

Submission

to the

South African Human Rights Commission

On

The Policy Framework around Artisanal Mining, the Impact of Artisanal Mining on the Human Rights of Surrounding Communities and the Scope and Tactics Employed in Operation Vala Umgodi

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Robert Krause

Acting Head: Environmental Justice
Researcher

Centre for Applied Legal Studies

Email: Robert.Krause@wits.ac.za

Mazi Choshane

Attorney: Environmental Justice

Centre for Applied Legal Studies

Email: Mazi.Choshane@wits.ac.za

Aqeela Bean

Candidate Attorney: Environmental Justice

Centre for Applied Legal Studies

Email: aqeela.bean@wits.ac.za

A) INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies (“CALS”) welcomes the opportunity provided by the human rights commission to make submissions in the inquiry The Policy Framework around Artisanal Mining, the Impact of Artisanal Mining on the Human Rights of Surrounding Communities and the Scope and Tactics Employed in Operation Vala Umgodi.
2. CALS is a human rights organisation and registered law clinic with the Legal Practice Council of the Northern Provinces, based at the School of Law at the University of the Witwatersrand. For over 40 years CALS has been committed to the protection of human rights through partnering with individuals and communities in the pursuit of systemic change. We use a combination of research, advocacy, litigation and teaching to advance social justice.
3. CALS’ vision is a country and continent 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. In fulfilling this mandate, we are guided by the four pillars namely:
 - 3.1. Expanding the agency of marginalised actors;
 - 3.2. Developing a critical partnership with the state;
 - 3.3. Ensuring horizontal application of the Constitution; and
 - 3.4. Taking a gendered and intersectional approach to rights violations
4. CALS operates across a range of human rights issues, namely home, land and rural democracy, business and human rights, environmental justice, gender justice, as well as civil and political justice. It adopts a gendered and intersectional approach to interpreting, implementing and – where necessary – promoting the development of the law.

5. The environmental justice programme aims to counter this injustice and make environmental rights a reality for all who live in South Africa. We aim to change the behaviour of both the corporate actors, who make use of natural resources, and the state, which regulates this process. Much of our work has related to the mining sector both because of its central role in the South African economy and its perpetuation of systemic inequality and violations of communities environmental and other rights.

Background and focus of our comments

6. At the heart of the Stilfontein Crisis and Massacre and the criminalisation of artisanal mining is a political and policy choice: to prioritise attracting predominantly global north and domestic investors and corporations over transforming the extractivist mining sector and broader economy with one capable of yielding broad-based societal benefits.
7. In practice this policy choice means treating the lives, human dignity and other rights of marginalised Black miners and their families as expendable. The submission to this inquiry by community network MACUA chillingly details the chain of events that led to the preventable deaths of 93 miners.¹ The brothers, sons and breadwinners would probably still be alive if not for a conscious decision by state officials to prevent relief and rescue efforts. The state employed xenophobic language and narratives (often unchallenged by mainstream media) to justify its response, which is especially dangerous given the pervasiveness of xenophobic violence and sentiments in South Africa.² The criminalisation of artisanal mining and the corresponding failure of the state to regulate the activities of marginalised Africans seeking an honest living contributes to incidents of miners trapped underground as we have seen in Stilfontein and other areas by denying access to equipment, training and other support to make underground mining.
8. Stilfontein and broader challenges around artisanal and small-scale mining are also products of the irresponsible disengagement by mining companies rooted in an extractivism and the maximisation of short-term profits. Patterns include overuse of care and maintenance, failures of post-closure rehabilitation due to a range of legal loopholes, and the economic vacuum left by the absence of planning for post-mining economic development.

¹ MACUA 'Submission to the National Inquiry into Artisanal Mining Policy and Human Rights, 2025' at 15-22.

² Ibid at 90-105

9. It is likely that the circumstances giving rise to these challenges will intensify in the medium term, as the transition to renewable energy will impact the demand for coal and likely lead to increased closures of coal mines.
10. This submission is, in particular, focused on the following points. First, to argue that the Stilfontein crisis reveals a range of societal crises linked to the persistence of the systemic inequality and extractive nature of mining. In this regard we will also show that these crises are likely to escalate especially in areas dominated by coal absent plans to ensure the energy transition is a just one. Second (following from the first), this requires that the DMPR, parliament and other role players implement the law and policy reform directives, proposals and demands that have been made by SAHRC³, the Parliamentary High Level Panel headed by former President Kgalema Motlanthe⁴, civil society organisations and communities amongst others. In this regard we will highlight the MPRDA reform proposals that have been submitted to the DMPR by the MPRDA Coalition.⁵ While decriminalising and regulating ASM (as this submission subsequently) is very likely to result in considerable improvement, addressing these underlying issues would also likely reduce its scale and make it even more amenable to regulation. Third, we wish to highlight the link, shown across a variety of sectors between decriminalising (and regulating where appropriate) and reduction of the worst harms and how criminalising itself strengthens the most violent organised crime elements of sectors that are not possible to stop due to societal drivers. We therefore argue that government should pursue decriminalisation and regulation of ASM in the interests of harm reduction as well as justice.

B) THE LINKS BETWEEN FAIR REGULATION OF ASM AND A TRANSFORMATIVE VISION OF A JUST ENERGY TRANSITION

11. South Africa faces a dual challenge: the urgent need to transition away from a carbon-intensive economy to mitigate climate change, and the socio-economic realities of widespread poverty and inequality, which drive many to engage in ASM. Although ASM holds significant potential for economic inclusion, especially in

³ South African Human Rights Commission *Hearing Report on the Underlying Socio-Economic Challenges of Mining-Affected Communities* (2018).

⁴ High Level Panel, Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017, parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf, p. 504 (High Level Panel Report).

⁵ The summary of the submissions handed over to the DMPR by the MPRDA Coalition and MACUA on 14 November 2024 is attached as Annexure 1.

historically marginalised communities, the state's current policy approach largely frames ASM as a criminal activity. This punitive posture reproduces colonial hierarchies and forecloses opportunities for grassroots participation in the new energy economy.

12. The global shift towards renewable energy technologies and away from fossil fuels necessitates a parallel restructuring of the mining sector. In South Africa, the energy transition is already manifesting in the planned and actual closure of coal-fired power stations and associated mines developments concentrated in provinces like Mpumalanga and Limpopo.⁶ These closures are likely to trigger job losses and deepen economic precarity in mining-dependent communities, many of which are rural and impoverished.
13. The global shift to renewable energy technologies is driving increased demand for minerals such as copper, lithium, cobalt, and manganese, which are essential for the production of batteries, solar panels, and wind turbines.⁷ South Africa possesses significant reserves of some of these minerals.⁸ ASM could potentially play a role in supplying these critical minerals, contributing to both the energy transition and local economic development, if it is properly regulated and supported.
14. While the concept of a "just transition" has gained traction among policymakers and activists alike, its implementation often remains narrowly technocratic, limited to reskilling workers or managing retrenchments. A transformative just transition demands much more. A truly "just" energy transition in South Africa must go beyond simply replacing fossil fuels with renewable energy sources. It calls for the dismantling of enduring colonial and apartheid structures that continue to marginalise black working-class communities. This includes interrogating land ownership, redistributing economic power, and democratising environmental governance.
15. South Africa's current socio-economic landscape the product of a long history of colonial dispossession, racial segregation, and economic exploitation. The transition to a low-carbon economy must be explicitly linked to addressing these

⁶ Centre for Environmental Rights 'ESKOM – Decommissioning/End of Life Dates & MES Applications Per Coal-Fired Power Station' https://cer.org.za/wp-content/uploads/2022/02/Annexure-A1_Summary-Table.pdf (Accessed on 17 April 2025).

⁷ J Bofo et al 'The race for critical minerals in Africa: A blessing or another resource curse?' (2023) 56 Resources Policy 103433 at 1.

⁸ Ibid at 3.

historical injustices. This means prioritising the needs of those who have been most harmed, including black communities, women, and workers. In this context, ASM becomes a site of both historical continuity and potential transformation. The persistence of informal mining among the poor, particularly black men and women excluded from the formal sector is a direct consequence of historical dispossession. Yet, if regulated fairly, ASM could also serve as a vehicle for economic self-determination and localised development within the transition framework.

16. Rather than viewing ASM as an opportunity for local development, the state has opted for securitisation and criminalisation through operations like Vala Umgodi. which involve the use of force, violence, and mass arrests, and are a stark reminder of the state's willingness to use its power to suppress the poor and protect the interests of the wealthy and powerful. These operations often target black miners, further entrenching racial disparities in the criminal justice system. The heavy-handed tactics employed often result in human rights abuses, including unlawful killings, assault, and arbitrary detention.⁹
17. This approach is deeply troubling. It positions poor, largely black artisanal miners as threats to national security while protecting corporate mining interests that have historically externalised environmental and social costs onto the same communities. In doing so, it reinforces the colonial logic that denies black people autonomy over natural resources and economic activity. It also places the state in opposition to the very communities that a just transition must serve.
18. The recognition and formalisation of ASM is both a legal and moral imperative. The first step towards a just approach to ASM is decriminalisation. This would involve repealing laws and policies that criminalise ASM and recognising the right of people to engage in this activity to earn a living. The state should then focus on developing regulatory frameworks that promote safe and environmentally sustainable mining practices.
19. Formalising ^{ASM} would involve providing miners with legal recognition, access to land, resources, and training, and support in forming cooperatives or small businesses. This would help to improve their working conditions, increase their productivity, and ensure that they receive a fair price for their minerals. ASM can

⁹ South African News Agency 'Operation Vala Umgodi Nets 369 Suspects'

<https://www.sanews.gov.za/south-africa/operation-vala-umgodi-nets-369-suspects> (Accessed on 21 April 2025).

play a role in supplying the minerals needed for the green economy, such as those used in renewable energy technologies. By supporting ASM, the state can help to ensure that local communities benefit from an energy transition that does not come at the expense of the poor and marginalised.

20. A transformative just transition cannot be achieved through elite policy-making or securitised interventions. It must be rooted in the lived realities of the communities most affected by both extractivism and decarbonisation. Fairly regulating ASM is not merely a matter of resource management; it is a test of whether South Africa can transcend its colonial past and build a democratic, inclusive, and sustainable energy future. Recognising ASM as a legitimate livelihood activity and ensuring that artisanal miners receive the support and resources they need, would help South Africa advance toward an energy future that is both environmentally sustainable and socially just. Enabling artisanal miners to participate legally and meaningfully in the transition would transform ASM from a criminalised survival strategy into a pillar of community-led development.

C) THE MPRDA HAS FAILED TO TRANSFORM THE COLONIAL AND EXTRACTIVE NATURE OF MINING AND FUNDAMENTAL REFORMS ARE REQUIRED

21. As MACUA argue in their submission, the Mineral and Petroleum Development Act, 2002 ("MPRDA") has failed in most key respects to realise its stated objective of transforming the mining sector¹⁰ from the colonial and apartheid system that yielded profits and benefits for a white minority and corporations on the basis of land dispossession and hyper-exploitation of labour of African majority. Despite some partial advances for labour, the lives of mining-affected communities are still in the main blighted by land dispossession, environmental degradation and poverty.

¹⁰ See Preamble of the Act and Section 2 ('Objects'). Note in particular subsections 2 (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa'; (d) 'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'; and (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating'

22. CALS has for over 10 years served as a co-convener of the MPRDA Coalition (“the Coalition”), a coalition comprising of community networks and organisations such as MACUA and MECJON-SA, National Association of Artisanal Miners, public interest law organisations and other civil society partners around an agenda of reforming mining law, policy and decision-making to overcome the systemic exclusion of mining-affected communities. The position of the Coalition has consistently been that this is not solely the result of challenges in implementing the Act. Rather, more fundamentally, communities were not included as core stakeholders when it was formulated and, as a result, there are a significant number of environmental and socio-economic just issues either not addressed or inadequately addressed in MPRDA and the broader law and policy frameworks that impact mining.
23. On 14 November 2024 at a MACUA-led march to the DMPR, the MPRDA Coalition submitted a comprehensive set of law reform proposals, in response to the department’s plans to re-open the review of the MPRDA.¹¹ The themes were grouped as follows: artisanal and small-scale mining free prior and informed consent and consultation; compliance monitoring and enforcement; women and gender inequality; resettlement and relocation; social and labour plans; mining charter; mine closure, rehabilitation and care and maintenance.

Resettlement and relocation

24. Over 30 years following the formal end of apartheid, many community members still often have to leave their ancestral land to make way for mining often by multinational corporations.¹² The consultation process often occurs in a manner that provokes divisions between sections of the community in favour and against the resettlement including threats and intimidation against community members in opposition (instances of such behaviour by mining companies and police have also been reported).¹³ There are also inconsistencies in the practices of different mining companies with regards to comprehensiveness of compensation (for example compensating only for the value of the land surface or including land uses and livelihoods) and the extent of consultation.¹⁴ Compensation for surface lease agreements are frequently paid into community trusts¹⁵ which not only in the mining setting have documented problems of transparency, maladministration and

¹¹ Annexure 1.

¹² SAHRC (note 3 above) at 16 – 23; High Level Panel (note above) at 60, 503-504.

¹³ SAHRC (note 3 above) at 19.

¹⁴ Ibid at 19.

¹⁵ Ibid at 21.

misappropriation¹⁶ with the result that the funds often does not reach the intended beneficiaries. Government and mining companies also exclude communities from decision-making processes with the exception of favoured traditional leaders and local elites.

25. The MPRDA legal framework never explicitly acknowledged the right of holders of communal land rights to consent to land use that that deprives them of their rights as recognised in the Constitution and the Interim Protection of Informal Land Rights Act (IPILRA).¹⁷ The DMPR disregards the right to Free Prior and Informed Consent in spite of a line of cases beginning with *Maledu* where the Constitutional Court held that the MPRDA and IPILRA must be read as in harmony, and that the process of obtaining consent under IPILRA was still required in parallel to the consultation of landowners/occupiers under Section 10 of the MPRDA.¹⁸ This Commission has made directives pertaining to resettlement including not regarding the community as having consented without the consent of a minimum of 2/3rds of households directly affected by the relocation.¹⁹

Compliance monitoring and enforcement

26. Problems of high levels of reported non-compliance with environmental and socio-economic obligations by mining companies and insufficient consequences are well-documented, for example by this Commission²⁰ and others.²¹ Companies not fulfilling their rehabilitation duties are relevant to challenges around ASM in several respects. First, mines that are not properly rehabilitated or secured are more accessible to ASM miners and due to this accessibility not being through an orderly process of allocation to ASM, there is scope for conflict between prospective miners and with the broader community. Second, a lack of rehabilitation of an environment precludes other potential post-rehabilitation land uses – meaning that there may be fewer alternatives to ASM to earn a living. ASM would likely be easier to support and regulate if it were only one of many sources of income.

¹⁶ High Level Panel (note above) at 252-253; Corruption Watch *Mining Royalties Research Report* (2018) at 4-5.

¹⁷ Act No. 31 of 1996.

¹⁸ *Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) at para 106.

¹⁹ SAHRC (note 3 above) at 29.

²⁰ SAHRC (note 3 above) at 75-80

²¹ Centre for Environmental Rights *Zero hour: poor governance of mining and the violation of environmental rights in Mpumalanga* (2016). <https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>

27. There is a well-documented lack of consequences for non-compliance with environmental, health and safety and other obligations with a frequent lack of recourse for communities who are unable to access legal support.²² The department in its own admission has insufficient²³ and is also wary of the impact of shutting down non-compliant mines. At the same time, the department has not capitalised on the local observations and knowledge of community members who often report non-compliance²⁴ and the MPRDA does not provide a framework for community assistance in compliance monitoring. The other side of the coin of broad-based participation in compliance monitoring is transparency and access to information. In this regard communities still face very significant barriers and regional DMPR officials still insist on PAIA requests for basic licensing and compliance information such as EIAs, environmental authorisations, environmental management programmes and reports on compliance status despite court judgments such as *Balen*²⁵ which require the DMPR to provide documents submitted as part of a mining right on request without a formal PAIA application and which emphasise the public nature of this information. Based upon CALS' and our community and civil society partners' engagements with individual companies and the minerals counsel in our own capacity and on behalf of clients, we can observe that companies regard reports to the regulator on license conditions as confidential information. Even worse MACUA have recently found in their latest report based on social audits of 11 mines that 5 out of these mines were even flouting the explicit obligation (in terms of the MPRD Regulations) to make their social and labour plans publicly available²⁶

Women and gender inequality

²² SAHRC (note 3 above); Centre for Environmental Rights (note 21 above).

²³ Minutes of Portfolio Committee Mineral and Petroleum Resources Meeting 6 March 2012 <https://pmg.org.za/committee-meeting/14099/>; Question NO285 to the Minister of Mineral and Petroleum Resources (Ministers' response). <https://pmg.org.za/committee-question/29049/>

²⁴ As a registered law clinic, the Centre for Applied Legal studies receives more requests from communities for legal assistance on mine's SLP performance than we have the resources to service and in some of these cases there has already been a paper trail of communities reporting the compliance issues to the department and/or relevant companies without a response.

²⁵ *Duduzile Baleni and Others v Regional Manager Eastern Cape and Others* 2021 (1) SA 110 (GP).

²⁶ MACUA & WAMUA *Looted promises: the crumbs economy of mining and the myth of the just transition* (2025) at 38. https://macua.org.za/wp-content/uploads/2025/05/Looted_Promises-4.pdf

28. Women have been historically excluded from the mining sector, an example being the complete prohibition on women working underground during apartheid.²⁷ While there has been progress in representation of women it remains limited. The Commission for Gender Equality estimates that women represent 19% of the workforce²⁸ and observed that there were ‘very few female executives.’²⁹ Women from mining communities, in particular, seldom benefit from work opportunities in the mining sector.³⁰ The intersection of economic and societal inequalities gives rise to many observed societal ills which women bear the brunt.³¹ These include gender-based violence, sex work as the only livelihood opportunity for many women, increases in transmission of HIV/AIDs and other STIs, and pregnancies of young women which often lead to leaving school early and a cycle of marginalisation, as well a host of environmental and environmental-health impacts which increases women’s domestic care burden.
29. It would be an exaggeration to state recognise the need for gender redress including the objectives which specifically name ‘women and communities’ as groups within historically disadvantaged persons the Act seeks to advance³² and the definition of ‘broad-based economic empowerment’ which includes addressing the legacy of gender discrimination.³³ However, limited attention is given to gender equality in the regulations and implementation of mechanisms under the act and suggest the need for more guidance from the Act in this regard. For example there are no requirements for dedicated projects in Social and Labour Plans to address gender inequality in the provisions in the MPRD Regulations governing the content of Social and Labour Plans.³⁴ It is therefore not surprising that CALS and partner organisations such as MACUA have observed few such programmes in the large number of SLPs we have analysed and monitored in the course of our work.³⁵

²⁷ T Mkhathswa & B Genc ‘Women’s representation in senior and executive management positions in a South African coal mine: A case study’ (2022) 79 *Resources Policy* at 1.

²⁸ Commission for Gender Equality *Gender transformation in the South African Mining Industry 2023/2024* at 5. https://www.parliament.gov.za/storage/app/media/OISD/Reports/Commission_for_Gender_Equality/2024/01-08-2024/Gender_Transformation_in_the_South_African_Mining.pdf.

²⁹ Ibid at 42.

³⁰ B Gibertini ‘The hustle lifeways of Black women in mining-affected communities of South Africa’ (2025) 22 *The Extractives Industry and Society* 101629 at 6, 9.

³¹ International Labour Organisation *Women in mining: towards gender equality* (2021) at 38. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@sector/documents/publication/wcms_821061.pdf

³² Section 2(d) of the MPRDA.

³³ Section 1 of the MPRDA.

³⁴ Regulation 46 of the MPRD Regulations.

³⁵ CALS and MACUA have both published various reports on SLPs. Examples include Centre for Applied Legal Studies ‘The Centre for Applied Legal Studies ‘The Social and Labour Plan Series Phase 2: Implementation Operation Analysis Report’ (2017)

Social and labour plans

30. The link between Social and Labour Plans to ASM is as follows: If they effectively fulfilled their potential as a vehicle for broad-based economic development there would be a greater diversity of opportunities of community members and erstwhile mineworkers for earning a living, which would reduce their reliance on ASM.
31. SAHRC and civil society organisations have highlighted multiple interrelated problems of implementation and design. For the purposes of this submission, it will be enough to identify four. First, there is a lack of broad-based community with participation processes often dominated by community forums of mines serving as gatekeepers. Second non-compliance remains pervasive which also includes completion of projects well after the 5-year SLP cycle.³⁶ Third there is a lack of transparency with some companies still flouting the requirement of making their approved SLPs available and other crucial information including compliance and inspection reports treated as strictly confidential. Fourth, local economic development projects are also frequently unambitious in nature and scale and not commensurate with the impact of larger mining projects, the wealth of larger mining companies (and their historic profits through land dispossession and hyper-exploitation). Income generating/business support projects usually comprise of small business support centres and/or training for a limited number of community SMMEs.
32. Projects designed to set up local factories/economic sectors for communities and the workforce that can outlast the mining operation are rare. This is especially significant as the increasing mechanisation of the sector often translates into a limited number of relatively skilled jobs and means that other interventions to ensure job creation are required.
33. There are gaps in the legal framework that contribute towards these outcomes. Unusually the objects, contents and processes regarding SLPs are only dealt with in regulations and guidelines but not in the Act. The regulations do require mining

at [https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labourplans/Social and Labour Plan Series Phase 2: Implementation Operation Analysis Report](https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labourplans/Social%20and%20Labour%20Plan%20Series%20Phase%202%20Implementation%20Operation%20Analysis%20Report%202017.pdf) (2017)

at <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labourplans/>; MACUA Systemic exclusions, the big collusion: MACUA/WAMUA social audit report 2022. <https://macua.org.za/wp-content/uploads/2022/06/MACUA-Social-Audit-Report-2022-DIGITAL.pdf>.

³⁶ SAHRC (note 3 above) at 77-78; MACUA (note above) at 34-35.

companies to implement income generating projects in communities but do not set standards and objectives for such projects. The absence of a legally mandated minimum contribution to the SLP budget, as this Commission recommended³⁷ also allows for a limited contribution with the standard practice being 1% of declared profits.

Mine closure, rehabilitation, and care and maintenance

34. A set of issues especially related to ASM are around the systemic historic and current failures of mining companies to take responsibility for post-closure rehabilitation, for the socio-economic consequences of mine closure as well as the practices of care and maintenance warehousing of mines when mines are less profitable than projected.

35. Companies bear a legal duty under the National Environmental Management Act (“NEMA”)³⁸ and the Financial Provision Regulations³⁹ to rehabilitate the mine site while the mine is active (concurrent rehabilitation) and, before a closure certificate is issued, restore the site to the former condition where possible failing which to a state allowing for land uses consistent with sustainable development. However, the reality is that, over and above the (legacy) ownerless and abandoned mines, failure of companies to take responsibility for closure and rehabilitation is common. It is a too-common practice for larger companies to divest themselves of the responsibility for mine closure by selling their mining operations late in the life of mine often to smaller companies and junior miners (known as the practice of “pass the parcel.”⁴⁰ These new owners often lack the capacity to fulfil rehabilitation commitments and, in some cases, subsequently go into business rescue and/or liquidation.

36. The real-world consequences are range of environmental harms born by the community examples of which include (to cite a few) soil erosion and dust pollution, water pollution, failure of tailings dams which can often lead to flooding as well as

³⁷ SAHRC (note 3 above) at 91.

³⁸ Section 24N (2) (f) and (7) (e) of Act No. 107 of 1998.

³⁹ Appendix 3 and 4 of Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations, 2015. GNR. 1147

⁴⁰ M Mpanza & E M I Adam ‘A critical review of the impact of South Africa’s mine closure policy and the winding-up process of mining companies’ (2021) 17 *The journal for transdisciplinary research in Southern Africa*. <https://doi.org/10.4102/td.v17i1.985>; T Humby ‘Facilitating dereliction? How the South African regulatory framework enables mining companies to circumvent closure duties’ ACG Conference Proceedings (2014).

unfenced/secured sites that become a health and safety hazard. The government should also not be surprised that many community members pursue what can be the only available means of putting food on the table – artisanal mining of shafts/mines that still have minerals deposits. Failures of rehabilitation undoubtedly are therefore a driver of the scale of ASM. That is not to concede that ASM is inherently environmentally destructive - we subsequently demonstrate in this submission it is precisely the absence of regulation of the sector and the needed support (including training ASM miners in environmental rehabilitation) that prevents ASM from being environmentally sustainable.

37. With the afore-mentioned legal duties on mining companies, why does rehabilitation remain a challenge and not only for legacy mines? Without discounting a range of contributing factors, such as inadequate compliance monitoring and enforcement and other implementation questions, one cannot ignore the important loopholes and misalignment of legal frameworks that have been highlighted in successive commissions of inquiry, scholarly articles and civil society reports. For the purposes of this submission, it will suffice to highlight just a few of these loopholes that leave ample discretion to both mining houses and regulators to shift responsibility.
38. The overarching problem is insufficient identification of the diversity of distinct closure scenarios including care and maintenance, formal decommissioning and closure, abandoned and ownerless mines, mines under liquidation as well as partial closures (e.g. where only certain shafts are closed) and guidance on how they each should be addressed in legislation and policy. At present guidance is mostly confined to the ideal-type scenario of a single mine right holder throughout the mining lifecycle. More guidance is needed for each scenario on vital questions such as substantive duties, allocation of roles and responsibilities, processes and timeframes, and the role of community consent and participation.
39. The transfer of mining rights and company ownership requires better regulation to prevent 'pass the parcel'. At present there is no legislative prohibition of avoidance of closure liability. Likewise, there are no specific provisions designed to prevent companies using elaborate corporate structures to avoid liability. There are no requirements for community consultation and consent in relation to transfers of ownership of companies holding mining rights.

40. Further, Blyvooruitzicht and other case studies⁴¹ highlight that the misalignment of legal frameworks governing environmental management and mining on the one hand, and insolvency, business rescue and liquidation on the other⁴² can lead to a failure to rehabilitate the environment. There are at present, for example, no specific duties on business rescue practitioners and liquidators to ensure rehabilitation and application for closure certificates.

D) BROADER LAW REFORMS ADDRESSING UNDERLYING ISSUES

41. In November 2024, a number of community and civil society organisations led by MACUA marched to the DMPR offices in Pretoria and handed over a file comprising of submissions for reform of the MPRDA (and alignment of legislative frameworks) prepared by the MPRDA Coalition and which were designed to address the above issues. This submission briefly identifies some of these reforms that are especially prescient to the work of the commission. We will set out amendments pertaining to SLPs and mine closure slightly greater length due to their importance to addressing the underlying socio-economic and environmental issues in areas such as Stilfontein.

42. First, there is a need to decriminalise and regulate the ASM sector. This matter of pivotal importance will be addressed in Section E of this submission.

Free prior and informed consent and meaningful consultation

43. Second, the MPRDA needs to be explicitly aligned with the requirement for Free Prior Informed Consent in line with IPILRA and the case law discussed above and strengthening consultation requirements more broadly. Measures the MPRDA Coalition has put forward include amending Section 10 of the MPRDA to provide a process of seeking consent where IPILRA applies including but not limited to measures to level the playing field; amending Section 10 to make the proceedings

⁴¹ See Lawyers for Human Rights The impact and assessment of improper mine closures in South Africa: community perspectives on human rights (November 2022); Lawyers for Human Rights Blyvooruitzicht Mine Village: the human toll of state and corporate abdication of responsibility in South Africa (2017; SAHRC (note 3 above) at 26 -28, 30.

⁴² M Mpanza & E M I Adam 'A critical review of the impact of South Africa's mine closure policy and the winding-up process of mining companies' (2021) 17 *The journal for transdisciplinary research in Southern Africa*. <https://doi.org/10.4102/td.v17i1.985>; T Humby 'Facilitating dereliction? How the South African regulatory framework enables mining companies to circumvent closure duties' ACG Conference Proceedings (2014). https://www.academia.edu/8621292/Facilitating_dereliction_How_the_South_African_regulatory_framework_enables_mining_companies_to_circumvent_closure_duties

of RMDEC more transparent and for the process to be more accessible to affected communities; as well as aligning various other provisions in the act in line with the consent requirement.

Strengthened compliance monitoring and enforcement

44. Third, reforms are required to strengthen compliance monitoring and enforcement. For example, there is a need to empower communities to play an active role in compliance monitoring and enforcement in a manner akin to the role of the workforce in workplace health and safety. communities who can observe concerning changes in the local environment can alert the regulator to possible non-compliance. Regional multistakeholder forums for monitoring compliance should be established. Penalties also requiring strengthening in order to deter non-compliance.

More robust regulation of social and labour plans

45. Fourth, amendments are required to strengthen Social and Labour Plans to maximise their potential to serve as instruments for participatory local economic development and to require mining companies to invest in industries for workers and communities. In response to this Commission's directives and recommendations in its 2018 hearing report, which included a review of the SLP system the then-DMRE published amendments to the MPRD Regulations (in 2020). The amendments, however, implemented some but not all of the issues and recommendations in the report and only partially addressed others. Examples of issues not addressed in the amendments include prescribed and ring-fenced SLP expenditure for companies; gender responsiveness of SLPs; prohibitions of amendments to SLPs without consulting communities and municipality; and specific sanctions for SLP non-compliance. A fatal flaw in the Department's response was that it only amended regulations and not the MPRDA itself. This is significant first because the parliamentary process provides far more opportunity for input by communities and other stakeholders and, second, because meaningfully addressing some of the issues would require significant changes that could render the regulations *ultra vires* without amending the act.
46. The MPRDA Coalition and members such as CALS have put forward recommendations that echo those of the Commission together with some additional proposals, including but not limited to changes designed to address the

socio-economic dimensions of mine closure and promoting a just energy transition worthy of its name.⁴³ Examples include:

- 46.1. A new short chapter in the MPRDA providing a holistic legal framework for SLPs;
- 46.2. Requiring an equitable portion of SLP programmes to be targeted at host communities (as well as labour sending communities and workforce) and explicitly identifying the primary rights holders in SLPs;
- 46.3. Setting out broad principles for community consultation and mandating amendments to the regulations to provide clear and tailor-made processes for formulation of first SLP, the progress meetings held three times a year, five yearly review of SLPs, as well as procedural and substantive limits to prevent the abuse of amendments to defer compliance;
- 46.4. Explicitly require an additional type of LED project namely investment and support by rights holders towards setting up industries whose long-term viability is not dependent on mining activity in order to address the socio-economic impacts of mine closure and promote a just transition for areas reliant on minerals such as coal; and
- 46.5. Explicit requirement for ring-fencing of financial provision and a minimum requirement for expenditure (the Coalition has proposed 5% of projected turnover at least for operations and companies over a threshold size).

Binding transformation requirements

47. The Coalition has called for the MPRDA to be amended to address the lack of binding transformation requirements since courts' clarification that the Mining Charter is not legally binding.⁴⁴ These include amending the MPRDA to require binding transformation regulations (incorporation of the Mining Charter); addressing present gaps in content (limited provision for gender equality especially in communities) and making non-compliance an offence subject to specified penalties.⁴⁵

Protections for communities impacted by resettlement and relocation

⁴³ SLPs are addressed in Section 5 of Annexure I.

⁴⁴ Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others (2022 (1) SA 535 (GP)).

⁴⁵ Addressed in Section 9 of Annexure I.

48. The MPRDA Coalition law reform proposals include addressing the absence of legislative protections for communities subject to resettlement.⁴⁶ These are designed to (amongst others) protect the right to free prior and informed consent, regulate the consultation process and level asymmetries of information and access to expertise; provide guidance for determining fair compensation and the contents of resettlement plans; require a ring-fenced financial provision for all rights/permit applicants; and set up an independent grievance mechanism for impacted communities, households and individuals.

Strengthened regulation of mine closure and care and maintenance

49. With regards to mine closure and care and maintenance some key law reform proposals by the MPRDA Coalition have included:

- 49.1. Inserting a new provision in the MPRDA define, distinguish and provide clear guidance for different mine closure scenarios, such as temporary closure (Care and Maintenance), abandoned mines, derelict mines, liquidated mines, and partial closures;
- 49.2. Inserting a new section in the MPRDA to enhance community involvement in the mine closure including by requiring community consent in the formulation of closure plans through a transparent process with documentation and continual requirements for transparency and community involvement in the implementation and updating of closure plans;
- 49.3. Amending Section 52 of the MPRDA to impose clear duty on license holders to prioritise the rehabilitation of old mines, on the state to enforce rehabilitation requirements and require regular updates on rehabilitation status and progress;
- 49.4. Address the various manners in which business rescue and liquidation currently thwarts rehabilitation including addressing conflicts with Chapter 14 of the Companies Act, imposing duties on business rescue practitioners and liquidators to comply with environmental rehabilitation requirements and applications for closure certificates;
- 49.5. Deterring the “pass the parcel approach” of selling on to smaller companies close to closure, by inserting Section 45C including by ensuring the beneficial owners are held responsible for closure requirements by providing a surety;
- 49.6. Insert a new transparency and responsibility clause in the MPRDA to prevent mining companies from using complex corporate structures to avoid closure responsibilities; and

⁴⁶ Addressed in Section 7 of Annexure I.

- 49.7. Insert a new section of the MPRDA targeted at protecting communities from the impacts of care and maintenance including but not limited to prohibiting care and maintenance without a rigorous process of community consent; requiring maintenance of critical infrastructure to allow resumption of mining and the deployment of non-critical infrastructure for economic diversification projects.

E) CASE FOR DECRIMINALISATION AND REGULATION OF ASM

50. This section of the submission begins by showing how the harms of criminalisation exceed the benefits through drawing on the history of criminalising other activities such as sex work and the broader impacts of incarceration. It will then proceed to discuss the benefits of decriminalisation and a supportive regulatory framework before identifying some basic pillars of a just ASM dispensation.

Historical experience of link between criminalising prevalent economic sectors and rights violations

51. The historic experience of wholesale criminalisation of sectors whose existence reflects strong societal drivers (e.g. lack of alternative livelihoods, fulfilling an unmet demand etc.) provides a cautionary tale. The most notorious example is the prohibition of alcohol in the United States and other countries in the early 20th Century, which was no more effective than regulation at curbing consumption⁴⁷ and is generally regarded as benefiting organised crime⁴⁸ who were given an opportunity by the vacuum left by the forced departure of the formal business sector. The criminalisation of the sex work sector also provides lessons.
52. First, criminalisation leads to stigmatisation of already vulnerable and marginalised persons. Law plays an integral role in influencing societal attitudes.⁴⁹ As seen in the case of sex workers the criminalisation breeds stigma and negatively affects the way society perceives sex workers.⁵⁰ As a result, communities often perceive

⁴⁷H G Levine & C Reinerman 'From prohibition to regulation: Lessons from alcohol policy for drug policy' (1991) 69 *The Milbank Quarterly* 461 at 470-471.

⁴⁸ While it is not correct that organised crime was the main supplier of alcohol in the US under prohibition, there were cities such as Chicago where that was the case and overall organised crime is regarded as a beneficiary. Ibid at 472.

⁴⁹ C Mgbako 'The Case for Decriminalisation of Sex Work in South Africa' (2013) 44 *George Town Journal of International Law* 1423 at 1426.

⁵⁰ Ibid.

attacks on sex workers to be justifiable because of their criminal status.⁵¹ Such stigmatisation leads to vulnerability to violence at the hands of the police, their clients and many other facets of society.⁵²

53. In addition, criminalisation has open up the flood gates to human rights abuses which includes; police abuse, lack of access to justice and unfair labour practices given criminalised activities fall outside of labour law protection.⁵³ The negative human rights impacts of incarceration are not only borne by the imprisoned miner but by their family, who lose a parent, spouse and income. There is a growing body of literature mostly from the United States (which has the world's highest prison population) showing that the extreme financial pressures on lower income families, who typically are unable to fill the gap in household income left by the imprisoned spouse with additional work.⁵⁴ Therefore they have to make less money stretch further.⁵⁵

54. Democratic South Africa inherited the criminalisation of sex work from the apartheid era. When in 2007, amendments to the Sexual Offences Act (SOA) were introduced⁵⁶ in an effort to strengthen the approach into combatting sex related crimes, the legal status of sex work was not addressed.⁵⁷ The purpose of criminalisation in this regard is the government's response to reduce commercialised sex and to combat the social ills that are presumed to be associated with it.⁵⁸ There is an assumption by law makers that practice of sex work further instigates crime, and therefore be criminalised in order to minimise criminal activities.⁵⁹ However, Malepe argues (as cited by the SA Law Reform Commission) that this assumption is unfounded and based on the results of the prohibition of sex work as opposed to the practice of sex work.⁶⁰ Furthermore, criminalisation has

⁵¹ African Sex Worker Alliance *Violence against Sex Workers in Africa* (2019) available at https://www.nswp.org/sites/nswp.org/files/aswa_report_final_low_res-2.pdf.

⁵² C Gould & N Fick *Selling Sex in Cape Town: Sex work and trafficking in a South African city* (2008) at 55.

⁵³ C Mgbako 'The Case for Decriminalisation of Sex Work in South Africa' (2013) 44 *George Town Journal of International Law* 1423 at 1444 - 1446.

⁵⁴ A Bruns 'Consequences of partner incarceration for women's employment' (2017) 79 *Journal of Marriage and Family* 1331 at 1348.

⁵⁵ Ibid.

⁵⁶ Act No.23 of 1956 as amended; Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.

⁵⁷ C Mgbako *Sex Work and Human Rights in Africa* (2010) 33 *Fordham International Law Journal* 1178.

⁵⁸ South African Law Commission Issue Paper 19 *Sexual Offences: Adult Prostitution* (2002).

⁵⁹ Ibid.

⁶⁰ L Malepe L 'Adult Commercial Sex Workers - Decriminalisation or Regulation?' (Paper presented at adult Commercial Sex Work: Decriminalisation or Regulation National Conference, May

failed to achieve its primary aim of reducing sex work with available evidence suggesting it has no impact on the supply or demand of sex work.⁶¹ The drafters of the SOA amendments also failed to make platforms available to the input of sex workers in the legislative process which could have been valuable.⁶² In order to make a case for legal reform one needs to further unpack the effect of criminalisation on society as well as those who are criminalised.⁶³ Similarly to sex workers ASM have faced similar challenges with their identities being villainized.

The criminalisation of ASM has similarly contributed to individual and systemic human rights violations

55. There is no greater indictment of the human costs of criminalisation of ASM than the deaths of 93 miners who likely would still be alive today if the state responded as they would towards people in need of urgent assistance rather than faceless criminals stripped of human dignity. Criminalisation is also contributing to systemic harms which translate into daily hardships.

56. The overwhelming majority of ASM are mining illegally because of their inability to access a mining permit or mining right and because of financial constraints.⁶⁴ However, the mining laws enacted after 1994 did not provide recognition and regulations tailored towards artisanal and small-scale mining, with the mining permit application process still too onerous for the sector (being better suited to smaller formal businesses).⁶⁵ Thus, the status quo from Apartheid still exists where large-scale mining companies continue to dominate and the poor and marginalised individuals are not able to access mining economy independently due to financial strain, absence of a regulatory framework and non-recognition. Consequently, the only practical alternative is to engage in illegal small-scale artisanal mining.

57. This illustrates how criminalisation and the lack of regulatory framework creates a backdrop for the abuse of ASM rights such as access to fair labour practices and

2000) cited by: South African Law Reform Commission Discussion Paper 0001/2009 *Sexual Offences: Adult Prostitution* (2009) At 21.

⁶¹ C Mgbako 'The Case for Decriminalisation of Sex Work in South Africa' (2013) 44 *George Town Journal of International Law* 1423 at 1425, 1443.

⁶² C Mgbako *Sex Work and Human Rights in Africa* (2010) 33 *Fordham International Law Journal* 1178 at 1217.

⁶³ SWEAT and Human Rights Watch *Why Sex Work should be Decriminalised in South Africa* (2019) available at https://www.hrw.org/sites/default/files/report_pdf/southafrica0819_web_0.pdf.

⁶⁴ Legal Resources Centre & International Labour Research and Information Group *Submissions as a Response to the Draft Artisanal Small-Scale Mining Policy* (2021) at 15.

⁶⁵ South African Human Rights Commission *Report of the Investigative Hearing: Issues and Challenges in relation to the Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2016) at 6, 26

also further alienates pushes black working class to the margins. These considerations are vital in highlighting the need for legal reform. The words of the anti-colonial theorist Frantz Fanon in *Wretched of the earth* cited by the Constitutional Court in the landmark *Maledu* judgment are especially prescient: 'Strip someone of their source of livelihood, and you strip them of their dignity too.'⁶⁶

Decriminalisation of ASM would advance deferred aspirations of racial justice

58. Historically, mining has always played a crucial role in South Africa economy owing to the abundance of rich mineral resources.⁶⁷ The mining sector was also a driver and beneficiary of colonialism and apartheid, and the structural inequalities and violence of the sector persists. During the Colonialism of the late 19th Century, South Africa had a gold rush period which attracted major European investment and allowed for the establishment of large mining corporations that monopolised the mining industry.⁶⁸ Consequently, the South African mining industry has fostered an environment that only allows for growth in the large mining sector and as a result created an ongoing exclusionary equity gap towards ASM who are predominantly black working class.⁶⁹ Furthermore, under the Apartheid regime the exclusionary equity gap increased as there was no regulatory framework that recognised ASM.⁷⁰ Consequently, there were not many opportunities for ASM to benefit from the mineral resources in South Africa.⁷¹

59. With the fall of the apartheid regime, there was hope that poor and marginalised indigenous peoples of South Africa would be able to benefit from the mineral resources and the economy given that large-scale mining dominated the industry.⁷² Artisanal and small-scale mining was seen as a means of job creation, poverty alleviation and financial independence.⁷³ However, on the whole very little effort has been made to define, recognise or regulate ASM.⁷⁴ This is illustrated by the

⁶⁶ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* (2018) ZACC 41 at para 1.

⁶⁷ V Bester *A Corporate Social Responsibility (CSR) Conceptual Framework to Address Unregulated Artisanal Gold Mining in South Africa* PhD Thesis University of Johannesburg (2019) at 3-4.

⁶⁸ Legal Resources Centre *Artisanal Mining Report* (2016) at 24-25.

⁶⁹ Wilhelm-Solomon *University Witwatersrand Migration and Health Project South Africa News* (28.11.2016)

⁷⁰ Legal Resources Centre *Artisanal Mining Report* (2016) at 24-25.

⁷¹ V Bester *A Corporate Social Responsibility (CSR) Conceptual Framework to Address Unregulated Artisanal Gold Mining in South Africa* 3-4.

⁷² Legal Resources Centre & International Labour Research and Information Group *Submissions as a Response to the Draft Artisanal Small-Scale Mining Policy* (2021) at 15.

⁷³ *Ibid.*

⁷⁴ Legal Resources Centre *Artisanal Mining in South Africa: Support needed by artisanal miners and the legislative framework around the new artisanal mining bill.*

61. On 20 May 2025, the Minister of Mineral Resources published a draft Mineral Regulation Amendment Bill for public comment (“draft Bill”). Significantly, the draft bill explicitly addresses ASM for the first time.
62. On the positive side the Bill recognises ASM as a distinct sector defining it as ‘traditional and customary mining operations using traditional or customary ways and means, which includes the activities of individuals using mostly rudimentary mining methods, manual and rudimentary tools to access mineral ore, usually available on surface, or at shallow depths’. At same time, the definition places undue reliance on the method used as opposed to the societal position of the miners (miners who reside in the community and who lack access to alternative livelihoods or capital to participate in the formal sector). Dangers of this approach include that it does not seem to envisage a role by the state in providing technical support and training on newer methods where required and it also ignores the context and realities of present-day artisanal mining.
63. The Bill also provides for a specific permitting system for artisanal and small-scale mining (the artisanal mining permit) issued for a period of no longer than two years and covering a mining area of no more than 1.5 hectares.⁷⁹ It also empowers the Minister to in consultation with the Council for Geoscience designate land for small-scale and artisanal mining and invite applications for permits by notice in the Government Gazette.⁸⁰ While a specific artisanal mining permit represents a step forward it is noticeable that there is no provision for consultation with the artisanal mining sector in identifying land and, further, the government gazette is inadequate notice that is unlikely to reach a sizable proportion of artisanal miners.
64. The Bill does not create any obligations and mechanisms for government to provide training and technological support to the sector. Examples of areas for training support include workshopping the new permitting system, training in environmental management and rehabilitation (since artisanal miners will have environmental obligations)⁸¹ and provision of financial and technological support where required.
65. The Bill also does not contain measures to promote social justice within the artisanal mining sector such as requirements for participation of women, preference for co-operatives. The latter would also potentially incentivise co-

⁷⁹ Section 27A of the draft Bill, 2025.

⁸⁰ Section 7A of the draft Amendment Bill, 2025.

⁸¹ Section 27A (2), (8), and (9) of the draft Amendment Bill, 2025.

operation rather than conflict and competition between artisanal miners. In addition, the Bill does not contain clear safeguards to ensure the system is not captured by elites which might include requiring applicants to be resident in the area in question and not receiving income for other activities.

66. What is especially concerning is that the Bill also adopts a more punitive approach to illegal mining than previously through amendments to Section 5A, and the new sections Section 5B and 5C which create specific offences for aiding and abetting illegal mining and transporting minerals mined illegally. Further, the offences provision is amended to make illegal mining an offence attractive more severe penalties than before including up to 10 years imprisonment. It is vital that the state has suitable sanctions for mining at scale that bypasses completely or does not comply with the environmental and other requirements. On the other hand, this should be done in a manner that does not open the door to an unfair targeting of the ASM sector. There may be practical barriers to artisanal miners unable to access the permit such as delays in the permitting process, and lack of awareness of a new process. This is especially likely during the first years of the system when teething problems and the need for fine-tuning of practices are inevitable.
67. Considering the Stilfontein massacre and negative perceptions in government towards the sector, fears that the reformulated offence and penalties will be employed to escalate the punitive approach to the sector are far from unfounded. There therefore should be exemptions and/or other safeguards built in to prevent a reality characterised by growing militarisation of the state's response to the most artisanal miners while only accommodating a minority in practice via the regulatory system.

F) CONCLUSION

68. In summary, the essence of this submission is the following: First, the framework for this submission is of a transformative just transition which entails not only an energy transition but the redistribution of wealth and power to replace an extractivist economy rooted in colonialism with one based around participation and broad-based benefit. Operation Vala Umgothi, by criminalising the poverty of Black working-class communities eking out a living reinforces existing injustices. Second, the challenges in areas such as Stilfontein speak to a failure of the mining dispensation under the MPRDA to ensure free prior and informed consent and meaningful participation of host communities, broad-based economic benefit, environmentally responsible mine closure and to ensure sustainable economic development and livelihoods post-closure. Second, a range of law reforms to help

tackle these issues have been recommended to the executive and parliament including by this Commission as well as by civil society and community organisations, as summarised in the proposals of the MPRDA Coalition. With exceptions the DMPR, in particular, has been non-receptive. Third, the submissions draw upon historical experiences of other prohibited sectors to demonstrate that a supportive framework for ASM is both more just and likely to lead to better societal outcomes than the present dead end of criminalisation and securitisation. In this regard we set out some bedrock principles for a just and transformative dispensation for ASM.

69. On a final note, we wish to echo the call for accountability of government officials and SAPS officers for their role in the deaths of around 93 miners. MACUA's submission makes for chilling reading, methodically dismantling the official narrative and showing a high likelihood of intent including statements of officials deeming the miners as unworthy of saving, obstruction of delivery of food, and autopsy reports showing dehydration and starvation was the primary cause of death.
70. Thank you for providing the opportunity to provide input. For queries and further information, please contact Robert Krause (Researcher) at Robert.Krause@wits.ac.za.