



Structures of Governance: Enhancing or Impeding Environmental Justice?

The Mapungubwe Case Study

by the Centre for Applied Legal Studies

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T H E R A I T H

F O U N D A T I O N

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Acronyms

CALS	Centre for Applied Legal Studies
CER	Centre for Environmental Rights
CoAL	Coal of Africa Limited
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism (DEA predecessor)
DMR	Department of Mineral Resources
EMC	Environmental Management Committee
EMF	Environmental Management Framework
EMP	Environmental Management Plan
EMPR	Environmental Management Programme
HBsC	Heritage and Biodiversity Subcommittee
IGRFA	Intergovernmental Relations Framework Act
LHRA	Limpopo Heritage Resources Agency
MoA	Memorandum of Agreement
MoU	Memorandum of Understanding
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NEMPAA	National Environmental Management: Protected Areas Act
NGO	Non-Governmental Organisation
PAIA	Promotion of Access to Information Act
PHRA	Provincial Heritage Resources Agency
SAHRA	South African Heritage Resources Agency
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WMsC	Water Monitoring Subcommittee

1. Executive Summary

Despite the profound cultural, historical, scientific and aesthetic value of Mapungubwe,¹ its status as a World Heritage Site, National Heritage Site, Protected Area and National Park, and a vigorous campaign by civil society organisations,² a coal mine was established less than 7 km to its border. How is it possible that one of the dirtiest forms of mining, open cast coal mining, can operate in such close proximity to one of the world's most important protected areas? How could this mining operation be allowed to proceed in apparent contravention of a complex and extensive set of regulatory and legislative provisions designed to protect areas like Mapungubwe?

This development should give rise to serious reflection on the efficacy of the institutional safeguards for protecting sensitive areas of cultural and natural value from invasive economic activity. If Mapungubwe is a testament to systemic governance problems, other cultural and natural heritage sites could be at risk.

The Save Mapungubwe Coalition (the Coalition), created in response to the mining activity in the area, has consistently pursued engagement with the multiplicity of governance entities mandated to manage mining, the environment and World Heritage Sites. This experience has afforded its members and legal representatives a unique perspective into environmental governance. In particular, it has given us insight into how the various government structures responsible for protecting Mapungubwe are managing the imperatives of (i) economic development, (ii) protection of heritage sites and (iii) environmental and social justice. The Mapungubwe case study is an ideal portal through which to examine, and improve, the management of competing ecological and cultural imperatives that arise where sensitive areas attract industry.

¹ The Mapungubwe Cultural Landscape was inscribed on the United Nations Education, Scientific and Cultural Organization's (UNESCO) World Heritage List on the 5th of July 2003 based on a number of criteria, including, that the Mapungubwe Cultural Landscape contains evidence for an important interchange of human values that led to far-reaching cultural and social changes in Southern Africa between AD 900 and 1300.

² The Save Mapungubwe Coalition is comprised of the Mapungubwe Action Group (MAG), Endangered Wildlife Trust (EWT), World Wide Fund for Nature South Africa (WWF), Birdlife South Africa (Birdlife), Association of Southern African Professional Archaeologists (ASAPA) and the Wilderness Foundation (Wilderness). The Centre for Applied Legal Studies (CALS) and the Centre for Environmental Rights (CER) act as attorneys of record for the Save Mapungubwe Coalition.

The Mapungubwe case study is also an example of a larger tension. This is the tension between the need for economic development, on the one hand, and, on the other, the protection of the water, air, soil and heritage that are necessary for impoverished communities to survive.

This report forms part of a series of investigations into the manner in which this tension and the broader systemic issues of community participation, corporate and state governance have been addressed in relation to Mapungubwe, each with a different area of focus. The first of these reports, entitled 'Changing Corporate Behaviour', reflected on the avenues for holding corporations to account for their social and environmental obligations under the Constitution and legislation. CALS' 'Community Engagement Policy', which was informed by our experience engaging with communities in the Mapungubwe project, was the second in this the series. The culmination of this series shall be a comprehensive volume on Mapungubwe which shall, in addition to a synopsis of each report, address further issues.

While the previous reports focused on the roles of NGOs, communities and the private sector, this report is concerned with the alignment and efficacy of the broader structures of governance responsible for Mapungubwe.

A number of challenges within the governance framework of Mapungubwe are identified in this report. Its main finding is that the lack of alignment of applicable legislation has led to numerous obstacles in the way of those tasked with managing, protecting and conserving Mapungubwe. The consequences have been severe: In the ensuing confusion of obligations and inconsistencies in approaches to sustainable development, invasive development, such as mining, has been allowed to occur adjacent to a World Heritage Site and National Protected Area.³

The findings and recommendations in this report are designed both to learn from Mapungubwe and to suggest ways in which this seemingly intractable tension can be ameliorated. The report's recommendations focus on how to better align the laws and institutions governing ecological, heritage and pro-poor developmental imperatives.

The Mapungubwe case study is an ideal portal through which to examine, and improve, the management of complex inter-relationships amongst agents of governance. This complexity requires a system that is based on

³ These terms shall be defined in the body of the report below.

considered planning and which can be easily understood by the role-players who utilise the framework.

Our principle recommendation is for parliament and its associated portfolio committees to conduct a systematic investigation of how heritage, water, environmental and mining legislation is aligned in light of the overarching goals of sustainable development and environmental justice.

We hope this report will stimulate conversation amongst governance role-players on interventions to achieve a fundamentally integrated system to ensure the optimal protection of the physical, social and cultural environment for present and future generations.

2. Introduction

2.1 AIMS OF THE REPORT

The Mapungubwe Cultural Landscape World Heritage Site (Mapungubwe) is an area of universal significance and value. The area is rich in culture and heritage, standing as a testament to the history of African development and tradition. It is set against the backdrop of the Mapungubwe National Park, an area of natural beauty, boasting ecological and biodiversity significance and which is also an extremely water-scarce area.⁴ This unique confluence has made the area an object of admiration and has resulted in its protection through its inscription as a UNESCO World Heritage Site, a National Heritage Site and a National Park.⁵ Another consequence of Mapungubwe's multifaceted value is that its management falls within the responsibility of various government departments and agencies, each with very different mandates and functional areas of concern.

The aim of this report is to analyse the particular responsibilities and the interplay of the various departments involved in mineral, environmental and heritage regulation through the experiences gained during the Mapungubwe project. We analyse our engagement with the various regulators, focusing on the challenges that arose but also the manner in which these governance structures interact with each other in relation to their respective mandates.

The primary aim of the Coalition's campaign was to pressurise the mining company, Coal of Africa Limited (CoAL), to honour its environmental and social obligations, and to protect the site through creative lawyering and coalition building.⁶ However, while the Coalition's efforts were directed primarily at CoAL, each stage of the campaign has required engagement with the multiplicity of governance structures involved in regulating the site. As a result, CALS' experience as co-representatives of the Coalition provides a unique perspective into how the various responsible entities are

⁴ Vhembe District Municipality 2012/2013-2016/2017 *Integrated Development Plan* 3.

⁵ A clear reflection of his esteem was reflected in the Order of Mapungubwe, which is one of the highest honours which can be bestowed by the Presidency on South African citizens 'for excellence and exceptional achievement.

See <http://web.archive.org/web/20070208183147/http://www.thepresidency.gov.za/main.asp?include=orders/main.html#mapungubwe>. A second example was the decision to name a research institute (the Mapungubwe Institute for Strategic Reflection) after it. See <http://www.mistra.org.za/Aboutus/Pages/AboutUs.aspx>.

⁶ The experience and the lessons derived are recounted in the report entitled 'Changing Corporate Behaviour: The Mapungubwe Case Study.'

managing the imperatives of economic development, social justice and heritage and environmental protection.⁷

This report seeks to utilise these experiences in order to assess the roles, relationships and performance of some critical entities in relation to the tasks of first, harmonising environmental, social and economic objectives through spatial planning and decision-making; second, managing the environmental and social impacts of mining; third, managing heritage sites; and, fourth, compliance monitoring. In so doing, it shall highlight the confusion and the conflicts that can result from overlapping departmental mandates.

We hope that by identifying some forms of misalignment and highlighting their consequences, this report will provide impetus for a concerted effort by the relevant departments and agencies, parliament and civil society in particular, to arrive at a comprehensive understanding of the problem. Ultimately this report aims to stimulate a conversation on possible solutions to these challenges, albeit legislative or administrative in nature.

Before commencing with this analysis, however, it is important to begin by providing the broad conceptual framework required for navigating this discussion.

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 misconception. Protecting the basic attributes of the physical and aesthetic environment including the quality of air, soil and water, is a precondition to the eradication of poverty as this lies at the foundation of the rights to water, to food; and to dignity.⁸

⁷ CALS, together with Centre for Environmental Rights (CER) has served as the Coalition's attorneys of record. The advantages of this dual-representation model are discussed in the report entitled 'Changing Corporate Behaviour.'

⁸ This connection was recognised by the Constitutional Court in the *Fuel Retailers* case, the leading case on sustainable development. The court acknowledged that economic development was required for realising the socio-economic rights contained in the Constitution but that this development could not be sustained 'upon a deteriorating environmental base.' *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others* 2007 (6) SA 4 (CC) at para 44.

The Centre for Applied Legal Studies (CALs) is a civil society organisation based in the School of Law at the University of the Witwatersrand, Johannesburg. CALs is committed to the protection of human rights through the 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 goal through three methodologies namely research, advocacy and strategic litigation, all of which were used in the Mapungubwe project.

CALs' Environmental Justice Programme seeks to realise the environmental right contained in Section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution) especially 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 which threatens 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.

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 is about both outcome and process. The outcome-based dimension refers to the notion that the benefits and burdens of development must be equitably shared. The procedural dimension requires that affected communities be permitted to participate equally in decisions which will have long term and/or significant impacts on their lived environment and socio-economic position.⁹

While environmental justice is still an emerging paradigm confined primarily to the worlds of social movements, NGOs and academics, today the

⁹ 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 RJ Lazarus 'Pursuing "environmental justice": The distributional effects of environmental protection' (1992-1993) 87 *North Western University Law Review* 787; 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.

notion of 'sustainable development' is the dominant framework in relation to the environment and which has been formally adopted at the level of the United Nations (UN).¹⁰ 'Sustainable development' is, in essence, the requirement that development meet the needs of the present generation 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 forms of planning and decision-making.¹¹

The third concept upon which the analysis contained in this report is based is that of governance. We shall therefore briefly explain how we understand this for the purpose of this report.

2.3 THE PRINCIPLE OF GOVERNANCE

Governance, as with all concepts in the social sciences, is highly contested, particularly with regard to objectives and role-players of governance. Definitions of governance can be divided into 'narrow' understandings confined to formal state institutions and broader understandings. An example of a narrower understanding is the definition adopted by the Governance Group of the World Bank Institute:

'...the traditions and institutions by which authority in a country are exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.'¹²

An example of a broad understanding is the definition adopted by the United Nations Commission for Global Governance:

¹⁰ See K Morrow 'Rio +20, the Green Economy and Re-orientating sustainable development' 14 *Environmental Law Review* 279, United Nations Conference on Environment and Development Rio de Janeiro, Brazil, 3 to 14 June 1992
AGENDA 21 <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>;
'Resolution adopted by the General Assembly on 27 July 2012 The Future We Want' 280-281; A/RES/66/288 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/10/PDF/N1147610.pdf?OpenElement>.

¹¹ This understanding has been adopted at the UN Conference on Environment and Development. See *Ibid*.

¹² World Bank Governance Matters 2007: Worldwide Governance Indicators, 1996-2006 (available at <http://0-info.worldbank.org/innopac.wits.ac.za/governance/wgi2007/>). Cited in LJ Kotze 'Environmental Governance' in LJ Kotze & A Patterson *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) at 105.

'...the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.'¹³

This report employs a middle-ground understanding of governance. The objective of governance is the alignment of diverse interests in pursuit of the public interest, which is the realisation of the open, democratic and egalitarian society enshrined under the Constitution.¹⁴ With regards to role players, this understanding conceives of a spectrum between the central agents of governance (who are accorded express powers in terms of the Constitution, legislation and/or customary law) and more peripheral but still important role players who do not possess formal authority but who are vital to the governance process.¹⁵ The latter play an especially important role in ensuring that the formal institutions of governance are held to account. Accordingly, this report will focus on the formal institutions of governance (including global institutions, national and provincial line departments, agencies, and municipalities) while not ignoring the role played by community-based organisations, NGOs and the press.

2.4 CO-OPERATIVE GOVERNANCE

The South African Constitution allocates primary legislative¹⁶ and executive¹⁷ powers to three spheres of government, namely national, provincial and local.¹⁸ It does not create tightly defined and clearly differential roles for the different levels. The vision is one of collegial collaboration rather than silos and strict hierarchies. However, this also creates much scope for confusion of responsibilities and for conflict. The main constitutional and legislative vehicle for preventing and resolving conflicts is the doctrine of co-operative governance, which, as defined in

¹³ Commission for Global Governance *Our Global Neighbourhood* (1995) at 2. Cited in Kotze & Patterson (op cit) at 104-105.

¹⁴ Section 1 of the Constitution (Founding values).

¹⁵ Writers from the New Haven school of international legal theory, for example HD Lasswell define public policy as 'a projected program of goals values, and practices.' R Huang 'On the Nature of Public Policy' (2002) 1 (3-4) *Chinese Public Administration Review* 275.

¹⁶ Section 43 of the Constitution.

¹⁷ Sections 85 (2), 125 and 151 of the Constitution.

¹⁸ Section 40 (1) of the Constitution.

constitutional jurisprudence and legislation refers to the philosophy of co-ordination between the national, local and provincial spheres of government.¹⁹ The two basic principles of co-operative governance are the following:

- One sphere of government should not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state;²⁰
- 'The functional and institutional integrity of the different spheres of government must...be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution and the countervailing powers of other spheres of government'.²¹

As this language, and the focus of the Intergovernmental Relations Framework Act (IGRFA),²² suggests, the available framework emphasises relations between the national, provincial and local spheres of government rather than relations between line departments and agencies.

¹⁹ The provisions pertaining to co-operative governance are contained in Chapter 3, Sections 40-41 of the Constitution. The leading cases on co-operative governance include *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC); *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) (SA 732 (CC) at para 40; *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

²⁰ *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at para 58

²¹ *Ibid.*

²² Intergovernmental Relations Framework Act No. 13 of 2005.

3. Identifying governance structures in the Mapungubwe Cultural Landscape World Heritage Site

3.1 INTRODUCTION

Due to the complexity and intersectionality of the issues involved in managing and protecting the Mapungubwe landscape, the list of governance structures is extensive. Due to the need for brevity this report does not intend to provide an exhaustive description of each of the entities involved but merely to convey the complexity of the landscape and the key role-players. The list of institutions we have selected encompasses international, national, provincial, local and community-based structures. In order to provide the reader with a sense of 'who's who' we shall start by briefly introducing a number of key governance role-players and the role that each has played in relation to Mapungubwe.

3.2 UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANISATION

The United Nations Educational Scientific and Cultural Organisation (UNESCO) was founded on the basis of humanity's moral and intellectual solidarity.²³ UNESCO created the concept of World Heritage to protect sites of outstanding universal value,²⁴ by building an intercultural understanding through protection of heritage and support for cultural diversity.²⁵ The driving force behind UNESCO's heritage mandate is the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).²⁶ South Africa incorporated the World Heritage Convention into South African law by promulgating the World Heritage Convention Act (Heritage Convention Act) in 1999.²⁷

The system established by the World Heritage Convention involves state parties nominating heritage sites within their borders for inclusion on the

²³ Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization. http://portal.unesco.org/en/ev.phpURL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html

²⁴ Nominated sites must be of 'outstanding universal value' and meet at least one of the ten criteria, see <http://whc.unesco.org/en/criteria/>

²⁵ UNESCO's aspirational goals detailed at <https://en.unesco.org/about-us/introducing-unesco>

²⁶ Ibid.

²⁷ World Heritage Convention Act No. 49 of 1999 (Heritage Convention Act).

World Heritage List by UNESCO.²⁸ Further, states should provide UNESCO with the names of the government organisation/s primarily responsible for the implementation of the World Heritage Convention.²⁹

This system aims to incentivise states to protect the heritage within their borders. Once the site of a state party is inscribed on the World Heritage List, the resulting status often helps raise awareness among residents and state parties for heritage protection and conservation.³⁰ The greater awareness, additionally, makes the site more attractive as a tourist destination leading to revenue opportunities for the state and local communities. A country could also apply for fiscal and expert support from the World Heritage Committee to assist with the preservation of its sites.³¹ The inscribed site remains the property of the host country, but it is managed in terms of the international interest to safeguard the site for future generations. UNESCO does routine monitoring missions to ensure sites are conserved and preserved in line with the World Heritage Convention and the country's commitments.

Although countries accede to the World Heritage Convention, the protection of the sites is a country-specific task. UNESCO will make recommendations but lacks the power of enforcement when it comes to the management of the site. UNESCO's source of leverage is the above-mentioned benefits of inscription coupled with its power to remove properties from the World Heritage Site list, which, if exercised, may harm a country's reputation.³² Governmental departments in charge of heritage are also sometimes hesitant to take instruction from international bodies falling outside of the state hierarchy. Officials from the global South may experience an interventionist approach by UNESCO as a perpetuation of historic power dynamics.³³

²⁸ Articles 11 (1) and (2) of the World Heritage Convention; paras 24 a) of the Operating Guidelines for Protection and Maintenance of World Heritage (World Heritage Convention Guidelines) (2013).

²⁹ Paragraph 13 of the World Heritage Convention Guidelines (2013).

³⁰ See <http://whc.unesco.org/en/faq/>

³¹ Article 14, United Nations Educational, Scientific and Cultural Organisation 'Convention Concerning The Protection Of The World Cultural And Natural Heritage', Adopted by the General Conference at its seventeenth session Paris, 16 November 1972.

³² UNESCO has exercised this power on two occasions: First, when it removed the Arabian Onyx Sanctuary (in Oman) and second, when it removed the Dresden Elbe Valley (Germany). The latter is a cultural landscape of museums, 19th century gardens and villas, numerous monuments and parks that are all centred on the Pilnitz palace. It was deleted due to the construction of a four-lane bridge through the centre of Dresden. <http://whc.unesco.org/en/decisions/1786>.

³³ The 'Global South' is not a geographical term but is used to describe countries previously subject to colonial role 'engaged in political projects of decolonization towards the realization of a postcolonial international order'. SN Grovogui 'The Global South: A Metaphor

3.3 DEPARTMENT OF ENVIRONMENTAL AFFAIRS

The Department of Environmental Affairs (DEA) is responsible for all environmental policy, management and decision-making nationally, except where otherwise provided in sector-specific legislation.³⁴ The DEA is delegated the authority to ensure the protection of the environment and conservation of natural resources.³⁵ The DEA must, importantly, balance the imperatives of sustainable economic development and the equitable distribution of the benefits derived from natural resources. The DEA acts as the custodian and champion of the environment and is charged with finding solutions to environmental management challenges in a manner premised on a human-centred approach that recognises the centrality of Batho Pele.³⁶ The DEA fulfils this mandate through regulating the way the environment is managed. A primary function in fulfilling this regulatory obligation is the issuing of environmental authorisations for activities listed under NEMA.³⁷

The DEA played a particularly important role in the Mapungubwe story by issuing CoAL with an environmental authorisation in terms of Section 24G of NEMA for activities listed under NEMA regulations (Section 24G Rectification).³⁸ One of the conditions of this Section 24G Rectification was the conclusion between CoAL, DEA, South African National Parks (SANParks) and the DMR on biodiversity offsets which are designed to compensate for the adverse impacts on biodiversity in the region with creative initiatives.

The DEA also has responsibilities in relation to heritage impact assessments (HIAs) which are the heritage component of an Environmental Impact

Not an Etymology' (2010) 6 (3) *Global Studies Review*. <http://www.globality-gmu.net/archives/2271>

³⁴ These mandates are conferred by the National Environmental Management Act (NEMA) No. 107 of 1998. See the definition of 'department' in Section 1 of NEMA; and Chapter 5 of NEMA (integrated environmental management).

³⁵ See <https://www.environment.gov.za/aboutus/department>.

³⁶ Batho Pele, 'People First' is a South African political initiative. The initiative was first introduced by the Mandela Administration on October 1, 1997 to stand for the better delivery of goods and services to the public. It is also now used to imply the eradication of government organizations deemed corrupt or obsolete. The Batho Pele initiative aims to enhance the quality and accessibility of government services by improving efficiency and accountability to the recipients of public goods and services. See http://dev.absol.co.za/gcis_content/aboutgovt/publicadmin/bathopele.htm

³⁷ Section 24 of NEMA.

³⁸ Note, however, that the authorisation was issued in terms of Section 24G of NEMA which provides for the rectification of prior unauthorised activities on the payment of an administrative fine. See 'Changing Corporate Behaviour' report for more discussion of Section 24G.

Assessment (EIA). The responsibility for commenting on HIAs belongs to the South African Heritage Resources Agency (SAHRA) while the responsibility for processing and deciding on the entire EIA belongs to the DEA.³⁹ It is the DEA's responsibility to assess these EIAs and, in turn, decide on the suitability of the particular project, from both an ecological and heritage perspective. The DEA also manages all National Parks, through SANParks, an agency of the DEA.

Therefore the DEA is responsible for leading efforts to protect the environment through legislation and policy. This task is an increasingly challenging one, as the DEA needs to make do with a fairly small portion of the national fiscus to manage the large areas under its protection.⁴⁰ The current National Development Plan (NDP) proposes an aggressive accelerated development drive on the national agenda, therefore the capacity of this department is likely to come under even greater pressure. Various legislative and policy reforms have been introduced to regulate and facilitate the movement to a more industrialised economy. The most important of these is arguably the Infrastructure Development Bill (IDB) which provides for a reduced EIA timeframe for projects identified as strategic integrated projects (SIPs).⁴¹

3.4 LIMPOPO DEPARTMENT OF ECONOMIC DEVELOPMENT ENVIRONMENT AND TOURISM

The Limpopo Department of Economic Development, Environment and Tourism (LEDET) has a strategic mandate to promote economic development and growth in the province, and is intent on creating work and fighting poverty from food security to 'real economic growth.'⁴² LEDET has a central role in providing strategic interventions in the furtherance of economic development, investment promotion as well as promotion of tourism and sustainable use of environment. Since Mapungubwe falls within Limpopo, LEDET has played a role in the policy-making processes relating to its management.⁴³

³⁹ Section 38(1) of the National Heritage Resources Act No. 25 of 1999.

⁴⁰ The DEA was allocated R5 668 386 in the 2014 national budget.

<http://www.treasury.gov.za/legislation/bills/2014/Appropriation%20Bill%2004-2014.pdf>

⁴¹ The Infrastructure Development Act 23 of 2014 provides for steering committees (Sections 11-16 of the Act) to expedite projects designated as Strategic Integrated Projects (SIPs) (part 3 of the Act). Schedule 2 provides for a streamlined timeframe for SIPs.

⁴² <http://led.co.za/organisation/provincial-department-economic-development-and-tourism>.

⁴³ In particular, it has, in conjunction with the DEA, initiated the process of developing an environmental management framework (EMF) for Mapungubwe. EMFs will be defined and discussed at a later stage in this report.

LEDET is thus responsible for both the development of the province and the protection of the environment. This two-part mandate brings together competing objectives due to the difficulty in balancing developmental and environmental imperatives. Conflict arises in part because of the prevailing conceptions of development and the environment. Development is conceived of as narrow economic growth independent from environmental and social impacts while environment is conceived as limited to the bio-physical and not the social environment.⁴⁴ In a province like Limpopo where high levels of unemployment and poverty are a pressing and an understandable concern, there is a risk that, given these prevailing perceptions, the developmental prerogative will dominate while the environment is relegated as a secondary concern which is not afforded the required consideration. As we discuss below, this binary is neither correct nor necessary.

3.5 DEPARTMENT OF WATER AFFAIRS

The Department of Water Affairs is the custodian of South Africa's water resources and is accordingly invested with the primary responsibility for the design and enactment of policy governing this sector. The Department of Water Affairs also has an overarching responsibility for water services provided by local government. The Department of Water Affairs' mandate is to ensure access to clean water and safe sanitation, while promoting effective and efficient water resources management to ensure sustainable economic and social development.⁴⁵ The Department of Water Affairs commits to achieve its mandate through an important regulatory function of issuing and controlling water use licenses. In contrast to the DEA which has separate government departments in each province, Department of Water Affairs has regional offices in different areas which all fall under the national department and which processes applications for water use licenses and registrations.

Before President Zuma's Cabinet reshuffle in 2009, the Department of Water Affairs fell within the Ministry of Water and Environmental Affairs but now falls within the Ministry of Water and Sanitation.⁴⁶ The frequency with which

⁴⁴ The assumption that 'development' and 'the environment' are entirely severable is contrary to jurisprudence of the Constitutional Court, which, as cited above, recognised that economic development in the long run requires a sound environmental base. *Fuel Retailers case* (op cit) para 44.

⁴⁵ Section 3 of the National Water Act No 36 of 1998, Water Services Act

⁴⁶ In May 2009 the Department of Water Affairs and Forestry was divided, with the forestry responsibility being transferred to the Department of Agriculture, Forestry and Fisheries. The Department of Water Affairs and Sanitation was established in May 2014.

this portfolio is relocated poses risks to staff retention, institutional memory and the relationships and networks officials have built while serving within a particular ministry.

The Department of Water Affairs has played an important role in the Mapungubwe story. First, it has been responsible for issuing CoAL with a water use license under the National Water Act, in spite of significant objections being raised regarding the quality of CoAL's studies in support of the application. Second, Limpopo, the Province where Mapungubwe is located, is an extremely water scarce area and therefore the department's mandate of protecting and managing water resources assumes particular importance.

In practice, the Department of Water Affairs and the DEA have often had different stances on development. This was evident in the Mapungubwe case, where it became clear that at the outset the DEA, then under the portfolio of Department of Environment and Tourism (DEAT), had serious concerns regarding the CoAL development while the Department of Water Affairs did not similarly express its concerns, and appeared to take a stance closer to that of the DMR i.e. in favour of the mine development.⁴⁷ This is an interesting stance as the water scarcity in the area was one of the most grave and important issues. Engaging with two state entities whose approaches to realising common departmental objectives in relation to invasive developments have shown limited alignment, is a highly challenging exercise.

3.6 DEPARTMENT OF MINERAL RESOURCES

The DMR's mandate is to promote mining and development while ensuring the transformation of the sector and an equitable distribution of the economic benefits of mining. This is achieved within the framework of the Mineral and Petroleum Resources Development Act (MPRDA) and the DMR's obligations as the custodian of the country's mineral wealth for the benefit of its citizens.⁴⁸ Most importantly, the DMR is responsible for issuing mining rights and hence deciding whether a project can proceed or not.⁴⁹

⁴⁷ The DEAT submitted comments in relation to CoAL's draft environmental management programme (EMPR), a component of its mining right application where it raised concerns in relation to, *inter alia*, biodiversity and conservation and South Africa's relations with UNESCO. DEAT Comments on draft EMPR (20 July 2009).

⁴⁸ Section 2 (a) and (b), Section 3 of the MPRDA.

⁴⁹ Sections 22 and 23 of the MPRDA.

In its capacity as the driver of mineral development, the DMR must take the principles of environmental management into consideration when deciding whether or not to grant a mining right, and must in so doing promote the realisation of the environmental right in Section 24 of the Constitution.⁵⁰ The difficulty is that these are fundamentally conflicting imperatives. Mines will always have negative and severe environmental and heritage-related impacts. In its capacity as the driver for these invasive developments, it needs to conduct a very delicate balancing exercise in which environmental and developmental interests are equally taken into account. Permitting a mine to develop an open cast coal mine 7km from a World Heritage Site, a National Park and in a water scarce area is indicative of an unbalanced approach to sustainable development.

3.7 DEPARTMENT OF ARTS AND CULTURE

The Department of Arts and Culture is the government ministry dedicated to preserving, protecting and developing arts, culture and heritage in South Africa.⁵¹ It is the ministry which is concerned with the management and protection of resources considered culturally significant on a national, provincial and local level, and all heritage resource agencies are funded by and located in the Department of Arts and Culture. The National Heritage Resources Act (Heritage Resources Act) is the primary legislation dealing with the management of the national heritage estate. It seeks to provide a systematic approach to the management of heritage resources across the country, at all levels of government.

The Department of Arts and Culture suffers from the relatively low priority assigned to culture in the South African budgetary process and is consequently not a very well-resourced department in relation to the breadth of its mandate.⁵² As a consequence, its capacity to oversee the sound management of South Africa's considerable body of heritage resources is limited.

⁵⁰ Sections 2 (h) and 3(3) of the MPRDA.

⁵¹ <https://www.dac.gov.za/8-2-1-vision-mission-values> accessed on 3 June 2014.

⁵² For the 2014/2015 financial year the Department of Arts and Culture was allocated R3, 524 748 000 (including funds for heritage resource agencies). Appropriation Bill [B-04 2014]. <http://www.treasury.gov.za/legislation/bills/2014/Appropriation%20Bill%2004-2014.pdf>.

3.8 HERITAGE REGULATION AGENCIES

3.8.1 SOUTH AFRICAN HERITAGE RESOURCES AGENCY

While the role of Department of Arts of Culture in relation to heritage is primarily one of formulating regulations and high level policy-making, the South African Heritage Resources Agency (SAHRA) is the national body responsible for the actual work of heritage resources management, and is the controlling authority in terms of the Heritage Resources Act.⁵³ Applications for permission to carry out activities listed in the Heritage Resources Act⁵⁴ or which may in any way damage or alter a heritage resource/s recognised under the Act must be addressed to the provincial offices of SAHRA or the Provincial Heritage Resources Agencies (PHRAs).⁵⁵

SAHRA is established by the Heritage Resources Act to fulfil the tasks of identifying, managing and protecting national heritage. 'Heritage resources' are defined in the Heritage Resources Act as 'those objects and places in South Africa which are of cultural significance or special value to communities, both for present and for future generations.'⁵⁶ SAHRA is consequently assigned a number of responsibilities, including the following:

- In relation to heritage resources classified as being of national significance (grade I heritage resources), SAHRA plays a direct managerial and administrative role. SAHRA is therefore responsible for identifying heritage that can be considered significant on a national level;⁵⁷
- The development and implementation of a national framework for identifying and managing heritage resources both on a national and provincial level.⁵⁸ This framework is applicable to heritage resource authorities and other bodies which have been appointed by the Minister responsible for arts and culture as agents of implementation;⁵⁹

⁵³ Section 13 of the Heritage Resources Act.

⁵⁴ The list is contained in Section 38 (1) (a) – (e) of the Heritage Resources Act which further empowers SAHRA and PHRAs to specify further activities by way of regulations.

⁵⁵ Section 38 (1) of the Heritage Resources Act. There is, however, considerable overlap between the functions of the Department of Arts and Culture and SAHRA, particularly in relation to regulation making, which is a source of confusion.

⁵⁶ Section 3 (1) of the Heritage Resources Act.

⁵⁷ Section 27 (1) of the Heritage Resources Act.

⁵⁸ Section 13 of the Heritage Resources Act.

⁵⁹ The framework consists of standards, principles and policy regulating the national estate.

- Monitor the entities responsible for the management and protection of national and provincial heritage resources, to make sure that this management is in alignment with the framework it has designed;⁶⁰ and
- To raise the profile of the estate for the public's benefit and enjoyment.⁶¹

SAHRA is overseen by the SAHRA Council, which consists of not more than fifteen people appointed by the Minister responsible for arts and culture.⁶² Nine out of the fifteen members of the Council represent the provinces in the management of heritage resources, together with the Chief Executive Officer of SAHRA. SAHRA is responsible under the Heritage Resources Act for advising the Council on the condition of the national estate⁶³, the policies in place for this estate, any legislative amendments needed as well as the expenditure directed to the management and protection of the estate.⁶⁴ The Council, in turn, is responsible for advising the Minister of arts and culture on heritage resource management.⁶⁵

3.8.2 PROVINCIAL HERITAGE RESOURCES AGENCY

South Africa has a three-tier structure for the management of heritage resources that is split into national, provincial and local levels.⁶⁶ Each level of management is responsible for the heritage resources which the Heritage Resources Act deems to fall within its area of competence.⁶⁷

SAHRA is responsible for heritage resources which are considered significant on a national level and are classified Grade I heritage resources. Provincial Heritage resource authorities (PHRAs) are to be established by the relevant provincial MEC to regulate heritage resources considered significant at a provincial level, and these resources are classified as Grade II heritage resources.⁶⁸ Local authorities, namely municipalities, have been allocated the regulation of resources considered significant at the local level, and

⁶⁰ Section 13 (1) (b) of the Heritage Resources Act.

⁶¹ Section 13 (1) (e) of the Heritage Resources Act.

⁶² Section 14 (1) of Heritage Resources Act.

⁶³ Section 3 of the Heritage Resources Act defines the national estate as 'those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations.'

⁶⁴ Section 13 (2) of the Heritage Resources Act.

⁶⁵ Section 16 of the Heritage Resources Act.

⁶⁶ Section 8 (1) of the Heritage Resources Act.

⁶⁷ Section 8 (1) of the Heritage Resources Act.

⁶⁸ Section 8 (3) of the Heritage Resources Act.

these resources are classified as Grade III.⁶⁹ Neither PHRAs nor local authorities may perform any functions unless deemed competent to do so by SAHRA and the relevant PHRA respectively.⁷⁰

PHRAs, Limpopo in particular, struggle with gaining approval from SAHRA with regards to the various competencies required to assess and manage the various sites.⁷¹ The struggle is due to the lack of capacity, financial resources, skills and equipment available to the PHRAs. Where the PHRAs do not have the required competency, SAHRA will step in to take responsibility for fulfilling the mandate which further stretches its resources.

3.9 SOUTH AFRICAN NATIONAL PARKS

South African National Parks (SANParks) was established in terms of the National Environmental Management: Protected Areas Act (NEMPAA)⁷² which accords the Minister of Environmental Management with the discretion to assign the management of protected areas to a suitable entity.⁷³ It operates as an agency of the DEA responsible for the conservation of South Africa's biodiversity, landscapes and associated heritage assets through a system of National Parks.⁷⁴ NEMPAA obliges the Minister responsible for environmental management in South Africa to assign the management of all National Parks to SANParks.

SANParks promotes the conservation of the country's natural and cultural heritage by managing a system of 22 National Parks.⁷⁵ A central function of SANParks is the management of any World Heritage Sites assigned to it by the Minister.⁷⁶ In addition to National Parks and World Heritage Sites, SANParks may be involved with the management of a number of other protected areas.⁷⁷

⁶⁹ Section 8 (4) of the Heritage Resources Act.

⁷⁰ Section 8 (6) (a) of the Heritage Resources Act.

⁷¹ The Minister responsible for art and culture issues criteria by which this competence is assessed, including an assessment of the staff, expertise and administrative systems available to perform the appropriate tasks.

⁷² Act No. 57 of 2003.

⁷³ Section 38 (1) (b) of NEMPAA.

⁷⁴ See <https://www.environment.gov.za/statutorybodies/sanparks>.

⁷⁵ Ibid.

⁷⁶ Section 55 of NEMPAA. In Government Notice No. 71 of 30 January 2009 (GN 31832) the Mapungubwe Cultural Landscape was declared as a World Heritage Site in terms of the World Heritage Convention Act (Act No. 49 of 1999), and delegated specified powers of management to SANParks.

⁷⁷ The types of protected areas are listed in Section 9 of NEMPAA. Apart from World Heritage Sites and National Parks discussed above, the list includes nature reserves, protected environments, marine protected areas, protected forest areas, and mountain catchment areas.

Apart from managing protected areas in South Africa, SANParks may be included in any environmental, conservation and cultural heritage initiatives supported by the Minister. Such initiatives may be on an international, regional or national level.⁷⁸ It is noted that cultural heritage initiatives are specifically mentioned here in the context of SANParks. This seems to fall outside of the expertise of the agency. Therefore, while it is not compulsory that SANParks be involved with cultural heritage initiatives, NEMPAA clearly envisages the capacity for SANParks to be involved with such projects. This can create difficulties as SANParks representatives are specialists in the protection of ecologically sensitive sites rather than cultural heritage sites.

3.10 LOCAL GOVERNMENT

3.10.1 INTRODUCTION

The Constitution allocates original legislative, executive and administrative powers to local government⁷⁹ in order to fulfil its functions which include the promotion of local economic development, air pollution and water and sanitation services.⁸⁰ In the recent *Le Sueur* case the KwaZulu-Natal High Court held that 'municipal planning' powers include environmental management.⁸¹ To ensure municipalities fulfil their developmental mandate, all municipal councils are required under the Municipal Systems Act⁸² to adopt an integrated development plan, a planning tool which provides the overarching framework for local economic development.⁸³

3.10.2 VHEMBE AND CAPRICORN DISTRICT MUNICIPALITIES

The original buffer zone boundaries of the Mapungubwe Cultural Landscape, which have since been revised, traversed two district municipalities, namely Vhembe and Capricorn though only a small part of

⁷⁸ Section 55 (1)(a) of NEMPAA.

⁷⁹ Sections 156 and 229 of the Constitution.

⁸⁰ These powers are enumerated in part B of Schedules 4 (concurrent national and provincial legislative competence) and 5 (exclusive provincial legislative competence) and include municipal planning, local tourism, air pollution, 'water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems' and municipal parks and recreation

⁸¹ *Le Sueur and Another v Ethekwini Municipality and Others* [2013] ZAKZPHC 6 (30 January 2013) para 33.

⁸² Act No.32 of 2000.

⁸³ Section 25(1) of the Municipal Systems Act.

the South West corner of the buffer zone lay in Capricorn Municipality).⁸⁴ District municipalities (which encompass a number of local municipalities) are required to create a framework for the Integrated Development Plans (IDPs) of all municipalities within the district municipality, manage waste disposal and promote local tourism.⁸⁵ Thus in addition to developing their own IDPs, they are also required to oversee the IDPs of their local municipalities through the development of an IDP framework.⁸⁶

Some of the responsibilities of Vhembe district municipality accord it influence over the management of Mapungubwe. IDPs and IDP frameworks developed by the district, for example, will have to provide for local economic development that is consistent with the heritage and ecological value of Mapungubwe.

3.10.3 MUSINA AND BLOUBERG LOCAL MUNICIPALITIES

The original Mapungubwe buffer zone also covered two local (as opposed to district) municipalities, namely Musina (falling under Vhembe District Municipality) and Blouberg (falling under Capricorn District Municipality). As local municipalities, they are allocated the powers and functions listed in the Constitution with the exception of the powers assigned to district municipalities under the Municipal Structures Act and which include the promotion of local tourism. However, as provided for in the Municipal Structures Act, responsibility for local tourism has been assigned to Musina Local Municipality.⁸⁷ This adjustment of functions is, as required by the Municipal Structures Act, reflected in the notices in the Provincial Gazette establishing the municipality.⁸⁸

Musina's local tourism responsibilities might include marketing Mapungubwe and the IDPs it compiles will need to be mindful of the attributes of Mapungubwe. Consequently, the Musina municipality can be

⁸⁴ Buffer Zones are part of international best practice and constitute a transition zone between the core heritage site and the surrounding area for the purpose of regulating economic activity. The World Heritage Committee of United Nations Educational, Scientific and Cultural Organisation (UNESCO), which held its 38th Session in Doha, Qatar, from 15 - 25 June 2014, approved a revised buffer zone. It should be noted that Capricorn Municipality is not included in this buffer zone. However, due to this report being grounded in our historical experience, its inclusion here is warranted.

⁸⁵ These respective responsibilities are allocated by Sections 84 (1) (a), (e) and (m) of the Municipal Structures Act.

⁸⁶ Section 27 of the Municipal Systems Act.

⁸⁷ Adjustment of functions is regulated by Section 85 of the Municipal Structures Act.

⁸⁸ Amendment of Notices Establishing District Municipalities and Local Municipalities in terms of Sections 16 and 85 of the Local Government: Municipal Structures Act No. 177 of 1998. Limpopo Provincial Notice. No. 5 of 2003. PG No. 878.

characterised as a role player in relation to the governance of Mapungubwe.

However, the extent of its involvement in decision-making about Mapungubwe has often been less than the Blouberg Municipality, which is located further from the core area of Mapungubwe.⁸⁹

3.11 INDIGENOUS COMMUNITY STAKEHOLDERS

The management of many World Heritage Sites, including Mapungubwe, has significant implications for the environmental and cultural rights of the indigenous communities for whom the site is sacred or otherwise inextricably linked to identity, culture, or practices. The General Assembly Declaration on the Rights of Indigenous Peoples, which had the support of a majority of states including South Africa, contains a number of principles supporting the rights of indigenous communities with links to Mapungubwe.⁹⁰ These principles include that, first, 'Indigenous people...have the right to maintain, protect and have access in privacy to their religious and cultural sites' and, second, that 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.'⁹¹

The African Charter on Human and Peoples Rights (Banjul Charter) proclaims 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'⁹²

⁸⁹ Examples of processes in which Blouberg rather than Musina have been involved include the redrawing of the buffer zone, the compiling of the Mapungubwe Environmental Management Framework (EMF) and the Environmental Management Committee (EMC) for Vele Colliery. Each of these shall be defined in sections of the report to follow.

⁹⁰ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/29. Voting record <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares61295>

⁹¹ Article 12: 'Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.'

Article 23: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.'

⁹² Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3. Article 22 (1).

The South African Constitution protects the rights of 'cultural, linguistic and religious communities' to 'enjoy their culture, practice their religion and use their language.'⁹³

Several different indigenous communities claim rights over Mapungubwe ranging from rights of access to ownership. In an effort to expedite the required social and economic redress after apartheid, land reforms were mandated by the property clause in the Constitution.⁹⁴ Key measures have included a land restitution process that allows people dispossessed since the 1913 Land Act⁹⁵ to submit claims to be decided by the Commission for the Restitution of Land Rights.⁹⁶ Communities claiming ownership and other rights to Mapungubwe include Ga-machete, Vhangona, Tshivula and Balemba.

The indigenous peoples of Mapungubwe have experienced a number of challenges. The main difficulty has been significant fragmentation both between and within these indigenous groups. Communities are hardly ever homogenous and fragmentation is to be expected. The geographical dispersal of communities, many of whom do not currently live near Mapungubwe, has heightened the challenges involved in co-operating and in co-ordinating their efforts to advance their rights.⁹⁷ Distance presents logistical barriers and renders the building of relationships of trust more difficult.

⁹³ Section 31 of the Constitution.

⁹⁴ Section 25 of the Constitution.

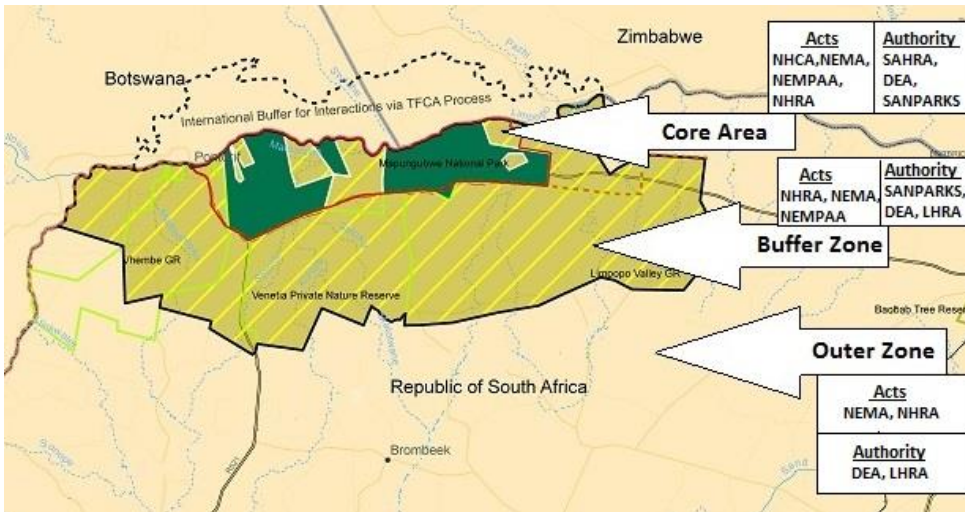
⁹⁵ Act no. 27 of 1913.

⁹⁶ The purpose of the restitution programme is to provide equitable redress to victims of racially motivated land dispossession, in line with the provisions of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994).

⁹⁷ The Lemba community, for example, largely live in Thohoyandou which is 191km, using the shortest route, from Mapungubwe.

4. An Assessment of domestic regulatory system

4.1 INTRODUCTION



(COURTESY OF SANPARKS)

There are many pieces of legislation in South Africa dealing with environmental management and protection, some of which combine to create overlapping mandates. The Heritage Convention Act incorporates the terms of the World Heritage Convention into domestic law. While the Heritage Convention Act provides protection to places and objects seen to be naturally and culturally significant from an international perspective, the Heritage Resources Act focuses on the recognition of such places chosen by South Africa to be naturally or culturally significant.⁹⁸ Apart from this heritage legislation, environmental regulation is provided by NEMPAA, which extends protection to specified conservation areas.⁹⁹ The protected areas framework is of importance to areas that have a confluence of cultural and natural heritage value. Finally, NEMA outlines general principles and mechanisms to enhance co-operative governance between the different government departments dealing with the environment.¹⁰⁰

The fragmented legislation described above fails to provide a holistic framework that can enable the most effective management of the

⁹⁸ Discussed at paragraph 3.7 above.

⁹⁹ Discussed at paragraph 3.9 above.

¹⁰⁰ Chapter 3 of NEMA provides mechanisms for co-operative governance while Chapter 4 contains decision making and conflict management processes.

environment. While each piece of legislation may work sufficiently well in its area of competence, they are interdependent. As such, the effectiveness of their provisions needs to be analysed against the criteria of how well they work together in providing an effective environmental management framework. From this perspective, one can see that the environmental management system created by this legislation fails to cohere, as each piece of legislation is administered by different authorities, with different developmental priorities.

Mapungubwe is a relatively rare example of a site subject to two systems of protection, for its cultural heritage and natural/ecological value respectively. It was inscribed by UNESCO on the basis of its cultural heritage significance in 2003. In domestic law, its status as a World Heritage Site was recognised a few years later, in January 2009, in terms of the Heritage Convention Act.¹⁰¹ This dual natural/ecological and cultural heritage value is of crucial significance.¹⁰²

Mapungubwe is thus subject to a range of authorities and regulatory regimes. The DEA, through SANParks, manages Mapungubwe both as a World Heritage Site and as a National Park (in terms of the Heritage Convention Act and the NEMPAA respectively). The Department of Arts and Culture manages Mapungubwe as a National Heritage Site (as defined in the Heritage Resources Act). Below we explore the framework provided by the Heritage Convention Act, the NEMPAA and the Heritage Resources Act for the management of Mapungubwe as a site of cultural and natural value in South Africa.

4.2 INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL HERITAGE FRAMEWORKS

As discussed above, the Heritage Convention Act incorporates the terms of the World Heritage Convention into domestic law. The World Heritage Convention was ratified by South Africa on 10 July 1997.¹⁰³ The World Heritage Convention stipulates that each state-party to the convention is under a duty to identify sites or monuments in their jurisdiction which represent cultural or natural heritage of outstanding universal value.¹⁰⁴

¹⁰¹ Government Notice 71 in Government Gazette 31832 (30 January 2009).

¹⁰² Refer back to paragraph 2.1 above.

¹⁰³ whc.unesco.org/en/stateparties/ZA/.

¹⁰⁴ UNESCO has defined outstanding universal value as: 'cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent

When such sites or monuments have been identified by the member state and given world heritage status by UNESCO, it is the member state's responsibility to ensure the protection and maintenance of this heritage and to ensure the transmission of the same to future generations.¹⁰⁵ With reference to this protection and maintenance, the World Heritage Convention obliges member states, in so far as they are able, to put in place general policies and programmes aimed at the protection and maintenance of world heritage identified in their territories.¹⁰⁶ Moreover, the member states are obliged to use any reasonable measures available to them to protect and maintain the world heritage estate.¹⁰⁷ The Heritage Convention Act therefore represents a legal measure that South Africa has chosen in fulfilment of its duties under the World Heritage Convention.

The Heritage Convention Act vests the Minister of Environmental Affairs with the responsibility for the administration of World Heritage Sites and monuments in South Africa.¹⁰⁸ The Minister is responsible for; *inter alia*, the identification of potential World Heritage Sites and monuments in the country.¹⁰⁹

The Heritage Resources Act came into effect four months before the Heritage Convention Act. The Act extends protection to national, provincial and local heritage sites in the country. Instead of enacting the Heritage Convention Act, South Africa could have chosen to align the Heritage Resources Act with its World Heritage Convention Obligations. However, this route was not followed and two parallel systems were created to administer world heritage and national heritage. As will be explored below, these systems are not sufficiently integrated.

The Heritage Resources Act governs all sites and objects considered significant for South African communities present and future.¹¹⁰ Such national heritage may be especially significant for South Africans on a cultural basis. The Act invests SAHRA, which falls under the Department of

protection of this heritage is of the highest importance to the international community as a whole.' Paragraph 49 of the World Heritage Convention Guidelines (2011).

¹⁰⁵ Article 4 of World Heritage Convention. This emphasis on intergenerational equity is a principle of sustainable development that finds its echo in the language of the environmental right in Section 24 of the Constitution.

¹⁰⁶ Article 5 of World Heritage Convention.

¹⁰⁷ Article 5(d) of World Heritage Convention. The World Heritage Convention specifically mentioning any appropriate legal, scientific, technical, administrative and financial measures that may contribute to this world heritage conservation.

¹⁰⁸ Section 1 (xiii) read with Section 6.

¹⁰⁹ Section 6 of Heritage Convention Act.

¹¹⁰ Section 3 of the Heritage Resources Act.

Arts and Culture with the task of identifying and managing the national estate. The Heritage Resources Act provides principles for the protection and maintenance of the national estate, which the Minister of Arts and Culture, and to which all bodies involved in national heritage conservation have to adhere.¹¹¹ These principles contain no direct reference to the principles outlined in the World Heritage Convention, which is suggestive of an absence of an initiative to harmonise the two sets of principles.

The overlap between the Heritage Convention Act and the heritage regulated by the Heritage Resources Act occurs where a site in South Africa has been recognised both as a National Heritage Site and a World Heritage Site. Where this occurs, as in Mapungubwe, both the Minister of Environmental Affairs and the Minister of Arts and Culture have jurisdiction over the management, protection and maintenance of this heritage resource. Since the two systems of protection and maintenance are not aligned, the potential for disagreement as to the effective conservation of the heritage in question is significant and there is no clear dispute resolution mechanism. These tensions are described in more detail below in the section on conflicting legislative mandates.

4.3 INTERPLAY BETWEEN ENVIRONMENTAL, WATER AND MINING LEGISLATION IN RELATION TO ENVIRONMENTAL MANAGEMENT OF WORLD HERITAGE SITES

The interplay between NEMA, the National Water Act and the MPRDA is of the utmost importance to the survival of culturally and ecologically sensitive areas such as Mapungubwe. This is due to the fact that the environmental impacts of mining are largely regulated by this trio which, together, contain the main rules governing the management and exploration of these areas. The effective functioning of environmental governance requires that these Acts are in alignment. The unfortunate reality is that these Acts are not sufficiently aligned, and the resulting fragmentation is a major obstacle to effective regulation of the environmental impacts of mining.

In addition to regulating their functional areas, the Acts confer mandates on the respective departments, with the result that the pattern of fragmentation extends to relations between the departments. This is evidenced by the duplication and confusion around administrative procedures, and licensing requirements in particular.

¹¹¹ Section 5 of the Heritage Resources Act.

The regulation of water in a mining context is an example of this fragmentation. Inland water resources are principally regulated by the National Water Act through the Department of Water Affairs which is invested with the authority to issue water use licenses and the authorisation of controlled activities.¹¹² Conducting a water use/controlled activity without the appropriate license is illegal. The issuing of a mining right by the DMR authorises mining. In practice all mining activities entail a water use licence. The impact on water resources is significant, both for the quantity of water required for mining and because of the negative impact on water quality in mine affected regions. However, the MPRDA does not expressly require a water use license in order to mine. The result in Mapungubwe was that CoAL was issued a mining right a full year before obtaining a water use license. This, in turn, resulted in the risk that, unregulated and unmitigated water uses would take place in the intervening period. This misalignment applied equally to the relationship between the environmental authorisation regulated by the DEA and the mining right regulated by the DMR.

CoAL began mining without a water use license and only received an environmental authorisation on a rectification basis over a year after receiving its mining right, due to the fact that the mining process triggered NEMA listed activities. Many listed activities, like the removal of vegetation are very common by-products of mining and these have all fallen under the DEA – but all are affected by mining.

The fact is that a mining license – and in turn mining operations – often progress without the approval of all the related environmental impacts. This generates conflict between government departments and allows for irreparable environmental harm.¹¹³ Trying to ensure that each relevant license is obtained and managed is an unrelenting task; CALS and its partners have had to engage multiple government departments with vague and confusing mandates, which has been a challenging and resource intensive exercise.

This unnecessary complexity and non-cohesive regulatory framework is a barrier to the realisation of the rights enshrined in the constitution; and impedes, rather than enhances, environmental and heritage legislation.¹¹⁴

¹¹² Part 2 of the National Water Act and Part 5 of the National Water Act.

¹¹³ In the coming year amendments to the MPRDA and NEMA shall bring alignment between the two acts through bringing environmental management in a mining context in the NEMA system, albeit administered by the DMR.

¹¹⁴ The problem of fragmentation has been acknowledged in environmental governance literature. See, for example, this passage by Kotze: '...fragmentation of the environmental

4.4 ALIGNMENT OF SPATIAL PLANNING TOOLS

4.4.1. INTRODUCTION

In 2013, the Coalition discovered that the DEA was simultaneously engaged in two spatial planning processes, namely the revision of the Mapungubwe Cultural Landscape Buffer Zone and the initiation of the Greater Mapungubwe Environmental Management Framework (EMF).¹¹⁵ The processes seemed to be occurring in silos as was evidenced by the use of the initial buffer zone to inform the EMF while a new buffer zone was delineated.¹¹⁶ Additionally the new buffer zone would not be able to draw on the work done in compiling the EMF. In order to understand this disconnect, it is necessary to provide an explanation of spatial planning tools and their importance; and to assess the extent to which the regulatory frameworks for each planning tool are in alignment.

Spatial planning requires that decision makers responsible for development in a particular geographical area have a comprehensive and accurate picture of the distribution of cultural, ecological, hydrological and economic value and of regional interest groups. This can be accomplished through the mapping of the characteristics of the area. These maps can provide guidance on the appropriate location of various forms of development, based on a considered assessment of the balance between these afore-mentioned forms of value. This can be accomplished through the mapping of various zones of greater and lesser environmental sensitivity. The greater the sensitivity of the zone, the less scope there is for invasive development. Spatial planning tools therefore refer to documents which contain information on the social, economic, cultural and environmental characteristics of an area, consolidated into a map and divided into zones, for the purpose of guiding decision making about development

governance effort leads to unsustainable results in terms of effective and adequate service-delivery by government. Integration, or a form of holistic environmental governance, may contribute to direct reform initiatives on a sustainable path. LJ Kotzé 'Improving Unsustainable Environmental Governance in South Africa: The Case for Holistic Governance' (2006) 9 *PEJL* 99 75-118. http://www.nwu.ac.za/webfm_send/11502.

¹¹⁵ Defined as 'a study of the biophysical and socio-cultural systems of a geographically defined area to reveal where specific land uses may best be practiced and to offer performance standards for maintaining appropriate use of such land. Regulation 1 (1) of the EMF Regulations. GN No. R.547 in GG 33306 of 18 June 2010.

¹¹⁶ In fact the respective consultants assigned the task of running the two processes had not even spoken to each other until the Coalition introduced them to each other. This fragmentation and silo mentality might be an inherent risk of using consultants who, not invested with any original or statutory powers, will, tend to prefer to construe their mandates in a narrow manner.

parameters. Spatial planning tools are an increasingly common feature of the South African regulatory landscape as the government seeks creative means of implementing sustainable development amid growing land use conflicts.¹¹⁷

4.4.2. THE IMPORTANCE OF ALIGNMENT BETWEEN FRAMEWORK LEGISLATION FOR PLANNING TOOLS

Government's increasing use of spatial planning tools is not without its risks. The proliferation of planning tools pertaining to the same attributes in the same area can lead to conflict and confusion amongst government regulators and between the regional stakeholders upon whose co-operation their success depends. In the Mapungubwe case, this would occur if the EMF, when it is adopted, contradicts the buffer zone in relation to either boundaries or permitted land uses. Misalignment, including contradictory notions of development, undermines the purpose of planning tools as vehicles for co-ordination, co-operation and clarity. These situations are less likely to arise if the legislative sources of all planning tools are clear and in mutual alignment with regard to mandate, legal effect, content and procedure. We shall therefore take a closer look at the regulatory frameworks for both buffer zones and EMFs and evaluate the extent to which these align.

4.4.3. REGULATORY FRAMEWORKS FOR BUFFER ZONES AND EMFs

While not an express requirement of the World Heritage Convention, UNESCO has adopted, in its recommendations to state parties and its guidelines, the concept of a buffer zone.¹¹⁸ Buffer zones are conceived as a transition zone between the 'core' site and the area outside the core in order to harmonise the protection of the site with the need for economic development in nearby areas. They are an example of the 'good practice' that gives life to the World Heritage Convention.¹¹⁹

The Heritage Convention Act, however, does not contain any reference to this concept. This means that the primary statutory basis for buffer zones in South African law offers no guidance as to how buffer zones should align with other development tools. The practice in South Africa is to develop

¹¹⁷ Rooted in the tensions between the imperatives of rapid economic development and long-term environmental sustainability.

¹¹⁸ World Heritage Convention Guidelines (2011), Clause 103-107.

¹¹⁹ The Mapungubwe buffer zone was developed as part of South Africa's application for the listing of Mapungubwe as a World Heritage Site.

policy documents around the specific buffer zones declared for a particular World Heritage Site. If a particular area does not have a specific policy about the buffer zone, it will remain unprotected.

The Mapungubwe story indicates that the absence of regulatory guidance can impact on the quality and effectiveness of buffer zones. The original buffer zone was deficient in several respects. Consultation about the location, the breadth and the forms of development permitted in the buffer zone was highly limited and the buy-in of the local landowners was not secured. The boundary of the buffer zone was not based on empirical scientific data. Crucially, there was a diversion on its north-eastern boundary (adjacent to Vele Colliery), which allowed mining to take place very close to Mapungubwe. While the reason for this diversion will probably never be known, logic suggests this was a deliberate step by regulators to allow mining in proximity to Mapungubwe. Finally, the vast area to the South of Mapungubwe made the buffer zone difficult to manage, especially when local awareness and support was limited. These inadequacies, in turn, played an important role in the Mapungubwe story: the gap in the buffer zone, coupled with the lack of traction amongst local stakeholders removed a potential obstacle to the approval of Vele Colliery.

These deficiencies have been addressed significantly in the revised buffer zone that was approved by UNESCO at its 38th session, from 15-25 June 2014. The new boundaries protect the North East of Mapungubwe and would preclude the extension of Vele Colliery (or any other mine) into this area. The new buffer zone was developed on the basis of empirical scientific data and closely corresponds to the location of heritage resources around Mapungubwe. The consultation process was far more inclusive and robust. The original boundaries presented an opportunity for mining to occur that should have been prohibited. The importance of clear regulatory guidance on the process of drawing up a buffer zone, its content and its management is clear. Fragmented legislation and governance is the reason for the commencement of CoAL's mining next to one of the world's most important heritage sites. A cohesive regulatory approach would help reduce the likelihood of buffer zones which fail to protect areas of universal value.

While buffer zones are derived from South Africa's international obligations, EMFs have their basis in domestic legislation (NEMA) and are regulated by

the Environmental Management Framework regulations.¹²⁰ EMFs are 'a study of the biophysical and socio-cultural systems of a geographically defined area to reveal where specific land uses may best be practiced and to offer performance standards for maintaining appropriate use of such land.'¹²¹ While the regulations do not define an 'area' for the purposes of EMFs, they typically cover several local municipalities, a single district or a specific area of interest.¹²²

Similar to buffer zones, EMFs are a planning tool that can assist in considering the cumulative impacts of mining and harmonising conflicting imperatives such as mining versus environmental protection. EMFs, if authorised by the appropriate authorities, must be taken into account by authorities considering applications for activities within the area to which the EMF applies.¹²³ There is no mention of buffer zones in the EMF regulations.¹²⁴ This is understandable given that buffer zones are not addressed in the laws governing World Heritage Sites and domestic heritage sites. In conclusion the regulatory frameworks for EMFs and buffer zones are not sufficiently aligned to create a coherent system of spatial planning.

4.5 RELATIONSHIP BETWEEN NATIONAL AND PROVINCIAL HERITAGE RESOURCES AGENCIES

As stated above, South Africa's heritage regulation system divides heritage resources into three grades in descending order namely Grade I (national) heritage resources, Grade II (provincial) heritage resources and Grade III (local) heritage resources.

While Mapungubwe itself has been gazetted as a Grade I heritage site, thereby falling under SAHRAs jurisdiction as the national heritage authority, there is uncertainty over the agency responsible for the buffer zone, due to the lack of a formal designation. SAHRA and the Limpopo Heritage Resource Agency both regard the buffer zone as being a grade II heritage resource. Given that the Limpopo Heritage Resources Agency has very limited resources and capacity at its disposal, the heritage value of this area has largely been ignored by regulators.

¹²⁰ GN No. R.547 in GG 33306 of 18 June 2010. Promulgated in terms of Sections 24(5) and 44 of NEMA.

¹²¹ Regulation 1 (1) of the EMF Regulations, note 116 above.

¹²² The latter, in our opinion, is the appropriate approach.

¹²³ There is provision for EMFs to be initiated by other parties but these EMFs, have a lesser status: They 'may' be taken into account. Regulation 5 (3)

¹²⁴ Nor protected areas for that matter.

Due to the lack of provision for buffer zones in legislation, there is no regulatory guidance on which heritage resources agency should be accorded authority over the buffer zones of World Heritage Sites. Providing for the same authority to manage both would promote integrated and thus more effective protection of heritage. Further, it should be noted that, with exceptions, the resource and capacity challenges of SAHRA are heightened at the level of PHRAs and that of local government, due to financial and skills constraints.¹²⁵

Given the limited capacity of Limpopo Heritage Resources Agency to manage the buffer zone, the question arises as to the mechanisms available for ensuring that heritage sites are managed by the body with the requisite capacity. The Heritage Resources Act addresses this need through the standard of competency. While SAHRA is empowered to do all that is necessary to manage the national estate, with the presumption that SAHRA has capacity, the Heritage Resources Act stipulates that the provincial heritage resource authorities and local authorities may only perform a function in terms of the Act if they have the competency in respect of the particular function.¹²⁶ The competency of PHRAs is determined by SAHRA while the competency of local authorities is determined by the PHRA under which they fall. The criteria for establishing the competency of the provincial or local authority are contained in regulations promulgated in terms of the Heritage Resources Act (Minister's Regulations).¹²⁷

The Heritage Resources Act, however, provides insufficient clarity on what should happen in the event that a PHRA has either ceased functioning or no longer had the requisite capacity to manage the particular heritage resource in question, whether a building, a gravesite or rock art. Each type of heritage resource requires particular expertise for its management and the absence of the requisite expertise will place the resource in danger. The act does empower SAHRA periodically to assess the competence of PHRAs and such an assessment is mandatory every two years.¹²⁸ This constitutes a mechanism through which SAHRA can re-coup responsibility where it is in a better position to manage the resources. However, during the intervening two year period significant and irreparable damage can occur. There are no mechanisms for compelling SAHRA to act during this

¹²⁵ The authority for Grade III heritage resources.

¹²⁶ Section 8 (6) (a) of the Heritage Resources Act.

¹²⁷ Regulations 4 and 5 of Minister's regulations. Gn. No. R. 18 2000 in GG No. 21051.

¹²⁸ Section 8 (6) (d) of the Heritage Resources Act.

period. Even so, SAHRA itself may not have capacity to do the assessment.¹²⁹ Further, there is a lack of clarity on how disputes between SAHRA and PHRAs regarding competency are to be resolved. The Act provides for arbitration but without any guidance as to what this procedure entails.

4.6 ABILITY OF LEGISLATION TO PROMOTE AND ENSURE CO-OPERATIVE GOVERNANCE

Given the multiple authorities discussed above with often conflicting legislative mandates, the legislative framework for promoting their co-operation assumes particular importance. As discussed above, the main constitutional and legislative vehicle for preventing and resolving conflicts is co-operative governance. The Act giving effect to the constitutional doctrine of co-operative governance, the Intergovernmental Relations Framework Act (IGRFA),¹³⁰ creates several mechanisms for the co-ordination of spheres of government and the resolution of disputes including:

- The President's Co-ordinating council, which is a consultative forum where the President can, for example, 'consult provincial and local governments on the implementation of national policy and legislation at provincial and local level';¹³¹
- Various permutations of intergovernmental forums ranging from national forums established by a cabinet member to facilitate intergovernmental relations in their area of responsibility¹³² to district forums designed to facilitate relations between the district municipality and local municipalities in the district;¹³³
- Implementation protocols can be entered into where, for example, implementing a policy or exercising a statutory power, requires the participation of 'organs of states in different governments.' These protocols must identify the challenges of implementation, specify roles and responsibilities of each organ of state and provide indicators to measure the implementation of the protocol.¹³⁴

¹²⁹ The capacity of SAHRA shall be addressed below.

¹³⁰ Act 13 of 2005.

¹³¹ Sections 6 - 9 of the IGRFA.

¹³² Sections 9 - 15 of IGRFA.

¹³³ Sections 24-27 of IGRFA.

¹³⁴ Section 35 of IGRFA.

- A procedure for resolving intergovernmental disputes. Once a formal dispute has been declared, parties must meet to determine the nature of the dispute, identify the mechanisms for resolving the dispute and designate a facilitator.¹³⁵

As has been acknowledged in the literature, the IGRFA, while providing important mechanisms for vertical co-ordination, has its limitations.¹³⁶ First, neither the Constitution nor the IGRFA address horizontal intra-governmental relations (i.e. between line departments and agencies at the same level of hierarchy), which, as we have shown, constitute a key form of misalignment identified in this report.¹³⁷ Second, the IGRFA excludes disputes between national and provincial legislation.

In relation to the first problem, however, it has been suggested that the mechanisms discussed above, including implementation protocols can be used as a guide for promoting co-ordination and resolving disputes at an intra-governmental level.¹³⁸

NEMPAA provides that the management authority responsible for a protected area under NEMPAA to enter in a co-management agreement with a range of entities including organs of state, the local community, individuals and 'other parties'.¹³⁹ The language thus can potentially embrace line departments and agencies. Agreements can serve a wide variety of purposes including enabling access to the area¹⁴⁰ and facilitating the development of economic opportunities in and adjacent to the protected area.¹⁴¹ This mechanism, however, seems to be focused more on management than high-level policy and regulation and is not necessarily capable of addressing conflicting standards in regulatory instruments.

In summary the main limitation of available mechanisms is that they are not designed with a view to facilitating inter-departmental co-operative governance. Consequently, issues such as the competing mandates of

¹³⁵ Section 42 of IGRFA.

¹³⁶ S Woolman & T Roux 'Co-operative Government & Intergovernmental relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2002) 14.

¹³⁷ *Ibid* 45-46.

¹³⁸ *Ibid* at 51-52.

¹³⁹ Section 42 of NEMPAA.

¹⁴⁰ Section 42 (2) (d) of NEMPAA.

¹⁴¹ Section 42 (2) (f) of NEMPAA.

respective departments or contradictory standards due to misalignment of planning instruments such as buffer zones or EMFs are not addressed.

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¹⁴² S Woolman & T Roux 'Co-operative Government & Intergovernmental relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2002) 14.

¹⁴³ *Ibid* 45-46.

¹⁴⁴ *Ibid* at 51-52.

¹⁴⁵ Section 42 of NEMPAA.

¹⁴⁶ Section 42 (2) (d) of NEMPAA.

¹⁴⁷ Section 42 (2) (f) of NEMPAA.

5. Identifying Challenges in Co-operative Governance

5.1 CONFLICTING MANDATES OF DEPARTMENTS

Thus far we have shown that, as a result of non-alignment of regulatory efforts, there are numerous potential points of conflict between the various entities responsible for environmental, heritage and mineral regulations in South Africa. In particular we showed how the respective frameworks for Mapungubwe as a World Heritage Site, National Heritage Site and National Park do not cohere. These legislative conflicts can translate into confusion of responsibilities between the departments they regulate and, at times, even between entities subject to the same legislation. The first example is the lack of clarity regarding how SANParks (responsible for the World Heritage Site) and SAHRA (responsible for the National Heritage Site) are supposed to co-ordinate their management of Mapungubwe. Another example is the confusion between SAHRA and LIHRA (the Limpopo PHRA) over who is responsible for management of the Mapungubwe buffer zone.

Interdepartmental conflicts are, however, not only due to poor legislative drafting. They are also due to inherent differences in mandate between departments. For example, the DMR is primarily tasked with the promotion of mining while the DEA is primarily tasked with preserving the environment. Differences of focus also translate into different networks of practice, institutional cultures and views of development. The result can, as was observed during the Mapungubwe mining right application process, result in different positions being taken by respective departments in relation to the same development project.

In the context of Mapungubwe, the consequences of this complex array of overlapping responsibilities and conflicting mandates could be grave indeed: The destruction of our cherished heritage under the watch of the government entities tasked with its protection.

5.2 INTRA-GOVERNMENTAL COMMUNICATION

CALS and its partners observed a number of discrepancies and inconsistencies in the approaches of the various government departments and agencies to Mapungubwe and the Vele Colliery. The parallel buffer zone revision and EMF process provided evidence of systemic communication shortcomings within as well as between government entities. The DEA led both processes but each had been initiated by a

different branch of the department. It is foreseeable that given challenges of capacity (discussed below), regular and structured communication may sometimes fall down the list of priorities. The lack of constant and effective exchange of information is the breeding ground for non-compliance with environmental legislation.

5.3 GOVERNMENTAL CAPACITY

A third set of factors inhibiting effective co-operative governance in relation to Mapungubwe are challenges of resources and capacity that are, to various degrees, experienced by the responsible government entities. These challenges include inadequate staff levels, high staff turnover, and staff training which is sometimes inadequate.

Staff numbers are often extremely low in the government departments responsible for regulating Mapungubwe. The following trends in staff levels have been identified in the National Budget Estimates for 2014:

- SAHRA's personnel level is placed at 79 for the 2013 / 14 budget term. This appears inadequate to meet optimally a multitude of obligations which include identifying places and objects which are of cultural significance nationally, managing the national and provincial estate and raising the public profile of the national estate. While, since its inception the staff numbers have stayed within a fairly narrow band, turnover rates have been high. In 2011/2012 this was especially high (at 34%) due to restructuring and the closure of provincial offices of SAHRA.¹⁴⁸
- The programme in the DEA dealing with the processing of environmental impact assessments has a staff level of 60 for the 2013 / 14 budget term. This number looks generous when compared with the staff level of 20 allocated to the programme monitoring compliance with environmental legislation. These numbers might contract as mining environmental management responsibilities are transferred to the DMR;
- The staff levels for the Department of Water Affairs programme dealing with water resource regulation compliance were listed at 120 for the 2013 / 14 budget term and the programme dealing with

¹⁴⁸ South African Heritage Resources Agency Annual Report 2011-2012 at 33.

the issuing of water licences only had a staff level of 23 for the same period. These numbers appear insufficient to regulate the vast number of water users in South Africa;

- The DMR's Mineral Regulation and Administration programme, which deals with the processing of applications for mineral rights and permits, has a staff level of 380 and as of November 2013, 66 posts were vacant. Therefore, there are just over 300 staff members catering for the processing of prospecting and mining permits nationally. Nevertheless this is nearly 10 times the number of officials tasked with processing water use licenses, which indicates that water resource management is considered of a lesser priority. As is appropriate given the expanded mining environmental management role that the MPRDA amendments assign to the DMR, the DMR's mining environmental management budget is set to increase at an annual average of 11% up until 2016/2017.¹⁴⁹

Apart from staff levels, there are the related issues of inadequate staff training and high staff turnover level. The following training inadequacies can be seen from the National Budget Estimates for 2014:

- For the Department of Water Affairs, a significant part of the budget had to be spent on outside consultants due to a 'lack of scientific, technical and engineering skills' in order to fulfil job requirements.¹⁵⁰ However, it was stated that this cost should decrease in the medium term because specialised knowledge would be transferred to the personnel in the Department. However, a high staff turnover rate would negate this knowledge 'spill-over'.
- For the DEA, a lack of critical skills was acknowledged for the programme dealing with the processing of environmental impact assessments which similarly was stated to necessitate the use of external consultants.¹⁵¹ It was again stated that knowledge spill-over would diminish expenditure on consultants, an assumption that can be questioned on the same basis as for the Department of Water Affairs.

¹⁴⁹ Report of the Portfolio Committee on Mineral Resources on the Strategic Plan and Budget Vote 32 of the Department of Mineral Resources for the 2014/2015 Financial Year, dated 11 July 2014.

¹⁵⁰ National Treasury Estimates of National Expenditure for 2014: Department of Water Affairs at 22.

¹⁵¹ Ibid at 14.

6. Recommendations

6.1. INTRODUCTION

The complexities in environmental governance in South Africa compromise the government's ability effectively to protect the social needs of the environmental right. The Mapungubwe case study provides a portal of analysis, not only in order to understand the problems but also to identify possible solutions.

In providing recommendations, we acknowledge that our perspective is borne out of engagement with the relevant departments and agencies rather than from a perspective of working within the structures themselves. It is CALS' view that addressing systemic problems in environmental governance requires an inclusive and rigorous dialogue that embraces government, civil society and affected communities.¹⁵² Every role player possesses a unique perspective derived from their experiences. CALS' contribution to the dialogue derives from our perspective as legal specialists who have, in the course of the Mapungubwe project, engaged in issues of governance. Governance has been of consistent importance in each phase of the Mapungubwe project, namely negotiations and compliance monitoring. We shall therefore present these recommendations in the spirit of constructive dialogue and not as rigid prescriptions.

6.2. INVESTIGATION INTO THE ALIGNMENT OF HERITAGE, ECOLOGICAL AND MINING LEGISLATION

It has been shown that the existence of a completely discrete regime for domestic and world heritage creates jurisdictional confusion, particularly between SANParks and SAHRA regarding the interplay between the management of Mapungubwe as a World Heritage Site and as a national (Grade I) heritage site. As a consequence, another layer is added to the already complex governance matrix. There is a risk of duplication which would stretch already highly limited capacity and resources. On the other hand there is also a risk of no regulation and management because each player presumes the other is serving as the regulator. Given that nearly every cultural world heritage site in South Africa is also a Grade I site and thus under SAHRA's jurisdiction, it would make sense to provide for the

¹⁵² This statement applies equally to other areas of governance.

cultural attributes of World Heritage Sites to be governed by the same entity.

6.3. INVESTIGATION INTO THE LEGISLATIVE FRAMEWORK FOR INTER-GOVERNMENTAL AND INTER-DEPARTMENTAL CO-OPERATIVE GOVERNANCE

One cannot expect legislative harmonisation to eliminate these conflicts entirely as disagreements over interpretation of statutory provisions and inter-departmental politics are a feature of any government. Consequently, specific mechanisms designed to prevent and manage conflicts and confusion of responsibilities is required. As noted above, however, the current framework for co-operative governance is largely silent on relations between departments representing a gap in the law on co-operative governance. While, as commentators have acknowledged, there is nothing stopping departments from using the mechanisms provided in IGRFA in the inter-departmental context, the absence of clearly applicable legislative parameters is likely to lead to inconsistency in practice.¹⁵³ A set of legislative provisions regulating conflicts between government departments might be of assistance. The challenges of co-operative governance highlighted in this report, and especially those of an inter-departmental nature, suggest the need for a systematic and inclusive assessment of the legislative framework of co-operative governance and its implementation.

6.4 HARMONISE THE REGULATORY UNDERPINNINGS OF SPATIAL PLANNING FRAMEWORKS INCLUDING EMFs AND BUFFER ZONES

Detailed and comprehensive spatial mapping has significant potential to guide decision-making about invasive developments, especially in areas of high ecological or heritage vulnerability. Given their inherent similarities EMFs and World Heritage Site buffer zones should never conflict and therefore should not be developed in silos. It is imperative that the EMF regulations and the Heritage Convention Act make clear the relation between EMFs and buffer zones and that the former specify the substantive and procedural implications of the existence of a buffer zone in the same geographical area.¹⁵⁴ It might be appropriate to have an express provision

¹⁵³ See, for example, Woolman & Roux (note 135 above) 51-52.

¹⁵⁴ By which is meant substantially the same geographical area. Of course, the precise boundaries of the buffer zone might differ from the prospective EMF. This, as stated under the heading 'alignment of spatial planning tools' is presently the situation at Mapungubwe for the reason that the EMF was initiated in terms of buffer zone boundaries that were in the process of being – and have since been – revised.

stating that EMFs in respect of a particular area must conform in content and boundaries to any buffer zone pursuant to South Africa's obligations under the World Heritage Convention.

6.5 ANY ENVIRONMENTAL OFFSETS SHOULD BE FINALISED PRIOR TO THE ISSUING OF ANY LICENSE OR AUTHORISATION

A condition of the Section 24G Rectification was the conclusion of a biodiversity offset agreement between CoAL, DEA and SANParks which would, *inter alia*, maintain the integrity of Mapungubwe through 'comprehensive biodiversity offsets programmes, thereby optimising benefits to local communities.' Offsets are designed to restore the equivalent ecological value that shall be lost due to the particular development.

The Memorandum of Understanding between the parties provides for a range of offset programmes including natural heritage conservation; cultural heritage conservation; tourism development; and water resource management. These components are to be translated into more comprehensive programmes and implementation plans. Further, to facilitate wider stakeholder engagement, the Parties agreed to the establishment of an environmental management committee or steering committee, as well as the relevant sub-committees. Parallel to this initiative, the South African Botanical Institute (SANBI) has been mandated to undertake a process of developing national guidelines for biodiversity offsets which, once completed, will influence the activities in the area as well.

Biodiversity offsets agreements can constitute a mechanism for co-ordination of planning and implementation by agencies (for example the DEA, SANParks and the DMR) in relation to biodiversity planning for a region. If successful they can serve an example of co-operative governance used creatively to harmonise the imperatives of environmental protection, economic development and social justice.

However, the failure to finalise the details of the offset agreement three years following the granting of the Section 24G Rectification illustrates the importance of finalising the nature of the offset and roles and responsibilities prior to the issuing of licenses. A condition to negotiate offsets leaves the final outcome subject to a range of variables, which include political will and good faith. These uncertainties render it a weaker condition than adherence to an already-concluded offset agreement.

6.6 UTILISE MULTI-STAKEHOLDER OVERSIGHT BODIES TO ADDRESS CO-OPERATIVE GOVERNANCE CHALLENGES

South Africa has increasingly been experimenting with the use of multi-stakeholder oversight bodies in environmental management. The DEA is increasingly inserting the establishment of environmental management committees (EMCs) as conditions of environmental authorisations.¹⁵⁵ These committees are designed to monitor compliance with license conditions but also to encourage improved environmental management practices and the use of monitoring data to improve the quality of licenses. The Coalition members (including CALS) have been fortunate enough to participate in the Vele EMC and some of our experiences are captured in the report entitled 'Changing Corporate Behaviour'.¹⁵⁶ One of the findings to emerge is the valuable role EMCs can play in promoting co-operative governance. By bringing together the multiplicity of role players integral to the environmental management of a development, they provide a tangible expression of the principle of environmental management and are a vehicle for co-operative governance.

EMCs provide a forum for different government entities to share information and co-ordinate their efforts to ensure the project in question is environmentally sustainable. In this manner they play a valuable role in overcoming departmental silos. They can also help anticipate and resolve conflicts between government entities on the body. Further, civil society and communities can contribute their particular knowledge, expertise and perspectives to ensure a more holistic understanding of the issues. A more detailed set of findings and recommendations on EMCs shall be contained as a chapter in the Mapungubwe book that shall be the culmination of this report series.

6.7 ENTER INTO AN IMPLEMENTATION PROTOCOL FOR MAPUNGBWE

Implementation protocols, a mechanism identified above, are one of the vehicles available for realising co-operative governance. The protocols are designed to clarify objectives, roles and responsibilities and create accountability between governmental departments and agencies bound to the agreement. If protocols are soundly designed and are implemented

¹⁵⁵ DEAT (2005) *Environmental Monitoring Committees (EMCs), Integrated Environmental Management Information Series 21*, Department of Environmental Affairs and Tourism (DEAT), Pretoria at 5.

¹⁵⁶ This report can be accessed at http://www.wits.ac.za/files/bilsp_112254001405415643.pdf.

they can enhance the alignment and efficacy of environmental governance. We would therefore strongly encourage the DMR, DEA, Department of Water Affairs and the Department of Arts and Culture to enter into an implementation protocol for the benefit of Mapungubwe.

7. Conclusion

There is wide recognition in South African environmental law literature that as the 20 year anniversary of the environmental right approaches, and despite a considerable body of law guaranteeing the right to an environment not harmful to health and well-being and creating an institutional architecture based on sustainable development, the performance of the system still falls far short of its objectives. One should remain mindful of the underlying cause of this gap between aspiration and reality, namely the nature of economic development in South Africa, which places a significant burden on institutions designed to harmonise sustainability and economic development. While the relationship between these imperatives is not an inherently conflictual one, the extractives-driven pattern of development that continues to characterise the South African economy is one that leads to conflict. Given the scale of the challenge, it is critical that the work of all governance institutions responsible for extractives-based economic growth or the environmental management of affected areas are in alignment.

CALS' involvement in Mapungubwe has afforded it an excellent case study on governance, and especially co-operative governance, challenges in relation to the implementation of the environmental right in the face of extractives-driven economic growth. The combined attributes of Mapungubwe, namely its heritage significance, natural beauty, its situation in a water stressed area, and the presence of mining, mean that co-operative governance assumes particular importance. A co-ordinated governance response is necessary given the inherent conflict in land use between heritage and eco-tourism, agriculture and the extractives sector.

The overarching impression we have gained from our engagement with the multiplicity of governance role players is that the government response in relation to Mapungubwe and the challenge of Vele Colliery has been characterised of by misalignment, inconsistency and conflict. First, the stances of the main departments charged with the environmental management of mining, namely the DMR, DEA and Department of Water Affairs, seemed to be in conflict at the crucial stage of CoAL's mining right

application though, greater alignment of approaches was later achieved. Given the power of the DMR to issue a mining right irrespective of the applicant's obtaining of environmental authorisations, this meant that mining was allowed to go ahead. Second, it was discovered that two spatial planning processes were occurring in silos despite being initiated by the same government department (DEA).

In explaining these phenomena, this report sought to, first, investigate the extent of alignment between the legislation governing the management of Mapungubwe as a heritage site, as an ecologically sensitive environment, and as a mineral rich area. Unfortunately, we found that in several important the applicable regulatory instruments did not align. This misalignment heightened the risks of inter-departmental conflict and confusion of responsibilities. Both duplication, and its antithesis, regulatory gaps were therefore likely. In particular, the following instances of legislative misalignment were observed: First, misalignment between the licensing procedure for mining, listed activities under NEMA and water uses; second misalignment between the protective regimes for areas of ecological and heritage significance; third, misalignment between international and domestic heritage regulation frameworks; and fourth, misalignment between the frameworks for two spatial planning tools.

In addition, we have found that the present system for co-operative governance is of limited assistance for the challenges observed at Mapungubwe which are, primarily, between departments rather than national, provincial and local spheres of governance.¹⁵⁷

Further, we have suggested that the relatively limited capacity of the departments to fill their extensive mandates, impacts on their efficacy as guarantors of sustainable development.

In light of the shortcomings identified in this report and in a spirit of constructive collaboration we have suggested a menu of possible interventions which the legislature and the relevant departments could, with the support of civil society, explore. We suggest that the starting point might be a systematic audit of the alignment of legislation and departmental mandates in relation the protection of heritage and ecological resources. This could lead to legislative reform aimed at achieving this alignment. In this regard we have suggested the need for an

¹⁵⁷ Not exclusively, however, as the difficulties relating to the three tiers of heritage authorities under the Heritage Resources Act, demonstrate.

integrated system for the identification, protection and management of international and domestic heritage resources and for the alignment of all regulations that give rise to spatial planning processes.

While, our analysis suggests the need for reforms to improve co-operative governance we also identified two existing mechanisms that have the potential to help resolve difficulties of co-operative governance. First, we propose that the DEA, Department of Arts and Culture, Department of Water Affairs, the DMR and other relevant role players enter into an implementation protocol for the protection of Mapungubwe. While designed in the vertical co-operative governance setting, there is no reason that they cannot be entered into by different departments and agencies as well. The second is the use of multi-stakeholder compliance monitoring bodies, like Environmental Management Committee (EMCs) as arenas in which governance role players can discuss common challenges and solutions.

The Mapungubwe story is a case study showing how the effectiveness of safeguards protecting precious ecosystems and heritage resources from the impacts of the extractive industry is impaired by misalignment of legislation and between role players responsible for regulating the area. Where safeguards fail, everyone's environment and heritage is in danger. However, amidst the thicket of regulatory challenges and conflicts, the pathway to co-operation and clarity can be glimpsed. Our task, as government, as civil society, as South Africans and as inhabitants of Earth, is to pursue this strenuous, but ultimately rewarding, path.

