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AN ECOFEMINIST APPROACH TO UNDERSTANDING DEFICIENCIES IN THE MINING REGULATORY FRAMEWORK IN SOUTH AFRICA

by

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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG | WITS SCHOOL OF LAW

DECLARATION

I, _____727405_____ (Student number), declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

Black women in rural areas of South Africa experience the harm in mining-affected communities more than other groups. This research report examines the legislative causes of this unequal distribution of harm. This report undertakes an analysis of the regulatory framework governing mining using the storytelling of two black, eco-activists in South Africa as the research methodology and ecofeminism as the theoretical premise to analyse and critique this framework.

The issues of exclusion, limited participation, self-determination, violence, land rights, and legislative challenges are elucidated through the compelling stories of these two women and their legal battles in the pursuit of justice. Introducing ecofeminism as a theoretical framework, the paper underscores the shared oppression experienced by women and nature within patriarchal societies, advocating for the integration of ecofeminist principles into decision-making and legislative processes.

In its conclusion, the paper calls for legislative reform, exposing the disparities between existing frameworks and the harsh realities faced by women, especially in environmental activism. Accentuating the pivotal role of women's active participation and public engagement, it proposes these as essential steps towards a more equitable and sustainable future. The convergence of ecofeminist principles, inclusive decision-making, and public participation is presented not only as a moral imperative but also as a pragmatic necessity for addressing the intricate challenges posed by environmental degradation and gender-based discrimination.

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I INTRODUCTION

'We will sacrifice our bodies, our blood to save that land for our children'[1]

There is general consensus acknowledging the adverse effects of mining. Though the extent of these effects remains debated, they include environmental degradation and adverse socio-economic conditions within mining communities.[2] Compelling evidence further indicates that the brunt of these consequences is disproportionately borne by black women.[3]

Nonhle Mbuthuma ("Mbuthuma") and Fikile Ntshangase ("Mam' Ntshangase") are prominent figures in the environmental justice movement in South Africa, particularly within mining-affected communities. Mbuthuma has been a vocal advocate for community rights and environmental protection in the Xolobeni area, where mining activities have threatened the livelihoods and well-being of residents. Similarly, Mam' Ntshangase, from the Mpukunyoni community, played a pivotal role in challenging mining interests and advocating for the rights of her community members.[4] Both Mbuthuma and Ntshangase exemplify the resilience and determination of women in rural South Africa to safeguard their land, communities, and future generations against exploitative practices and environmental degradation perpetuated by extractive industries. Their activism highlights the importance of recognising the intrinsic connection between the land, communities, and environmental sustainability, and how these factors impact black women more than other demographics within mining-affected communities.

Against this backdrop, this research report seeks to delve into the regulatory framework in South Africa that governs mining, and its multifaceted impacts, with a specific focus on why black women in rural South Africa experience these adverse effects more profoundly than other

[1] Mark Olalde 'South Africa: The Pondoland Rebellion' *Pulitzer Center*, 12 April 2017, available at *https://pulitzercenter.org/stories/south-africa-pondoland-rebellion* last accessed on 24 January 2024.
[2] Sina Amirshenava and Morteza Osanloo, 'A hybrid semi-quantitative approach for impact assessment of mining activities on sustainable development indexes' (2019) 218 *Journal of Cleaner Production* at 823-834; Responsible Mining Foundation 'Harmful Impacts of Mining: when extraction harms people, environments and economies' 2021, available at *https://www.responsibleminingfoundation.org/app/uploads/RMF_Harmful_Impacts_Report_EN.pdf* last accessed on 11 March 2024, 17 – 32; 40 – 41.
[3] Lian Sinclair, 'Beyond victimisation: Gendered legacies of mining, participation, and resistance' *The Extractive Industries and Society* 8 (2021); Asanda Benya, 'The Invisible Hands: Women in Marikana' (2015) 42 *Review of African Political Economy*.
[4] I have learned about the stories of these two women through my work in the legal field and desktop research.

demographic groups. The purpose is to gain a comprehensive understanding of the challenges black women in mining communities face; critique the regulatory environment regarding social protection in mining areas that allow for this exclusion; and propose initiatives to mitigate these impacts through ecofeminism's call for inclusion.

This research report employs storytelling as a methodology and one of the theoretical pillars to investigate the lived experiences of black rural women in communities affected by mining.[5] It commences in section II exploring the experiences of Mam' Ntshangase and Mbuthuma. Their stories illustrate and personalise the challenges rural women face in opposing mining activities and shed light on the tangible risks that black, female, and rural environmental activists confront, as well as spotlighting the deficiencies of the regulatory framework governing mining activity.

Section III introduces the concept of ecofeminism, which will be used as the second theoretical pillar to introduce, analyse, and critique the regulatory frameworks in South Africa. Ecofeminism is a political philosophy and a branch of feminism that explores the link between humans and nature through a gendered perspective.[6] It argues that the mistreatment of women and the environment are interconnected, aiming to challenge patriarchal and capitalist systems while highlighting the value of both women and nature.[7] This approach addresses the overlapping issues of gender discrimination and environmental harm.[8] This report argues that countering such oppressive treatment involves incorporating ecofeminist principles into decision-making processes and ensuring the active participation of women in these decisions.

With storytelling and ecofeminism as the theoretical and methodological foundations, section IV examines the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), National Environmental Management Act 107 of 1998 ("NEMA"), the Interim Protection of

[5] The terms 'communities affected by mining' and 'mining-affected communities' are used interchangeably in this report. The definition of these terms, for the purposes of this report, includes communities adjacent to the mine and/or mining operations, communities in which mining and/or mining operations are happening or proposed, and new communities established by the mine.
[6] Trish Glazerbrook 'Karen Warren's Ecofeminism' 2002 (7) *Ethics and the Environment*, 13 – 14.
[7] Anshuman Sahoo 'Eco-feminist Jurisprudence: A Much Needed Change in the Perception of Law' (2015) 2 *International Journal of Law and Legal Jurisprudence Studies*, 208.
[8] Gwyn Kirk 'Ecofeminism and Environmental Justice: Bridges Across Gender, Race, and Class' (1997) 18 *Frontiers: A Journal of Women Studies*, 10 - 11; Kathryn Miles 'Ecofeminism, sociology and environmentalism' *Britannica*, 09 October 2018, available at *https://www.britannica.com/topic/ecofeminism* last accessed on 23 January 2024.

Informal Land Rights Act 31 of 1996 ("IPILRA"), the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 ("TLGFA") and the Traditional and Khoi-San Leadership Act 3 of 2019 ("TKLA"). It scrutinises the mining regulatory framework underpinned by an ecofeminist foundation established in section III and aims to answer the question: 'What aspects of the regulatory framework contribute to negative impacts that affect black rural women from mining-affected communities?'. It examines how existing frameworks fall short of addressing the adverse effects on black rural women. The section concludes that the mining regulatory framework simultaneously creates the negative impacts of mining while failing to ameliorate these impacts.

In section V, I consider *Baleni v Minister of Mineral Resources*[9] ("*Baleni*"). This is a seminal case regarding the requirement for mining companies to obtain free, prior, and informed consent ("FPIC"). It also provides authority for the supremacy of informal land rights over mining rights. This section aims to illustrate that, despite its shortfalls, the mining regulatory framework can be interpreted to ensure black rural women's inclusion in mining activities from the outset.

In the final section, section VI, I conclude by advocating for an ecofeminist perspective to be integrated into legislative drafting and interpretation, advocating for its potential to alleviate the adverse impacts experienced by women in mining-affected communities. It is imperative to take concrete and effective steps to ensure the safety, agency, and well-being of black rural women in mining-affected communities.

II THEORETICAL PILLAR 1: STORY-TELLING

'Storytelling reveals meaning without committing the error of defining it'[10]

(a) Storytelling in law

Engaging with the stories of Mbuthuma and Mam' Ntshangase and the methodology of storytelling at the outset is essential. Their narratives lay the foundation for understanding the

[9] *Baleni and Others v Minister of Mineral Resources and Others* [2018] ZAGPPHC 829.
[10] Hannah Arendt "Isak Dinesen: 1885–1963" in *Men in Dark Times* (1970).

gendered aspect of environmental harm and the broader themes discussed herein, namely, exclusion, intersectionality, and the deficiencies of the regulatory framework. These stories explain better than any theory how the omission of communities, especially women, from legislative frameworks and decision-making processes compounds the adverse effects of mining, with black women bearing the brunt of this harm.

In addition to forming the humanising foundation of this report, legal storytelling stands as a creative tool utilised in the practice of law. It is useful both in legal adjudication and legislative law-making. Ruth Anne Robbins, a professor of law, asserts its significance in the practical aspects of legal work, stating that 'storytelling is the backbone of the all-important theory of the case, which is the essence of all good lawyering'.[11] This context underscores the significance of storytelling, as it injects lived experiences into the typically abstract and distant concepts of law, aiming to persuade the reader effectively.

Furthermore, storytelling plays – or ought to play – a crucial role in shaping law and policy, particularly in the drafting of legislation. Legislation aims to address issues, but without an understanding of the problem, it cannot adequately do so. The legislature must ask, 'Why are we drafting this piece of legislation?'– a question that cannot be answered solely by the people in Parliament.

(b) Two stories

This research report commences with the compelling stories of two black women, Mam' Ntshangase and Mbuthuma. The stories of these two women shed light on the detrimental effects of mining on themselves, primarily as women in the community, as well as on themselves as environmental activists for sustainable and community-led development. The report fundamentally aims to humanise the struggle of black women: to survive, to fight, to thrive –seeking a life free from violence, harm, and subjugation. The two stories that follow encapsulate this struggle vividly.

[11] Christopher Rideout, 'Applied Legal Storytelling: A Bibliography' in *Seattle University School of Law Digital Commons* 12 Legal Comm. & Rhetoric: JALWD 247 (2015).

(i) Mam' Ntshangase

Mam' Ntshangase was a dedicated environmental activist and a prominent figure in the leadership of the Mfolozi Community Environmental Justice Organisation[12] ("MCEJO") in KwaZulu-Natal. Established in 2015, MCEJO's mission is to 'promote sustainable projects that will benefit women, the youth, and the elderly, and to uphold all community interests such as improving quality of life and living in an environment that is not harmful to their communities and livelihoods'.[13]

At the time of her murder, MCEJO, under Mam' Ntshangase's leadership, vehemently opposed the proposed expansion of the Somkhele Coal Mine in Xolobeni, an open-cast coal mine operated by Tendele Coal Mining Company ("Tendele"). Tendele is a foreign-owned company operating in South Africa. The Somkhele Mine is situated approximately eight kilometres from the Hluhluwe-Imfolozi Game Reserve ("the Reserve"), which is the oldest nature reserve in Africa. Open-cast mining, also known as surface mining, involves extracting coal from near the earth's surface rather than from deep underground. This method entails removing layers of soil and rock to access coal deposits, a practice often favoured for coal extraction as coal deposits are typically within sixty meters of the surface. Following extraction, the coal undergoes processing at a plant, which includes washing to remove impurities and preparing the raw material for sale.[14]

Whilst the term 'washing' seems innocuous, the washing process, which washes the coal of 'impurities such as ash, soil, and rock, crushes it into graded and sized chunks (sorting) [and] stockpiles grades',[15] is particularly harmful to the environment. It gives rise to 'to large waste dumps, which may ignite spontaneously and cause air pollution'.[16] The waste is typically burned for disposal, but this method itself carries significant environmental impacts.

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[12] 'Mfolozi Community Environmental Justice Organisation' *MCEJO*, available at *https://mcejo.org.za/* last accessed on 14 March 2024.
[13] 'Mfolozi Community Environmental Justice Organisation' *Environmental Justice Fund*, available at *https://ejfundsa.org.za/ejf-grantees/mfolozi-community-environmental-justice-organisation/* last accessed on 10 December 2023.
[14] Mineral Council South Africa, 'The Coal Mining Life Cycle' *Mining For Schools*, 2022, available at *https://www.miningforschools.co.za/lets-explore/coal/the-coal-mining-life-cycle* last accessed on 13 March 2024.
[15] Ibid.
[16] Phillip J Lloyd, 'Coal Mining and the Environment' (2002) *Energy Research Institute, University of Cape Town*, 1.

In addition to the risk of accidental ignition, extinguishing such fires is incredibly challenging once they ignite. These fires emit sulphur oxides into the atmosphere, which can adversely affect respiratory health and lung function. Moreover, sulphur oxides released during burning can contaminate soil, making it infertile, and water sources, making them undrinkable and unusable, further compounding environmental concerns.[17] The noise pollution generated by mining activities and processing plants also adversely affects animals in the area. It hampers their ability to communicate, compromises their well-being, and alters their behaviour.[18]

These are the issues that were raised by the Mpukunyoni community, who were affected by the mine's operations. They raised concerns encompassing health issues such as respiratory illnesses, resource problems including the pollution of drinking water and dried-up water sources, environmental protection, and cultural grievances related to the improper exhumation and movement of graves without adequate identification and notification.[19] The contamination of land and water sources resulting from coal mining waste renders it impossible to cultivate crops for community members and to protect the fauna and flora in the affected areas. The successful expansion of the Hluhluwe-Imfolozi Game Reserve would mean that the Reserve's neighbours could lose access to integral parts of this significant natural reserve – a central focus of Mam' Ntshangase's activism.

The opposition to the project was rooted in these issues. There was, however, support for the project, driven by the urgent need for employment. Mining companies, including Tendele, employ divisive strategies to garner support and use 'divide and conquer' tactics to do so.[20] Tendele made 'half payment to the families who had signed and agreed to be relocated and promised to pay them the balance soon as the other resisting families agree'.[21] This

[17] Ibid, 3.
[18] M.H.L. Duarte, R.S. Sousa-Lima, R.J. Young, A. Farina, M. Vasconcelos, M. Rodrigues and N. Pieretti, 'The impact of noise from open-cast mining on Atlantic forest biophony' (2015) 191 *Biological Conservation*.
[19] Tonie Carnie, 'Expert report uncovers 'hidden mental trauma' of opencast coal mining in rural KwaZulu-Natal', *Daily Maverick*, 08 November 2022, available at *https://www.dailymaverick.co.za/article/2022-11-08-expert-report-uncovers-hidden-mental-trauma-of-opencast-coal-mining-in-rural-kwazulu-natal/* last accessed on 10 January 2024.
[20] The historical roots of the 'divide and conquer' tactic can be traced back to the Scramble for Africa in 1885, where it proved to be an effective method for creating destabilisation, allowing Global North countries to exploit both the people and the land. This enduring strategy finds echoes in contemporary practices, as exemplified by Tendele and Rio Tinto, an Anglo-Australian mining company. Accusations have been levelled against Rio Tinto for employing similar 'divide and conquer' tactics, pitting local communities against each other (*https://londonminingnetwork.org/2012/06/rio-tinto-accused-of-divide-and-conqer/*).
[21] Tsepang Molefe and Robby Mokgalaka, 'Fikile Ntshangase – Another Environmental Activist Violently Silenced' *GroundWork*, 09 November 2020, available at *https://groundwork.org.za/fikile-ntshangase-another-environmental-activist-violently-silenced/* last accessed on 11 December 2023.

counterstrategy not only complicated the community dynamics but also directly undermined Mam' Ntshangase's activism.

Amidst this environmental struggle Mam' Ntshangase, along with fellow members of MCEJO and other environmental activists, faced persistent threats to their lives and intimidation. The period leading up to Mam' Ntshangase's tragic murder saw a surge in violence against community members who opposed the mine.[22] In an attempt to quell the opposition, Tendele sought an agreement with MCEJO, proposing the withdrawal of a court case against the company in exchange for the relocation of households from their homes in Mpukunyoni, Hluhluwe and surrounding areas. Opponents who declined the relocation proposition consequently faced targeted violence. While some members of MCEJO agreed to the proposal, Mam' Ntshangase refused, unwavering in her commitment to her ideals. She boldly declared at a community meeting, 'I refused to sign. I cannot sell out my people. And if need be, I will die for my people.'[23]

Tragically, a few days later, Mam' Ntshangase's words turned prophetic, and she was murdered.

On 22 October 2020, three men forcefully entered Mam' Ntshangase's home in Ophondweni, located approximately forty-five minutes away from the Somkhele mine. She was shot six times while preparing dinner, mere metres away from her thirteen-year-old grandson and two friends. At the date of writing, no arrests have been made in connection to her murder.

Mam' Ntshangase's murder followed a disturbing sequence of events. Her legal representatives asserted that she had been offered and declined a bribe of R350 000 to withdraw her support for the ongoing legal cases against the mine.[24] While shocking, attempts by the mine and its proponents to bribe and intimidate mining opponents are unfortunately not uncommon. Attempts to bribe activists and quash opposition through violence or threats have become

[22] In April 2020, Tholakele Mthethwa, a fellow activist, experienced a horrifying incident when nineteen bullets were fired at her home while she was with her two-year-old granddaughter. Miraculously, she survived this targeted attack; Cyril Zenda, 'LATEST KILLING AMPLIFIES DANGER FACING RIGHTS ACTIVISTS IN SOUTH AFRICA' *Fair* Planet, 01 December 2020, available at *https://www.fairplanet.org/story/latest-killing-amplifies-danger-facing-rights-activists-in-south-africa/* last accessed on 11 December 2023.
[23] Ibid (Zenda).
[24] Ibid.

increasingly prevalent, especially against environmental activists.[25] In response to Mam' Ntshangase's murder, Tendele publicly condemned the act, labelling it a 'senseless killing'. Alongside local leadership, they called for a thorough investigation by the South African Police Service and urged calm within the community.[26]

Tendele subsequently publicly disclosed the names of individuals actively opposing the mine's expansion.[27]

(ii) Nonhle Mbuthuma

Mbuthuma, an eco-activist hailing from Xolobeni in the Eastern Cape, occupies a fundamental role in the ongoing struggle against environmental injustice in the Pondoland region along the Wild Coast. Xolobeni, a conglomerate of villages,[28] bears witness to a rich history of resistance, epitomised by the notable Pondoland revolt spanning from 1950 to 1961.

Mbuthuma's activism is rooted in the historical struggle against oppression in Xolobeni and the surrounding villages, echoing the ongoing fight for justice along the Wild Coast. Her connection to this history is deeply felt, as her grandfather, who raised her, actively participated in the Pondoland Revolt. She recounts 'He told me all the stories about how he used to fight and why. It was to keep the land and ensure the people are happy. Now he says it is up to me, that my decisions must not hurt the next generation.'[29]

Fighting for her ancestral land is a necessity for Mbuthuma, driven by a commitment to herself and future generations. Growing up deeply connected to the land, she engaged in farming,

[25] Katharina Rall, 'Still No Justice for Killing of South African Mining Activist' *Human Rights Watch,* 22 October 2021, available at *https://www.hrw.org/news/2021/10/22/still-no-justice-killing-south-african-mining-activist* last accessed on 18 January 2024.
[26] Patrick Greenfield, 'South African environmental activist shot dead in her home' *The Guardian*, 23 October 2020, available at *https://www.theguardian.com/world/2020/oct/23/south-african-environmental-activist-shot-dead-in-her-home* last accessed on 11 December 2023.
[27] Thami Nkosi on behalf of The Asina Loyiko Working Group 'Civil society statement on Tendele and Mam'Fikile Ntshangase' *Centre for Applied Legal Studies* 21 October 2021, available at *https://www.wits.ac.za/news/sources/cals-news/2021/civil-society-statement-on-tendele-and-mamfikile-ntshangase.html* accessed on 15 March 2024.
[28] For the purposes of this report, these collective villages will be referred to as Xolobeni or uMgungundlovu, used interchangeably.
[29] 'South African Earth Defender Nonhle Mbuthuma Comes To London' *The Gaia Foundation*, available at *https://gaiafoundation.org/south-african-earth-defender-nonhle-mbuthuma-comes-to-london/* last accessed on 22 January 2024.

fishing, and utilising the land for cultural, spiritual, medicinal, and subsistence reasons. This defence of her land and rights exposes her to risks, a choice she willingly makes, stating to journalists, 'I wake up each morning and thank God I am still alive. I know I am a target. My husband and my family and friends are worried. They tell me to go into hiding. But I can't do that. It's not me. I choose this road.'[30]

Mbuthuma's activism under the banner of the Amadiba Crisis Committee (ACC)[31] commenced when an Australian mining company, Mineral Resources Limited, sought to mine the vast titanium reserves in the area.[32] Previously involved in eco-tourism, Mbuthuma and many others, showcased the magnificent terrain and abundant nature of Xolobeni, guiding people through the area's history. The opposition to the proposed mining project stemmed from concerns about its inevitable adverse environmental impact, the displacement of around two hundred households (approximately one thousand people), and the disruption of numerous individuals' relationships with, and access to, the land and sea. Additionally, the mine threatened the livelihoods of community members who earned income through eco-tourism, fishing, and farming.[33]

In 2007, in response to the proposed mining development, the ACC was established by Mbuthuma and various other members of the community. Mbuthuma is its current spokesperson, representing the organisation's public face. While not fundamentally opposed to development, the ACC advocates for community-centric and beneficial projects. Mbuthuma emphasises the importance of community involvement in development and has been quoted as saying '[w]hen it comes to development, you have to be involved. You can't just think about now. You have to think about tomorrow'.[34] For ACC, this would be eco-tourism and agriculture.[35] The ACC's initial focus on the mining proposal expanded to encompass all

[30] Jonathan Watts, ''I thank God I am alive': standing firm against mineral extraction in South Africa' *The Guardian*, 21 July 2018, available at *https://www.theguardian.com/environment/2018/jul/21/i-thank-god-i-am-alive-standing-firm-against-mineral-extraction-in-south-africa* last accessed on 20 January 2024.
[31] Mbuthuma has consistently advocated for her community's development and sustainable economic growth that aligns with community interests. It was institutionalised with the creation of the ACC.
[32] Supra note 29.
[33] 'Amadiba Crisis Committee (ACC)' *Alternative Information and Development Centre (AIDC)*, available at *https://aidc.org.za/partners/amadiba-crisis-comittee/* last accessed on 10 January 2024.
[34] Supra note 29.
[35] Ibid.

developments that pose risks to the land and community, with a commitment to informing the South African and international public about mining-related conflicts.[36]

Mbuthuma has accepted the danger that comes with her eco-activism. She has filed police reports after receiving threatening messages. However, the threats do not end with an intimidating text message. In March 2016, Sikhosiphi 'Bazooka' Radebe ("Bazooka"), Mbuthuma's friend and chair of the ACC, was assassinated on his property. Unknown men approached the house in a vehicle that resembled a police car and opened fire on him in the yard. He was shot eight times.[37] In the hours leading up to his tragic death, Bazooka urgently called Mbuthuma, revealing a hit list.[38] The ominous text she received after his murder further emphasised the imminent danger: 'Bazooka was number one, Sbu was number 2, and you Nonhle you are number 3. We are coming for you.'[39]

This fatal shooting marked the culmination of violent attacks on community members, including an attempt on Mbuthuma's life in 2008.[40] Whispers of a renewed assassination plan against her and a colleague in January 2023 only intensified the grave risks they face.[41] Undeterred, Mbuthuma acknowledges her place on the hit list, stating defiantly at a community meeting, 'If I am dying for the truth, then I am dying for a good cause. I am not turning back.[42]

Both activists courageously advocated for a healthy and safe environment amidst challenges posed by powerful mining companies, an oppressive state, and communities divided by companies seeking to create discord. In the case of Mbuthuma, her advocacy efforts continue, reflecting ongoing dedication and resilience. The stories of these two women shed light on the

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[36] 'Amadiba Crisis Committee' *ESCR-Net*, available at *https://www.escr-net.org/node/367502* last accessed on 21 January 2024.
[37] Tariro Washinyira 'Wild Coast Amadiba mining opponent 'assassinated'' *Mail and Guardian*, available at *https://mg.co.za/article/2016-03-23-wild-coast-amadiba-mining-opponent-assassinated-1/* last accessed on 22 January 2024.
[38] 'Nonhle Mbuthuma' *Front Line Defenders*, available at *https://www.frontlinedefenders.org/en/profile/nonhle-mbuthuma* last accessed on 22 January 2024.
[39] Estelle Ellis 'Death threats as Amadiba Crisis Committee fights for control over land' *Daily Maverick*, available at *https://www.dailymaverick.co.za/article/2020-11-19-death-threats-as-amadiba-crisis-committee-fights-for-control-over-land/* last accessed on 24 March 2024.
[40] Supra note 37.
[41] 'STATEMENT: Amadiba Crisis Committee 2023-01-30: Plot to kill two leaders in Amadiba, Mbizana, EC' *AIDC*, 30 January 2023, available at *https://aidc.org.za/statement-amadiba-crisis-committee-2023-01-30-plot-to-kill-two-leaders-in-amadiba-mbizana-ec/* last accessed on 22 January 2024.
[42] 'We Know Our Lives are in Danger' *Human Rights Watch*, 16 April 2019, available at *https://www.hrw.org/report/2019/04/16/we-know-our-lives-are-danger/environment-fear-south-africas-mining-affected* last accessed on 19 January 2024.

detrimental effects of mining on themselves, primarily as women in the community, as well as on themselves as environmental activists for sustainable and community-led development. The report fundamentally aims to humanise the struggle of black women: to survive, to fight, to thrive—seeking a life free from violence, harm, and subjugation.

Section IV will illustrate storytelling's effectiveness when assessing the mining regulatory framework, before doing so, I will set out the second theoretical pillar that I rely on for assessment – ecofeminism.

III THEORETICAL PILLAR 2: ECOFEMINISM

'Nearly three decades into democracy, the prevailing face of poverty remains that of a black woman'[43]

This section introduces ecofeminism as a theoretical framework that illuminates the connection between environmental exploitation and its detrimental impact on black rural women within mining-affected communities in South Africa. Along with storytelling, ecofeminism is an illuminating tool when assessing mining regulatory frameworks in section IV. Examining the deficiencies in the existing mining regulatory framework through an ecofeminist lens lays the groundwork for proposing measures aimed at mitigating the adverse impacts experienced by both women and the environment in these communities.

(a) A call for inclusion

The term 'ecofeminism' was coined by François d'Eaubonne in her book *Le Féminisme ou la Mort* in 1974. Ecofeminism is a political philosophy and a branch of feminism that examines the intricate connection between humans and nature, employing gender as a lens for understanding these relationships.[44] Ecofeminism contends that there is an interconnectedness between the oppressive treatment of women and the environment, while advocating for transformative solutions, challenging patriarchal and capitalist structures, and recognising the

[43] Cyril Ramaphosa 'Address by President Cyril Ramaphosa on the occasion of Women's Day, Union Buildings, Tshwane' *South African Government* 09 August 2023, available at *https://www.gov.za/news/speeches/president-cyril-ramaphosa-womens-day-2023-09-aug-2023* last accessed on 27 January 2024.
[44] Lois Ann Lorentzen and Heather Eaton 'Ecofeminism: An Overview' (2002) *The Forum on Religion and Ecology at Yale*.

intrinsic value of both women and nature.[45] Through its intersectional lens, ecofeminism addresses the intertwined challenges of gender-based discrimination and environmental degradation. This perspective delves into the striking parallels between the subjugation of women and nature, shedding light on the shared oppression and domination.[46]

Ecofeminism encompasses two primary branches: cultural ecofeminism and radical feminism.[47] Cultural ecofeminism advocates for an intrinsic biological connection between women and nature, as well as the reinforcement of the gender roles women take on in society. Cultural ecofeminism thus holds that women have a distinctive understanding of, and intimate connection to, nature.[48] Cultural ecofeminism is founded on the recognition of women as caregivers, providers, and life creators, who hold a profound appreciation for intuition, an ethic of caring, and the labyrinthine relationships between humans and nature.[49]

Radical ecofeminists, on the other hand, reject the notion of an inherent biological link between women and the environment or caregiving. Instead, they argue that these associations are socially constructed and imposed on women. It is these harmful structures of oppression that should be deconstructed.[50] Radical ecofeminists believe that the 'dominant patriarchal society equates nature and women in order to degrade both'.[51] This perspective highlights the association of women and nature with negative and commodifiable attributes. Its core argument is that women and nature are seen as sources of profit only, attributed to their perceived unreliability, sensitivity, and wild nature. This aligns with the notion that capitalism predominantly mirrors patriarchal and paternalistic values.[52] Radical ecofeminists assert that capitalism prioritises the maximisation of profit, viewing power, labour, and property as tools for dominating both women and nature.

Radical ecofeminism reveals the structure that ensures that women are significantly more vulnerable to exploitation and poverty, often engaging in part-time, unskilled, and semi-skilled

[45] Supra note 7.
[46] Ibid; Mark CJ Stoddart and David Tindall 'Ecofeminism, Hegemonic Masculinity and Environmental Participation in British Columbia, Canada, 1998 – 2007: "Women always Clean Up the Mess"' (2011) *Sociological Spectrum* 31(3).
[47] Supra note 8.
[48] Ibid.
[49] Carolyn Merchant *Radical Ecology: The Search for a Livable World* (2005), 201 – 202.
[50] Supra note 8.
[51] Ibid.
[52] Supra note 7.

jobs for lower pay.[53] The 'necessary labour of "feeding people, looking after the sick, infants, keeping warm, feeling safe, maintaining a sustainable environment or satisfying emotional needs"'[54] is borne primarily by women, which leaves very little capacity – energy, time and financial – for women to enter into the workplace.[55] When they do enter the workplace, they often earn less than their male counterparts, are discriminated against based on their marital and parental status, and face violence in the workplace.[56] Consequently, women face heightened susceptibility to poverty, food insecurity, and hunger.[57] The exploitative reproductive labour performed by women makes productive labour possible. The most exploited in both these forms of labour are black women. Radical ecofeminists highlight the inherent discrepancy in the valuation of labour in production versus reproduction, highlighting how this contributes to the exploitation of women and the environment.[58]

Despite variances in the approaches of radical and cultural ecofeminism, they converge on a shared objective – their goal of advocating for improved treatment of both women and the environment and the rejection of male domination over both women and the environment. Women shoulder a disproportionate share of unpaid care work, underscoring the undervaluation of their contributions. Most care responsibilities, excluding nursing, are unpaid despite being arduous, time-consuming, and demanding. This workload often hinders their participation in public spheres, impeding professional and personal relationships.[59]

The exploration of ecofeminism as a lens for understanding the intricate relationships between humans, nature, and gender, illuminates the shared experiences of subjugation faced by women and the environment. The branches of radical and cultural ecofeminism provide nuanced perspectives on the exploitation of both women and nature, emphasising the need for a paradigm shift in societal values. As we navigate the complex terrain of environmental activism, it becomes evident that women, often relegated to the peripheries of decision-making processes, play pivotal roles as caregivers, providers, and advocates for sustainable practices. Drawing inspiration from ecofeminist principles, it is imperative to recognise the agency of

[53] Supra note 3 (Benya), 555.
[54] Ibid, 546.
[55] Bonita Meyersfeld, 'The rights of women and girls in HRIA: the importance of gendered impact assessment' in Nora Götzmann (ed) *Handbook on Human Rights Impact Assessment* (2019), 159.
[56] Calvert and UNIFEM 'The Calvert Women's Principles', 1 – 4.
[57] Ibid, 4, 8 and 10.
[58] Laura Hobgood-Oster 'Ecofeminism: Historic and International Evolution' in Byron Taylor (ed) *The Encyclopedia of Religion and Nature* 2 ed (2010).
[59] Supra note 55, 154.

women in shaping policies and legislation that protect the environment and promote gender equality.

In her 1974 book, d'Eaubonne argued that the ongoing debate at the time, overpopulation, fundamentally stemmed from the denial of women's bodily autonomy.[60] The ability to oppress women and diminish their designated roles readily extends to the exploitation of the environment. When women's caregiving responsibilities are devalued, so are the resources required for these tasks—land, water, food. It is no coincidence that the feminist resurgence in the 1970s in the United States of America ("USA") aligned with a growing environmental awareness in the country. Earth Day's inception in 1970, after a catastrophic oil spill in Santa Barbara the year before, symbolised a call for environmental protection.[61] Concurrently, second-wave feminism was predicated on the idea that women's liberation and ecological consciousness were inextricably linked.[62]

The denial of women's bodily autonomy and environmental degradation, primarily instigated by men, persists today. There is the ongoing discourse on overpopulation, although that argument seems to be exclusively reserved for black Africans.[63] There are also emerging concerns about underpopulation.[64] Simultaneously, in the USA, women's reproductive rights are facing systematic erosion. The landmark *Roe v Wade* decision was overturned by the USA Supreme Court in 2022 in the case of *Dobbs, State Health Officer of the Mississippi Department Of Health, Et Al. V. Jackson Women's Health Organization Et Al*., effectively

[60] Alicia Puleo 'What is Ecofeminism?' (2017) 25 *Quaderns de la Mediterrània*, 30.
[61] EarthDay.Org 'Our History' *EarthDay.Org*, available at *https://www.earthday.org/history/* last accessed on 22 March 2024.
[62] Daliliah Montesino '"Earthkeeping/Earthshaking": The Legacy of Ecofeminism in the Second Wave Feminist Movement' *The Feminist Poetry Movement* 12 December 2021, available at *https://sites.williams.edu/engl113-f18/montesino/earthkeeping-earthshaking-the-legacy-of-ecofeminism-in-the-second-wave-feminist-movement/#:~:text=This%20special%20issue%20of%20Heresies,to%20end%20the%20exploitation%20of* last accessed on 14 March 2024.
[63] Kate Kelland 'Bill Gates has a warning about population growth' *World Economic Forum* 19 September 2018, available at *https://www.weforum.org/agenda/2018/09/africas-rapid-population-growth-puts-poverty-progress-at-risk-says-gates/* last accessed on 15 March 2024; Eliza Anyangwe 'Prince William's overpopulation remarks will do women no favors' *CNN World* 26 November 2021, available at *https://edition.cnn.com/2021/11/26/uk/prince-william-overpopulation-remarks-as-equals-intl-cmd/index.html* last accessed on 15 March 2024.
[64] Tristan Bove 'One week after Elon Musk talked about an 'underpopulation crisis,' the U.N. says the world population is set to continue growing until 2100' *Fortune* 11 July 2022, available at *https://fortune.com/2022/07/11/elon-musk-underpopulation-crisis-un-population-report/* last accessed on 15 March 2024; Al Jazeera 'Fears for future as South Korea's fertility rate drops again' *Al Jazeera* 28 February 2024, available at *https://www.aljazeera.com/news/2024/2/28/fears-for-future-as-south-koreas-fertility-rate-drops-again* last accessed on 15 March 2024.

nullifying the Constitutional right to abortion.[65] Subsequently, numerous laws have been enacted across the country that restricts women's access to abortion, even in cases of rape or medical necessity.[66] Women are reduced to mere reproductive vessels, with little regard for their lives or the welfare of their children, further diminishing their autonomy over their bodies.

At the same time, the earth is burning.[67]

Women are being utilised to expand the global workforce, further reinforcing their lack of autonomy, while the Earth is being exploited for the enrichment of a select few who profit from its degradation. The unequal distribution of power leaves both women and the environment susceptible to exploitation and oppression, without the necessary protections they urgently require.

(b) Ecofeminism and storytelling in South Africa

Though two stand-alone theoretical frameworks, ecofeminism and storytelling combined form valuable foundations in assessing the mining regulatory framework. For example, Mbuthuma stresses the significance of land as a source of independence, life, and happiness. From her standpoint, corporations, emblematic of a capitalist and patriarchal system, prioritise greed and financial gains, often to the detriment of the environment and public health.[68] The perceived vulnerabilities associated with women and nature make them susceptible targets for oppression, further exacerbated by inadequate legislative measures to counteract these injustices.

Mbuthuma reemphasises the significance of eco-tourism and agriculture, not merely as alternatives to mining but as sustainable practices that contribute to the well-being of her children. She passionately expresses to journalists that 'Humans are not more important than

[65] *Dobbs, State Health Officer of the Mississippi Department of Health, Et Al. V. Jackson Women's Health Organization Et Al*. (2022), United States Supreme Court, 24 June 2022.
[66] Many Republican American states have banned abortion, except in medical emergencies, including Texas, Alabama, and Montana. Missouri recently voted against allowing abortion in cases of rape and incest.
[67] Luke Kelly, David Bowman, Ella Plumanns Pouton, Grant Williamson and Michael-Shawn Fletcher 'Our planet is burning in unexpected ways - here's how we can protect people and nature' *The Conversation* 15 September 2023, available at *https://theconversation.com/our-planet-is-burning-in-unexpected-ways-heres-how-we-can-protect-people-and-nature-213215* last accessed on 14 March 2024.
[68] Nonhle Mbuthuma and Maxine Bezuidenhout 'Op-Ed: Amadiba Crisis Committee will honour slain activist by defending the right to say no to extractivism' *AIDC*, available at *https://aidc.org.za/op-ed-amadiba-crisis-committee-will-honour-slain-activist-by-defending-the-right-to-say-no-to-extractivism/* last accessed on 13 March 2024.

Nature… we must look after Nature because it looks after us - we can't survive without Nature. People go to Church to ask for something but I go into Nature to say "thank you". Thank you God for making trees grow at my house to give me shade and shelter, thank you for a wonderful harvest, thank you for allowing this small plant to grow so that I can heal my child even though I don't have money to buy medicine.'[69] This perspective reflects an innate harmony with nature, where the reciprocal relationship between humans and the environment is acknowledged and celebrated. Mbuthuma's sentiments feature the vital role of sustainable practices in fostering a relationship with nature that goes beyond utilisation and exploitation. The ecofeminist ideology at the core of this issue stresses the interrelation of protecting and celebrating nature alongside protecting and celebrating women.

In assuming the roles of caretaker, provider, and activist against the patriarchal system, Mbuthuma embodies key elements of both branches of ecofeminism – radical and cultural. Her multifaceted approach highlights the interrelation of these perspectives and their relevance in addressing environmental and gender-related challenges. By advocating for sustainable practices and acknowledging the salient value of nature, Mbuthuma exemplifies the principles that resonate with both radical and cultural ecofeminism. Her holistic stance contributes to the broader discourse on the intersectionality of gender, the environment, and activism.

The harm experienced by black women in mining-affected communities in South Africa is fundamentally linked to the harm inflicted upon the environment. Often, the perpetrators of this harm are one and the same. In addressing these systemic issues, it is necessary to have a comprehensive legal framework that safeguards the rights of women and the environment. The role of inclusive law is paramount in shaping a future where the rights and well-being of groups who are exploited and oppressed, including women, are protected, and where the environment is preserved for present and future generations. Having set out the two theoretical pillars, I now turn to provide a description and assessment of the mining regulatory framework.

[69] 'Nonhle Mbuthuma' *Wild Law Institute*, available at *https://www.wildlaw.net/board-of-directors-and-team/nonhle-mbuthuma* last accessed on 28 January 2024.

IV THE MINING REGULATORY FRAMEWORK'S INCLUSION SHORTFALLS

'Diversity is being invited to the party; inclusion is being asked to dance'[70]

Ecofeminism and activist storytelling inform us that inclusion is paramount. Any effective mining regulatory framework must safeguard both women and the environment. Five key pieces of legislation comprise the mining regulatory framework: MPRDA, NEMA, IPILRA, TLGFA and TKLA. This legislation has been selected because, combined, they represent the convergence of the mining regulatory framework across mining rights, land rights and traditional leadership that impact women. When assessed against the theoretical foundations, each piece of legislation falls short to varying degrees.

(a) Primary mining legislation – MPRDA and NEMA

The MPRDA and NEMA form South Africa's primary mining legislation. The MPRDA places the government as the guardian of the resources in the country and aims to provide for 'equitable access to and sustainable development of the resources'.[71] It aims to expand opportunities to enter into and benefit from the country's mineral resources. NEMA aims to protect everyone's Constitutional right to a healthy environment and specifically to meet the needs of previously disadvantaged communities.[72]

(i) MPRDA

Section 2(d) of the MPRDA, declares that its objects are to 'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'.[73] This is the only reference made to women in the act. Unfortunately, this singular mention lacks specificity on how women, as a group who are and have been

[70] Verna Myers 'Diversity is being invited to the party: Inclusion is being asked to dance', available at *https://www.bu.edu/diversity/resource-toolkit/diversity-is-being-invited-to-the-party-inclusion-is-being-asked-to-dance/* last accessed on 16 March 2024.
[71] The Mineral and Petroleum Resources Development Act 28 of 2002, Preamble.
[72] National Environmental Management Act No. 107 of 1998, Preamble.
[73] Supra note 71, section 2.

historically excluded from engagement on issues that pertain to their own futures, should be given the space to participate.[74]

(ii) NEMA

The MPRDA is the legislation from which NEMA flows, NEMA being instrumental in regulating environmental protection. While NEMA echoes the MPRDA's commitment to the protection of women, it, as does the MPRDA, falls short in providing explicit measures for their inclusion in and protection from violence and discrimination throughout the mining processes. NEMA, enacted in 1998, asserts that the '[s]tate must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities',[75] drawing attention again to the necessity for the protection of vulnerable groups. Notably, section 2(4)(q) of NEMA emphasises the 'vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted'.[76] Yet, it fails to translate this acknowledgement into concrete inclusive measures or rights advancements for women.

It is clear that these two primary pieces of the mining legislative framework lack provisions for inclusion, representation, and meaningful decision-making by, or engagement with, women. There should be explicit recognition, promotion, and prioritisation of women's active involvement in decision-making regarding environmental impacts and mining activities, especially black rural women who will live directly with the aftermath of mining. The voices and perspectives of local women must be central to discussions and policies concerning their communities and the challenges they face. Again, inclusion must go beyond superficial measures; it should prioritise addressing the real issues faced by people, forming the foundation for meaningful consultation, participation, and legislative drafting.

[74] Katy Jenkins 'Women, mining and development: An emerging research agenda' (2014) 1.
[75] Supra note 72.
[76] Ibid, section 2(4)(q).

(b) Land rights and tenure – IPILRA

The IPILRA, promulgated in 1996, aims to 'recognis[e] and protect… the underlying land rights of vulnerable people'.[77] This legislation sought to establish secure land tenure for individuals who had endured centuries of dispossession due to racist and sexist colonial and apartheid laws. The IPILRA was intended to be temporary while another permanent piece of legislation was drafted to address these issues. However, it continues to be renewed annually by Parliament, as the permanent legislation has yet to be introduced. Two sections in the Constitution, namely 25(6) and 25(9), empower Parliament to enact laws providing tenure for those historically dispossessed or victimised by past discriminatory laws.[78] Due to the absence of official land rights tenure in many rural communities, particularly following the dispossession of land and displacement of people during Apartheid, communities often have precarious tenure, stressing the critical role of the IPILRA in safeguarding their rights.

The IPILRA has emerged as a pivotal piece of mining legislation, particularly in recent times, for aiding mining-affected communities. Its acknowledgement of land rights, especially the crucial requirement for all affected community members to provide consent for any land deprivation, has empowered individual members with authority over their land and related decision-making processes. The IPILRA has played a critical role in addressing the shortcomings within the MPRDA and its interpretation. Unlike the MPRDA, which has often prioritised mining rights over community land rights, the IPILRA ensures a more balanced approach by focusing on the importance of community land rights. This shift in focus has been instrumental in defending the rights of communities, including women.

Nevertheless, a concern persists with the IPILRA, stemming from its omission of explicit references to women. This omission places women in a particularly precarious position, given that traditional council structures frequently exclude them from the decision-making process, including matters that will have a profound impact on women's lives.[79] The requirement for

[77] 'The Interim Protection of Informal Land Right Act (PILIRA)' *Custom Contested*, available at *https://www.customcontested.co.za/laws-and-policies/the-interim-protection-of-informal-land-right-act-ipilra/* last accessed on 25 January 2024.

[78] Section 25(6) states: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. Section 25(9) states: 'Parliament must enact the legislation referred to in subsection (6)'.

[79] Mkhacani Chauke 'The Role of Women in Traditional Leadership with Special Reference to the Valoyi tribe' (2015) 13 *Studies of Tribes and Tribals*.

consent under the IPILRA is further nuanced by the customary law practices specific to each area, varying from one community to another.[80] Moreover, domestic structures often contribute to additional exclusion, with men typically assuming decision-making roles concerning family and financial matters, and women assuming the care role. The absence of participation in the decision-making process inherently exacerbates the adverse impact of mining on women, as it means they are subject to existing laws, rules, or customs without contributing to the decision-making process.

(c) Traditional leadership – TLGFA and TKLA

(i) TLGFA

The TLGFA outlines provisions for the acknowledgement of traditional communities, councils, and leadership. The Preamble explicitly addresses the incorporation of women in the governance structures of traditional councils. It affirms that 'traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that…gender equality within the institution of traditional leadership may progressively be advanced'.[81] Additionally, it asserts that the 'institution of traditional leadership must promote freedom, human dignity and the achievement of equality and non-sexism'.[82]

This legislation is crucial concerning black women's disadvantages in the mining sector because companies primarily interact with leadership councils. However, the absence of women on these councils exacerbates their exclusion and leads to subsequent disadvantages, such as limited representation in decision-making processes and reduced access to benefits and opportunities within the mining sector. While the TLGFA's preamble is promising, it has two key shortfalls.

Firstly, in the establishment of the traditional councils, the TLGFA introduces a provision mandating that a third of the council must comprise women.[83] However, a notable caveat allows the Premier to set a lower threshold if it is deemed that there is an insufficient number of eligible

[80] *Mashona Wetu Dlamini and Others v Minister of Forestries, Fisheries and the Environment*, case no 59394/21, para 40 – 44; 78.; The explanation about Xolobeni's customary law follows in section V.
[81] The Traditional Leadership and Governance Framework Amendment Act 23 of 2009, preamble.
[82] Ibid.
[83] Ibid, section 3(2)(b).

women to participate.[84] The rule stipulating that only a third of traditional councils need to comprise women is inherently inadequate. The question arises: why should the initial formation of these councils not guarantee equal representation for women, especially considering the critical role they play in governance?

The provision becomes even more concerning when one considers the provision that allows for the lowering of this already insufficient threshold. The lack of clarity on what constitutes women being 'available' to participate introduces ambiguity into the process. This provision, while aiming to promote gender representation, raises concerns about potential loopholes that might compromise the intended level of female inclusion in traditional councils. The ability to adjust the requirement introduces a degree of flexibility and opens the door to interpretations that could dilute the impact of the gender representation objective.

Secondly, the TLGFA extends its provisions to the establishment of kingship or queenship councils.[85] This is problematic as, despite the acknowledgement of queenships, the predominant leadership within traditional governance remains male-dominated. Furthermore, the legitimacy of some kingships is questionable,[86] with many current leaders being 'direct descendants of apartheid-imposed rulers'.[87] This historical context raises concerns about the authenticity and representativeness of traditional leadership structures, emphasising the need for thorough scrutiny and reforms to ensure genuine inclusivity and legitimacy.

Given the significant power and authority vested in traditional leadership, the current state of unequal representation is unacceptable. Traditional councils wield influence over their communities, and the exclusion of women from these decision-making bodies perpetuates a systemic imbalance. Reforming this aspect of the TLGFA is crucial to achieving true gender equality within the institution of traditional leadership. The absence of clear directives on women's participation undermines the broader goals of the TLGFA and impedes progress towards a more equitable and inclusive governance structure. Unfortunately, any hopes of

[84] Ibid, section 3(2)(d).
[85] Ibid, sections 3A(2)(b).
[86] *Wezizwe Feziwe Sigcau and Another v The President of the Republic of South Africa and* Others (961/2020) [2022] ZASCA 121. This case was heard in the Constitutional Court in November 2023 and awaiting judgment. It deals with the legitimacy of the successor to the throne in amaMpondo aseQaukeni.
[87] Anthony Diala 'South Africa has a new traditional courts bill. But it doesn't protect indigenous practices' *The Conversation* 22 September 2022, accessed at *https://theconversation.com/south-africa-has-a-new-traditional-courts-bill-but-it-doesnt-protect-indigenous-practices-190938* last accessed on 27 January 2024.

adequately reforming the TLGFA, in the form of the TKLA, were swiftly quashed given the legislature's failure to adequately facilitate participation prior to enactment.

(ii) TKLA

The TKLA was introduced to address the shortcomings of the TLGFA. However, in 2023, rural communities, activists, including those from the Xolobeni area, and human rights organisations collectively approached the Constitutional Court to address issues related to public participation.[88] The TKLA was deemed unconstitutional and thus invalid due to its 'fail[ure] to comply with its constitutional obligation to facilitate public involvement before passing'[89] it in Parliament. A new bill or a revised act has yet to be tabled or passed.

While the struggle concerning the TKLA and public participation is seen as progressive, the TKLA shares provisions with the TLGFA concerning the requirement for and caveat on the representation of women, stipulating that a third of the representation must be women. This act expands these requirements to various other councils, including the sub-council. Additionally, it mandates 'fair representation of women in the provincial houses and at least one of the elected representatives of such provincial house to the National House to be a woman'.[90] Unfortunately, the legislation lacks clarity on what constitutes 'fair representation'.

The quest for changes within traditional structures had encountered years of unsuccessful attempts, and the introduction of the TKLA presented an opportune moment for voices, particularly the voices of women who have been subject to exclusionary oppressive structures, to be heard. During the bill stage, the TKLA initially empowered traditional leaders to allocate land without consulting communities, and there was no requirement for community consultation in leaders' decisions to enter into partnerships.[91] However, through valuable public feedback, this deficiency was recognised, emphasising yet again the crucial role of public

[88] South Africa is a participatory democracy and mandates public participation in the Constitution in sections 59, 72 and 118.
[89] *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14, para 87.
[90] The Traditional and Khoi-San Leadership Act 3 of 2019, section 49(2)(b).
[91] Xavia Poswa 'What happens when government fails to listen to rural voices: Constitutional Court declares Traditional and Khoisan Leadership Act unconstitutional' *Dullah Omar Institute*, 03 September 2023 available at *https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-18-issue-3-september-2023/what-happens-when-government-fails-to-listen-to-rural-voices-constitutional-court-declares-traditional-and-khoisan-leadership-act-unconstitutional* last accessed on 25 January 2024.

participation, which included the voices of women, in ensuring community rights are safeguarded.

(d) Assessment of the legislative framework and meaningful public participation

Despite an obligation for public participation in legislative drafting, it often falls short, especially in mining-related matters. The TKLA is a clear example of this. Consultations frequently bypass the majority of the community, either concentrating on Traditional Leadership structures that disregard the will of various subsects of the communities they represent,[92] or conducting insufficient and non-compliant consultations.[93] To address this, there must be engagement with all community members, representing different interests and needs, to identify issues and subsequent engagement with affected communities to rectify them. In addition, the impact assessment of any mining project must be gendered. There must be an understanding that not all people within a community are the same or have homogenous experiences.[94] This process relies on the storytelling of those facing harm, acknowledging the diverse experiences of different groups.

In rural areas, traditional councils serve as governing bodies, and meaningful participation of women within these structures is essential. Including women in traditional councils enables them to influence decisions concerning mining activities in their communities. Currently, women are largely excluded from decision-making processes, whether it be in public consultations, formal decision-making bodies, or even within their own households. This exclusion denies them the opportunity to actively engage in shaping their lives and exercising self-determination.[95]

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[92] In Xolobeni, the traditional leader claimed sole representation of the region, asserting that his consultation with the mine sufficed. Notably, he also holds a directorship in the local partner of the Australian company involved. The company contended that their consultations were comprehensive, given the engagement with the traditional leadership. This specific case is documented in *Baleni.*

[93] Sections 10, 16, 22 and 27 of the MPRDA, delineate the requirements for consultation, a term historically mired in controversy. The significance of consultation, however, underwent a pivotal shift following the case of *Baleni.*

[94] Supra note 55, 154.

[95] In this research report, self-determination refers to 'The right to self-determination is the fundamental right of collectivities to decide their own development path'; Daniel Huizenga 'The right to self-determination in rural and indigenous politics in South Africa' (2017) The 5th International Conference of the BRICS Initiative for Critical Agrarian Studies *RANEPA* at page 1.

To achieve this, the legislative framework discussed above must incorporate a gender perspective to counteract the inherent gender bias and discrimination in our society. Inclusion should not be a superficial checklist item but rather meaningful inclusion leading to substantive equality. Failing to 'wade through the invisible barriers to equality and identify structural discrimination'[96] results in the exacerbation of the harm faced by women. Denying self-determination amounts to oppression and a rejection of autonomy. Unsurprisingly, such issues persist in mining legislation, especially that which aims to protect the environment, which, in practice, has tended toward the protection of capital rather than the protection of people. This stresses the undeniable connection between the subjugation of women and the exploitation of nature.

Notwithstanding the deficiency in the mining legislative framework, mining-affected communities have used legal strategies to interpret the framework in a manner which ensures the protection of community land rights and environmental protection, through advancing FPIC, and ultimately, guaranteeing women's inclusion. I consider one such case in the next section.

V *BALENI* – READING INCLUSION INTO THE MINING REGULATORY FRAMEWORK

'But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world'[97]

In 2008, the Minister of Mineral Resources ("the Minister") and other governmental representatives ("government parties"), with the support of the local chief, granted a mining right to Mineral Resources Commodities, the holding company of Transworld Energy and Mineral Resources ("TEM").[98] This decision led to heightened tensions and conflicts within the community. It was during this time that the ACC was formed.

[96] Supra note 55, 158.
[97] Supra note 9, para 1.
[98] Kiyasha Thambi 'Baleni v Minister of Mineral Resources: A fait accompli' (2022) 122 *Journal of the Southern African Institute of Mining and Metallurgy*, 529.

In response to the creation of ACC and community dissatisfaction, the Minister imposed an eighteen-month moratorium on mining activities in the area, effective until 2017. Despite this, TEM submitted a new application for a mining right within the same community in March 2015. This new application became the catalyst for the *Baleni* case.

Diverse opinions about the project regarding the project led to the creation of divisions within the community. Initially, there was strong opposition to the mining project, but over time, some members shifted their stance and supported it. A source of dissatisfaction arose when iNkosi[99] Lunga Baleni, a community member and a member of the traditional council, initially staunchly opposed the mining but later embraced it after receiving benefits from TEM.[100] He accepted a vehicle and a directorial position in both TEM and XolCo, the latter being a mining company established in 2003 as a black economic empowerment partner for TEM.[101]

Despite these complexities, the government parties maintained that the MPRDA took precedence over the IPILRA, contending that only the MPRDA provisions were relevant in acquiring mining rights.[102] iNkosi Baleni's shift in stance created deep divisions within the community, turning comrades into opponents, as he sought to persuade those he had once stood alongside to support the mining project. The divisions extended across the uMgungundlovu area, with inland members favouring the mine due to the perceived lack of impact on their land and the promises of job opportunities and economic growth – a narrative often debunked as a myth.[103]

Baleni was launched by the uMgungundlovu community who sought an order declaring that the Minister's decision was unlawful. The basis of the claim was that the Minister had no authority to grant the mining right to TEM. For the mining right to be valid, there had to be free, prior, and informed consent on the part of the community. The community asserted that they should have been consulted and given the opportunity to consent to the mining operations

[99] iNkosi is the isiZulu word for chief or king. iNkosana is the feminine of iNkosi.
[100] Supra note 109, para 22.
[101] Ibid.
[102] Ibid, para 26.
[103] Professor Bonita Meyersfeld extensively discusses the 'Myth of Mining,' challenging the notion that mining development invariably delivers jobs and economic growth to the communities it enters. This commonly held belief is often debunked. For an in-depth exploration of this argument, refer to Bonita Meyersfeld's article, 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2017) *Business and Human Rights Journal* 2(1).

in their area under the IPILRA, while the mine and the government parties contended that the MPRDA only provides for consultation and not consent.[104]

The applicants based their argument on the integral role of land in sustaining life, providing food, and shelter, and serving as a final resting place.[105] The dispossession of land, as experienced by indigenous communities, equates to a loss of dignity and autonomy. This sentiment reinforces the grave implications mining projects, including the one proposed by TEM, have on the affected communities.[106] In doing so, the uMgungundlovu community asserted their informal land rights under the IPILRA, which stipulates that no one 'may be deprived of any informal right to land without his or her consent'.[107] TEM argued that an application for mining rights under the MPRDA requires consultation only and not consent from the community.[108]

On 22 November 2018, Judge Basson delivered the judgment in *Baleni*. The judgment marked a decisive moment in communities' land rights. The judgment spoke to the significance of the culture and history tied to the land, acknowledging the deep historical meaning of land rights.[109] This consideration was weighed against mining rights.[110] Emphasising that both the IPILRA and the MPRDA aimed to address historical economic and territorial dispossession during colonisation and apartheid, she asserted that these acts should 'be read together'.[111]

The judgment held that commencing the mining project would amount to a deprivation of the community's land rights. Reading the two acts in conjunction, the judge determined that any individual seeking a mining right must consult with *and* secure full consent from the community.[112] Basson J ordered that the Minister lacked lawful authority to grant the mining right to TEM and confirmed the Minister's obligation to obtain full and informed community consent before granting any mining right.[113]

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[104] Supra note 98.
[105] Supra note 9, para 7 – 17.
[106] Ibid, para 1.
[107] The Interim Protection of Informal Land Rights Act 31 of 1996, section (2)(1).
[108] Supra note 71, section 10(1)(*a*) and (*b)*.
[109] Supra note 9, para 9 – 17.
[110] Ibid, para 68
[111] Ibid, para 40.
[112] Ibid, para 48.
[113] Ibid, para 84.

Baleni is seminal in elevating the importance of consent to the same level as consultation for mining-affected communities. This decision grants communities the explicit right to refuse mining activities, a crucial shift in the legislative framework governing mining. Furthermore, the applicants invoked international law standards of FPIC. The acknowledgement of these standards in international and domestic law marked a key moment, setting a precedent to protect these fundamental rights from future infringements. Basson J established that 'in line with international law on free, prior and informed consent, that the applicants have " ... the right to decide what happens on their land", they "... may not be deprived of their land without their consent", and they must be "... allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land"'.[114]

A crucial theme recurring throughout the activism and legal battles in the Xolobeni community revolves around the fundamental right to say no and, equally, the right to emphatically say yes – the right to self-determination. In the broader context of disputes with mining companies and struggles for land rights, the challenge often lies not in the absence of communities' entitlement to the right to self-determination but in their ability to enforce it.[115] The issue fundamentally pivots on power dynamics rather than the acknowledgement of the right itself. The recent judgment marks a significant milestone by enforcing the community's authority to actively participate in these decision-making processes, thereby beginning to balance the negotiating power between communities and mining entities. This is precisely the nature of inclusion that ecofeminism demands.

FPIC plays a crucial role in rebalancing the power dynamics inherent in the consultation process. Prior to the recognition of FPIC as consent and not consultation, mining companies often engaged in selective consultation, primarily liaising with individuals or groups within the traditional council who were supportive of mining activities. [116] These selective consultations frequently overlooked dissenting voices within the community, leading to decisions that did not adequately represent the broader community's interests. FPIC changes this dynamic by

[114] Jackie Dugard 'Evaluating Transformative Constitutionalism in South Africa: A View from the Mineral Rights Adjudication Looking Glass" (2021) *39 Nordic Journal of Human Rights 3*, 377.
[115] Supra note 95 (Huizenga).
[116] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41, decided in the Constitutional Court of South Africa, recognised the community as lawful occupiers and this their consent was required for any activity on the land. Prior to this, traditional leaders had the unilateral power to enter into mining agreements.

necessitating the consent of the entire community rather than relying on superficial consultations with a select few. This ensures that decision-making authority is not concentrated in the hands of a few individuals but is instead distributed among the entire affected population. By requiring mining companies to obtain consent from the entire community, FPIC fosters a more inclusive and democratic decision-making process. It acknowledges the diverse perspectives and concerns within the community, promoting transparency and accountability in mining operations.[117]

Of course, a question remains about the meaning of 'consent' and who in a community is part of the decision-making process leading to the granting or withholding of consent. The requirement for consent would be fulfilled differently in different communities. The customary law of the area would determine the processes by which consensus is achieved. In the uMgungundlovu community, decision-making does not follow a strictly majoritarian approach. Even if a majority agrees, decisions that may lead to conflict or division are not approved. The community engages in an extensive consultative process, and the traditional leader, in their case the iNkosana, primarily assesses consensus rather than making unilateral decisions. This participatory and consensus-driven approach reflects a nuanced understanding of community dynamics and values collective agreement over unilateral authority.[118]

This framework observed in the Xolobeni community exemplifies a crucial aspect of inclusive decision-making: enabling women to participate equally in processes directly impacting their lives, environments, and communities. By involving women who possess first-hand knowledge and understanding of the consequences of these decisions, especially as it pertains to mining activities, this approach ensures that their voices are heard, and their perspectives are considered integral to the decision-making process. This inclusive environment provided the platform for Mbuthuma's activism to flourish, highlighting the transformative power of inclusive and participatory governance structures.

[117] Daniel Huizenga 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa' (2019) 6 *The Extractive Industries and Society*, 717.
[118] Supra note 80.

VI CONCLUSION

In a holistic examination of the intersections between ecofeminism, women's inclusion in decision-making processes, and the compelling narratives of activists like Mam' Ntshangase and Mbuthuma, a profound call to action emerges. Ecofeminism serves as a powerful analytical tool, unravelling the parallels between the subjugation and commodification of women and the exploitation and commodification of the natural environment. Mam' Ntshangase and Mbuthuma's stories bring to light the lived experiences of women on the frontlines of environmental activism, facing gendered violence and systemic challenges, amidst the relentless pursuit of justice.

The threads of ecofeminism weave through the fabric of their narratives, illustrating the intertwined struggles for gender equality and environmental protection. The recognition of women as caretakers, providers, and advocates is not only a theoretical standpoint but a lived reality in communities affected by mining activities. The inadequacies of legislation become glaringly apparent when juxtaposed with the stark realities faced by black rural women, stressing the urgency of reforming policies to address the unique challenges encountered by women in the environmental sphere.

The environmental justice struggle 'is located at the confluence of three of our greatest challenges: the struggle against racism, the struggle against poverty and inequality and the struggle to protect the environment'.[119] These issues are deeply intertwined and cannot be effectively addressed in isolation from one another. Therefore, any legislative framework designed to support environmental justice must comprehensively tackle all these intersecting challenges simultaneously, recognising their interdependence and collective impact on communities and ecosystems.

[119] Jacklyn Cock, 'Public Sociology and the Environmental Justice Movement' Paper presented at RAU Sociology Seminar 2004/21 (10 September 2004) 5.

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