and the soil that they till.<sup>106</sup> It certainly does not include the quality of their housing and infrastructure or their spiritual connection to the land of their ancestors. This leads to the concealing of the reality, acknowledged by the principle of sustainable development contained in our constitution and legislation, that all economic development must draw from an environmental base, the depletion of which will ultimately lead to the collapse of economic life.<sup>107</sup>

Further there is an assumption that economic development is an unqualified good rather than a condition for the realisation of every person's potential. On this latter understanding there are different ways of facilitating economic development, some leading to the redress of the apartheid legacy, others to its entrenchment.

If development is viewed as always leading to environmental degradation and independent from the preservation of the environment, more environmental protection will always be equated with less development. The concerns of those who point out the grave threats posed by mining in sensitive areas can therefore be dismissed as stemming from an “anti-development” point of view<sup>108</sup> that is elitist for privileging fauna and flora over the needs of people who would benefit from the abundant jobs created by mines.

### **7.6.2. CIVIL SOCIETY SHOULD PROMOTE AN ALTERNATIVE UNDERSTANDING OF MINING, DEVELOPMENT AND THE ENVIRONMENT**

To counteract the view expressed above, civil society organisations with an environmental justice orientation should, in all public statements, consistently drive home an alternative account of the relationship between economic development, social justice, mining and the environment. This might include the following premises:

<sup>105</sup> This conception is discussed and critiqued by Cock. J Cock *The War against Ourselves: Nature, Power and Justice* 48-49.

<sup>106</sup> The environmental justice movement has highlighted the link between human rights and a healthy environment and on the societal power imbalances that lead to the externalisation of environmental costs onto marginalised communities. For analyses of environmental justice movements and differing conceptions of its aims see S Forster ‘Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement’ 1998 86 *California Law Review* 775.

<sup>107</sup> As Ngcobo J remarked in the *Fuel Retailers* case, the leading South African authority on sustainable development ‘development cannot subsist on a deteriorating environmental base.’ *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and 11 Others* 2007 (6) SA (4) (CC) para 44.

<sup>108</sup> For an example of this labelling see the remarks by ex-CoAL Chief Executive John Wallington on his experience with the Coalition: ‘I went right out of my way to engage with them,..’ ‘I was disappointed because, in my view, the path these NGOs followed is not sustainable. If they do not find a way to engage honestly in finding a balance between their cause and economic development then I believe they will become increasingly irrelevant.’ ‘Coal of Africa: Lessons Learnt’ *Financial Mail* (12 July 2013).

- The purpose of development is giving more people the power, resources and opportunities to meet their basic needs; develop their talents; and participate in the key economic, civic and political institutions of society;
- As is acknowledged in the United Nations (UN) Guiding Principles on Extreme Poverty and Human Rights,<sup>109</sup> this requires people living in poverty to be afforded the space to articulate what their needs are and how they would like development to occur;
- Many forms of development, such as mining in South Africa, typically occur in a manner in which communities residing near the mine experience most of the harms resulting from mining while the benefits from mining primarily flow outwards, to mining companies, investors and national government. This is especially the case when mining causes the destruction of critical ecosystem services which are necessary for both individual subsistence and to local economies;<sup>110</sup>
- In the longer run, development depends on the preservation of critical ecosystems services (including water), and on a healthy population. Consequently, the failure to prevent or sufficiently mitigate irreversible impacts is ultimately an anti-development approach; and
- Companies with a genuine social license to operate will, in the long run, face less risk of social upheaval, litigation and reputational damage. The story of CoAL provides a cautionary tale of how the failure to consult affected persons and to adopt sound environmental practices (including refraining from mining in environmentally sensitive areas) erodes its social license to the ultimate detriment of its profits.

### 7.7. A MEDIA POINT PERSON/ORGANISATION

Mining companies, apart from the smallest junior miners, will tend to have a dedicated media officer with the capacity to focus permanently on media strategy and generate media content, and through whom all written press statements are directed. This can be of great use in the efforts to shape the public discourse as:

- It allows for a steady stream of content to the media by people with the capacity and the mandate to produce content;
- It enables rapid responses to developments or statements by the opposing side, required by the brevity of news cycles;
- It facilitates the formulation, elaboration and adjustment of media strategy;
- Consistency in messaging is more easily maintained; and
- Relationships with journalists and media outlets can be cultivated and maintained, resulting in a higher publication rate.

<sup>109</sup> Guiding Principles on Extreme Poverty and Human Rights 27 September 2012, HRC Res 21/11.

<sup>110</sup> Ecosystems services have been defined in the Millennium Ecological Assessment (mandated by the-UN Secretary General Kofi Annan in 2001) as including 'both the tangible and intangible benefits humans obtain from eco-systems.' Millennium Ecological Assessment *Eco-systems and Human Well-being: A Framework for Assessment* (2003). <http://www.unpe.org/maweb/documents/document300.aspx.pdf>.

The Coalition has not had a media point person. Its approach instead has been to issue major statements collectively, while individual members/legal representatives have commented on other matters on an *ad hoc* basis. While effective internal communication has ensured consistency of messaging, the Coalition would have benefitted from a designated media person.

Furthermore, the complexities associated with moving to a less adversarial mode of engagement<sup>111</sup> have made media engagement particularly challenging. The result is a limited public awareness of the significance of the Coalition's EMC participation and how this advances its goals.

The Coalition's experience therefore suggests that civil society organisations/coalitions should, at the outset, designate a media point person/office where this is feasible. Some coalitions might find that by pooling their resources they are able to appoint an adequately resourced media liaison person.

### **7.8. THE POWER OF FILM AND NARRATIVE**

The power of facts and logical argument goes only so far. To win the support of the public, especially when working against the dominant discourse, it is important to capture the imagination of a highly diverse audience and to show them how the issue resonates with their values and experiences. In an increasingly visual culture, images will often have a greater impact than well-crafted arguments. Film is especially powerful as it combines a narrative structure with visual and audio imagery.

The Coalition's series of short films, telling the stories of people's relationships with Mapungubwe was thus a particularly valuable instance of media engagement that was able to convey both the beauty and the significance of Mapungubwe, and the potential loss that could occur through mining.<sup>112</sup>

### **7.9. THE COSTS OF CONDUCTING BUSINESS BELOW THE THRESHOLD OF LEGAL COMPLIANCE**

Highly industrialised companies and, in particular, mines should see the economic benefit of operating according to the highest standards of compliance. At an international level, transnational corporations appear increasingly to be realising the importance of environmental and social issues. The World Resources Institute

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<sup>111</sup> Including the need to maintain relationships with CoAL and regulators on the EMC.

<sup>112</sup> These films can be accessed at the Coalition website at the following address: [www.savemapungubwe.org.za](http://www.savemapungubwe.org.za).



Report<sup>113</sup> details how many large companies have established goals and targets in the area of sustainability, and it has become increasingly common for large companies to address major issues such as climate change. More efficient use of natural resources, such as energy and water, reduces operating costs and increases profitability. Consumer preference has caused companies to start taking steps to reduce the environmental impact of their products and supply chains.

As discussed above, the history of CoAL's JSE share price performance provides some evidence suggesting that unsustainable environmental practices by companies compromise their profitability, thus making the business case for robust CSR. The two main intervening variables between unsustainable practices and loss of profits are the threats of closure and reputational damage. There are also two main agents who can bring these threats to fruition: regulators who take enforcement action, and civil society actors who can litigate against the company and can create negative publicity.

There are a number of reasons why environmental practices below compliance level may negatively affect a company's bottom line. First, non-compliance may attract enforcement measures by government. Such measures, including directives and suspension/withdrawal of licenses may lead to the temporary or permanent shut-down of the mine, which will lead to lost income opportunities which, depending on the length of the shutdown and the financial shape of the mining company, may undermine the viability of the project. Where the mining company faces civil society mobilisation, non-compliance may attract litigation which, if successful, can lead to the temporary or permanent cessation of production.

## 8. Conclusion

The 21<sup>st</sup> century has seen a proliferation of initiatives, binding and voluntary, international and domestic, direct and indirect, to impose human rights obligations on corporations in response to a public increasingly attuned to the social and environmental consequences of corporate conduct. The most important examples in South Africa are a Bill of Rights applicable to private bodies, the King Codes and the requirements for listing on the Johannesburg Stock Exchange. These changes reflect a shift in public conceptions of corporations from single-minded maximisers of shareholder value to repositories of power that have the potential both to violate human rights and to contribute to their realisation on a vast scale. This shift has come about due to globalisation and the associated rise in corporate power and declining power of the state. In response to societal expectations and increased legal obligations, corporations have increasingly adopted a language of social responsibility and environmental sustainability.

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<sup>113</sup> In February 2013 the World Resources Institute (WRI) published a working paper. AS Pareira, P Del Pino & B Oliveira 'Aligning Profit and Environmental Sustainability: Stories from Industry (working paper)' (2013). [www.wri.org/publications](http://www.wri.org/publications).

However, the manner in which companies have both defined and conducted their core business has often lagged behind the rhetoric as has, too often, been seen in the South African mining sector. The Coalition's engagement with CoAL on its colliery near Mapungubwe has proved an excellent case study of how today's drive for corporate accountability plays out in relation to the mining sector. A mining company, despite lofty sustainability rhetoric, decides to mine near a critical heritage site and is willing to carry out activities before obtaining the required licenses.

Despite an array of laws designed to safeguard the environmental right, the responsible government departments are willing to give the project their support. In response, a diverse Coalition of NGOs and affected communities work together to hold the mine accountable employing a series of strategies namely litigation, negotiations and, currently, serving as the first civil society organisation on an Environmental Management Committee.

This experience has provided a wealth of insights for civil society on holding companies responsible for violations of environmental rights. It has highlighted both the obstacles faced by citizens despite good laws, and the mismatch between the law in theory and the practice of the institutions that implement it. Neither internal appeals nor judicial review currently offer quick and affordable relief and there is a need for reform. However what emerges equally clearly is that, even pending institutional reforms, litigation can still be a source of leverage, and that creative and nuanced campaigns by civil society can have an impact on both the behaviour of corporations and the landscape in which they operate. In the mining sector, change can be effected through building diverse coalitions that pool skills, knowledge and perspectives, and by participating in new multi-stakeholder oversight forums such as EMCs. The key to changing corporate behaviour thus lies in a combination of coalition building, strategic litigation, participation in multi-stakeholder forums and advocacy for systemic reform.





