The Regulation of small-scale mining in Namibia: A legal perspective

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My parents, AP and N de Jongh, for their endless support, unconditional love, their extraordinary wisdom and the marvellous example they have set for me all my life.

My Heavenly Father for with Your grace, nothing is impossible
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<tr>
<td>EIA</td>
<td>Environmental impact assessment(s)</td>
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<td>EMA</td>
<td>Environmental Management Act</td>
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<td>ERSMA</td>
<td>Erongo Regional Small-Scale Miners' Association</td>
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<td>IEM</td>
<td>Integrated environmental management</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>MDFA</td>
<td>Minerals Development Fund of Namibia Act</td>
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Abstract

The objective of this study is to conduct a critical evaluation of the Namibian law and policy framework that currently regulates small-scale mining in Namibia. The discussion begins with an introduction to small-scale mining in Namibia which deals with the practice of small-scale mining, *inter alia*, as far as it is defined and the possible affects thereof. Small-scale mining affects various second generation rights of persons directly involved therein as well as the community as a whole. These rights include child labour; unemployment; gender issues; public health care; occupational health and safety; access to finance; poverty alleviation; and access to mining tools, machinery, markets and buyers.

The law and policy framework applicable to small-scale mining in Namibia is accordingly critically discussed in terms of the strengths and weaknesses of the current framework. It is found that small-scale mining is quite well regulated in Namibia, but the current law and policy framework is not without its problems. Some of the main weaknesses identified are the centralised nature of the application for and pegging of claims, the lack of formal provision and regulation of the off-set markets, and the lack of access to finance for small-scale miners.

Recommendations are made, such as that regulatory measures should be put in place to make provision for and to regulate the off-set markets for the minerals being mined by the artisanal miners. At the end of the study further research topics which relate directly to the regulation of small-scale mining in Namibia are identified.

**Keywords:** Regulation, small-scale mining, Namibia, law and policy framework, socio-economic rights, artisanal mining, legal perspective
Opsomming

Die doel van hierdie studie is 'n kritiese evaluering van die Namibiese wet en beleidraamwerk wat tans kleinskaalse mynbou reguleer in Namibië. Die bespreking begin met 'n inleiding tot kleinskaalse mynbou in Namibië wat handel oor die praktyk van kleinskaalse mynbou, onder andere, sover dit omskryf en die moontlike invloed daarvan. Kleinskaalse mynbou raak verskeie tweede generasie-regte van persone wat direk daarby betrokke asook die gemeenskap as 'n geheel. Hierdie regte sluit kinderarbeid, werkloosheid, geslagkwessies, openbare gesondheidsorg, gesondheid en veiligheid, toegang tot finansiering, die verligting van armoede, en toegang tot mynbou gereedskap, masjinerie, markte en kopers.

Die wet en beleidraamwerk wat van toepassing is op kleinskaalse mynbou in Namibië is dienooreenkomstig krities bespreek aan die hand van die sterk- en swakpunte van die huidige raamwerk. Dit is bevind dat kleinskaalse mynbou baie goed gereguileer is in Namibië, maar die huidige wet en beleidraamwerk is nie sonder sy probleem nie. Sommige van die vernaamste tekortkominge wat geïdentifiseer is, is die gesentraliseerde aard van die aansoek en vaspen van eise, die gebrek aan formele voorsiening en regulerings van markte en 'n gebrek aan toegang tot finansiering vir kleinskaalse myners.

Aanbevelings word gemaak soos dat regulatoriëse maatreëls in plek gestel word om voorsiening te maak vir markte tesame met die regulerings daarvan. Aan die einde van die studie word verdere ondersoek onderwerpe geïdentifiseer wat direk verband hou met die regulerings van kleinskaalse mynbou in Namibië.

Sleutelwoorde: Regulasie, kleinskaalse mynbou, Namibië, die reg en beleidraamwerk, sosio-ekonomiese regte, handgemaakte mynbou, wetlike perspektief.
1 Introduction

Namibia is a generally arid country with a population of approximately two million people, most of whom reside in rural areas.\(^1\) Mining is regarded as one of the primary sectors contributing to the country's macro and micro economy.\(^2\) Despite the existence of the large mining, fishing and agricultural sectors Namibia still records an unemployment rate of approximately 37 per cent, of whom the majority are in their youth.\(^3\) Notwithstanding this fact, the small-scale mining sector is rapidly expanding\(^4\) and may offer the unemployed an alternative income-earning opportunity in a country where jobs are scarce.

Small-scale or artisanal mining has existed for almost sixty years in Namibia, but very little if any research has been done on the activities within this sub-sector of mining.\(^5\) No common definition of small-scale mining has been established despite the various attempts to do so.\(^6\) Hentschel defines small-scale mining as:

> Mining by individuals, groups, families or cooperatives with minimal or no mechanisation, often in the informal (illegal) sector of the market.\(^7\)

Dreschler further describes small-scale mining as:

> Operations of individuals organized in groups (four to eight) or co-operatives of ten or more individuals, which are entirely financed by exiting resources at a certain limit, and carried out on a full-time basis using simple traditional techniques and tools of low mechanization levels.

\(^{4}\) ILO Small-scale mining on the increase in developing countries 17 May 1999.
\(^{6}\) Hentschel, Hruschka & Priester “Global report on artisanal and small-scale mining” 4.
\(^{7}\) Hentschel, Hruschka & Priester “Global report on artisanal and small-scale mining” 4.
Krappmann\(^8\) uses size to classify artisanal mining\(^9\) into three categories, namely micro-scale miners,\(^10\) mechanised small-scale miners,\(^11\) and mining enterprises,\(^12\) the latter representing the most advanced category of small-scale miners.

The United Nations defines small-scale mining in terms of the amount of produced materials:\(^13\)

Any single mining operation having an annual production of unprocessed materials of 50,000 tonnes, or less as measured at the entrance of the mine.

This type of mining raises several questions about environmental impacts (e.g. in the form of deforestation and land degradation)\(^14\) as well as about 'sustainability'\(^15\) in the general sense. The consideration of the social and economic dimensions of sustainability is also triggered \textit{inter alia} by the harsh working and living conditions of small-scale miners,\(^16\) yet it must be acknowledged that small-scale mining contributes \textit{inter alia} to poverty alleviation through the creation of employment and opportunities to earn an income, and that it sustains local businesses by means of the purchases done at local and nearby towns, for example.\(^17\) In other words, small-scale mining impacts both directly and indirectly on the lives of the miners themselves, as well as on the community as a whole.\(^18\)

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9 Artisanal mining is a synonym for small-scale mining, and these terms will be used interchangeably in this study.
10 These are individuals or small groups of artisans who use mostly primitive and labour-intensive methods of excavation.
11 In this category the use of mining tools such as compressors is more prevalent, and they also apply blasting as a method. They work in groups not exceeding six individuals.
12 This category refers to operations which consist of up to fifty employees and are primarily distinguished from the other two categories by the fact that they have access to capital.
13 Dreschler "Small-scale mining and sustainable development within the SADC region" 1.
14 See par 2.3 hereunder.
15 Defined in Vision 2030 http://www.npc.gov.na/vision/pdfs/Summary.pdf 13 as "the type of development that meets the needs of the present, without limiting the ability of future generations to meet their own needs".
18 For example, small-scale mining activities can have an impact on the communities surrounding the mining area and the rights of persons in those communities.
It would appear, therefore, that despite the fact that some aspects of the practice of small-scale mining are problematic, it benefits poor communities to such an extent that it may have to be recognised and even promoted by government.\textsuperscript{19} Perhaps the challenges,\textsuperscript{20} risks and impacts associated with it also demand regulation by the state authorities.

The importance of having a legal framework to regulate small-scale mining has \textit{inter alia} been flagged in the \textit{Minerals Policy of Namibia}.\textsuperscript{21} Small-scale mining as a sub-sector of mining may at the moment be expected to be regulated in terms of a range of constitutional and statutory provisions as well as policy instruments related to the environment, sustainability in the broad sense, and mining generally. These instruments include amongst others the \textit{Constitution of Namibia}, 1990 (hereafter the Constitution), the \textit{Minerals (Prospecting and Mining) Act} (hereafter the Mining Act),\textsuperscript{22} the \textit{Environmental Management Act} (hereafter the EMA),\textsuperscript{23} the \textit{Environmental Assessment Policy for Sustainable Development and Environmental Conservation} (hereafter EA Policy),\textsuperscript{24} the \textit{Minerals Development Fund of Namibia Act} (hereafter the MDFA),\textsuperscript{25} and the \textit{Minerals Policy of Namibia} (hereafter the NM Policy).\textsuperscript{26} There also exist various other sectoral-specific acts pertaining to water,\textsuperscript{27} air quality,\textsuperscript{28} land use,\textsuperscript{29} general biophysical impacts\textsuperscript{30} and socio-economic impacts,\textsuperscript{31} which may directly or indirectly have an impact on

\begin{enumerate}
\item[19] NM Policy 9 and 16.
\item[20] See par 2.
\item[21] Minerals Policy of Namibia 15.
\item[23] Environmental Management Act 7 of 2007.
\item[28] Atmospheric Pollution Prevention Ordinance 45 of 1965.
\item[29] Town Planning Ordinance 18 of 1954; Township and Division of Land Ordinance 11 of 1963; Nature Conservation Ordinance 4 of 1975; Nature Conservation Amendment Act 5 of 1996, relevant town planning scheme(s).
\end{enumerate}
small-scale mining to the extent that regulation by these instruments may put constraints on or conditions for small-scale mining activities in certain instances.\textsuperscript{32}

It follows that small-scale mining does not happen in a legal vacuum – it may have legal implications by virtue of its challenges, risks and impacts and may therefore be expected to be regulated by law. Against this background, this study sets out to determine the manner in which provision is currently made in Namibian law and policy for the regulation of ‘sustainable’ small-scale mining.\textsuperscript{33}

The research method adopted for this study is a desktop review. It entails a critical review of relevant materials including, but not limited to, legislation, policy, textbooks, electronic sources, scholarly publications and reports by research institutions and non-governmental organisations, for example.

The study comprises of three parts. The first part offers an exploration of the sustainability dimensions that accompany small-scale mining i.e. the environmental, economic, social and cultural. The second part aims to unpack and discuss the Namibian law and policy framework applicable to small-scale mining. The third part offers a critical analysis of the strengths and weaknesses of the existing regulatory framework as perceived through the sustainability lens. The final part concludes the study with some recommendations.

\textsuperscript{32} In addition, because of Namibia’s monoistic legal system a range of international law instruments may also potentially be applicable to small-scale mining. These include, inter alia, the Convention Concerning the Protection of the Worlds Cultural and Natural Heritage (1972), United Nations Framework Convention on Climate Change (1992), Convention on Biological Diversity (1992), United Nations Convention to Combat Desertification in those Countries Experiencing serious Drought and/or Desertification, Particularly in Africa (1994), Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) and the SADC Protocol on Mining (2000). These international law instruments will, however, not be dealt with for the purposes of this dissertation.

\textsuperscript{33} It is undesirable if not impossible to aptly define sustainable small-scale mining. For the purposes of this dissertation sustainable small-scale mining refers to small-scale mining that complies with the law and policy objectives for sustainable development in the Namibian context. See further par 2.
2 'Sustainable' small-scale mining: Balancing social, environmental and economic interests

This paragraph sets out to explore the phenomenon of small-scale mining through the lens of sustainability and the need\(^\text{34}\) in the Namibian context to balance and seek equilibrium between social, economic, environmental and cultural interests. First of all an exposition of the different types of impacts that small-scale mining may have is provided. This is done to illustrate that the latter cannot be regulated only from an environmental perspective nor can it be addressed from a solely economic or any other perspective. A reading of the framework and specific laws and policies that exist at the international, regional and national level suggests that small-scale mining in Namibia may have to be regulated with respect to the objective of sustainability.\(^\text{35}\) This implies the recognition and regulation of small-scale mining as a multi-faceted activity with social, economic, environmental and cultural aspects.

In this paragraph the challenges that small-scale mining in Namibia faces will be identified and discussed with specific reference to the social, environmental and economic impacts thereof. These will be used eventually as benchmarks for evaluating the strengths and weaknesses of the existing law and policy framework in Namibia.\(^\text{36}\)

2.1 Impacts of small-scale mining

As suggested earlier small-scale mining and its related activities have a significant impact on the social and economic interests of the artisans who practise this type of mining.\(^\text{37}\) In Africa artisanal mining is increasingly being practised in rural areas, more often than not by miners who lack the required expertise, equipment, financial means and infrastructure to mine safely.\(^\text{38}\) Some


\(^{35}\) NM Policy 15.

\(^{36}\) See par 4.

\(^{37}\) Hilson 2002 *Natural Resource Forum* 3.

\(^{38}\) Economic Commission for Africa *Compendium on Best Practices in Small-Scale Mining in Africa* iii.
of the specific impacts on the natural resource base include deforestation and land degradation. The discussion to follow focuses on these two strands of impacts.

2.2 Socio-economic impacts

Small-scale mining raises serious challenges with regards to the social interests of both those who are involved in this kind of mining itself as well as those affected by the mining and the indirect consequences thereof. These social interests range from issues of health and safety, the protection of livelihoods, poverty alleviation, education and access to land, to issues of gender. As will become clear, these issues also closely tie in with some of the basic rights of Namibian citizens. The specific social issues to be highlighted for the purposes of this discussion are (in no specific order): child labour; unemployment; gender issues; public health care; occupational health and safety; access to finance; poverty alleviation; and access to mining tools, machinery, markets and buyers.

2.2.1 Alleviation of unemployment

According to the International Labour Organisation (hereafter the ILO) it was found in a survey that thirteen million people world-wide are involved directly in small-scale mining, most of whom are in developing countries. Further to this, it is presumed that about 80-100 million people depend on small-scale mining for their livelihoods globally. In 2011 it was estimated that about two thousand people were involved in small-scale mining in Namibia. In Namibia small-scale mining contributes to employment creation both directly and indirectly. It has

39 See par 2.3 hereunder.
40 See the discussion to follow.
been said that the small-scale mining sector remains one of the most ideal sectors to empower previously disadvantaged Namibians.\footnote{45}{Namibian Mining February 2006 \textit{The Economic Stronghold} 8; NM Policy 9.}

The labour-intensive nature of small-scale mining largely contributes to job creation, sometimes in contrast to larger mining operations which are more mechanised.\footnote{46}{Economic Commission for Africa \textit{Compendium on Best Practices in Small-Scale Mining in Africa} iv; Namibian Mining February 2006 \textit{The Economic Stronghold} 8.} The small-scale miners and their communities also contribute to job creation in other sectors and indirectly alleviate unemployment.\footnote{47}{Economic Commission for Africa \textit{Compendium on Best Practices in Small-Scale Mining in Africa} 1; NM Policy 16.}

\subsection*{2.2.2 Prevalence of child labour}

As is true elsewhere in the world, Namibia also faces problems with regards to child labour.\footnote{48}{NM Policy 16.} As a sub-sector, small-scale mining is not immune from this problem.\footnote{49}{NM Policy 16.} About 1.7 per cent of the small-scale miners in the Erongo region are in their youth, for example.\footnote{50}{Nyambe & Amunkete www.tips.org.za/files/ SSM_NEPRU_project_Final.pdf 13.} The limited scope of these statistics, against the background of the child labour problem in Namibia generally, may, however, not be a true reflection of the status quo of children involved in small-scale mining across Namibia.

The reasons for the employment of child labour in the small-scale mining sector can vary from the lack of financial capacity of the families of such children to the lack of an adequate educational infrastructure, \textit{inter alia}.\footnote{51}{According to Hentschel, Hruschka & Priester \textquote{Global report on artisanal and small-scale mining} 33, other reasons for the prevalence of child labour include parents who are not interested in the education of their children, parents who are unaware of the risks involved with children working in mines, parents who do not plan their children's future, the tradition of children working in mines, and the lack of legislation, enforcement and labour inspection to curb the practice of child labour in mines.}

The effects of child labour in the small-scale mining industry specifically are far-reaching. As children are engaged in these mining activities they often do not attend school, for example, which detrimentally impacts on their long-term
development and their opportunities in adult life. Small-scale mining also poses a physical threat to children as it is a very dangerous practice.

2.2.3 Increased female vulnerability

In terms of the ILO report for discussion at the tripartite meeting on Social and Labour Issues in SSM of 1999, it is estimated that about 3.4 – 4 million women are involved in small-scale mining directly and another 1.5 – 2 million women indirectly, world-wide. In Namibia it is once again not clear what the percentage of women involved in small-scale mining is, but in the Erongo region it is estimated that about 35 per cent of the miners are female, which is a significant percentage. The involvement of women in small-scale mining should, however, not be seen as a negative aspect per se, except for the periods in a woman’s life when she should not be participating in activities which may pose a threat to unborn or breastfed babies.

Women tend to be inexperienced at mining, as they are seldom employed as miners in the large-scale mining industry, and they are accordingly found doing subordinate work at the bottom end of the small-scale mining sector’s hierarchy. Furthermore, women are often tied to their households and can thus not move around after new discoveries of mineral deposits. As a result they lack experience in the small-scale mining trade and often do not reap the advantages of newly found mineral deposits, which accordingly renders their practice as small-scale miners unsustainable.

It has to be understood that the involvement of women in the small-scale mining sector is not limited to mining itself but also includes trading in minerals, the

53 See the discussion regarding the health and safety of miners in par 2.2.5 hereunder.
54 Nyambe & Amunkete www.tips.org.za/files/SSM_NEPRU_project_Final.pdf 12. According to Dreschler "Small-scale mining and sustainable development within the SADC region" 6, it is estimated that 25 percent of the miners in the SADC region are female; NM Policy 16.
55 Hentschel, Hruschka & Priester "Global report on artisanal and small-scale mining" 30.
56 Dreschler "Small-scale mining and sustainable development within the SADC region" 6.
57 Dreschler "Small-scale mining and sustainable development within the SADC region" 6.
supply of food, drinks, tools and equipment, and in some instances even sexual services.\textsuperscript{58}

Gender inequality in families is inclined to temper whatever benefits\textsuperscript{59} women derive from being involved in small-scale mining, as a male is often the head of the household and the women do not benefit equally from the income generated by the mining.\textsuperscript{60} Further inequality can be seen in the opportunities available to women in small-scale mining as they struggle even more than men to obtain support with regards to finance, for example.\textsuperscript{61} Further challenges which are unique to women in the small-scale mining industry include health risks due to the lack of sanitation in mining camps, malnutrition, physical trauma from the difficulty of manual labour, miscarriages due to injury and stress, and sexual and gender-based violence and abuse.\textsuperscript{62}

\subsection*{2.2.4 Public health care}

Among other public health care concerns, problems such as the prevalence of disease due to the unsafe drinking water and the lack of sanitation facilities are experienced in the small-scale mining communities of Namibia.\textsuperscript{63} The deficiency in public health care in or nearby small-scale mining communities can be attributed to the 'temporary' status of such communities.\textsuperscript{64} The small-scale mining communities often form over very short periods of time as a sudden rush of miners occurs to a certain location as a result of the discovery of a mineral deposit.\textsuperscript{65}

Some communities develop into more permanent settlements over time but are often not recognised as established communities and accordingly do not qualify for access to public health facilities and the benefits of sanitation programmes, for

\begin{itemize}
\item\textsuperscript{58} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 30.
\item\textsuperscript{59} For example the income earning opportunity small-scale mining gives.
\item\textsuperscript{60} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 30.
\item\textsuperscript{61} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 32.
\item\textsuperscript{62} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 30-32.
\item\textsuperscript{63} Nyambe & Amunkete www.tips.org.za/files/SSM_NEPRU_project_Final.pdf 4.
\item\textsuperscript{64} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 19.
\item\textsuperscript{65} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 19.
\end{itemize}
example.\textsuperscript{66} In Namibia, where diseases such as cholera and tuberculosis are highly prevalent among the small-scale miners, the lack of access to public health care poses a significant threat to the lives of miners.\textsuperscript{67}

2.2.4.1 HIV/AIDS

It is estimated that approximately 190 000 people were living with HIV in Namibia in 2011, which amounts to an adult HIV prevalence of 13.4 per cent.\textsuperscript{68} In a single year AIDS has claimed the lives of 3500 Namibians.\textsuperscript{69} Specific reference to the HIV/AIDS pandemic has to be made as miners, both men and women,\textsuperscript{70} have been identified as having a high risk of infection.\textsuperscript{71}

The HIV/AIDS pandemic effects sustainable development, family welfare, health, economic activity and future social and economic viability, to name just a few issues.\textsuperscript{72} As miners, who are often the primary wage earners, fall ill as a result of HIV and are rendered unable to work, their families suffer and the economic, social and emotional impacts can be devastating.\textsuperscript{73}

\textsuperscript{66} Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 20.
\textsuperscript{68} http://www.unicef.org/infobycountry/namibia_statistics.html#102.
\textsuperscript{70} Male miners are deemed as being at high risk as their work requires of them to be away from their wives and regular partners for long periods of time. The women are also regarded as high-risk, as they frequently work in the sex trade, which increases their risk of exposure substantially.
2.2.5 Occupational health and safety

The occupational health and safety of small-scale miners is a significant concern due to the fact that the informal nature of this activity dictates that no specific regulations exist with reference to miners' health and safety. In the Erongo region alone, five miners lost their lives in mine shafts in the period between 2009 and 2011, for example.

Another factor which contributes to the dangerous working conditions in small-scale mines is the fact that the miners are uneducated, especially with regards to the planning and structuring of mines, which results in their constructing unsafe structures. As a number of the small-scale mining activities that take place are conducted illegally, miners tend to erect structures in such a manner that they can be concealed easily and due regard is not given to the safety of such structures.

The most frequent causes of accidents in small-scale mines, according to the ILO, can be attributed to rock falls, lack of ventilation, the misuse of explosives, the lack of knowledge and training, the violation of regulations, and the use of obsolete and poorly maintained equipment. Furthermore, safety equipment in small-scale mining is often completely absent. This can once again be attributed mostly, if not solely, to the miners' lack of finance. In relation to the miners' regard for their own safety, they consider that the cost of safety equipment is too great, especially as it does not directly contribute to their income. It is therefore not a priority, in their estimation.

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79 Hentschel, Hruschka & Priester 'Global report on artisanal and small-scale mining' 41.
80 Hentschel, Hruschka & Priester 'Global report on artisanal and small-scale mining' 42.
81 Hentschel, Hruschka & Priester 'Global report on artisanal and small-scale mining' 42.
82 Hentschel, Hruschka & Priester 'Global report on artisanal and small-scale mining' 42.
2.2.6 Access to finance

In a report by the ILO in 1999 which was based on the findings of a questionnaire that was distributed in Asia, Latin America and Africa, obtaining finance was the greatest constraint facing small-scale miners globally. According to a more recent study the situation in Namibia with regards to obtaining finance by small-scale miners is no different. Despite the existence of Namibia’s Mineral Development Fund (hereafter the NDF) small-scale miners still lack access to adequate funding. The economic viability of small-scale mining operations is often the Achilles heel when artisans apply for funding from the NDF.

One of the main reasons for the small-scale miners of Namibia being denied finance by institutions is the fact that most of the miners are poorly educated and in some instances not educated at all and the financial institutions accordingly deem them to lack the necessary collateral in order to be able to pay back their loans. Another factor which detrimentally affects the miners' application for loans is the volatile nature of small-scale mining. In instances where miners do succeed in obtaining finance for their operations, such loans are generally coupled with very high interest rates, which in turn negatively affect the viability of the re-payment of such loans.

2.2.7 Poverty alleviation

It has already been stated that small-scale mining can assist in the alleviation of poverty. Further, small-scale mining contributes to the economy as most of the

85 Also see par 3.1.4 hereunder.
86 Namibian Mining February 2006 The Economic Stronghold 8.
89 Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 47.
income generated is invested back into local economies. Most of it is spent in towns close to the mining areas and on basic necessities.\textsuperscript{91}

Small-scale mining may potentially also contribute to the growth of Namibia's mining sector generally, and as such to overall national growth. This relates specifically to the fact that sometimes small-scale miners discover large deposits whilst going about their daily exploitation of reserves otherwise deemed uneconomical.\textsuperscript{92}

2.2.8 Access to mining tools and machinery

The sustainability of small-scale mining can be directly linked to the capabilities and capacity of small-scale miners. One of the challenges faced by small-scale miners is that they lack sufficient and effective equipment to maximise their capabilities.\textsuperscript{93} Much of the equipment used by Namibian small-scale miners is relatively primitive and derives from the traditional way of mining, i.e digging.\textsuperscript{94}

2.2.9 Access to markets and buyers

The lack of a formally regulated market in the semi-precious stone\textsuperscript{95} trade often leads to miners selling their stones at a price below market value as a result of their dire need for money.\textsuperscript{96} Their lack of knowledge with regards to the actual value of their products contributes to this.\textsuperscript{97}

International buyers are often repelled from buying stones as a result of the difficulties involved in the process of obtaining export permits, and in some cases

\begin{flushleft}
\textsuperscript{92} Economic Commission for Africa Compendium on Best Practices in Small-Scale Mining in Africa 1.
\textsuperscript{93} Nyambe & Amunkete www.tips.org.za/files/ SSM_NEPRU_project_Final.pdf 17.
\textsuperscript{94} Nyambe & Amunkete www.tips.org.za/files/ SSM_NEPRU_project_Final.pdf 17.
\textsuperscript{95} For example agates, aquamarine, tantalite, topaz, quartz, tourmaline, emeralds and sapphire.
\end{flushleft}
they are also limited in the amount of minerals they are permitted to export, which detrimentally affects the sale of the miners' products.\(^{98}\)

The Erongo Regional Small-Scale Miners' Association (hereafter the ERSMA) for example, recently indicated that it intends to regulate the sales process and create an international semi-precious stone market for this area.\(^{99}\) An advantage that the miners stand to gain from this is that they would no longer have to sell their gemstones for varying and negotiated prices which are usually lower than market value.\(^{100}\)

\subsection{Environmental interests}

Small-scale mining in general is deemed to have higher environmental costs than other types of mining, which means it is 'dirtier' than medium-, large- and modern mining operations per unit of output.\(^{101}\) The main reason for this is that small-scale mining, especially in Namibia, is conducted in open mining pits and the mining area accordingly has to be cleared of all vegetation and growth. In other African countries the most considerable impact on the environment is the use of mercury in gold mining.\(^{102}\) Gold is not mined by small-scale miners in Namibia, and the most common waste produced by this activity is top sand, which is disposed of simply by leaving it around the mining area.

The environmental concerns resulting from small-scale mining can be divided into direct and indirect impacts.\(^{103}\) The mining activities performed by the artisans in Namibia differ from those in other countries in the sense that waste such as mercury is not generated as no gold mining activities are conducted on a

\begin{itemize}
\item[99] The Namibian Small-scale miners struggling to survive 18 February 2013.
\item[100] The Namibian Small-scale miners struggling to survive 18 February 2013.
\item[101] Hentschel, Hruschka & Priester ‘Global report on artisanal and small-scale mining’ 48.
\item[103] Although the author hereof is not aware that such a distinction has previously been made, it is deemed necessary here, in order to illuminate the difference between environmental harms resulting from the actual mining activities and on the other hand the harms caused by the inhabitants of the so-called mining settlements.
\end{itemize}
small-scale.\textsuperscript{104} The most prevalent 'direct' environmental harm caused by the small-scale miners of Namibia is degradation of the environment, especially in the form of deforestation, siltation of drainage systems, and land degradation as a result of their digging open holes, audits and mining pits, trenches, building steep walls to the pits, and disposing of rocks in the mining areas.\textsuperscript{105}

Although it may be argued that the environmental harm caused as described above is less significant than the other environmental challenges that Namibia faces, it should be borne in mind that in such an arid country with large percentages of uninhabitable geographical areas\textsuperscript{106} no harm can be afforded.\textsuperscript{107}

The harms that are caused relate for instance to erosion damage and deforestation, landscape destruction, garbage and solid waste, tropical diseases, cultural damage due to the invasion of sensitive tribal land, and the practising of uncontrolled small-scale mining activities in protected areas.\textsuperscript{108}

\textbf{2.4 Conclusion}

It is evident from the discussion above that small-scale mining affects those directly involved in the practice as well as the community as a whole. The effect small-scale mining has is also not limited only to the environment, but extends to impact on the interests of other parties, both directly and indirectly. It must be said though that if properly regulated, small-scale mining has the potential to uplift many people and contribute to the country as a whole.\textsuperscript{109} In the paragraphs

\textsuperscript{106} Only one per cent of Namibia's geographical area is arable land, according to http://data.worldbank.org/indicator/AG.LND.ARBL.ZS/countries.
\textsuperscript{107} It should be understood in context that the author does not condone any degree of harm caused to any environment, which is inflicted either negligently or intentionally, but that in order for people to survive, harm to the environment is inevitable. However, a proper consideration should be given to all relevant factors in the instance that an activity has the potential to cause environmental harm, and in the present scenario the sensitive nature of the geographical area of Namibia is such a relevant factor and should be weighed against the possible socio-economic gains.
\textsuperscript{108} Hentschel, Hruschka & Priester 'Global report on artisanal and small-scale mining' 49.
\textsuperscript{109} Hilson 2002 Natural Resource Forum 3.
to follow, the regulation of small-scale mining in Namibia will be discussed and critically evaluated.

3 Regulatory tools applicable to small-scale mining

Small-scale mining in Namibia is regulated *inter alia* by law and policies such as the Mining Act, the Diamond Act,¹⁰ the EMA, the Constitution, the EA Policy and the NM Policy on a national level. Regional instruments such as the Southern African Development Community's (hereafter the SADC's) Protocol on Mining¹¹ are also applicable to all mining activities in Namibia. Namibia is also a party to various international instruments such as treaties and agreements which may have an influence on the regulation of small-scale mining.¹² Together all of the abovementioned create the regulatory framework applicable to small-scale mining in Namibia. This framework is discussed below.

3.1 National legislation

3.1.1 The Constitution

The *Constitution of Namibia*, 1990 (hereafter the Constitution) does not explicitly provide for, nor mention mining or small-scale mining. It is, however, the environmentally related provisions that make the Constitution part of the total regulatory framework applicable to small-scale mining. Provision is made for environmental protection in article 95(l) of the Constitution which states that:

> [t]he State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: ...

> (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures

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¹⁰ 13 of 1999.
¹¹ 10 February 2000.
¹² These include the *Convention Concerning the Protection of the Worlds Cultural and Natural Heritage*, 6 April 2000, the *United Nations Framework Convention on Climate Change*, 16 May 1995, the *Convention on Biological Diversity*, 16 May 1995, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 4 September 2003.
against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

This Constitutional environmental principle does not, however, establish an enforceable environmental right, although it is binding on all levels of government – including the level at which the Commissioner operates. With reference to the nature of the constitutional principle, Louw states:

> It merely constitutes an abstract objective constitutional provision that should guide the state in its decision-making processes that may have an impact on or influence the environment.¹¹³

As an organ of state the Commissioner as well as all other authorities mandated with the authorisation, monitoring etcetera of small-scale mining are bound by this principle.

### 3.1.2 Mining Act

The Minerals (Prospecting and Mining) Act has as its purpose to regulate minerals in Namibia, with specific reference *inter alia* to the reconnaissance, prospecting and mining for, disposal of, and the exercise of control over minerals.¹¹⁴ The Mining Act determines that all rights in relation to minerals vest in the State.¹¹⁵ A Mining Commissioner together with other officers appointed for this purpose is empowered in terms of the Act to perform such powers, duties and functions as may be imposed on him/her by the Minister.¹¹⁶ In terms of section 5,¹¹⁷ the Mining Commissioner and designated officers may investigate and make enquiries into any reconnaissance, prospecting or mining operations being conducted in Namibia in order to determine whether any of the provisions of the Act, terms and conditions or any order made in terms of the Act are being adhered to.¹¹⁸

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113 Louw *Environmental regulation of uranium mines* 3.
114 Mining Act, Objective.
115 Mining Act s 2.
116 Mining Act s 4.
117 Mining Act.
118 Mining Act s 5(1).
The Mining Act applies to small-scale miners to the extent that mining as provided for in the Act is defined as.\textsuperscript{119}

Any operations calculated to win any mineral or group of minerals from a mine or from any ore won from a mine, and includes any operations which are necessary for, or incidental to, such operations.

As small-scale mining has the objective of exploiting minerals, like any other type of mining, the practice therefore fits within the scope of the application of the Act. As the Mining Act is the primary regulatory instrument with regards to reconnaissance, prospecting and mining, the Act and more specifically the provisions applicable to small-scale miners and small-scale mining operations are discussed in order to explain the manner in which the Act regulates artisanal mining. The Act is quite detailed as far as it concerns administrative and related processes, as will become clear from the discussion below.

The Mining Act makes specific provision for 'mining claims', which are available to Namibian citizens only, are valid for three years, and serve to protect small-scale mines and mineral deposits.\textsuperscript{120} However, no person shall peg any claim unless such a person is the holder of a non-exclusive prospecting licence, or the holder of an exclusive mining licence with the permission of the Minister as contemplated in terms of section 25(2)(a).\textsuperscript{121} The procedure with reference to the acquisition of a non-exclusive prospecting licence and the rights of such licence holders are subsequently discussed.

3.1.2.1 Prospecting licences

A small-scale miner in Namibia needs a non-exclusive prospecting licence.\textsuperscript{122} In terms of the Mining Act the holder of a non-exclusive prospecting licence may carry out prospecting operations, remove minerals and sell or dispose of minerals with the permission of the Commissioner. This is further subject to the conditions

\textsuperscript{119} Mining Act s 1.
\textsuperscript{120} Mining Act s 25(1).
\textsuperscript{121} Mining Act s 25(1).
\textsuperscript{122} As per an exclusive reading of s 16-24 of the Mining Act.
as determined by the Minister or subject to the conditions of an exemption granted under section 137.\textsuperscript{123} A holder of a non-exclusive prospecting licence may, however, not exercise any of the rights above on or under any private land unless the holder of such a licence has obtained permission from the owner of such land in writing or by endorsement on the licence to exercise his/her rights on such land without paying compensation to the owner of the land.\textsuperscript{124} The licence holder may further not exercise his/her rights in such a way that the rights and interests of the owner of any land are adversely affected, except to the extent that the owner is compensated.\textsuperscript{125}

The Mining Act further stipulates that a holder of a non-exclusive prospecting licence may not exercise his/her rights on or under land: a) forming part of any land in relation to which an application has been made by another person for a reconnaissance licence and an exclusive right as referred to in section 59 which has been submitted to the Commissioner and is pending, b) any land in a claim area, prospecting area, retention area or mining area or subject to the provisions of section 29.\textsuperscript{126}

In the instance that the holder of a non-exclusive prospecting licence has removed any mineral or group of minerals from the place that it was found or incidentally won for any purpose other than the sale or disposal, to any place in Namibia, the holder of such a licence shall inform the Commissioner in writing of such removal within fourteen days or any longer period that the Commissioner allows and provide particulars of the nature of the sample, mineral or group of minerals and the place that it has been moved to.\textsuperscript{127}

Any person may apply for a non-exclusive prospecting licence, provided that in the case of a natural person, such a person has reached the age of eighteen

\begin{itemize}
\item \textsuperscript{123} Mining Act s 16(1).
\item \textsuperscript{124} Mining Act s 16(2)(a).
\item \textsuperscript{125} Mining Act s 16(2)(b).
\item \textsuperscript{126} Mining Act s 16(2)(c).
\item \textsuperscript{127} Mining Act s 16(5).
\end{itemize}
years.\textsuperscript{128} The application shall be made to the Commissioner in the prescribed form and be accompanied by such an application licence fee as is determined by section 123. The application must set out all the necessary information required by the Commissioner and be accompanied by the documentation required by the Commissioner.\textsuperscript{129} The Commissioner may then grant such a licence, impose terms and conditions, or refuse to grant the licence.\textsuperscript{130} If the applicant is deemed by the Commissioner not to be a fit and proper person to hold such a licence the Commissioner may refuse same.\textsuperscript{131}

### 3.1.2.2 Pegging claims

Once a small-scale miner has obtained a non-exclusive prospecting licence he/she will be able to peg a claim in terms of Part VI of the Mining Act.\textsuperscript{132} The procedure, restrictions, limitations, manner, and effecting of the pegging of claims are accordingly discussed.

As stated already, no person may peg a claim unless he/she is the holder of a non-exclusive prospecting licence, or an exclusive prospecting licence.\textsuperscript{133} Certain restrictions are placed on the pegging of claims, which include that no person may peg any claim in respect of source material which is specified in part 5 of Schedule I of the Mining Act.\textsuperscript{134} Further, no small-scale miner may peg a claim if such a miner is the holder of ten or more mining claims, and accordingly no miner may peg more than ten claims or a number of claims which would, together with any other claims pegged by such a miner, exceed the number of ten claims without the prior permission of the Minister.\textsuperscript{135} It follows that very specific limitations are imposed on small-scale miners as far as concerns the number of claims which may be pegged by a single miner.

\begin{itemize}
\item \textsuperscript{128} Mining Act s 17.
\item \textsuperscript{129} Mining Act ss 18(1) and (2).
\item \textsuperscript{130} Mining Act s 18(3).
\item \textsuperscript{131} Mining Act s 20.
\item \textsuperscript{132} Mining Act s 25.
\item \textsuperscript{133} Mining Act s 25.
\item \textsuperscript{134} Such source materials include amongst others: uranium and thorium.
\item \textsuperscript{135} Mining Act s 26(2).
\end{itemize}
As said above, an application for the permission of the Minister shall be made in writing and in the required form, and accompanied by an application fee and such supporting documentation as may be required.\textsuperscript{136} In considering such an application the Minister will weigh up the interests of the development of the mineral resources of Namibia and the technical and financial resources of the applicant to which such an application relates.\textsuperscript{137} Such technical and financial resources are not described in the Act in any further detail.

A small-scale miner is further prohibited from pegging any claim between sunset and sunrise on a Sunday or public holiday unless such a person or his duly authorised\textsuperscript{138} representative is present on the land on which such a claim is pegged and in possession of the first-mentioned person's exclusive or non-exclusive prospecting licence, or a certified copy of the same.\textsuperscript{139} If a miner pegs a claim as referred to above, he/she shall allot an ordinal number to each claim pegged in consecutive order commencing with number one.\textsuperscript{140} Contravention of section 27(1) is regarded as an offence and may lead to a fine not exceeding R8000 or twelve months imprisonment, or both.\textsuperscript{141}

Section 28 of the Act prescribes the manner in which a claim must be pegged and determines that a peg shall be in a rectangular shape with dimensions of 600 and 300 metres for its longer and shorter sides respectively.\textsuperscript{142} These provisions will not, however, apply to claims in respect of which this size and shape is rendered impossible, but in such instance the claim shall not exceed 18 hectares.\textsuperscript{143}

Any claim in respect of section 28(1) shall be pegged by the erection of two middle beacons, each at the middle of the long sides, 300 metres horizontally apart, four corner beacons at each corner of the claim together with line beacons

\begin{enumerate}
  \item Mining Act s 26(3).
  \item Mining Act s 26(4).
  \item It is required that the authorisation is in writing.
  \item Mining Act s 27(1).
  \item Mining Act s 25(2).
  \item Mining Act s 25(3).
  \item Mining Act s 28(1).
  \item Mining Act s 28(2).
\end{enumerate}
adjoining any two boundary beacons if the same are necessary to ensure clear visibility of the boundary beacon from any line beacon.\textsuperscript{144} Claims in respect of section 28(2) shall be pegged by erecting a corner beacon at each point where each line on the boundary of such a claim changes direction and line beacons between any of the aforementioned beacons to ensure visibility of the boundary beacon from any beacon adjoining the first mentioned beacon with the boundary beacon.\textsuperscript{145} In the instance that the place of a beacon as set out above is not reasonably accessible, an indicatory beacon shall be erected at each boundary line which meet up at a point as close as possible to the point indicating the position of such a point.\textsuperscript{146}

The beacons as contemplated above shall consist of a peg in the form of either a metal rod with a diameter of more than 20 millimetres, or a metal fencing pole or a wooden pole with a diameter of more than 50 millimetres which is fixed, having regard to the nature of the surface of the land, in an upright position projecting at least one metre above the surface of the ground.\textsuperscript{147} The beacon shall further have a plate consisting of metal or strong wood, the long and short sides which shall measure more than 300 and 230 millimetres respectively, at the uppermost end of the peg.\textsuperscript{148} The peg must also have a cairn of stones of conical shape at its base with a diameter of more than one metre at its apex and rising to least 300 millimetres in height, or in an area where sufficient stones are not available, a heap of gravel or sand with a diameter of more than two metres at its apex and at least 300 millimetres in height.\textsuperscript{149}

In addition to the above, the cairn of stones further needs to be surrounded by a trench 300 millimetres deep and wide where the landscape permits.\textsuperscript{150} Where the landscape does not allow for the digging of such a trench, a two metre line of stones needs to be laid from the base of the cairn in the direction of the two

\textsuperscript{144} Mining Act s 28(3).
\textsuperscript{145} Mining Act s 28(4).
\textsuperscript{146} Mining Act s 28(5).
\textsuperscript{147} Mining Act s 28(6)(a).
\textsuperscript{148} Mining Act s 28(6)(b).
\textsuperscript{149} Mining Act s 28(6)(c).
\textsuperscript{150} Mining Act s 28(6)(d).
adjoining beacons of such a beacon on the boundary of such a claim.\textsuperscript{151} The beacon plates as contemplated by section 28(6)(b) must display, in legible block letters more than 25 millimetres in height, the name of the licence holder, the nature and number of the licence, the ordinal number allotted to the claim by the holder, the date that the claim was pegged, a description of the type of beacon (i.e. a middle beacon, corner beacon, etcetera) and in the case of an indicatory beacon, the distance from the peg of such beacon to the point to which such a beacon relates.\textsuperscript{152}

Once a claim has been pegged in accordance \textit{inter alia} with the requirements as set out above, no person other than the licence holder of the claim in question may carry on prospecting operations on the claim during a period of 21 days as from the date of the pegging of the claim, or in the event that an application for the registration of such a claim has been made to the Commissioner, until such time that the application is refused, withdrawn or has lapsed, or if the application is granted, until such time as the registration of the claim is entered into the register referred to in section 36(2).\textsuperscript{153}

It follows from the above that very specific measures are in place to ensure the limitation and protection of the rights of a small-scale miner once he/she has obtained the necessary authorisation and properly pegged a claim.

3.1.2.3 Rights of the holder of a mining claim

A small-scale miner who pegged a claim in accordance with the prescribed requirements has the right, subject to the conditions to which a mining claim has been registered, to carry out mining operations and prospecting operations for a period not exceeding six months, or for any period as determined by the Commissioner upon application by the holder, for any mineral or group thereof for which the claim has been registered.\textsuperscript{154} The minerals or group of minerals which

\textsuperscript{151} Mining Act s 28(6)(e).
\textsuperscript{152} Mining Act s 28(7).
\textsuperscript{153} Mining Act s 29.
\textsuperscript{154} Mining Act s 31(1)(a) and (b).
have been mined by the holder of the claim may be removed to any place within Namibia from the place it was won, found or incidentally won in the course of prospecting operations, given that it is not a controlled mineral or sample or group of such a mineral, for any purpose other than the sale or disposal thereof.\textsuperscript{155}

The mined minerals or group thereof may also be removed to any place outside of Namibia with prior consent by the Commissioner and subject to the terms and conditions as determined. Controlled minerals or samples or groups thereof may further also be removed with the permission of the Commissioner.\textsuperscript{156} Minerals or groups thereof as referred to in section 31(1)(a) and (b)(i) of the Mining Act may be removed for the purposes of the sale or disposal thereof, again only with the prior permission of the Commissioner.\textsuperscript{157}

Other operations such as the erection or construction of accessory works reasonably necessary for any small-scale mining operations, prospecting operations, removal, selling, or disposal as set out above may be carried out by the holder of the mining claim with the prior permission of the Commissioner and subject to the provisions of sections 52(1)(a)-(e) and (f), 52(2)-(7) and 53 of the Act.\textsuperscript{158} Permission shall not be granted in respect of a claim situated on private land in the absence of an agreement (between the holder of the claim and the owner of such land) that contains the terms and conditions relating to the payment of compensation to the land owner.\textsuperscript{159} In some instances a small-scale miner would be exempted from entering such an agreement.\textsuperscript{160}

The holder of a mining claim who has removed any mineral or group of minerals in terms of section 31(1)(c) and who is not exempted in terms of section 137 of the Act must inform the Commissioner in writing within fourteen days of such removal, or such a longer period as the Commissioner may allow, and provide

\textsuperscript{155} Mining Act s 31(1)(c).
\textsuperscript{156} Mining Act s 31(1)(d)(i)-(ii).
\textsuperscript{157} Mining Act s 31(1)(d)(iii)-(iv).
\textsuperscript{158} Mining Act ss 31(1)(e), 31(2) & 31(3)(a).
\textsuperscript{159} Mining Act s 31(3)(b).
\textsuperscript{160} See s 110(4).
particulars of the nature of the sample, mineral or group of minerals and the place
to which it has been moved.\textsuperscript{161} Any person who contravenes this provision shall
be guilty of an offence and liable to imprisonment of not more than two years or a
fine not exceeding R20 000, or both, on conviction.\textsuperscript{162}

3.1.2.4 Registration of mining claims

A person who has pegged a claim as set out above\textsuperscript{163} will be allowed to register
such a claim. The registration procedure that a small-scale miner for example
would have to follow is prescribed by the Act.\textsuperscript{164} After a claim has been 'pegged' as per the provisions of section 28, the Commissioner shall within 21 days of receiving an application grant or refuse the registration of the claim.\textsuperscript{165} The details of the relevant information required for the purposes of the application are all contained in the Act.\textsuperscript{166} The full particulars of the claimant; any other licences issued to the claimant in accordance with the Act; any future or past, general or mining operations within a ten-year period that are to be executed by a claimant alone or with a person outside of Namibia; and any other documentary proof that may support the claim; these matters are exemplary of the information required.\textsuperscript{167} The Act also extensively provides for the renewal of registrations.\textsuperscript{168}

The Commissioner further has the discretionary power to request in the form of a written notice from the claimant further information as he deems relevant in consideration and determination of a registration application.\textsuperscript{169} Should the Commissioner deem it necessary, further investigations may follow.\textsuperscript{170} The Commissioner shall consider several mitigating factors during the process of

\begin{thebibliography}{99}
\bibitem{161} Mining Act s 31(5).
\bibitem{162} Mining Act s 31(6)(a).
\bibitem{163} Par 3.1.2.
\bibitem{164} Mining Act s 33.
\bibitem{165} Mining Act s 33(1).
\bibitem{166} Mining Act s 33.
\bibitem{167} Mining Act s 33(2)(a) and (b).
\bibitem{168} See Mining Act s 33(2) and (3).
\bibitem{169} Mining Act s 34(1)(b).
\bibitem{170} Mining Act s 34(2).
\end{thebibliography}
making a final decision on the application, such as the need to conserve and protect natural resources of the land in question as well as those adjacent to it.¹⁷¹

Section 35 lists instances where the Commissioner may refuse the application for the registration of claims.¹⁷² In addition, section 35 provides for the reasonable grounds which the Commissioner must take into account when considering a claim, such as good faith, and whether or not the claimant envisages taking appropriate measures to prevent pollution of the environment during the course of the mining operations.¹⁷³ The Commissioner may determine by way of written terms and conditions the way in which the mining claim shall be registered and thereafter it shall be entered into the register of mining claims.¹⁷⁴

Should all the requirements be met, the Commissioner shall issue a registration certificate to the claimant.¹⁷⁵ This will be accompanied by a sketch-plan of the claim area indicating the geometrical and numerical depictions and a description of the claim.¹⁷⁶ The registration shall further contain the terms and conditions of the approval of the application, as well as a written notice informing the landowner of the registration of the claim.¹⁷⁷ The Commissioner is responsible for keeping and maintaining a register of all mining claims.¹⁷⁸ This register shall contain the full particulars of the holder, a joint holder, and or a person with an interest in such a mining claim, or to whom such a claim or interest has been transferred, granted, ceded or assigned.¹⁷⁹ Furthermore, the register shall record information such as the date on which the claim has been registered, transferred or interest granted, ceded or assigned.¹⁸⁰ The above-mentioned certificate and register will be available for inspection by any person, free of charge, and any

¹⁷¹ Mining Act s 34(3).
¹⁷² This section must be read together with section 32 and Part IV of the Act.
¹⁷³ Mining Act s 35.
¹⁷⁴ Mining Act s 35(2).
¹⁷⁵ Mining Act s 36(1)(c).
¹⁷⁶ Mining Act s 33(2).
¹⁷⁷ Mining Act s 36(1).
¹⁷⁸ Mining Act s 36(2)(a).
¹⁷⁹ Mining Act s 36(2)(a) & (b).
¹⁸⁰ Mining Act s 36(2)(c).
person may obtain copies of such a registration certificate or extracts of the register.\textsuperscript{181}

A mining claim's registration can last for up to three years after the date of registration before it lapses.\textsuperscript{182} The registration can also last until a later date, not exceeding two years at a time, as from the date on which the registration has been renewed, or until the date on which a mineral deposit retention or mining licence is issued to the holder in respect of the claim area.\textsuperscript{183} Subject to the above-mentioned, and the other provisions of the Act, where the holder of such a mining claim makes an application for the renewal of the registration or for the mineral deposit retention or mining licence in relation to the claim area, the registration shall not lapse until this application is refused or withdrawn.\textsuperscript{184} If such an application is granted, a mineral deposit retention or mining licence shall be issued for an application for renewal.\textsuperscript{185}

The Mining Act makes ample provision for the record keeping of information regarding mining operations, prospecting operations, the types and quantities of minerals being mined, mining areas, employees of the holders of mineral licences, expenses and taxes in the form of a requirement as set out in section 45 of the Act. Any person who contravenes or fails to comply with the record keeping and reporting requirements as set-out in section 45 shall be guilty of an offence and on conviction may be liable to a fine not exceeding R8 000 or imprisonment for a period not exceeding 12 months, or both.\textsuperscript{186}

In the instance where it is reasonably necessary for the holder of a non-exclusive prospecting licence, a mineral licence or a mining claim to obtain access to land in order to carry out operations authorised by such a licence, to erect structures on any land, to obtain a supply of water, to dispose of water or other substances or do anything else in order to exercise any right conferred to him by such a

\textsuperscript{181} Mining Act s 36(3).
\textsuperscript{182} Mining Act s 37(1)(a).
\textsuperscript{183} Mining Act s 37(1).
\textsuperscript{184} Mining Act s 37(2).
\textsuperscript{185} Mining Act s 37(2).
\textsuperscript{186} Mining Act s 45(4).
licence, and the owner of the land in question who is competent to grant such a right unreasonably withholds such permission, an application may be made to the Minerals Ancillary Rights Commission to grant any such right.\(^\text{187}\)

The type of details and specifications provided for in the Mining Act as applicable to small-scale miners testifies to the fact that in terms of authorisation processes small-scale mining is very thoroughly regulated. This makes for strengths as well as weaknesses in the total regulatory framework, as will be shown in Paragraph 4.

**Figure 1: The procedure of registering a claim in terms of the Mining Act**

1. Non-exclusive mining licence application from the Minister: Mining and Energy
2. Miner pegs a claim according to detailed provisions in Mining Act
3. Application for registration of claim from the Mining Commissioner
4. Claim is registered
5. Upon registration miner acquires different rights e.g. exclusive mining right on demarcated land for a period of 6 months.

\(^{\text{187}}\) Mining Act s 109.
By default, mining has an impact on the natural environment. This is as true of small-scale mining as of large-scale mining. The EMA most importantly sets out a set of environmental protection measures as well as environmental management principles. The EMA was introduced on 6 February 2012 and establishes framework legislation that regulates all matters pertaining to the environment, especially with regards to environmental management and environmental protection measures in Namibia.

The EMA also gives effect to article 95(l) of the Constitution in as far as it requires of the state to promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at protecting the environment. The EMA would in principle apply to small-scale mining as it falls under the listed activities as published in the Government Gazette and in terms of section 27(2) of the Act.

The objectives of the EMA are, *inter alia*, to prevent and mitigate the significant effects of activities on the environment by ensuring that the effects thereof on the environment are carefully and timeously considered. The objective is further to ensure that there are opportunities for timeous participation of interested and affected parties throughout the environmental assessment processes and that the findings of an assessment process are taken into account before any decision is made in respect of projected activities. Part 2 of the EMA sets out the principles of environmental management and serves as the general framework within which environmental plans must be formulated, and also guides the implementation of the EMA and other laws relating to the protection of the

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188 See par 2.3 above.
189 EMA Objectives.
190 EMA s 3.
191 This provision is discussed in detail in par 3.1.1 above.
192 These activities include the construction of facilities for any process or activities which require a licence, right or other form of authorisation, any other form of mining or extraction of any natural resources, whether regulated by law or not, including but not limited to resource extraction, manipulation, conservation and other related activities.
193 GN 29 in GG 4878 of 6 February 2012.
194 EMA s 2.
195 EMA s 2.
environment.\textsuperscript{196} Given the wide scope of application of the Act and the environmental impacts\textsuperscript{197} of small-scale mining, the principles and provisions of the Act must be taken into consideration in decisions on and the activity of small-scale mining.

In terms of section 3(2) of the EMA, renewable resources must be used on a sustainable basis for the benefit of both present and future generations, and community involvement must be promoted and facilitated in natural resource management and the sharing of benefits arising from the use of such resources.\textsuperscript{198} The needs, values and interests of interested and affected parties must be taken into account and the participation of such parties promoted with regard to decisions that may affect such parties.\textsuperscript{199} This would typically include decisions related to the authorisation of small-scale mining activities. Another one of the principles envisaged in section 3(2) of the Act is the polluter pays principle, in terms of which a person who causes harm to the environment must pay the costs of the rehabilitation of the damage caused, together with the costs associated with preventing any further harm.\textsuperscript{200}

Provision is furthermore made for the promotion of sustainable development with regards to all aspects pertaining to the environment, including the promotion of equitable access to environmental resources whilst taking into account the functional integrity of ecological systems to enable the sustainability of the systems in order to prevent harmful effects.\textsuperscript{201} The EMA also acknowledges the importance of the culture and heritage of Namibia, including its biological diversity, and urges the protection thereof for the benefit of present and future generations.\textsuperscript{202} With regards to remediation, the EMA prescribes that the reduction, re-use and recycling of waste must be promoted.\textsuperscript{203}

\textsuperscript{196} EMA s 3.
\textsuperscript{197} See par 2.3 above.
\textsuperscript{198} EMA s 3(2)(a)-(b).
\textsuperscript{199} EMA s 3(2)(c).
\textsuperscript{200} EMA s 3(2)(j).
\textsuperscript{201} EMA s 3(2)(d) and (f).
\textsuperscript{202} EMA s 3(2)(g).
\textsuperscript{203} EMA s 3(2)(l).
In terms of the prevention of environmental harm, assessments must be undertaken before the commencement of any activity which may have significant impacts on the environment or natural resources and activities which may cause harm to the environment must be reduced, limited or controlled.\textsuperscript{204} Even though mining is a listed activity attracting the requirement to have an environmental impact assessment done, it seems as if small-scale mining is excluded. In instances where sufficient evidence exists that threats of serious irreversible damage to the environment is imminent, the lack of scientific certainty will not be a satisfactory reason for the postponement of cost-effective measures to prevent environmental harm.\textsuperscript{205} The Commissioner in his/her consideration of small-scale mining authorisations should therefore be guided by the precautionary principle. This is true for all other EMA principles that may apply to small-scale mining.

3.1.4 MDFA

In terms of the funding of mining activities (including small-scale mining activities) in Namibia the Mineral Development Fund (hereafter the MDF) is the main tool. The MDF was established by giving effect to section 2 of the MDFA and is aimed \textit{inter alia} at safeguarding the production and earning power of the mining sector, at broadening the production base of the mining sector into the national economy and at supporting the mining sector in general by way of financing through loans, grants and other assistance.\textsuperscript{206} The application process, the requirements, conditions and considerations for a small-scale miner to obtain funding from the MDF are set out in section 15 of the MDFA and are accordingly discussed.

An application for funding must be made to the Board.\textsuperscript{207} Further to the particulars of the applicant, the application must contain the particulars of the mining operations, the minerals being mined, the licences which are held and the

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{204} EMA s 3(2)(e) and (l).
\item\textsuperscript{205} EMA s 3(2)(k).
\item\textsuperscript{206} MDFA s 2-3.
\item\textsuperscript{207} The Minerals Development Fund Control Board which is established in terms of s 4 of the MDFA.
\end{itemize}
\end{footnotesize}
prospecting operations of the applicant.\textsuperscript{208} Such an application shall also contain particulars of the project, programme or purpose for which the loan or grant is required as well as any other information which may be specified by the Board as being deemed necessary for considering the application.\textsuperscript{209}

In order to consider an application for a loan or grant the Board may conduct such investigations as are deemed necessary and shall not grant such an application unless it is satisfied that in the prevailing market conditions at the time of the application financing cannot be obtained elsewhere on reasonable terms and conditions.\textsuperscript{210} Further to the above, the Board must be satisfied that all eleven of the other requirements in terms of section 15(5)(b) have been met.\textsuperscript{211} The Board may also determine terms and conditions for the loan within its discretion, bearing in mind that the loan must bear a concessional rate of interest on terms reflecting the profitability and risk of each project.\textsuperscript{212}

It follows from the above that a small-scale miner would in principle be able to access external funding from the MDF, in which instance the requirements and preconditions are clearly outlined in the law.

\textbf{3.2 National policies}

\textbf{3.2.1 Namibia's Green Plan}

Compiled by the Ministry of Wildlife, Conservation and Tourism as well as an array of other governmental and non-governmental organisations, Namibia’s Green Plan (hereafter the Plan) has the objective of securing a safe and healthy environment and a prosperous economy for present and future generations.\textsuperscript{213} In

\begin{itemize}
\item \textsuperscript{208} MDFA s 15(2)(b)(i)-(iv).
\item \textsuperscript{209} MDFA s 15(2)(c) and (d).
\item \textsuperscript{210} MDFA s 15(4)-(5)(a).
\item \textsuperscript{211} Two of the requirements are, for example, the recruiting and promotion of private investment in the mining sector and the development or expansion of mineral processing facilities.
\item \textsuperscript{212} MDFA s 15(6).
\item \textsuperscript{213} Ruppel & Ruppel-Schlichting (eds) \textit{Environmental Law and Policy} 95.
\end{itemize}
essence, the aim of the Plan is to regulate the use of Namibia's natural resources without jeopardising the future accessibility thereof.  

The Plan determines, in accordance with the precautionary principle mentioned earlier, that all major construction projects, which may include mines and small-scale mines, must be preceded by an environmental impact assessment in order to ensure that potential negative effects on the environment be avoided, or alternatively minimised. It should, however, be noted that this policy and the said requirement preceded the promulgation of the EMA and that the EMA's environmental impact assessment provisions prevail in the case of conflict.

The notion of sustainable development stands central in the Plan together with various actions that need to be addressed in the pursuit thereof. All development in Namibia, including mining developments, may be deemed to form part of the long-term planning for Namibia. One may therefore assume that small-scale mining and the regulation thereof in the short- and long term will be expected by the Namibian government to be directed at the balancing of social, environmental and economic considerations.

3.2.2 Vision 2030

According to the Vision 2030 (hereafter the Vision) sustainable development, economic growth and the environment are *inter alia* some of the traits that Namibians should cherish as a nation. With regard to socio-economic rights,
poverty should be considerably reduced and the government must strive to create a condition of full employment by the end of the term of the Vision.\textsuperscript{221}

Further emphasis is placed on the equal opportunity of all citizens to have access and utilise the natural resources of Namibia.\textsuperscript{222} All of the issues raised in the Vision, which include mining, should be so addressed in the context of the principle of sustainable development.\textsuperscript{223}

3.2.3 NM Policy

The NM Policy is the only Namibian Policy document which explicitly provides for small-scale mining. In the executive summary of the NM Policy it is stated that:

Government acknowledges the participation of Namibians in small-scale mining. The Government remains committed to the promotion and development of the small-scale mining sector. It will investigate and take measures to support orderly operations of small-scale mining to allow legally supported operations in areas where large-scale mining is not cost efficient.\textsuperscript{224}

The regularisation and improvement of small-scale mining so that it becomes a part of the formal mining sector is one of the objectives of the Policy.\textsuperscript{225} Further, the Policy aims to promote and encourage local participation in exploration and mining as well as local beneficiation of mineral products, and to ensure compliance with the national environmental policy and other relevant policies to develop a sustainable mining industry, to name but a few objectives.\textsuperscript{226}

The NM Policy acknowledges that small-scale mining has increased significantly in the international environment and that it has the potential to economically empower disadvantaged groups.\textsuperscript{227} It is further acknowledged that much of the economic potential of small-scale mining is lost due to the absence of legal and

\begin{footnotesize}
\begin{enumerate}
\item NM Policy iii.
\item NM Policy 9.
\item NM Policy 9.
\item NM Policy 5.
\end{enumerate}
\end{footnotesize}
fiscal frameworks together with the rudimentary nature of the production, processing and marketing methods employed by small-scale miners. In lieu of the aforementioned the government undertakes to promote the further development of small-scale mining activities.

In the light of the social interests of small-scale mining it is acknowledged that it creates employment opportunities and encourages entrepreneurship. The government undertakes to encourage small-scale mining operators to adhere to good environmental, health and safety standards as the lack of monitoring of small-scale mining activities may lead to unsafe practices inevitably resulting in health and safety hazards and the abuse of children.

It is further acknowledged that the process of pegging and registration of mining claims in terms of the Mining Act is still centralised and not always readily available to small-scale miners throughout the country, and that the decentralisation of administrative and support services may assist in solving this problem. A weakness of the administrative process is the brief duration of permits and the inadequate monitoring of the small-scale mining sector, and this under-development of the mining claims system has resulted in a growth in illegal mining activities. The NM Policy states that the government is aware of the perception that small-scale miners do not receive adequate attention and accordingly undertakes to investigate cost-effective and efficient methods for the claim registration system for small-scale miners.

With respect to the economy and marketing environment of the small-scale mining sector it is acknowledged that certain weaknesses, such as the lack of finance, structured marketing systems and marketing information, aggravated by the theft of minerals and transfer pricing results in a loss of revenue to Namibia.

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228 NM Policy 5.
229 NM Policy 6.
230 NM Policy 16.
231 NM Policy 16.
232 NM Policy 16-17.
233 NM Policy 17.
234 NM Policy 17.
and renders the small-scale mining sector unsustainable.\textsuperscript{235} The government reaffirms in the NM Policy that it will continue to provide loans to viable small-scale mining projects through existing and future financial structures.\textsuperscript{236}

In order to commence mineral prospecting and mining operations, small-scale miners must adhere to a so-called environmental contract and it is admitted that the process of issuing these contracts must be streamlined and speeded up.\textsuperscript{237} It must, however, be noted that despite this reference to it in the Policy, the nature and enforceability of the environmental contract is not readily available in the existing legal framework. The government undertakes to ensure compliance with environmentally acceptable mining practices by way of regular monitoring.\textsuperscript{238}

In terms of the MN Policy the government accepts that business skills and innovation in the small-scale mining community are inadequate despite the fact that there are support centres already in place to assist miners in the development and implementation of appropriate technology.\textsuperscript{239} As a result, the government gives a further undertaking to provide technical assistance and information to small-scale miners and to encourage the development of appropriate technologies and skills training for small-scale miners.\textsuperscript{240}

### 3.2.4 EA Policy

The EA Policy was approved in 1995 with the purpose, \textit{inter alia}, of giving effect to article 95(1) of the Constitution and Chapter 11(j) of Namibia’s Green Plan. It takes the position that environmental impact assessment is a key tool to further the implementation of a sound environmental policy, which strives to achieve Integrated Environmental Management (hereafter IEM).\textsuperscript{241} The EA Policy reaffirms that the principle of sustainable development must underpin all policies,

\begin{itemize}
\item \textsuperscript{235} NM Policy 17.
\item \textsuperscript{236} NM Policy 17.
\item \textsuperscript{237} NM Policy 17.
\item \textsuperscript{238} NM Policy 18.
\item \textsuperscript{239} NM Policy 18.
\item \textsuperscript{240} NM Policy 18.
\item \textsuperscript{241} EA Policy Preamble.
\end{itemize}
programmes and projects in Namibia, and that the country's natural resources must be utilised in a responsible manner for the benefit of both present and future generations.\textsuperscript{242}

Appendix B of the EA Policy lists certain activities for which an environmental assessment (hereafter an EA) is required. Specifically listed are mining, mineral extraction and mineral beneficiation\textsuperscript{243} and accordingly the EA Policy will be applicable to small-scale mining activities. Although the EMA and regulations in terms thereof have mostly replaced the provisions of the EA Policy, the EA Policy is still applicable in as far as the EMA does not make specific provision with regards to activities which might have an impact on the environment.

The EA Policy provides for various components in the process of reaching the established outcomes for an EA, which include a management plan, a monitoring programme, an environmental agreement and an audit proposal.\textsuperscript{244} All of these instruments are implemented with the aim of actively contributing to effective environmental governance.\textsuperscript{245}

3.3 Conclusion

From the above discussion it is evident that small-scale mining in Namibia is regulated by different legislation and policy documents. Nevertheless, there are certain weaknesses in the current framework. The strengths and weaknesses of the existing legal and policy framework will be discussed in the next paragraph.

4 Strengths and weaknesses of the existing regulatory framework

The objective of this section of this study is to distil from the discussion thus far some of the key strengths and weaknesses of the regulatory framework relating to small-scale mining in Namibia. A distinction is made between the strengths

\begin{itemize}
\item \textsuperscript{242} EA Policy Introduction.
\item \textsuperscript{243} EA Policy Annexure B Item 11.
\item \textsuperscript{244} EA Policy par 6.3; Louw \textit{Environmental regulation of uranium mines} 31.
\item \textsuperscript{245} EA Policy par 6.3; Louw \textit{Environmental regulation of uranium mines} 31.
\end{itemize}
and weaknesses regarding legal design and the substantive content of the applicable law and policies.

It merits mentioning at this point that, as was shown above, the social, environmental and economic interests pertaining to small-scale mining do not exist in a vacuum. The law is expected to cater for a complex set of interrelated interests in the small-scale mining sector. The *Compendium on Best Practices in Small-Scale Mining in Africa* for example states that:

> Putting an efficient legal framework in place without enhancing the financial capacity of miners or raising their awareness of their legal obligations does not help to eradicate illegal mining activities. Similarly, enacting regulations for improving health and safety standards or environmental management without improving access to technology, finance, information and support services might have little long-lasting impact.\(^{246}\)

Using this as a benchmark and taking into account the needs of small-scale mining discussed earlier in this study,\(^{247}\) the following strengths and weaknesses are found to exist in the current Namibian law and policy framework.

### 4.1 Strengths

It would seem as if small-scale mining is properly regulated in terms of the administration and licensing aspects. There has been a significant decrease\(^{248}\) in illegal small-scale mining operations over the past decade, which can be attributed chiefly to the Namibian governments’ drive to regulate and promote small-scale mining. The acknowledgement by the government of the importance of the regulation and promotion of small-scale mining in for example, the NM Policy,\(^{249}\) is the first step in the proper regulation thereof.

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246 Economic Commission for Africa *Compendium on Best Practices in Small-Scale Mining in Africa* iv.
247 Chap 2 above.
248 It is estimated that in 2004 80 per cent of the small-scale mining activities were carried out illegally and this number has decreased to less than 5 per cent - Nyambe & Amunkete www.tips.org.za/files/SSM_NEPRU_project_Final.pdf 16.
249 NM Policy iii.
4.1.1 Legal design

The authorisation processes for small-scale mining are thoroughly provided for in the existing legal framework. All the authorisation requirements for small-scale mining are contained in a single law, namely the Mining Act, and accordingly there is very little fragmentation and no need for small-scale miners to familiarise themselves with scattered regulations, norms, standards etcetera. Most aspects of small-scale mining are addressed by the current law and policies with the exception of the regulation of off-set markets.

The fact that non-exclusive prospecting licences are available to Namibian citizens only may assist in preventing the over-exploitation of minerals and the accompanying extended environmental impacts. Further, the fact that 95 per cent of small-scale miners in Namibia are operating legally \(^{250}\) may attest to the fact that despite the weaknesses and the remaining \textit{lacunae}, the legal and policy framework and its implementation and enforcement are succeeding in some ways.

4.1.2 Substantive content

Significant provision is made for public participation in the application, registration and general authorisation processes, which may be said to promote the protection of both the environmental and the social rights of interested parties.

Furthermore, the limitations placed on the number of claims that may be pegged by the holder of a non-exclusive prospecting licence provides for equal opportunities (in principle with regards to the access to mining rights) and fair competition in the small-scale mining sector.

The current legal and policy framework acknowledges environmental impacts as a compulsory consideration in the authorisation processes. Further
acknowledgement of and provision for is also made with regards to some labour law concerns.\textsuperscript{251} With reference to administration, the current legal and policy framework makes ample provision for record-keeping and the collection of information pertaining to mining claims which, in principle, renders the mining operation easy to monitor and makes it possible to retain the necessary statistics.

Legal rights such as the right of a holder of a non-exclusive mining licence or mining claim to access water are strongly protected as, for example, section 109 of the Mining Act provides that an application may be made to the Minerals and Ancillary Rights Commission in instances where rights or demands are unreasonably refused.

\textbf{4.2 Weaknesses}

Although much has been done in the past two decades with regards to the regulation of small-scale mining, for example the introduction of the Mining Act and EMA, certain shortcomings in the existing legislation and regulatory framework still exist.

The organised small-scale mining sector, or the absence thereof according to some,\textsuperscript{252} hampers the potential of this kind of mining to grow into larger, alternatively more sustainable operations.\textsuperscript{253} The absence of a mineral development policy may be the biggest cause hereof.\textsuperscript{254} Small-scale mining has the potential\textsuperscript{255} to contribute to sustainable development.\textsuperscript{256} The ‘weaknesses’ of the current legal and policy framework is subsequently discussed.

\begin{itemize}
  \item \textsuperscript{251} See for example s 45(1)(ii)(cc) of the Mining Act.
  \item \textsuperscript{252} Namibian Mining February 2006 \textit{The Economic Stronghold} 8; Hentschel, Hruschka & Priester “Global report on artisanal and small-scale mining” vii.
  \item \textsuperscript{253} Economic Commission for Africa \textit{Compendium on Best Practices in Small-Scale Mining in Africa} 8.
  \item \textsuperscript{254} Namibian Mining February 2006 \textit{The Economic Stronghold} 8.
  \item \textsuperscript{255} Economic Commission for Africa \textit{Compendium on Best Practices in Small-Scale Mining in Africa} iii.
  \item \textsuperscript{256} Economic Commission for Africa \textit{Compendium on Best Practices in Small-Scale Mining in Africa} 1.
\end{itemize}
4.2.1 Legal design

The most salient problem regarding the current legal and policy framework is that there is no explicit law or policy dealing with small-scale mining. The result of this is that the existing, fragmented 'general' law and policy framework provides the only tangible guidance and regulatory regime.

In terms of the NM Policy it is acknowledged that the process of pegging and registering of claims in terms of the Mining Act is still centralised and not always available to miners throughout the country. Another problem is the short-term duration of permits/licenses/registrations, which causes an administrative and financial burden and creates an environment conducive to illegal small-scale mining activities. The absence of a monitoring system directed at the specific features of small-scale mining is also among the biggest concerns.

The Mining Act places a heavy administrative burden on small-scale miners in terms for example of the pegging of claims, the obtaining of licences, applications for condonement and extensions, reporting and record-keeping, and in most cases the small-scale miners do not possess over the necessary means, whether financial or educational, or the tools to meet all the requirements as set out in the Mining Act.

Theoretically the impacts of small-scale mining on the physical environment are addressed by the Constitution, the EMA, the NM Policy, the EA Policy and Mining Act all read in conjunction. The enforcement of the provisions of the aforementioned legislation, however, is a challenge, as not all of the small-scale miners are registered and the government may not be aware of the mining operations being conducted by these illegal miners and accordingly cannot

257 NM Policy 16-17.
258 NM Policy 17.
259 See Chap 3 above.
regulate the same. It is acknowledged that the monitoring of the small-scale mining sector is inadequate.\textsuperscript{261}

The activities of miners who are indeed registered also remain difficult to regulate as they move around quite often after the discovery of new mineral deposits and mining operations are conducted in a very big, mostly uninhabitable area of Namibia. Accordingly the state relies on the miners’ sense of responsibility to conduct their operations in a manner that is least harmful to the environment in accordance with the law and policy framework.

The current legal and policy framework does not make provision for the challenges that may arise by virtue of the fact that most small-scale miners are not property owners and often mine on privately owned land. Worryingly, the NM Policy is the only regulatory instrument that makes specific reference to small-scale mining, and as it is only a national policy, it remains largely unenforceable.

\subsection*{4.2.2 Substantive content}

Despite the existence of the MDF a significant need for access to funding still exists among small-scale miners. Even though the MDF is focused on smaller mining ventures it is still largely inaccessible to small-scale miners due to the nature and requirements of the prescribed application process for the obtaining of funding. Further to this, there are lots of arbitrary powers in the granting of finance, which render the current financial structures insufficient.\textsuperscript{262}

The current laws and policies do not regulate the off-set markets for the products being mined by small-scale miners, which results in abuse and injustice for small-scale miners.

The Mining Act is also not very clear on some of the requirements guiding the decision on whether or not to register a claim. For example, one of the

\footnotesize{\textsuperscript{261} NM Policy 17.  
\textsuperscript{262} See the discussion in par 3.1.4 above as well as MDFA s 15.}
requirements that the Commissioner has to consider is whether or not the applicant possesses the necessary technical and financial resources and capacity.\textsuperscript{263} This capacity is neither explained nor clearly defined in the Act, a fact which could lead to arbitrary decision making.

No provision is made for conflict resolution mechanisms between small-scale miners \textit{in ter re} and other mining companies, for example, or between small-scale miners and property owners, or between small-scale miners and the authorities. Such a dispute may arise, for example, where one small-scale miner invades the mining area on which a claim has been pegged by another small-scale miner.

The law further does not make provision for the provision of incentives for the use of efficient, clean technology. In terms of the Economic Commission for Africa’s \textit{Compendium on Best Practices in Small-Scale Mining in Africa}, where this is a benchmark, together with technical training, which can lead to more effective environmental protection.\textsuperscript{264}

\section{Conclusion and recommendations}

The objective of this study was to investigate to what extent small-scale mining is regulated by current Namibian law and policy framework. The study commenced with an introduction to small-scale mining in Namibia which \textit{inter alia} described the practice of small-scale mining, noted the lack of a working definition, described its possible effects, and listed the laws and policies which may play a role in the regulation thereof.

In paragraph 2 the socio-economic rights of interested and affected parties with regards to small-scale mining were unpacked and discussed. This discussion included an analysis of the possible positive and negative effects that small-scale mining may have on all interested and affected parties. It was evident from the discussion that small-scale mining affects those directly involved in the practice

\textsuperscript{263} See the discussion in par 3.1.4 above as well as MDFA s 15.
\textsuperscript{264} Economic Commission for Africa \textit{Compendium on Best Practices in Small-Scale Mining in Africa} 31.
as well as the community as a whole, and that if properly regulated it would have the potential to uplift the individual miners as well as the community in which the mines are situated.

The Namibian legal and policy framework was accordingly discussed in depth in Paragraph 3 in so far as it is applicable to small-scale mining. From the discussion it was clear that various law and policy instruments play a role in the regulation of small-scale mining. It was also found that proper provision was made for such regulation in certain respects but not in others.

The objective of Paragraph 4 was to identify and discuss the strengths and weaknesses of the current Namibian law and policy framework as far as it regulates small-scale mining. This was done with reference to the legal design and substantive content of the relevant laws and policies.

In terms of the initial research question it was found that small-scale mining is quite well regulated in Namibia. Despite the weaknesses identified in Paragraph 4, ample provision is made for the regulation of small-scale mining, although most of the laws and policies in terms whereof it is regulated are not specifically aimed at small-scale mining.

The main strengths that were identified in the law and policy framework are the provision which is made for environmental considerations in decision making procedures, the proper regulation of the application and administrative requirements with regard to the obtaining of licences and claims, and the acknowledgement of the importance of sustainable development in the regulation and promotion of small-scale mining.

In terms of the weaknesses identified, the most significant are the centralised nature of the application for the pegging of claims, the lack of formal provision and regulation of the off-set markets, and the lack of access to finance for small-scale miners.
In terms of the second generation rights as discussed in Paragraph 2 pertaining to child labour; unemployment; gender issues; public health care; occupational health and safety; access to finance; poverty alleviation; and access to mining tools, machinery, markets and buyers, it must be said that more could be done by the Namibian government to give effect to these rights. Although most of these issues are mentioned and/or addressed in some form in the legislation and/or policies, it is clear from the contents of this study that these rights still remain unfulfilled, to a certain extent, in the small-scale mining environment.

5.1 Recommendations

It is recommended that regulatory measures be put in place to make provision for and regulate the off-set markets for the minerals being mined by the artisanal miners. Further, that provision be made for addressing the financial needs of small-scale miners in addition to that which is already provided for by the MDFA. The decentralisation of the processes regarding the registration and pegging of claims might assist, *inter alia*, in the promotion of legal small-scale mining activities. This could be accomplished, for example, by establishing a network of regional and district offices for the monitoring and lending of assistance to small-scale miners.

Further to the above, there is a dire need for improved monitoring of small-scale mining and enforcement of law and policies. This might be resolved by the establishment of a specialised small-scale mining unit or department within the ministry responsible for mining that would promote and provide for support to the sector.

The narrow correlation between the promotion and regulation of small-scale mining on the one hand and poverty alleviation and rural development on the other is evident in the discussion above. The importance of the small-scale mining sector should not be forgotten by the government as it has great potential to uplift and empower.
Further research should be conducted into the legal protection of small-scale miners' health and safety, as the current framework for the regulation of occupational health and safety is complex and not suited to this sub-sector. Another interesting issue which requires further investigation is the extent of the enforcement of the regulatory framework with regards to small-scale mining.
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