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THE EMERGING PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT IN DEVELOPMENT: EVALUATING DEVELOPMENT PROJECTS IN THE LIMPOPO PROVINCE OF SOUTH AFRICA

THESIS SUBMITTED BY

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IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (PhD)

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ABSTRACT

The problem that I wish to address in this thesis is the failure by development agents, be it corporations or government departments, to obtain genuine consent from local communities before developmental projects can be launched in their territories or localities. The research aims to investigate if the application of the emerging principle of *Free, Prior and Informed Consent* (FPIC) could assist in obtaining genuine consent from affected communities; and to capacitate such communities to fully understand the implications of the proposed projects on their lives before they can agree or disagree to such projects taking place. Theoretical and practical research in the form of case studies was conducted to trace development patterns in South Africa and to establish if FPIC, or at least its spirit, has been applied in development projects. The results are that although South Africa has policies and a legislative framework that is in line with FPIC, the country has not formally adopted this principle. Neither has the principle been fully applied by development agents when they carry out their projects in communal lands. Consequent to these observations, I recommended that South Africa considers to formally adopt the FPIC principle as a policy, and if possible, legislate it; corporate organisations or institutes such as the Minerals Council of South Africa, for example, should adopt the FPIC principle and make its implementation by their members compulsory; and Government must ensure that every Act of Parliament that deals with development as well as land and environmental management incorporates public participation and consent pre-requisites for the granting of licences to carry out development project in lands belonging to local communities.

Key Words: Free, prior and informed consent; development; developmental projects; public participation; relocation; communities; land; policy; capacity, poverty, unemployment; inequality.

DECLARATION

I declare that this thesis is my own, unaided work. I further declare that the thesis has not been submitted before for any degree or examination at any other university.

Naledzani Hendrick Mukwevho

17 October 2019

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Background to the Study: Promptings to Research - a Personal Journey

My work with communities as a government official from the late 1990s onwards instilled in me a keen interest in rural development. During this period I observed how development projects were imposed upon communities by government through officials and development agents. My observation of the perceived failure by the state and development agents to fully engage with affected communities before projects took place on their lands, and during the implementation of such projects, stirred a desire to find a solution to this problem, hence the idea to conduct this research. The work with communities that I am referring to mainly refers to my stints with the Department of Land Affairs and Office of the Public Protector of South Africa. I will briefly narrate my experiences during my stints with the two institutions below.

Land reform became one of the priorities of the new political dispensation which was ushered in after the 1994 South African democratic elections. The new government went to the extent of establishing a Department of Land Affairs (the Department) which mainly focussed on land reform through programmes such as Land Redistribution, Land Restitution and Land Tenure Reform. I joined the Department of Land Affairs' Limpopo Provincial Office in 1997 as Deputy Director: Land Reform. My position at that time allowed me to participate in all three land reform programmes.

In 1998 I was assigned by the Department to work on the Ga-Pila resettlement project. Ga-Pila is a village outside Mokopane town (previously known as Potgietersrus) in the Waterberg district of Limpopo. The Village falls under Mogalakwena Local Municipality. The Limpopo provincial government requested the Department to intervene in the Ga-Pila project as there was a dispute between the community of Ga-Pila, and Potgietersrus Platinum Limited (PPL), a mining company under Anglo Platinum which is owned by Anglo-American Corporation. PPL is currently called Mogalakwena Mine.

In 1993, government granted Anglo Platinum rights to mine platinum in areas around Mokopane, which included Ga-Pila village.[1] The dispute between the mine and the Ga-Pila community started in 1998, when the provincial government authorised an extension of Amplats' operations, inclusive of the Ga-Pila village. This necessitated the relocation of the entire community to a new area adjacent to the current location, called Sterkwater. As part of the relocation package, the company undertook to provide the community with modern houses, monetary compensation, water supply, electricity, schools and other infrastructure in Sterkwater.

Part of the community was not happy to relocate at all. Members of the community who agreed to relocate were still not completely satisfied. Their dissatisfaction stemmed from several issues, including lack of, or inadequate, consultation, the amount of monetary compensation, relocation of graves, types of new houses and infrastructure development.[2]

The Department played a mediating role between the parties and I was the Department's representative at Provincial level. After several months of mediation, however, no resolution could be found. In the end, I was not convinced that there had been adequate community consultation prior to granting a mining right to the corporation, and authorising the expansion of its mining activities to the Ga-Pila area. I felt that most of the unresolved issues should have been dealt with before such mining right or permission was granted.

A few years later, I was employed in the Office of the Public Protector as a Chief Investigator and Head of the Limpopo Provincial office. The core mandate of the Office of the Public Protector is to investigate complaints by members of the public against all State organs in relation to maladministration and poor service delivery.[3] In 2004 the Limpopo Provincial Office received a complaint from communities or villages, dwelling alongside the Luvuvhu River near Thohoyandou in the Thulamela Local Municipality (which is within the Vhembe District). The complaint was directed against the Department of Water Affairs and Forestry

[1] Anglo American 'Mine Profile: Mogalakwena' www.angloamerican.com/about-us/our-stories/mine-profile-mogalakwena (last accessed 11/03/2018).
[2] T. Slander 'The Curse of Wealth: A Case Study on the Impact of Big Mining on Rural Communities in South Africa' http://african-times.com//index.php?option=com_content&view=article&id=273%3AT... (Last accessed 8/8/2011). Further details of the extent of the community's grievances are canvassed in chapter 6 of the thesis.
[3] Section 182, Constitution of the Republic of South Africa, 1996.

(DWAF) for their alleged unfair treatment of the community during and after relocation to make way for the construction of Nandoni Dam.

My office investigated the complaint on behalf of the Public Protector and issued a report that tracked many of the issues raised in the Ga-Pila case: Monetary compensation for the loss of land was not fair and equitable; some complainants did not receive any compensation at all for the loss of land; new houses were of poor quality; cultural requirements were not followed when graves were relocated; there was insufficient consultation during the relocation process; some complainants were not compensated for loss of agricultural equipment; the dam was not fenced off for safety reasons; some homesteads were left just a few metres from the dam water, posing a serious safety risk; there was no water supply in the new locations; and there was no electricity supply in some of the new locations.[4]

My personal involvement in both these projects exposed me first-hand to the practical reality of what takes place on the ground in the roll-out of so-called "developmental projects" and the consequences these hold for local communities. It revealed to me that what policies and legislation prescribe is not necessarily what takes place in real projects. It also suggested that policy and legislation were not going far enough to entrench a right to free, prior and informed consent (FPIC).

The following sections of this introductory chapter expand upon this statement of personal interest in the research project by outlining the importance of development in post-apartheid South Africa; how 'development' has unfolded through State practice; and how communities have tended to respond to development initiatives. It further outlines the state of knowledge of the relationship between FPIC and development in South Africa. The chapter concludes with an expanded problem statement and research questions, a statement of purpose inclusive

[4] Public Protector South Africa 'Final report on an investigation into complaints by people and communities who were allegedly adversely affected by the construction of the Nandoni Dam in Vhembe District, Limpopo Province' Report no. 4 of 2009/10 at 4.

of the selected case studies, limitations and contribution of the research, and structure of the thesis.

1.2 The importance of development in post-apartheid South Africa

Twenty-four years into the democratic era, South Africa is still a developing country. According to the 2016 Human Development Report the country's human development index value for 2015 was 0.666, positioning South Africa at 119 out of 188 countries.[5] Moreover, South Africa is still characterised by acute poverty and inequality. Although great strides were made in the reduction of poverty between 1994 and 2008, with poverty falling from 33.8% in 1996 to 16.9% by 2008, the trend began slowing down again with poverty levels having regressed to 18.9% by 2015.[6]

Unemployment in the country was still very high at 26.7% by end of 2017%.[7] It is submitted that high levels of unemployment increase inequality. Inequality is still rife in South Africa with the poorest 20% of the population consuming less than 3% of the national expenditure and the wealthiest 20% of the population consuming 65%.[8] The situation does not promise to change much in the near future, with country's economy having grown by only 1.3% by 2017, and forecasted to grow by a mere 1.4% in 2018.[9] This situation impacts negatively on the capacity of the country to fight poverty and inequality.

Therefore with the situation as presenting itself above, the importance of development in post-apartheid South Africa cannot be over-emphasised. To this extent, the new democratic government has since 1994 come up with development strategies. It is submitted that these development strategies were grounded in both the South African Constitution and legislation. Below I will succinctly discuss the role of the Constitution, legislation and several strategies in advancing development in post-apartheid South Africa.

[5] Human Development Report, 2016: 'Briefing note for countries on the 2016 Human Development report: South Africa'. www.hdr.undp.org>country-notes>ZAF (last accessed 06/05/2018).
[6] The World Bank: 'The World Bank in South Africa' www.worldbank.org/en/country/southafrica/overview#1 (last accessed 06/05/2018).
[7] Ibid.
[8] Ibid.
[9] Ibid.

(a) Development in the South African Constitution

The Constitution of the Republic of South Africa (the Constitution) lays the foundation for development in the country. Development is the task of all spheres of government. Section 152(1) of the Constitution also carves out a special developmental role for local government. The objects of local government listed in this section include providing democratic and accountable government for local communities; ensuring the provision of services to communities in a sustainable manner; promoting social and economic development and encouraging the involvement of communities and community organizations in the matters of local government.[10]

This section embodies what I will term the spirit of FPIC. This it does by emphasising the following factors: government that is accountable to the communities it serves; sustainable development; environment-friendly development; the promotion of socio-economic development; and an active citizenry in development matters.

More relevant to this thesis is the emphasis on public participation. The section encourages communities to be active citizens who participate in local government matters. This is important because most basic development, such as infrastructure, takes place at local government level. Public participation is the essence of participatory democracy and one of the essential elements of FPIC. Furthermore, section 195 of the Constitution makes it imperative for the public to participate in policy-making and administration, with section 195(1) stating that 'people's needs must be responded to, and the public must be encouraged to participate in policy-making.'[11]

Another development and FPIC-related issue that features prominently in the Constitution is that of the environment and sustainable development. Section 24 of the Constitution states that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of the present and future generations through measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[12]

[10] Section 152 (1) of the Constitution of the Republic of South Africa, 1996.
[11] Ibid s195 (1) (e).
[12] Section 24 of the Constitution of the Republic of South Africa, 1996.

This section promotes responsible development which balances the economic and social needs of the people while protecting and preserving the environment for future use and benefits. On the FPIC side, the environment, including conservation, is well guarded when communities are actively involved in environmental management. The National Environmental Management Act, 1998, which is the framework legislation giving effect to section 24, states environmental management principles NEMA, which will be discussed in detail in chapter 5, provides for community involvement and participation, as well as consent, in the management of the environment where development projects are undertaken in their lands.

The right to equality is also very important when it comes to development. Section 9(1) states that everyone is equal before the law and has the right to equal protection and benefit of the law; whereas section 9(2) goes further to say that equality includes the full and equal enjoyment of all rights and freedoms.[13] The right to equal protection before the law equates to same opportunities and equal access to resources.[14] This is central to development, as it promotes empowerment of all members of the community so that they can fully participate in the lives of the communities to which they belong.

Development can also advance the right to dignity by alleviating poverty and reducing inequality. Section 10 of the Constitution states that 'everyone has the right to have their dignity respected and protected.'[15] There is no dignity in unemployment, poverty and inequality.

Access to land is key to development, and the starting point FPIC is that communities should fully participate in all development projects taking place in their lands. Lack of access to land is one of the main contributing factors to poverty and inequality in South Africa. Section 25 of the Constitution seeks to address this historical injustice. According to section 25(5), 'the state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'[16]

[13] Section 9 of the Constitution of the Republic of South Africa 1996.
[14] Black Sash 'Chapter 1: Bill of Rights and Constitution – Summary of the Constitution' http://www.paralegaladvice.org.za/docs/chap01/04 (Last accessed 07/10/2018).
[15] Section 10 of the Constitution of the Republic of South Africa, 1996.
[16] Section 25(5) of the Constitution of the Republic of South Africa, 1996.

Another indicator of poverty and deprivation is that of housing or lack thereof. Section 26 of the Constitution states that 'everyone has the right to adequate housing.'[17] Millions of South Africans live in informal settlements and under squalid conditions. In the case of Grootboom[18] the constitutional court intervened and ordered government to take positive reasonable steps to address the situation of the inhumane conditions under which the Applicants were living.

According to section 27 of the Constitution, everyone has the right to have access to health care services; sufficient food and water; and social security. These are the basic necessities of life. Human development is measured by, amongst others, lack of hunger and access to health facilities. Regarding social security, government responded to this constitutional requirement by enacting the South Africa Social Security Agency Act, 2004; which resulted in the formation of the South African Social Security Agency that administers social security grants in South Africa.

According to section 29(1) of the Constitution everyone has the right –

(a) to a basic education, including adult basic education; and
(b) to further education.[19]

Disparity in education is the main contributing factor towards inequality in South Africa. Education also plays a critical role in development, as for members of affected communities to give informed consent to development projects on their lands, they need to have capacity to engage at certain intellectual level with the developers so that they can fully understand the implications of granting or withholding their consent.

(b) Development in South African Legislation

As part of implementing the constitutional mandate regarding development, the South African government has since the dawn of democracy introduced enabling legislation which seems to give prominence to development and how it is conceptualised. According to Section 3(1) (d) of the Development Facilitation Act, 1995,[20] one of the main requirements of the

[17] Section 26(1) of the Constitution of the Republic of South Africa, 1996.
[18] Government of the Republic of South Africa & Others v Grootboom & Others (CCT11/00) [2000] ZACC 19.
[19] Section 29(1)(a) and (b) of the Constitution of the Republic of South Africa, 1996.
[20] Act 67 of 1995.

development of State land which is occupied by communities is that such communities should actively participate in the process of land development. This is facilitated by officials from the local government. Rogerson, citing the 1998 White Paper on Local Government, refers to "developmental local government" which means 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.'[21]

Since 1994, the State has enacted legislation to give effect to the constitutional mandate of developmental local government, e.g. the Development Facilitation Act, 1998, the Local Government Municipal Systems Act, 2000 and the Municipal Structures Act, 1998. All these Acts emphasise the requirement of communities to be consulted and to participate in the decision-making processes in all development matters that affect them. This is the essence of participatory democracy which may be described as an arrangement 'to enable people's direct involvement in political, administrative and other processes which affect them.'[22]

According to Sokupo, section 16 of the Municipal Systems Act 'obliges municipalities to develop a culture of municipal governance that complements formal representative governance with a system of participatory governance.'[23] Sokupo goes on to say that 'participatory governance requires involvement of the public in core municipal processes like development planning, performance management, the budget and strategic decisions relating to the services'[24]. This sentiment has been emphasised by the current ruling party of South Africa, the African National Congress (ANC), which has indicated that development is about service delivery to an active citizenry, thereby empowering the communities.[25]

[21] CM Rogerson 'Local Economic Development in Post-apartheid South Africa: A Ten-year Research Review' in V. Padayachee (ed.) *The Development Decade? Economic and Social Change in South Africa, 1994 – 2004* (2005) at 229.
[22] Suzy Croft & Peter Beresford "The Politics of Participation" in David Taylor (ed.) *Critical Social Policy: A Reader* (1996) at 181.
[23] Thabile Sokupa 'Revitalising Public Participation' http://www.ngopulse.org/article/revitalising-public-participation (Last accessed: 08/2/2013).
[24] Ibid.
[25] African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) at 5.

(c) Development Strategies in South Africa

The importance of development in post-apartheid South Africa is further evidenced by the fact that over twenty-four years South Africa has had no less than five development strategies, commencing with the Reconstruction and Development Programme in 1994; followed by the Growth Employment and Redistribution Programme in 1996; the Accelerated and Shared Growth Initiative – South Africa in 2005; the New Growth Path in 2010; and the National Development Plan also in 2010. Each one of these strategies will be dealt with briefly in this chapter as a way of introduction and from the perspective of what they say about development, and in detail in chapter 3 of this thesis.

(i) Reconstruction and Development Programme

After 1994, the ANC immediately introduced the Reconstruction and Development Programme (RDP). The RDP was a policy framework for integrated and coherent socio-economic progress that aimed to transform South Africa by (a) developing strong and stable democratic institutions; (b) ensuring representivity and participation; (c) ensuring that the country becomes a fully democratic, non-racial and non-sexist society; and creating a sustainable and environmentally friendly growth and development path.[26] Furthermore, the RDP has been described as 'an integrated, people-centred development approach... characterised by integration between decision-makers from the public, private and voluntary sectors and the intended beneficiaries of development (i.e. the people).'[27]

The RDP formed the basis of all development in South Africa, and it is important to note that representivity and participation were some of the core elements of the programme. According to Ramoganyane, 'the RDP was a very important institutional transformation tool in that it also embraced radical departure from centralised, top-down planning philosophy to bottom-up, people oriented planning approach.'[28] One may opine, at this early stage, that the people-

[26] *White Paper on Reconstruction and Development* (GG General Notice 1954 of 1994) at 8.
[27] Ibid.
[28] Ramoshidi Piet Ramoganyane *Local Government and Local Economic Development in South Africa: A Case Study of Pietersburg/Polokwane* Dissertation submitted to the Department of Town and Regional Planning in the Faculty of Built Environment at the University of the Witwatersrand, in partial fulfilment of the requirements of the degree of Masters of Science in Development Planning, 2000.

centred approach of the RDP, as well as elements of representativity and participation are some of the characteristics that align it with the spirit of FPIC.

(ii) Growth, Employment and Redistribution Programme

The next development policy to follow the RDP was the Growth, Employment and Redistribution (GEAR) programme. GEAR was a 'macroeconomic strategy adopted by the Department of Finance in June 1996 as a five-year plan aimed at strengthening economic development, broadening of employment, and redistribution of income and socio-economic opportunities in favor of the poor.'[29] As a strategy GEAR outlined key goals and economic targets that needed to be achieved within a 5-year period.

Of major importance as far as this research project is concerned is the emphasis on the creation of socio-economic opportunities in favour of the poor. In this respect, GEAR has been heavily criticized for ushering in neo-liberalism in South Africa, and creating a space for big capital to monopolize the developmental space rather than improving the socio-economic conditions of the poor. This argument will be canvassed in detail in chapter 4 of this research report, where the relationship between GEAR and FPIC will also be analyzed.

(iii) Accelerated and Shared Growth – South Africa (ASGISA)

Following on the heels of GEAR was the Accelerated and Shared Growth Initiative – South Africa (ASGISA). It has been argued that ASGISA was not a policy, but an intervention strategy aimed at accelerating the implementation of development policies that were already in place such as the RDP and GEAR.[30] Adopted by Government in 2005, ASGISA aimed at improving policy implementation and economic growth by dealing with the challenges of lack of skilled and committed staff in the public service; lack of human resources to implement policies; inadequate financial resources; corruption and mismanagement of funds; lack of people-driven development; lack of proper co-ordination between institutions; and limited new investment opportunities.[31]

[29] Richard Knight 'South Africa: Economic Policy and Development' July 2001 www.richardknight.com (Last accessed: 29/09/2014).

[30] Chance Chagunda 'An outline and brief analysis of ASGISA' 2006 Southern African Catholics Bishops Conference 156. www.noelimits.co.za>pdfs>Briefing_Papers. (Last accessed 07/10/2018).

[31] Ibid.

ASGISA's emphasis was on improving policy implementation and economic growth, which was deemed to be central to development. The policies referred to are the RDP and GEAR, both of which aimed at improving the quality of life for all South African, although there is still a raging debate about the achievement of this goal through GEAR.

(iv) New Growth Path

ASGISA was replaced as a development strategy by the New Growth Path (NGP) in 2010. Essentially, the NGP's main objective was to curb the continuous rise in joblessness and poverty which its predecessors, ASGISA and GEAR purportedly failed to address. This sentiment was confirmed by the ANC when it stated that 'the level of unemployment, and the resultant poverty and inequality in the society need extraordinary measures.'[32]

Forrest also supports the above idea, and argues that what sets the new strategy apart from the previous ones is that it 'hones in on unemployment and job creation in a way that previous national economic policies have not. It identifies key sectors and cross-cutting activities, termed 'job drivers', where this employment creation can take place.'[33] These 'job drivers' include infrastructural development as supported by the National Infrastructure Plan which aimed to invest in bulk infrastructure such as ports, roads, railway systems, electricity plants, hospitals, schools and dams; labour-intensive activities such as mining, agriculture and manufacturing; new economies such as the green economy and the knowledge economy; as well as social capital and public services.[34]

Just like GEAR and ASGISA before, the NGP had its fair share of criticism, especially from COSATU and its allies. Overall, the labour federation contended that the NGP used the same tools as GEAR to achieve a stable and competitive economy; which, according to COSATU, is untenable.[35] Although the NGP was scheduled to run until 2020, it was abandoned by

[32] African National Congress '*ANC* welcomes the release of the New Growth Path strategy by Government' www.anc.org.za/content/anc-welcomes-release-new-growth-path-strategy-government (last accessed 16/03/2018).
[33] Caili Forrest 'Juggling Jobs: Assessing the New Growth Path and National Development Plan job targets' May 2012 at 3. www.durban.gov.za>edge>documents (last accessed 16/03/2018).
[34] http://www.gov.za/welcome-official-government-online-site (last accessed 08/08/2012).
[35] Congress of South African Trade Unions (COSATU) 'Government's New Growth Path Framework: One step forward, two steps backward: A Response from the Congress of South African Trade Unions' at 2-3. www.cosatu.org.za>subs>ngp_response (last accessed 20/03/2014).

government within two years of its adoption and replaced by the National Development Plan which will be discussed below.[36]

(vi) National Development Plan

In May 2010, the South African President appointed the National Planning Commission which was mandated to come up with a 20-year development plan for the country. The Commission produced the National Development Plan (NDP). This document is described as 'a plan for the country to eliminate poverty and reduce inequality by 2030 through uniting South Africans, unleashing the energies of its citizens, growing an inclusive economy, building capabilities, [and] enhancing the capability of the state and leaders working together to solve complex problems.'[37] Of major importance for the purposes of this research project is the participatory democracy undertone which is embedded in the NDP. This is even more explicit where the plan calls for citizens to be active in their own development, as follows:

> In many respects, South Africa has an active and vocal citizenry, but an unintended outcome of government actions has been to reduce the incentive for citizens to be direct participants in their own development. To prevent this practice from being entrenched, the state must actively support and incentivise citizen engagement and citizens should actively seek opportunities for advancement, learning, experience and opportunity; work together with others in the community to advance development, resolve problems and raise the concerns of the voiceless and marginalised; and hold government, business and all leaders in society accountable for their actions.[38]

The document goes on and indicates that an 'active citizenry and social activism is necessary for democracy and development to flourish. The state cannot merely act on behalf of the people – it has to act with the people, working together with other institutions to provide opportunities for the advancement of all communities.'[39] Therefore, the NDP seems to be going back to the initial focus of development ideology in South Africa as espoused by the RDP – that is people are central to development and that they need to be engaged in all development matters that affect their lives.

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[36] https://www.nationalplanningcommission.org.za/Pages/NDP.aspx (Last accessed 07/10/2018)
[37] National Development Plan 2030 - 2012 version http://www.gov.za/main/about.htm (last accessed: 28/09/2014).
[38] National Planning Commission 'National Development Plan 2030' 2012 at 30.
[39] Ibid.

From the analysis above, it can be deduced that development strategies - from the RDP to the NDP – have shaped development practices in South Africa. The next section deals with development practices in the country, and will demonstrate this fact, especially when one considers sub-programmes such as the Expanded Public Works Programme, the National Infrastructure Plan and the Integrated Resources Plan.

1.3 Development Practices in South Africa

My general observation is that development practices in South Africa have focussed mainly on large-scale investments such as mining which is dominated by the private sector, as well as infrastructure such as dams which is mainly the State's domain. The bias towards these large-scale developments projects could be for a good reason. In order for South Africa to compete globally and experience sustainable economic growth, the country needs large-scale investments. These investments have mostly been in the form of the mining of mineral resources such as gold, diamond, platinum, coal and copper. Transnational corporations have been at the forefront of these types of investments. However, the greater part of large-scale developments have been on big infrastructural projects relating to water, sanitation, healthcare facilities, housing, schools, transport and electrification.[40] These types of developments are mainly carried out by government.[41]

A considerable number of these developmental projects, both by private companies and the state, take place in lands or territories that are occupied by people or in which people have some attachments, e.g. ancestral lands.[42] When a new project starts or an old one is expanded, people living in these areas are inevitably affected. It could be that they must move from the land in order to make way for development or their quality of life is negatively affected by the activities conducted as a result of the projects.[43] This phenomenon is not peculiar to South Africa. Rubin, relating to the experience of the human rights movements in India, points out that these groups 'have found themselves opposing aspects of the government's strategy for

[40] South African Government 'National Infrastructure Plan' Government of South Africa, 2018.
[41] Ibid.
[42] Virginia Njeri Kamau *Achieving Sustainable Development and Indigenous Rights in Africa: Tensions and Projects* Dissertation submitted to the Faculty of Law, University of Pretoria (2007) at 11.
[43] Janet Warden-Fernandez 'Indigenous Communities and Mineral Development' Mining, Minerals and Sustainable Development (2001) 59 at 4.

economic growth which conflicts with the rights of marginal groups, as when, for example, tribal peoples are displaced for the sake of a dam or a mine.'[44]

Development is supposed to be for the benefit of communities, and therefore it is imperative that affected communities need to be part of any development process from inception to conclusion, and their aspirations and sentiments should be taken into consideration. That is why development is said to be 'about local people taking control of their own lives, expressing their own demands and finding their own solutions to their problems.'[45] This view is in line with the principle of people-centred development which stresses 'public participation, social learning, empowerment and sustainability.'[46]

As much as corporations and state agencies bring about the much-needed development and in some instances prosperity, there are instances where local communities were been left worse off than before the introduction of the projects in their areas.[47] This brings into question the extent to which corporations and state agencies observe human and people's rights, particularly the observance of the right to participate by affected communities in the areas where development projects are conducted.

Focussing particularly on infrastructural development and state practice in South Africa, the five major development strategies discussed above were supported by several sub-programmes or plans such as the Expanded Public Works Programme, the National Infrastructure Plan and the Integrated Resources Plan. I will succinctly discuss these sub-programmes below.

Launched in 2004, the Expanded Public Works Programme (EPWP) aimed to provide 'poverty and income relief through temporary work for the unemployed to carry out socially useful activities and help in the absorption of labour and income transfers to poor households in the short to medium term.'[48] It is therefore clear from the onset that EPWP is a job creation strategy, albeit temporary employment. Employment is a vital development strategy and most

[44] Barnett R. Rubin 'Human Rights and Development: Reflections on Social Movements in India' in David P. Forsythe (ed.) *Human Rights and Development: International Views* (1989) at 15.

[45] Comhla's Voluntary Options 'What is Development' http://www.volunteeringoptions.org/volunteering Development/what is development/tabid/78 (last accessed 09/022013).

[46] Davids, I "Development Theories: Past and Present" in Davids I, Theron F and Maphunye KJ *Participatory Development in South Africa* 2005 at 17.

[47] Michael M. Cernea *World Bank Technical Paper 80 Involuntary Resettlement in Development Projects: Policy Guidelines for World Bank-Financed Projects* (1988) at 9.

[48] Department of Public Works 'Expanded Public Works Programme Five-year Report' (2013) at 3.

of the EPWP jobs are in the government-funded infrastructure projects such roads, water and sanitation which are basic services contributing to the overall well-being of the society. Some of these infrastructure projects are large enough to necessitate the relocation of communities or families which are found to be in the way, therefore intensifying the irony of the need for development juxtaposed against the effects these may have on local communities.

The other major development was the Integrated Resources Plan (IRP). Adopted in 2010, the IRP is a national electricity plan aimed at the expansion of electricity supply and ensuring sustainable development, as electricity is key to all major development projects in the country.[49] The most interesting part of this plan as far as the research project is concerned is that it is a product of public participation.[50] Two rounds of public participation were conducted in different parts of the country with major stakeholders as well as affected and interested parties.[51] The second round of consultations produced the final plan which differed significantly from the first draft due to inputs received during the participatory process.[52]

Adopted in 2012, the National Infrastructure Plan (NIP) aimed to transform the country's economic land scape through infrastructural development in the field of healthcare, water, sanitation, housing, education (schools), electrification, and transport (ports, roads and railway systems).[53] According to the plan, such infrastructural development would create more jobs and improve the rate of service delivery.[54] As has been alluded to in the preceding section, the RDP also focussed on infrastructural development, and advocated for a people-centred approach in such developments.

1.4 Community Responses to Development

As pointed out above, most developmental projects in South Africa take place in areas that are already inhabited by communities. Some of these communities have occupied these areas for decades if not centuries, and have spiritual and sentimental connections to the land. This

[49] Department of Energy 'Integrated Resource Plan' www.energy,gov.za/files/irp (last accessed 08/05/2018).
[50] See the introductory part of Government Gazette Notice No.R.400 of 6 May 2011 in terms of the Electricity Regulation Act No. 4 of 2006.
[51] Government Gazette (Government Notice no. R.400 of 6/05/20110.
[52] Ibid.
[53] South African Government 'National Infrastructure Plan' Government of South Africa, 2018. https://www.gov.za/issues/national-infrastructure-plan (last accessed 08/05/2018).
[54] Ibid.

is the case with two of the four projects that have been identified as case studies for the purposes of this research.

Once a project has been identified and approved for a certain area, the community that occupies that place usually has to move in order to make way for such a project, resulting in such community being compelled to give up its rights to the land that is to be developed or participate in some benefit schemes initiated as a way to compensate the community for their loss of land rights.[55]

In some instances, the projects are already in existence, but there is a need to expand such projects, therefore encroaching further into communal land, forcing inhabitants to move or communities to relinquish their rights to the land. Yet in some instances communities may not be required to move, but the activities of the project are such that they would impact negatively on their lives - for example mining dust that would affect the quality of peoples' health in the adjacent community.[56] In all instances, it is usually purported that the affected communities, and even the nation at large, would benefit from the projects in the form of employment, infrastructure and tax revenues. Xanthaki says that in such instances 'States' justifications for forced relocations vary from economic reasons to environmental reasons...'[57]

In all cases, some form of negotiations or consultations is required in order to solicit consent from affected communities.[58] However, it is doubtful if these engagements do take place, or if they do, whether they were meaningful. I am expressing this doubt due to the amount of opposition or resistance by affected communities to most of these large-scale projects. The reasons for such resistances are many and varied, including lack of or inadequate compensation, lack of or inadequate consultation, insensitivity to cultural and religious

[55] A good example is the Xolobeni Mineral Sands Project where 5 villages lost land, the rights in land as well as livelihood due to the mining project in the area. See Ichumile Gqada 'Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project' (2011) South African Institute of International Relations Occasional Paper No. 99.

[56] For further examples of mining pollution and community impact see Kieren Moffat 'The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining' (2013) Resources Policy 39 at 61-70.

[57] Alexandra Xanthaki *Indigenous Rights and UN Standards: Self-Determination, Culture and Land* (2007) at 253.

[58] See note 58 above. In the Xolobeni matter the most contentious issue was inadequate consultation with affected communities.

symbols and beliefs, as well as the loss of access to the natural resources that have sustained such communities for ages.[59] These are issues that must be dealt with at the pre-project stage to avoid conflicts later on in the project.

At the end, communities are forced to relocate despite their resistance, and those that persist on staying become at risk of being forcibly removed or suffer the consequences brought about by the project activities, such as cracked houses from blasting during mining or construction of dams. Where no relocation has been required, some communities have had no choice but to accept what was offered as compensation for the loss of their land rights and try to move on with their lives. In these cases, most of the land would be for farming purposes, and most villages have been left worse off despite the cash compensation, as they have lost the basis of their livelihoods.[60]

In any event the acceptance of compensation is not indicative of free, prior and informed consent, as in most cases villagers have no option as whatever amount of compensation is better than nothing. Freeman *et al* have challenged this notion when assessing the sustainability of forest management in the Congo Basin, and enquired as follows: 'Can it be that consent is freely given when for local populations agreeing to logging activities is their only means of obtaining education, healthcare and basic infrastructure?'[61]

From the above sentiments, it can be argued therefore, that communities do not have any problem with developmental projects *per se*, but tend to have issues with the way that such projects have been introduced to them. It is on this basis that it is submitted that the principle of free, prior and informed consent can go a long way in stabilising the situation as, according to this principle, communities or people are afforded the opportunity to agree or disagree with the introduction of any projects in their traditional lands.[62] The granting or withholding of the

[59] For more insight on the community concerns that in some instances lead to protests, see the thesis by Nomsa Virginia Sibane 'The Implementation of the Bill of Rights for Sustainable Development by the Department of Mineral Resources (DMR): A Case Study of Xolobeni Mining Project in the Mbizana Local Municipality, Eastern Cape, South Africa' 2016.
[60] Ibid.
[61] Freeman *et al* "Free, prior and informed consent: Implications for sustainable forest management in the Congo Basin" Workshop on Forest Governance & and Decentralization in Africa 08-11 April 2008 Durban South Africa at 1.
[62] Rem B. Edward & Glen Graber *Bio-Ethics* (1988) at 124.

consent comes after such communities are well-informed about such projects through proper consultation and negotiation, and such decisions are taken without any pressure.[63]

1.5 State of Knowledge of the Relationship between FPIC and Development in South Africa

FPIC is an emerging international principle and the state of knowledge of its application to developmental projects in South Africa is still at a low level both in academia and practice. The reason why the principle has received so little traction in South Africa is that it developed within the discourse of the rights of indigenous peoples, which discourse is a weak one in this country. Much has been written about this principle internationally but to a limited extent in South Africa.[64] Most literature in South Africa focuses on 'consultation', 'public participation' and 'participatory democracy' without explicitly referring to the FPIC principle.[65] The same goes for the Constitution, legislation and development policies wherein FPIC is hardly explicitly mentioned.[66]

It must be noted however, that although this principle is not always referred to explicitly in these sources, development strategies such as the National Development Plan and RDP contain key elements of FPIC. The issue is the implementation of those FPIC elements by

[63] United States Institute of Peace 'Growing Support for Community Consent Rights for Natural Resource Development: Can "Free, Prior and Informed Consent" Implementation Reduce Conflict Over Natural Resource Development?' http://inec.usip.org/blog/2011/jun/03/growing-support-community-consent-rights-natural-resource-development... (last accessed 09/01/2013).

[64] See Rachel Wynberg , Doris Shroeder and Roger Chennells (eds.) *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* 2009; Matthews D *Intellectual Property, Human Rights and Development: the Role of NGOs and Social Movements 2011*; and Bonita Meyersfeld 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2017) Business and Human Rights Journal 2(1) 31-53.

[65] Although not referring specifically to FPIC, several authors have at least alluded to the spirit of this concept when writing on public participation, consultation and participatory democracy. Some of these authors are the following: Swanepoel H & De Beer F: *Community Development: Breaking the Cycle of Poverty* 4th ed. (2006); Barber BR: *Strong Democracy: Participatory Policies for a New Age* (1984); Rogerson CM 'Development in Post-Apartheid South Africa: A Ten Year Research Review' in V Padayachee (ed.) *The Development Decade? Economic and Social Change in South Africa, 1994 – 2004* (2006) ; Williams JJ: 'Social Change and Community Participation: The Case of Health Facilitation Boards in the Western Cape of South Africa' in *Spaces for Change: The Politics of Citizen Participation in New Democratic Arena* (2007) ; Naidu: 'Deepening Local Democracy and Participation: Experience from Practice' in B. De Villiers *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) Konrad-Adenauer-Stiftung Occasional Papers; Von Lieres B: 'Citizenship Participation in Land Struggles' and HIV/AIDS Activism' in A. Cornwall & VSP Coelho *Spaces for Change: The Politics of Citizen Participation in New Democratic Arena (*2007) ; Davids, Theron & Maphunye: *Participatory Development in South Africa 2nd* ed. (2009) ; and Barberton, Blake & Kotze *Creating Action Space: The Challenges of Poverty and Democracy in South Africa* (1998) .

[66] NEMA remains the only piece of legislation that explicitly mentions FPIC as a requirement in projects where environmental issues are involved.

government officials and development agents that have been found to be wanting. The reason for this failure could be the lack of knowledge or understanding of FPIC by those responsible for the implementation of the developmental projects.

1.6 Problem Statement

The problem that I wish to investigate in this thesis is the failure by development agents, including corporations and government, to obtain genuine consent from communities that are inhabitants of the lands before developmental projects can be launched in their locality. The research further aims to investigate whether South Africa implements the requirements of the emerging international law principle of Free, Prior and Informed Consent (FPIC) in development projects, and the benefits, if any, of applying this principle.

1.7 Research Questions

The following research questions will assist in responding to the issues raised in the problem statement above:

(a) How does the principle of FPIC square with development ideologies in general, and the approaches to development adopted in South Africa?

(b) To what extent is adoption of FPIC compatible with the existing constitutional legislative and practical frame for development in South Africa?

(c) Regarding the four case studies selected, is there a nascent adoption of FPIC? What is the impact on communities and development agents of the failure to follow FPIC?

(d) What measures should be put in place to foster the FPIC principles in development in South Africa?

The above research questions will assist me to make the necessary inquiry into issues raised by the problem statement, and to come up with relevant recommendations which will assist with the resolution of those problems.

1.8 Purpose Statement

This research is aimed at stimulating debate and engagement on the FPIC principle in South Africa at intellectual and government level. As indicated in 1.5 above, knowledge of FPIC in this country is at a low level as not much has been written on this topic within the South African context. This is the knowledge gap that needs to be filled.

Over and above addressing the knowledge gap that exists in South Africa, the aim of this research is to influence policy by making recommendations on the applicability and the benefits of FPIC to both government and corporations that are involved in developmental projects. A conscious application of the FPIC principle can go a long way in avoiding the pitfalls similar to those experienced in the four case studies that will be discussed in chapter 5 of this thesis.

Four case studies have been identified for the purposes of this thesis. Anglo-Platinum's Ga-Pila project was identified to analyse a relationship between national corporations and local communities impacted by their business activities. The project involved project involved the resettlement of a community to expand its mining activities. It is therefore critical to analyse the activities of this project to establish the extent to which the company conforms to the requirement of FPIC.

Nandoni dam represents a project where a national government is directly involved in a development project. Nandoni project has potentially compromised the rights of people that are supposed to benefit from such a venture in that the project involved a relocation of communities to make way for the dam. Being a post-1994 project during which laws that require community participation in developmental projects were already in place, it is crucial to investigate the extent, if any, to which FPIC was applied.

Vele Colliery and Makhado Project are privately-owned mining projects. An important distinguishing factor, compared particularly with Anglo Platinum, Vele Colliery and Makhado Project are owned by an Australian-registered multinational corporation, CoAL, and therefore provide an international perspective to the discourse.

A common factor to all the case studies mentioned above is that they are all associated with development, and all of them have given rise to controversy based on alleged lack of consultation, community participation and development-induced displacement. The case studies involve big development projects by both private companies and government. Communities were negatively impacted in all these cases. The identification of active and current projects as case studies will surely attract the attention of government and the corporate world as they are the major role-players in these projects. Further reasons for the identification of these projects as case studies will be discussed in detail in chapter 5 of this thesis. For the purposes of this introductory chapter, the case studies will be discussed in brief below.

1.8.1 Ga-Pila Resettlement Project

In 1998 Anglo Platinum, a division of Anglo American Corporation, acquired the rights from Government to expand its mining activities in the Mogalakwena area, outside Mokopane town, formerly known as Potgietrusrus. Ga-Pila was one of the villages that were affected by this expansion. Negotiations began with villagers to relocate to another village (Sterkwater), in an area which was about 30 kilometres away. The proposal by Anglo Platinum was that the villagers would be provided with modern houses and that the municipality would provide them with running water derived from underground sources.

Negotiations were not successful as the villagers needed guarantees on the amount of monetary compensation, structure and quality of houses, relocation of cultural sites and graves as well as the provision of farming land as they lived on subsistence farming. Villagers also wanted an undertaking that they would access jobs at the mine. There was no agreement between the parties for several years, and Anglo Platinum ended up commencing with its expansion activities, nevertheless.

As the expansion proceeded, villagers were left with no option but relocate to Sterkwater. Those who resisted the move suffered from mining dust and cracked houses as the mining operations approached their homes. There was insufficient land in the new area and the water was said to be polluted. The graves were not relocated in accordance with customs and culture, and issues relating to traditional governance were allegedly ignored.

The South African Human Rights Commission (SAHRC) investigated the matter and released a report which stated that Anglo Platinum had failed in the following respects: to provide adequate farming land to the communities; to ensure adequate access to water to communities; to provide full monetary compensation for loss of land; and to ensure that post-relocation communities would receive adequate services.[67]

1.8.2 The Nandoni Dam Project

Nandoni dam is a State-owned project under the auspices of the then Department of Water Affairs and Forestry (DWAF). The construction of the dam was completed in 2005.[68]

The dam provides water for domestic and agricultural use in the area but seven villages were affected by its construction.[69] In all instances, some members of the communities had to be relocated, and most lost their agricultural and residential land in the process.

The overarching principles guiding the construction of the dam were that the stakeholders should not be worse off than they were before the project;[70] and that there should be equity among individuals, reasonableness, openness and transparency, and inclusivity.[71]These principles were quite noble, but unfortunately, they were not completely adhered to by Government and the consulting engineers, BKS. There were running battles between the community and the Department from 1998 when the project started, up to this point, as the affected communities felt that they had been treated unfairly by the government. Due to the on-going conflict with DWAF, in 2006 the affected communities approached the Office of the Public Protector (OPP) to complain about the unfair treatment they had received from the Government, especially during the relocation process.[72] The OPP investigated the matter for

[67] SAHRC 'Report into Anglo Platinum and affected communities around the PPL Mine, Limpopo' 2008 at 42.
[68] Ibid.
[69] Public Protector Report, opcit at 3.
[70] Compare this requirement to Towle's assertion that development is "an instrument to improve quality of life and standards of living, and fundamentally refers to the reduction of poverty." KL Towle *Towards a Broader Understanding of Development in South Africa* Thesis submitted to the Faculty of Arts at Wits University for a Masters of Arts Degree in Development Studies (2004) at 2.
[71] UN Environmental Programme Dams and Development Project Secretariat 'IAIAsa Premium Award for the Nandoni Dam Relocation Project'. http://www.unep.org/dams/documents/ell.asp?story-id=129 (last accessed 08 August 2011).
[72] Public Protector Report, opcit at 11.

over two years, and concluded that indeed communities affected by the construction of the dam were unfairly treated.[73]

1.8.3 Vele Colliery (Mapungubwe Mine)

Mapungubwe is an Iron Age site discovered in 1932,[74] and is situated in the far north of the Limpopo Province. The site has been declared a World Heritage Site by the United Nations Education, Scientific and Cultural Organization (UNESCO).[75]

In early 2010, Coal of Africa Limited, an Australian-owned company, obtained a right for its Vele Colliery project to mine coal next to the Mapungubwe National Park.[76] The move to commence with the mining activities was vehemently opposed by various stakeholders, including environmentalists and local communities that had historical connections to the area.[77] The environmentalists were represented by the Mapungubwe Action Group which consisted of the Endangered Wildlife Trust, the Association of Southern African Professional Archaeologists, the Peace Parks Foundation, WWF, Birdlife of Southern Africa and the Wilderness Foundation of South Africa. The Mapungubwe Action Group feared that the mine would destroy Mapungubwe ecologically, archaeologically and culturally.[78]

To compound issues, the indigenous communities who are the custodians of cultural and ancestors' rites as well as and claimants in the Mapungubwe area were not consulted before the mining permit was issued in order to obtain their consent. The stakeholders were also concerned about the usage of water in the area for mining activities. The mining company was accused of using the water for its mining activities without obtaining a water use licence from the Government. The affected stakeholders went to the extent of taking government and

[73] Ibid at 12.
[74] South African National Parks 'Mapungubwe National Park' http://www.sanparks.org/parks/mapungubwe/ (last accessed 26/03/2016).
[75] UNESCO 'Mapungubwe Cultural Landscape' www.whc.unesco.org/en/list/1099 (last accessed 12/03/2018).
[76] Coal of Africa 'Vele Profile' November 2016 at 5.
[77] H. Komen 'Fight to Save the Mapungubwe World Heritage Site Intensifies www.hermanusdoorns.co.za (last accessed 13/10/2012).
[78] Elise Templehoff 'Mine could destroy Mapungubwe' http://www.news24.com/South Africa/News/Mine-could-destroy-Mapungubwe-2010... (last accessed 08/08/2011).

the mining company to court in an effort to stop the mining activities without compliance to the regulations regarding mining.[79]

1.8.4 Makhado Project

The fourth and last case study is Makhado project. This is another coal mining project by Coal of Africa. In May 2015, CoAL was granted a mining right by the Department of Mineral Resources for this project.[80] The project is also in Vhembe District, about 48 kilometres east of Vele Colliery.[81]

Through this project CoAL promises to bring about major socio-economic development to the Makhado local municipal area. The project aims to create 2500 jobs plus 100 contractors in its first 24 months,[82] which is a construction phase. About 1100 permanent jobs are envisaged for the operations phase.[83] According to CoAL, members of the communities will be empowered by the company's Supplier Development Programme, Enterprise Development Programme, Broad-based Black Economic Empowerment strategy and skills development programme.[84]

When it comes to consultation, CoAL has developed an *Engagement Model*, to empower communities through information, and by including them in the 'decision-making process.'[85] Through this model CoAL aims to establish various stakeholder forums to assist in its engagement with the communities. There are other interested parties such as land owners or farmers, national department and municipalities that the company will engage with as part of interested parties. Unlike the other projects that have been identified as case studies for this project, Makhado is the only one that conducted a comprehensive pre-project exercise. Whether this exercise meets the FPIC requirements or not will be determined in chapter 5 when I analyse the case study in detail.

[79] Centre for Environmental Rights 'Mapungubwe: The Legal Battle Rages on' http://cer.org.za/hot-topics/mapungubwe/ (last accessed 13/10/2012)
[80] CoAL 'Makhado Profile' 21 November 2016.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] CoAL 'Makhado Profile' 21 November 2016 11.

1.9 Research Methodology

1.9.1 Research Techniques

The study will be desk research based on primary and secondary sources such as books, journals, working papers, legislation, decided cases, policies, international legal frameworks and strategic documents. These sources have been consulted extensively with the aim of providing an evaluative analysis. The analysis will help in providing insight into the problem under research and in suggesting possible answers to that problem.

The relocation of communities at Ga-Pila village to make way for a platinum mine, and the relocation of communities for the purposes of the Nandoni Dam, the mining at Mapungubwe world heritage site and another mining at Makhado Project will be used as case studies. The rationale of identifying these four diverse projects is to demonstrate the challenges that South Africa has encountered on the implementation of the FPIC principle in the course of conducting different types of large-scale development projects.

1.9.2 Scope of the Research

The study will evaluate development projects in the Limpopo Province of South Africa to establish the extent to which the FPIC principles are followed or implemented. This will be done in comparison to international trends and practices. Since it is assumed that this principle is not fully observed in this country, the impact on communities of such shortcoming will be assessed. Furthermore, research will be done in order to establish the benefits of following the FPIC principle. The results of the research will be used to inform policy formulation and development by the Government and to encourage other development agents to accommodate the FPIC principle.

1.9.3 Methodological Limitations

Limitations in research or study are said to be influences or conditions that are beyond the researcher's control, and place constraints on the conclusions of the study.[86] There were

[86] RV Labaree 'Limitations of the Study – Organising Your Social Sciences Research Paper' https://libguides.usc.edu (last accessed 18/05/2018).

several restrictions or constraints in my research, including limited access to information, limited number of academic work pertaining to the South African situation and the fact that FPIC is still an emerging principle in the development arena.

On the issue of access to information, I struggled to get records and other official documents from Anglo American on the Ga-Pila resettlement project. Most of the information relating to this project is not readily available in the internet. I requested the information in writing, with letters of recommendation from my supervisor, but in vain. I even made several telephone calls to Mokgalakwena Platinum mine as the as Anglo American head office, without success. The situation at the Department of Water and Sanitation was a little different but I could still not obtain most of the official documentation on the Nandoni Dam project. Although officials in the Department were willing to assist, the filing system made it impossible for them to find the documents. However, essential documents, such as the Relocation Action Plan (RAP), Sustainable Utilization Plan (SUP) and records of certain community meetings were obtainable from the internet. I was able to obtain most of the information from the website and directly from Coal of Africa on both Vele Colliery and Makhado Project.

Coming to academic work on FPIC, especially in the South African context, very little has been written specifically on the principle. As pointed out above, there is a considerable amount of work on related topics such as public participation, consultation and participatory democracy. These academic works helped me to establish that although FPIC is not directly referred to in most development projects or academic writings in the country, the spirit of the principle are steadily taking roots in South Africa. This constraint is compounded by the fact that throughout the world FPIC is still evolving in the development arena, with different parts of the world being at different levels of realising this principle.

1.10 Limitations of the Study – Knowledge Claims

A knowledge claim is ‘something that the claimant believes to be true yet it is also open to discussion and debate … something that we believe we know and that we want to assess the

validity of.'[87] If one has to follow this definition, the fact that the principle of FPIC is still at an emerging stage is a limitation in itself, especially within the South African context. As pointed out in section 1.5 above, not much has been written about the topic in South Africa, and the evidence about the application of the FPIC principle in development projects in the country is very limited.

1.11 Chapter overview

(a) Chapter 1: General Introduction

The first chapter dealt with the general introduction of the research project, including the problem statement, how the researcher became interested in the problem, development ideologies in South Africa, development practices in South Africa, community responses to development, the state of knowledge of FPIC in South Africa, overview of the identified case studies and the articulation of the research questions.

(b) Chapter 2: The Concept of Free, Prior and Informed Consent

Chapter 2 will evaluate and explore the concept of *Free, Prior and Informed Consent (FPIC)* in development projects in detail. The chapter will attempt to define and analyse the FPIC principle. The first part of this chapter will look into the origin of the principle, its international, regional and local status, legal content, and its application at international and local levels; whereas the second part of the chapter will deal with the applicability of the FPIC principle to the concept of 'development' in general, based on the fact that there is an undertaking to evaluate some development projects in Limpopo Province as per the case studies in chapter 6 of this research assignment. Thereafter a conceptual framework of FPIC will be provided based on the research conducted on the above two sections of the Chapter. This will be followed by challenges that characterise FPIC at both conceptual and implementation levels.

[87] Adam Clark 'Definitions of knowledge claims and knowledge questions' Yokohama Open Learning, 2018. http://whoisadamklark.com/theory-of-knowledge/knoweledge-claims-knowledge-questions/?ak_action=reject_mobiles&r=1 (last accessed 29/09/2018).

(c) Chapter 3: South Africa and FPIC: Development Policy Framework Analysis

This chapter will identify and analyse development policies that have evolved in South Africa since 1994 in order to establish their effectiveness in addressing the challenges of poverty, inequality and unemployment that have bedevilled the country since the dawn of democracy; as well as their accommodation of the principle of free prior and informed consent. Major development policies that will be dealt with are the following: Reconstruction and Development Programme (RDP), Growth, Employment and Redistribution programme (GEAR); Accelerated and Shared Growth – South Africa (ASGISA), National Growth Path (NGP), and the National Development Plan (NDP).

(d) Chapter 4: South Africa and FPIC: Development Legislative Framework Analysis

After dealing with the policy framework above, this chapter will examine the legislative regime and its imperatives regarding development in South Africa. I will start by considering the South African constitution, followed by laws relating to local government, mining, water and environment management. I will also explore how these laws advance the interests of FPIC.

(e) Chapter 5: Case Studies

This chapter will introduce and provide a detailed discussion on four development projects that have been identified as case studies for this research. These projects are Ga-Pila resettlement project, Nandoni dam, Vele Colliery and Makhado Project. The projects will be evaluated in order to establish the extent to which the FPIC principle, or its spirit, was accommodated. Pertinent FPIC elements such as public participation, consent and consultation will be examined closely.

(f) Chapter 6: Observations and Findings

In this penultimate chapter, I will reflect on the entire work of this research project, including the understanding of the FPIC concept, its origin and application; ideologies, strategies and practices of development; as well as policy and legislative frameworks for development

within the South African context. I will end by applying the theoretical knowledge gained through the analysis of these concepts to practical case studies in chapter 6.

To achieve the above, I will consider and analyse the following areas:

(i) The evolution of FPIC in policy and law in South Africa since the early 1990s;
(ii) Evolution in the implementation of FPIC within the South African context;
(iii) Roles of various stakeholders in advancing FPIC;
(iv) Institutional arrangements for advancing FPIC; and
(v) The linkage between FPIC and development.

(g) Chapter 7: Recommendations

In this concluding chapter I will make three broad recommendations stemming from the observations and analysis in chapter 7.

CHAPTER 2

DEVELOPMENT OF THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT

2.1 Introduction

The main task of this chapter is to evaluate and explore the concept of *Free, Prior and Informed Consent (FPIC)* in development projects. To achieve this purpose, this chapter will attempt to define and analyse the FPIC principle. To this end, the first part of this chapter will consider the origin of the principle; its international, regional and local status; legal content; and its application at international and national levels.

The second part of the chapter will assess the relationship of the FPIC principle to the concept of 'development' in general, since there is an undertaking to evaluate some development projects in Limpopo Province as per the case studies in Chapter 6 of this thesis.

The final section of the chapter will outline conceptual and implementation challenges associated with FPIC. The work in these preceding sections grounds the development of a conceptual framework for evaluating FPIC in development projects.

The chapter concludes that although FPIC is still at its infancy stage, the benefits have started to show in the countries that have embraced the principle and embarked on its application. As will be shown below, some countries have even gone to the extent of passing legislation that helps to promote and implement FPIC.

2.2 The Origin, Sources, Nature and Content of the FPIC Principle

2.2.1 The origin and Sources of FPIC

The principle of FPIC is still at an evolving stage. It is a principle that is growing in popularity internationally, regionally and locally. The principle is developed through and supported by international law and international institutions as well as regional and local laws

and institutions such as courts and tribunals. I will succinctly discuss some of these international instruments and supporting institutions below.

(a) International Instruments

Internationally, FPIC has largely developed within discourses of human and peoples' rights, and of indigenous peoples in particular.[88] The following international instruments are regarded as some of the sources of this emerging principle: UN Declaration on the Rights of Indigenous Peoples, ILO Convention on Indigenous and Tribal Peoples in Independent Countries, General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination and UN GA Resolution on Second International Decade of World's Indigenous People. I will discuss the content of each of these instruments below only as far as such content relates to FPIC.

(i) General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination[89]

The UN Committee on the Elimination of Racial Discrimination falls under the Convention on the Elimination of All Forms of Racial Discrimination, 1965. The Committee monitors the implementation of the Convention by its State parties.[90] The Committee's General Recommendation no. 23 deals with the rights of indigenous people as far as the Convention is concerned.

In paragraph 3 of the Recommendation the Committee recognizes that indigenous peoples were, and still are, deprived of their fundamental freedoms, especially the right to land and its resources. Paragraph 4(d) is to the effect that no decisions affecting indigenous peoples are taken without their *informed consent*. Paragraph 5 is more decisive, indicating that in cases where indigenous people were deprived of their lands without free and informed consent, measures should be taken to return those lands. It is submitted therefore, that this

[88] Ricarda Roesch 'The story of legal transplant: The right to free, prior and informed consent in sub-Saharan Africa' (2016) 16 African Human Rights Law Journal at 505-531.

[89] General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination, (A/52/18) ANNEX V, 1997.

[90] Office of the High Commissioner: UN Human Rights 'Committee on the Elimination of Racial Discrimination' www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx (last accessed 20/01/2018).

Recommendation is of critical importance as far as FPIC is concerned as it directly indicates the application of the *free and informed consent* requirement when it comes to decisions affecting the rights of indigenous peoples to their lands.

(ii) ILO Convention on Indigenous and Tribal Peoples in Independent Countries[91]

This Convention aims, through its endeavours to combat discrimination at the work place, to enable indigenous and tribal peoples to 'participate in decision-making that affects their lives.'[92] As will be seen below, the ability to participate in decision-making is very crucial in the application of the FPIC principle. Article 16(2) specifically emphasises that where exceptional reasons exist for the indigenous and tribal peoples to be relocated from their lands, such removal can take place only with their *free and informed consent.*[93] This is a significant provision as this ILO convention is one of the first UN instruments to explicitly endorse the FPIC principle as a key requirement where indigenous people are removed for developmental purposes.

(iii) UN Resolution on Second International Decade of World's Indigenous People[94]

The objectives of the Second International Decade of the World's Indigenous People clearly establish a link with FPIC. Three of these objectives are directly related to FPIC, namely: the promotion of non-discrimination and inclusion of indigenous peoples in processes at all levels; the promotion of full and effective participation of indigenous people in decision-making; and redefining development policies that are culturally appropriate for indigenous peoples.[95] The significance of this resolution is that it emphasises the inclusion of the affected indigenous peoples and their participation in processes at all levels as key to successful development. It also alludes to the importance of proper identification of indigenous peoples' needs through development policies that are culturally appropriate.

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[91] ILO 'Indigenous and Tribal Peoples Convention' (1989) at 169.
[92] ILO 'Indigenous and Tribal Peoples Convention' www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm (last accessed 20/01/2018).
[93] Article 16(2) of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) 29 June 1989.
[94] UN Resolution on the 2nd International Decade of World's Indigenous People (A/RES/59/174) 22 December 2004.
[95] UN Department of Economic and Social Affairs 'Second International Decade of the World's Indigenous People' https://www.un.org/development/desa/indigenouspeoples/second-international-decade-of-the-worlds-indigenous people.htm.

(iv) Declaration on the Rights of Indigenous Peoples[96]

Adopted in 2007, this declaration established 'a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and elaborates on existing rights and fundamental freedoms as they apply to [the] specific situation of indigenous peoples.'[97] The preamble to the Declaration addresses all important issues relating to FPIC such as, amongst others, the right to equality, cultural diversity, development, lands as well as the right to control developments that affect indigenous peoples. Article 10 goes even further, specifically stating that no relocation of indigenous peoples from their territories should take place without their free, prior and informed consent.[98]

(b) International Institutions Supporting FPIC

A wide variety of international institutions are increasingly supporting the principle of FPIC. The principle has received support from various bodies within the UN system, international financial institutions and regional court systems. Some international institutions that have shown support for this principle are: the UN Permanent Forum on Indigenous Issues, the International Finance Corporation, UN Committee on Economic, Social and Cultural Rights and the Inter-American Commission and Court on Human Rights (at regional level). I will briefly comment on some of these institutions below.

The Permanent Forum on Indigenous Issues[99] is the advisory body to the UN's Economic and Social Council. The Permanent Forum's mandate is to deal with indigenous issues relating to human rights, socio-economic development, health, education, environment and culture.[100] This mandate places the Forum at the forefront of FPIC. According to the Joint Statement of the Permanent Forum on Indigenous Issues, FPIC is an established international human rights norm, particularly when it comes to human rights and climate change.[101]

[96] UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295) 13 September 2007.
[97] UN Department of Economic and Social Affairs 'United Nations Declaration on the Rights of Indigenous People' https://www.un.org/development//desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last accessed 20/01/2018).
[98] Article 10 of the UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295) 13 September 2007.
[99] Established by the Economic and Social Council through Resolution 2000/22, 28 July 2000.
[100] UN Department of Economic and Social Affairs 'United Nations Declaration on the Rights of Indigenous People' https://www.un.org/development/desa/indigenouspeoples/unpfi-sessions-2/17-2.htm.
[101] Joint Statement- Permanent Forum on Indigenous Issues, 10th Session, New York, May 18 2011.

The International Finance Corporation (IFC) is a division of the World Bank and focuses on providing investment, advice and asset management to developing countries and emerging markets.[102] Although focusing exclusively on the private sector, the IFC has adopted a clear policy on indigenous peoples' matters. Standard 7 of its Sustainability Framework addresses the need to respect indigenous peoples' human rights and FPIC.[103]

The Equator Principles[104] builds upon the IFC performance standards when calling upon member companies to seek and obtain *free, prior and informed consent* of indigenous peoples when conducting development projects in their territories.[105]

The Committee on Economic, Social and Cultural Rights monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. All party states are required to submit regular reports to the Committee on how they are implementing the protection of these rights.[106] The implementation of the rights relating to indigenous issues is regularly entertained in this Committee, as it was the case with Canada[107] and Russia.[108] Whereas the report on Canada showed some positive developments as far as the protection of indigenous peoples human rights are concerned, the report on Russia indicated that indigenous people in the Russian federation are politically marginalised and denied land and other resources.

[102] International Finance Corporation 'About IFC' www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home (last accessed 20/01/2018).
[103] International Finance Corporation 'Sustainability framework: Policy and performance standards on environmental and social sustainability access to information policy', effective from January 1, 2012. Also see IFC's 'International Finance Corporation activities related to Indigenous Peoples' Issues' January 2014. www.un.org>upfii>documents>ifc (last accessed 09/03/2018).
[104] IFC 'The Equator Principle: A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing', effective from June 2006.The Equator Principles is an environmental and social risk management framework adopted by international final institutions, and helps these institutions to determine, assess and manage such risks. https://www.equator-principles.com/ (last accessed 21/01/2018).
[105] http://www.csrandthelaw.com/2002/09/07/the-revised-equator-principles-call-on-compaines-to-seek-free-prior-and-informed-consent-next-up-governments/ (last accessed 16/01/2018).
[106] www.ohchr.org/EN/HRBodies/CESCRIntro.aspx (last accessed 20/01/2018).
[107] See report presented by Canada on 25 February 2016. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17092&LangID=E (last accessed 20/01/2018).
[108] See report presented by Russia in October 2017. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22156&LangID=E (Last accessed 20/01/2018).

The International Council on Mining and Metals is an international organization founded in 2001, with the aim of providing guidelines to its members on sustainable development.[109] Local members include Anglo American, African Rainbow Minerals, Anglo Gold Ashanti, Glencore, Gold Fields, Lonmin and Xstrata.[110] The organization has recently weighed in on the support for the implementation of FPIC when it comes to development projects operating on territories belonging to indigenous peoples. In its 2013 position statement, the Council resolved to adopt the FPIC principle and called upon its members to 'work to obtain *consent* of indigenous peoples, respect their rights and interests, and to engage in consultative processes that ensure meaningful participation of indigenous communities in decision making.'[111]

(c) Development of FPIC at Regional Level

Although the emergence of FPIC at regional or continental level has been at snail pace, there are signs that the principle is indeed taking roots in Africa and South America. In Africa, regional institutions such as the Pan African Parliament, the African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights have pronounced on FPIC-related issues; whereas regional instruments such as the African Charter for Popular Participation in Development and Transformation[112] and the African Convention on the Conservation of Nature and Natural Resources[113] have provisions that can be construed to accommodate FPIC or the spirit of this principle.

[109] International Council on Mining and Metals 'About ICMM' https://www.icmm.com/en-gb (last accessed 20/05/2018).
[110] International Council on Mining and Metals 'Our Members' www.icmm.com/en-gb/members/member-companies (last accessed 20/05/2018).
[111] International Council on Mining and Metals 'Indigenous Peoples and Mining Position Statement' https://www.icm.com/en-gb/members/member-commitments/positions-statements/indigenous-peoples-and-mining-position-statement (last accessed 16/01/2018).
[112] The African Charter for Popular Participation in Development and Transformation was adopted in February 1990 in Arusha, Tanzania at the international Conference on Popular Participation in the Recovery and Development Process in Africa. The charter recognises the importance of public participation in development projects. https://repository.uneca.org>handle (last accessed 04/10/2018).
[113] The African Convention on the Conservation of Nature and Natural Resources was signed in Algiers, Algeria in September 1968. Article 17 of the Convention requires that prior informed consent of affected communities be obtained in regard to indigenous knowledge and traditional rights. https://au.int/en/treaties/africanconvention-conservation-nature-and-natural-resources (last accessed 04/10/2018).

To start with, in 2012 the Pan-African Parliament called upon all member states to ensure that all investments were subjected to the free, prior and informed consent of the affected communities.[114] In the case of Social and Economic Rights Action Centre (SERAC) & Another v Nigeria[115] the African Commission found that the right to satisfactory environment provided for government to undertake environment and social impact assessment and to grant access to information to the population and regulatory bodies.[116] Although the case does not specifically mentions FPIC, it is submitted that this assertion is in line with the spirit of FPIC. However, in the Endorois case the African Commission specifically referred to FPIC.[117] In the most recent case, the African Court on Human and Peoples' Rights found that the Kenyan government violated the rights of the Ogiek people by expelling them from their ancestral land without prior consultation.[118]

In South America, the Inter-American Court of Human Rights upheld the right of indigenous people when it comes to FPIC-related issues. This was in the case of the Kalina and Lokono Peoples v. Suriname.[119] In this case the court found that the Suriname government violated the rights of the Kalina and Lokono peoples by failing to evaluate their claims to collective title to their land, their right to participate in the nature reserves and to consider the communities' input as well as the social and environmental impact when deciding to grant mining concessions in those areas.[120]

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[114] Pan-African Parliament 'Recommendations and Resolutions, Sixth Ordinary Session' (16-20 January 2012) OAU Doc PAP2/RECOMS/VI 6.

[115] AHRLR 60 (ACHPR 2001) (SERAC).

[116] Ibid para 56. Also see Ricarda Roesch 'The Story of Legal Transplant: The right to free, prior and informed consent in sub-Saharan Africa' (2016) 16 African Human Rights Law Journal at 505-531.

[117] Centre for Minority Rights Development & others v Kenya (2009) AHHLR 75 (ACHPR 2009). In this case the Kenyan government expelled the Endorois people from their land in order to make way for a nature reserve. The African Commission found that there was no proper prior consultation with the community and that the community was inadequately compensated. The Commission further found that the government had a duty to obtain free prior and informed consent of the affected community. https://www.hrw.org>news>2010/02/04 (last accessed 04/10/2018).

[118] African Commission on Human and Peoples' Rights v. Republic of Kenya, ACTHPR, 006/2012. In this case the Kenyan government evicted a small community of the Ogiek people from their ancestral land to make way for nature conservation. The African Court on Human and peoples' Rights found that by evicting the Ogieks from their land against their will and without prior consultation, the government had violated their rights, including the right to property, freedom of religion, culture, life and development. www.african-court.org>Cases>Judgment (last accessed 04/10/2018).

[119] Judgment delivered on 25 November 2015. Copy of judgment obtainable from the following source: www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf (last accessed 20/01/2018).

[120] www.ijrcenter.org/2016/02/12/iacthr-confirms-indigenous-peoples-land-and-access-to information-rights/ (last accessed 20/01/2018).

Even though FPIC has not gained formal recognition at national level in South Africa, developments at regional level prove that progress has been made through regional instruments and case laws. In Africa, the cases in Nigeria and Kenya have shown a big leap towards FPC. The pronouncement by the Pan-African Parliament added to the impetus. In South America, the pronouncement in Suriname left no doubt as to the commitment by courts around that region to rule in favour of FPIC.

(d) Development of FPIC at Local Level

At national level, Canada can be cited as one example of countries that have put processes in place to achieve the objectives of the FPIC. Section 35 of the Canadian Constitution Act, 1982 is meant to recognize the rights of Aboriginal Peoples.[121] However, the constitutional obligation to consult with Aboriginals before undertaking development projects in their territories and therefore affecting their rights and interest has been further developed mainly through case law.[122] While in South Africa FPIC is not legally required in development projects, the policy and legislative frameworks regarding development in the country are supportive to the spirit of FPIC as will be seen in chapters 3 and 4 of this thesis.

2.2.2 Discursive constructions of FPIC

Even though the principle of FPIC has been developed within the discourse of indigenous peoples' rights, it has been applied to other major themes such development, human rights, business and human rights, the right to development, sustainable development, indigenous knowledge systems as well as participatory democracy. The discussion under this section will cover all these themes, illustrating how FPIC has been constructed through and within these different discourses or themes. Thereafter, an endeavour will be made to link FPIC and development when discussing each of these topics or themes.

[121] PC Labead 'Free, prior and informed consent in international law' http://www.mondaq.com/canada/x/102986/Corporate+Governance/Global+CSR+Mo... (Last accessed: 09 Jan 2013).

[122] In his thesis titled "The Duty to Consult and Environmental Assessments: A Study of Mining Cases from across Canada", Jeffrey Thomas analyses 20 cases dealing with the duty consult indigenous peoples. He singles out the cases of *Haida First Nation v. British Columbia (Minister of Forests) and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* decided by the Supreme Court of Canada in 2004, as pivotal to jurisprudential development on the duty to consult affected indigenous people.

(a) FPIC and Development: General Overview

This sub-section will deal with the nature, content and scope of development in relation to FPIC, thus laying the foundation for further discussion on the relationship between FPIC and development within the South African context.

Development espouses more than just economic factors and encompasses the entire spectrum of human development. Nnandozie describes development within the African context as involving 'three mutually reinforcing dynamics: growth, improvement in quality of life and structural economic and social transformation.'[123] In the words of Myrdal, development means:

> the movement upwards of the entire social system... This social system encloses, besides the so-called economic factors, all non-economic factors, including all sorts of consumption by various groups of people; consumption provided collectively; education and health facilities and levels; the distribution of power in the society; and more generally economic, social and political stratification...[124]

The UN Development Programme defines development as 'to lead long and healthy lives, to be knowledgeable, to have access to resources needed for a decent standard of living and to be able to participate in the life of the community.'[125]

The above statements capture the essence of development within the FPIC context, which comprises of economic growth, poverty alleviation, freedom and quality life in line with Nnandozie's description of development as stated above. These elements are so intertwined that it is almost impossible to categorise them in terms of any priority. Maybe Arndt's description sums up the concept of development much better when he states as follows: 'Development is growth plus change; change in turn is social and cultural as well as

[123] Emmanuel Nnandozie 'Definition and Measurement of Growth and Development' in Emmanuel Nnandozie (ed.) *African Economic Development* (2003) at 30.
[124] Gunner Myrdal 'What is Development?' (1974) 8 (4) *Journal of Economic Issues* 663, 729.
[125] Comhla's Voluntary Options 'What is Development' http://www.volunteeringoptions.org/volunteering Development/what is development/tabid/78... (last accessed 09 February 2013).

economic, and qualitative as well as quantitative.'[126] Todaro goes into more detail when he describes the objectives of development as follows:

> to increase the availability and widen the distribution of basic life-sustaining goods such as food, shelter, health and protection; to raise levels of living, the provision of more jobs, better education, and greater attention to cultural and humanistic values…; to expand the range of economic and social choices of individuals and nationals by freeing them from servitudes and dependence not only in relation to other people and nation states but also to the forces of ignorance and human misery[127]

Although by no means the only or decisive factor, economic growth seems to form the basis for development. Without economic growth, other attributes of development such as lack of poverty, improved quality of life, freedom and even sustainable development may not be achieved. For example, Todaro defines economic development in terms of 'the reduction of poverty, inequality and unemployment within the context of a growing economy.'[128] This notion is supported by Meier, who describes economic development as 'the process whereby the real per capita income of a country increases over a long period of time – subject to the stipulations that the number below "an absolute poverty line" does not increase, and the distribution of income does not become more unequal.'[129]

As already pointed out above, it would indeed be a mistake to overemphasize the importance of one factor - economic growth in this regard - over others. As Nussbaum says:

> All over the world people are struggling for lives that are worthy of their human dignity. Leaders of countries often focus on *national economic growth alone* (my emphasis), but their people meanwhile, are striving for something different: meaningful lives for themselves. Increased GDP has not always made a difference to the quality of people's lives, and the reports of national prosperity are not likely to console those whose existence is marked by inequality and deprivation.[130]

[126] Heinz Wolfgang Arndt *Economic Development* (1987) at 89.
[127] Michael P. Todaro *Economic Development* 7th ed. (2000) at 14.
[128] Ibid at 18.
[129] Meier GM *Leading Issues in economic Development* 3rd ed. (1976) at 7.
[130] Martha C. Nussbaum *Creating Capabilities: The Human Development Approach* (2011) at 1.

The above notion is supported by Pogge: 'Freedom from poverty is among the most important human interests. We are physical beings who need access to safe food and water, clothing, shelter, and basic medical care in order to live well – indeed to live at all.'[131]

Some scholars have even hinted that socio-economic issues are the defining factors of development. Thorbecke says 'human development consists of a plethora of dimensions and aspects as they relate to health, education, nutrition, shelter, access to information, participation, nature of regime (degree of democracy and liberty) and many more.'[132] When referring to poverty which is a socio-economic issue, Lal and Myint point out that it 'must be defined with reference to living standard in particular countries, at a particular time.'[133] Arndt goes a step further and asserts as follows:

> The questions to be asked about a country's development are therefore: what has happened to poverty? What has been happening to unemployment? What has been happening to inequality? If one or two of these problems has been growing worse, especially if the entire three have, it would be strange to call the result 'development' even if per capita income has doubled.[134]

Sen also weighs in this debate when he states that 'economic growth cannot sensibly be treated as an end in itself. Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy.'[135] The author continues to expand on this view when he mentions that development further involves freedom from poverty, tyranny, poor economic opportunities, systematic social deprivation and poor public facilities.[136]

The above notion indeed confirms the fact that 'development' encompasses the entire spectrum of human development, including economic, social and political development. Central to this discourse are the following factors: economic growth, poverty reduction or elimination, freedom, and improvement in the quality of life. Importantly, all these factors

[131] Thomas Pogge *Freedom from Poverty* (2007) at 12.
[132] Erik Thorbecke 'The Evolution of the Development Doctrine 1950 – 2005' in Mavrotas & Shorrocks (eds.) *Advancing Development: Key Themes in Global Economics* (2007) at 29.
[133] Deepak Lal & H. Myint *The Political Economy of Poverty, Equity and Growth* (1996) at 30.
[134] Heinz Wolfgang Arndt *Economic Development* (1987) at 91.
[135] Amartya Sen *Development as Freedom* (199) at 3.
[136] Ibid at 14.

affect the basic rights of all human beings, hence the discussion on FPIC and human rights below.

(b) FPIC and Human Rights

Although the 1948 UN Declaration of Human Rights did not expressly or implicitly recognise FPIC as a human right,[137] subsequent covenants on human rights did at least implicitly acknowledge the principle by recognising indigenous peoples' right to self-determination.[138] FPIC has been recognised by international organisations such as the Permanent Forum on Indigenous Issues as integrally related to the right to self-determination.[139] According to the Joint Statement of the Permanent Forum on Indigenous Issues, FPIC 'is clearly established as an international human rights norm. The right of Indigenous people to grant or withhold approval for the actions affecting their rights is an integral element of the right of self-determination.'[140] The statement goes on to say that 'the right of FPIC has far-ranging significance for the indigenous peoples, especially in the context of human rights and climate change. These are generally key considerations, particularly where large-scale developments are concerned.'[141] Therefore there is no contention as to the link between FPIC and human rights as this has been confirmed by international law and international forums.

Closely linked to the issue of FPIC as a human right is the contentious topic of the right to development. The Declaration on the Right to Development states that 'the right to development is an inalienable right by virtue of which every human person and all peoples are entitled to *participate in, contribute to, and enjoy economic, social, cultural and political development* (my emphasis), in which all human rights and fundamental freedoms can be fully realised.'[142] This definition places the right to development at the heart of FPIC. The

[137] None of the 30 articles of the UN Declaration of Human Rights refers directly to FPIC or the right to self-determination by indigenous peoples.
[138] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in December 1966, build upon the Declaration of Human Rights, and the three instruments form the International Bill of Human Rights. www.2covenants.ohchr.org/About-The-Covenants.html (last accessed 21/05/2018).
[139] UN Permanent Forum on Indigenous Issues Report on the 10th session of the Economic and Social Council, 16-27 May 2011.
[140] Joint Statement- Permanent Forum on Indigenous Issues, 10th Session, New York, May 18 2011.
[141] Ibid.
[142] Ibid.

right to "participate in, contribute to, and enjoy economic, social, cultural and political development" sums up the essence of FPIC. Tlakula re-emphasises the fact that 'the human person is the subject to development and should be an active participant and beneficiary of the right to development.'[143]

Garcia-Amador is of the view that 'it is in the economic best interests of all States to promote universal realization of the right to development.'[144] This assertion links the right to development to economic development as discussed above, as well as sustainable development as will be deliberated below.

(c) Responsible Business Conduct, Human Rights and Development

The role of corporations and other development agencies such as governments in development is of paramount importance. These are development agents without which modern development would be impossible. As Bunn has put it, 'corporations can make substantial contribution to economic growth and human wellbeing by providing needed goods and services, creating employment, improving infrastructure and transportation systems, transferring technology and managerial skills and paying government and licence fees.'[145] In the words of Wallace, "many companies now acknowledge the connection between international trade, poverty and the ability of States to achieve development for citizens.'[146]

Considering the role that business plays in development, especially in the developing world, there is clearly a case to be made about business, development and human rights, which places business squarely in the centre of the FPIC debate. Horrigan describes the relationship between business and human rights as follows: 'Business is a key player in the integration of human rights and corporate concerns...'[147]

[143] Pansy Tlakula in Philip J. McConnaghay & Paul Tiyambe Zaleza (eds.) *Human Rights, the Rule of Law and Development in Africa* (2004) at 110.
[144] Garcia-Amador FV The *Emerging International Law of Development: A New Dimension of International Economic Law* (1990) at 79.
[145] Isabella D Bunn *The Right to Development and International Economic Law: Legal and Moral Dimensions* (2012) at 250.
[146] Rebecca M.M. Wallace *International Human Rights: Text and Materials* (2001) 1.
[147] Bryan Horrigan 'Corporate Social Responsibility in the 21st Century' at 24.

At international level, transnational corporations that conduct businesses in other countries are required to factor human rights risk assessments into their operational plans as observance of human rights is key to sustainable development.[148] This approach is supported by Principle 17 of the Guiding Principles on Business and Human Rights (the Ruggie Principles)[149] which recommends that business enterprises should carry out human rights due diligence so that they can 'identify, prevent, mitigate and account for how they address their adverse human rights impacts.'[150] The Ruggie principles are fully endorsed and supported by the Organization for Economic Cooperation and Development (OECG).[151]

Although providing a useful framework for action by states and corporations in relation to business and human rights, the Ruggie Principles are not binding in international law. It is for this reason that the UN put processes in place to develop a treaty on business and human rights.[152] Indeed, in 2014 the Human Rights Council adopted Resolution 26/9 to 'establish an open-ended inter-governmental working group on transactional corporations and other business enterprises with respect to human rights, whose mandate shall be to regulate, in international human rights law, the activities of corporations and other business enterprises.'[153] The process of establishing this treaty is still under way, and on its adaptation it will close a big gap in the field of business and human rights.

Echoing the sentiments of the Ruggie Principles, the UN Global Compact[154] states that 'business should support and respect the protection of internationally proclaimed human rights within their sphere of influence;'[155] whereas principle 2 goes further to say that

[148] www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/un_guidingprincplesbusinesshumanrights (last accessed 20/01/2018).
[149] Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy Framework, UN, New York and Geneva, 2011. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 21/01/2018).
[150] Ibid at 18.
[151] See OECD Guidelines on Responsible Business Conduct Matters for the endorsement of the Ruggie Principles.www.oecd.org/corporate/mne/responsible-business-conduct-matters.htm (last accessed 21/01/2018).
[152] https://www.hlregulation.com/2017/11/02/a-binding-treaty-on-business-human-rights-still-a-way-to-go/ (last accessed 08/06/2018).
[153] www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWOnTNC.aspx. (last accessed 08/06/2018)
[154] UN Global Compact, formed 26 July 2000. http://www.unglobalcompact.org/what-is-gc (last accessed 20/01/2018).
[155] Principle 1 of the Global Compact. Also see Boeger *et al: Perspectives on Corporate Social Responsibility* (2008) at 68.

'business should make sure that they are not complicit in human rights abuses.'[156] According to Macleod, participants to the Global Compact 'agree both to support and respect human rights and to ensure that they are not complicit in human rights abuses.'[157] However, in some instances adherence to the principles advanced by the Global Compact have been compromised by the need by business to make profit at all costs. This includes the disregard of human rights, and for the purposes of this research project the disregard of the FPIC.

Atkinson and Claude lament this tendency and write as follows: 'Unfortunately, the expansion of global corporate activity and the pursuit of increased profits have sometimes exacted painful social costs, risking human rights violations and undermining aspects of the human condition.'[158] According to Cornea,[159] as much as corporations and state agencies bring about the much needed development and in some instances prosperity, there are instances where local communities were been left worse off than before the introduction of the projects in their areas.

It is therefore important to note that as much as the role of business is crucial for development purposes and in turn the attainment of human rights which form the basis of FPIC, there is a need for a balancing act. If not properly monitored, business can bring as much misery to affected communities as it brings prosperity. This will in turn defeat the objectives of FPIC.

(d) FPIC and Sustainable Development

In order for development to be sustainable, chapter 26 of Agenda 21 urges governments to elicit full cooperation and agreement with affected communities when developing their areas, and to develop dispute resolution mechanisms especially when dealing with settlement and land-use issues. The chapter also urges governments to empower local communities so that

[156] Principle 2 of the Global Compact.
[157] S. Macleod 'The UN, Human Rights and Transnational Corporations' in Boeger *et al* "Perspectives on Corporate Social Responsibility" at 68.
[158] Atkinson D and Claude RP 'Human Rights and Multinational Corporations: The Global Compact and Continuing Evolution' in GGS Suder "International Business under Adversity: A Role in Corporate Responsibility, Conflict Prevention and Peace" at 9.
[159] Michael M. Cernea 'Involuntary Resettlement in Development Projects: Policy Guidelines for World Bank-Financed Projects' (1988) 80 World Bank Technical Papers at 9.

they can be able to manage their land resources efficiently.[160] This chapter reiterates the sentiment expressed in Principle 10 of the Rio Declaration itself, which states that 'environmental issues are best handled with the participation of all concerned citizens.'[161] Indeed, as it will be seen in the conceptualization section below, participation is central to FPIC and essential for development as a whole.

The Future we Want[162] also stresses the importance of public participation by indigenous people in the advancement of sustainable development, and recognizes the importance of the UN Declaration on the Rights of Indigenous peoples in the implementation of sustainable development strategies.[163] Again, public participation by communities that own the land that needs to be developed is crucial for the realization of the requirements and spirit of FPIC.

The Rio Declaration, *Agenda 21* and *The Future we Want* all emphasise the need for public participation by indigenous peoples in order for development to be sustainable. It is important to point out that the public participation referred to in this instance and which is in congruent with FPIC is participation in decision-making processes which can empower affected communities to give free prior and informed consent. This sentiment is supported by Boyle and Freestone who indicate that 'environmental impact assessment and public participation in decision-making perform the function of legitimising decisions, and if properly employed, may also improve their quality.'[164] Therefore one can say with confidence that there is a direct link between FPIC and sustainable development, and this link mainly rests upon public participation by affected communities in the decision-making hierarchy of the project.

The above being said, it is concerning that in both the Millennium Development Goals (MDGs) and the subsequent Sustainable Development Goals (SDGs) South Africa does not place much emphasis on public participation as evidenced by the pronouncements in 215

[160] Agenda 21 is a plan of action on sustainable development emanating from the Rio Declaration adopted in the Earth Summit held in Rio de Janeiro, Brazil, 1992. https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (last accessed 02/06/2018)
[161] The Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 1992.
[162] 'The Future We Want' is a UN Resolution (RA/RES/66/288) adopted at the Rio+20 Conference held in Rio De Janeiro in 2012 as a follow-up to the implementation of the Rio Declaration. https://sustainabledevelopment.un.org/futurewewant.html. (last accessed 08/06/2018).
[163] See Principle 49 of *The Future we Want – Outcome Document*.
[164] Allen Boyle and David Freestone 'Introduction' in Boyle and Freestone "International Law and Sustainable Development: Past achievements and Future Challenges" (1999) at 16-17.

Country report.[165] Without giving public participation the attention it deserves in development matters, the country may never achieve the SDG objectives, as much as it failed to attain the MDGs.

(e) FPIC and Indigenous Resources and Knowledge

The issue of consent as required by the FPIC principle is not only limited to the exploitation of natural resources, particularly land use, but also to the utilization and the destruction of natural resources other than land, as well as the knowledge and community experience in areas such as medicine and other beneficiations. In the Nandoni Dam project, which is one of the case studies to be discussed in chapter 6 of this research assignment, and where hundreds of residents were displaced to make way for a dam, one of the major complaints was the destruction of the medicinal plants and failure by developers to successfully relocate these plants to the new area.

The above instances are in contravention of international conventions and customs. Article 8(j) of the Convention on Biological Diversity (1992) (CBD) states as follows:

> Each party shall … respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional life styles relevant for the conservation and sustainable use of biological diversity and promote their wider application with *the approval and involvement* (my emphasis) of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[166]

Matthews expands on the content of Article 8(j) of the CBD, saying that it outlines the principle of *prior informed consent*, which 'presupposes active authorization prior to the use or even the custody of the resources and/or knowledge.'[167] He further points out, in case of the *Hoodia gordonii*, that even though informed consent was not obtained prior to the commercialization of the plant, the subsequent benefit agreement 'broke new ground in the recognition of the collective rights of indigenous people and set important precedents for

[165] Statistics South Africa 'Millenium Development Goals Country Report 2015' at 1.
[166] Article 8(j) Convention on Biological Diversity, 1992.
[167] Duncan Matthews 'Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements' (2011) at 62.

future consultation with indigenous people.'[168] This notion is supported, as the principle of FPIC is till at its emerging and evolving stage.

Furthermore, the Bonn Guidelines[169] which stem out of the Convention on Biological Diversity (CBD) emphasize the importance of obtaining informed consent from local stakeholders of traditional knowledge before the benefits of the commercialization of the genetic resources can be shared with the holders of that traditional knowledge.

(f) FPIC and Participatory Democracy

Participatory democracy entails that affected communities must fully participate and meaningfully engage in all decision-making processes that affect their lives, be it political, developmental (economical) or social activities. At a broader level the concept talks to 'local people taking control of their own lives, expressing their own demands and finding their own solutions to their problems.'[170] Gawanas goes to more detail when he states that 'communities need to have control over funds, resource allocation and decision-making.'[171]

Dr Kenneth Kaunda, the former President of Zambia, made the following remarks when commenting about a participatory programme in his country: **'**Voting once in five years is representative democracy. But we want participatory democracy... Every section of our society must participate in all activities - political, economic, social, cultural, scientific and technological.'[172] The above sentiments seem to get support from Phillips who contends that 'voting every five years hardly counts as a substantial expression of popular control.'[173] Popular control comes through meaningful participation by all segments of the society as alluded to by Swanepoel and De Beer when they state that:

[168] Ibid at 113.
[169] Secretariat of the Convention on Biological Diversity 'Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising Out of their Utilization' 2002. https://www.cbd.int>cbd-bonn-gdls-en (last accessed 16/02/2018).
[170] Comhla's Voluntary Options 'What is Development' http://www.volunteeringoptions.org/volunteering Development/what is development/tabid/78 (last accessed 09 February 2013).
[171] Bience Gawanas 'The African Union: Concepts and Implementation Mechanisms Relating to Human Rights' in P Bosl & J Diescho (eds.) *Human Rights in Africa* (2009) at 135.
[172] Patrick Eze Ollawa 'Democracy in Zambia: The Political Economy of National Development' (1979) at 19.
[173] Anne Phillips 'Democracy and Difference' (1993) at 112.

> it is the democratic right of the people to participate in matters affecting their future. Every adult, whether relatively poor, poor, or the poorest of the poor, has a right to be part of the decision-making mechanism affecting his or her development.[174]

The above statement links FPIC and participatory democracy to development. According to the FPIC principle, people are central to democracy and need to be involved from the beginning to the end when it comes to development matters. The authors continue and demonstrate that

> When people are mobilised to participate, they do so fully in all aspects of the project. Then they become part of the decision-making and planning of the project. They are part of the implementation and the evaluation of the project. And, if need be, they decide on the project course adaptations to keep the project on track; in short, they then participate fully in the management of the project.[175]

The above statement re-iterates that participation should be meaningful, hence the emphasis on communities being part of the decision-making process. In most development projects members of the communities do not fully and meaningfully participate in developmental projects, leading to tokenism (no meaningful participation), co-option (community members assimilated into the system with no decision-making powers) and elitism (only educated and well-articulated people act as community representatives).[176] The situation is worse in some projects where there is not even pretence to involve communities and predetermined project plans are imposed on the communities under the guise of consultation. Masaki noted and criticised this tendency:

> The history of planned development is replete with the imposition of projects resulting in the destruction or loss of indigenous peoples' lands and resources, as well as their political, economic and socio-cultural systems… In line with the principle of FPIC, it is imperative that development agencies involve indigenous peoples in decision –making in order to mitigate the negative consequences of their activities.[177]

[174] Swanepoel & De Beer, opcit at 28-9.
[175] Ibid.
[176] Ife and Tesoriero supra at 148.
[177] Katsuhiko Masaki 'Recognition of Misrecognition: Pitfalls of Indigenous Peoples' Free, Prior and Informed Consent' in Hickey and Mitlin *Rights-based Approaches to Development: Exploring the Potential and the Pitfalls* (2009) at 70.

When it comes to participatory democracy, the world should perhaps learn from Latin America's public budgeting experiments. Public budgeting is a 'participatory process of budget planning where citizens and civic organizations are encouraged to attend public meetings propose, debate and select a number of budgetary priorities in the area of public works and social services.'[178] Public budgeting, which is also referred to as participatory budgeting, is also described as a process in which 'ordinary citizens are called upon to decide on the municipal budget in a series of meetings to define local priorities and projects, [and] delegates from various districts would formulate a budgetary project.'[179]

One should distinguish this process from the South African version where the citizenry is called upon to comment on a predetermined budgetary plan. The Latin American version is meant to disempower the "political elite" and empower the "non-elite" by 'giving ordinary citizens access to the most important decision-making process at the municipality level…'[180]

For citizens to participate meaningfully and effectively, they must be empowered or capacitated to do so. According to Ramlogan, effective participation requires at least the following: education; access to information; a voice in decision-making; transparent decision-making; post-project analysis and monitoring; enforcement structures; and recourse to independent tribunals for redress.[181] Empowerment has also been described as a 'mixture between the right to make decisions and the ability to make decisions.'[182] Cornwall and Coelho eloquently demonstrate how lack of capacity by participants in decision-making can negatively affect participatory democracy and in turn the FPIC requirement:

> For people living in poverty, subject to discrimination and exclusion from mainstream society, the experience of entering a participatory space can be extremely intimidating. How they talk and what they talk about may be perceived by professionals as scarcely coherent or

[178] Enrique Peruzzotti & Andrew Selee 'The Politics of Institutional Innovation: The Implementation of Participatory Budgeting in the City of Buenos Aires' in Andrew Selee & Enrique Peruzzotti (eds.) "Participatory Innovation and Representative Democracy in Latin America" (2009) at 42.
[179] Gianpaolo Baiocchi *et al* 'Bootstrapping Democracy: Transforming Local Governance and Civil Society in Brazil' (2011) at 3.
[180] William R. Nylen 'Participatory Democracy versus Elitist Democracy: Lessons from Brazil' (2003) at 49.
[181] Rajendra Ramlogan 'Sustainable Development: Towards a Judicial Interpretation' (2010) at 164.
[182] Swanepoel & De Beer opcit at 30.

relevant; their participation may be viewed by the powerful as chaotic, disruptive and unproductive.[183]

As already alluded to, lack of capacity can negatively impact on the level of participation and reduce participation to tokenism and co-option. This will definitely defeat the empowerment requirement of FPIC.

In summary, the discussions in the above subsections point to the intertwined relationship between FPIC and development as a whole. Be it human rights, participatory democracy, sustainable development or indigenous knowledge, the application of the FPIC principle is critical to make any success of a project conducted on the lands occupied by communities. Genuine public participation in all stages of the project and decision-making processes is a precursor to a successful and sustainable project.

2.3 The Conceptual Framework of the FPIC Principle

According to the UN Commission on Human Rights, free, prior and informed consent 'recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into equal and respectful relationship with them, based on the principle of informed consent.'[184] The other definition, which may resonate better with this research project, is that FPIC is 'the principle that a community has the right to give or withhold consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use.'[185]

To understand FPIC better, it may be useful to break down the principle into three elements, that is "free", "prior", and "informed" consent. The United States Institute of Peace International Network for Economics and Conflict expands on the three elements as follows:

[183] Andrea Cornwall & Vera Schattan P. Coelho 'The Politics of Participation in New Democratic Arenas' in Andrea Cornwall & Vera Schattan P. Coelho *Spaces for Change: The Politics of Citizen Participation in New Democratic Arena* (2007) at 13.
[184] Commission on Human Rights, Sub-Commission on the promotion and Protection of Human Rights, Working Group on Indigenous Populations, 22nd Session, 9-13 July 2004 at 5.
[185] Forest Peoples Programme 'Free, Prior and Informed Consent' http://www.forestpeople.org/guidingprinciples/ (last accessed 09 February 2013).

> Consent must be obtained free of coercion and manipulation. Such consent must be secured prior to any authorization by government or third parties, and prior to commencement of activities by a company affecting indigenous peoples' lands, territories, and resources. Finally, the consent must be informed by meaningful participation and consultation of indigenous peoples based on the full disclosure of relevant aspects of the proposed project by the company and permit granting authority in a form that is understandable and accessible to indigenous peoples and local communities.[186]

For the purposes of this research project, it will be useful to succinctly consider each of the three elements of FPIC as defined above.

2.3.1 'Free' Consent

Simply put, free consent involves an element of voluntariness, meaning that communities should be 'independent of manipulation and coercive influences'[187] by developers and development agencies. Put slightly differently, free consent entails the 'substantial absence of control by others,'[188] and in this instance "others" would mean developers or development agencies. Mann *et al* put it even better when referring to medical research subjects, pointing out that such subjects should 'enjoy the absolute freedom of choice over the extent of the collaboration without fear of victimization.'[189]

However, when communities are offered substantial amounts of money or promised to be provided with modern infrastructure and jobs if they agree to certain developments taking place in their areas (as will be seen in the case studies in chapter 6), such a process cannot be said to be free of manipulation. Worse still, when all persuasions through incentives fail, communities are relocated against their will, therefore eroding the element of voluntariness. This is contrary to the requirements and spirit of FPIC.

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[186] United States Institute of Peace 'Growing Support for Community Consent Rights for Natural Resource Development: Can "Free, Prior and Informed Consent" Implementation Reduce Conflict Over Natural Resource Development?' http://inec.usip.org/blog/2011/jun/03/growing-support-community-consent-rights-natural-resource-development... (last accessed 09 January 2013).

[187] Tom L. Beauchamp & James F. Childress *Principles of Bio-medical Ethics* (1989) at 106.

[188] ibid at 76.

[189] Jonathan M. Mann *et al* 'Health and Human Rights' (1996) at 367.

2.3.2 "Prior" Consent

Consent should be the result of meaningful consultative and negotiated process based on good faith and equitable participation by all community members through their own representatives or customary structures, and the option of withholding such consent is essential[190]. Furthermore, such consent 'must be secured prior to any authorization by government or third parties, and prior to commencement of activities by a company affecting indigenous peoples' lands, territories, and resources.'[191] This calls for the need for pre-project consultative processes.

The crux of the matter is that people or communities need to be engaged from the inception or conceptualization of the project, instead of involving them so that they can endorse the predetermined plan and play some minor roles as beneficiaries of the project. As Ife and Tesoriero have observed,

> Deliberative democracy seeks to establish mechanisms that enable citizens to participate in the deliberative process, so that they can be part of the plan and developing the proposal. This involves government engaging in dialogue with the community before developing a further plan rather than mounting a "community consultation" after the plan has been developed, and seeks to draw on the wisdom and experience of the community."[192]

The tendency in development circles has been to come with readily made plans, "consult" on those plans, which effectively means holding information sessions over the predetermined plans with a few options from which the communities should choose or comment upon.[193] Despite the outcome of the "consultation", that is whether there was consent or not, the project will still go ahead as long as the communities have been informed.

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[190] Christina Hill, Serena Lilywhite and Michael Simon 'Guide to Free, Prior and Informed Consent' *Cultural Survival* (2010) at 8.
[191] Ibid at 3.
[192] Jim Ife & Frank Tesoriero 'Community Development: Community-based Alternatives in an Age of Globalization' (2002) at 148.
[193] Ibid.

2.3.3 "Informed" Consent

An informed community is a community that has been empowered to make decisions and are capable of saying "yes" or "no" to a particular proposal without undue influence from the developers or their agencies or the elite in the communities who stand to gain if the projects go ahead. Informed consent involves two basic issues, competency or capacity to make decisions and understanding the information regarding the project as a whole to make an informed decision.

Empowerment is a 'mixture between the right to make decisions and the ability to make decisions.'[194] Barber points out that community capacitation through deliberative engagement leads to "the development of a citizenry capable of genuinely public thinking and political judgment and thus be able to envision a common future in terms of genuine common goods.'[195] The full understanding of information comes because of full disclosure by the holder of the information so that the subject can make an informed decision. Therefore, the community should know the nature and consequences of their consent before deciding on a specific project. One is inclined to agree with the conclusion by Beauchamp and Childress who state that 'legal, philosophical, regulatory, medical and psychological literatures have all tended to favour the following elements as the analytical components of informed consent: disclosure, understanding, voluntariness, competence and consent.'[196] This statement touches on all aspects regarding FPIC as discussed in this section.

2.3.4 Consent

Affected communities should be able to give or withhold their consent. Communities should not only be capable to say "yes" or "no" to a development project, but should also be able to 'practically insist that certain conditions be met before consent is granted.'[197] This ability is a cumulative product of the fulfilment of all the elements of FPIC that have been discussed

[194] Hennie Swanepoel & Frik De Beer 'Community Development: Breaking the Cycle of Poverty' (1992) at 30.
[195] Benjamin R. Barber 'Strong Democracy: Participatory Policies for a New Age' (1984) at 197.
[196] Beauchamp and Childress opcit at 78.
[197] Michael Clark and Nolundi Luwaya's 'Communal Land Tenure 1994-2017: commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiation of the Parliament of South Africa' Land and Accountability Research Centre, June 2017.

above. For example, only a community that has a free prior and full knowledge of the project is capable of genuinely giving or withholding consent for development to continue.

2.4 Challenges in Relation to FPIC

The concept of FPIC and its application is characterised by pitfalls and ironies. In this section I will identify some of the challenges regarding FPIC both at conceptual and application levels.

2.4.1 Legal Status of FPIC in International Law

As already alluded to, FPIC is an emerging principle. This principle has been embodied in several major international conventions such as the Covenant on Economic, Social and Cultural Rights,[198] the International Covenant on Civil and Political Rights,[199] the International Convention on the Elimination of all Forms of Racial Discrimination,[200] the Convention on Biological Diversity[201] and the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries[202] and the UN Declaration on the Rights of Indigenous Peoples (UN Declaration).[203]

It is important to note that the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) is the first international instrument to deal directly with the FPIC principles. However, the Declaration, as pointed out by Wand, 'is not a binding legal instrument and is ultimately considered as an instrument of soft law.'[204] Wand continues and describes the situation as follows:

> Even though there appears to be minimal consensus amongst the supervisory bodies in relation to the right of indigenous peoples to be consulted in regard to development projects,

[198] December 16, 1966, 993 UN T.S. 3 (1967).
[199] December 16, 1966, 999, UN T.S. 171 (1978).
[200] December 21, 1965, 660 UN T.S. 195 (1969).
[201] June 5, 1992 (1993).
[202] June 27, 1989 (1991).
[203] September 13, 2007, GA Res. 61/295 (2007).
[204] Tara Wand 'The Right to FPIC: Indigenous Peoples' Participation Rights within International Law' 10 North-western Journal of International Human Rights, at 57.

these recommendations do not represent legally binding obligations and this limits their impact on the development of a customary international legal norm.[205]

The above analysis shows how the effectiveness of FPIC is greatly affected by its standing in international law. The status of FPIC as soft law is a drawback for this emerging principle as countries can only be encouraged to implement it as it is not binding on them unless they incorporate it in national legislation.

2.4.2 Diverse Understanding/Interpretation of FPIC and Lack of Standard Operating Procedures

One of the obstacles to the realization of FPIC is the diverse interpretation of the principle. According to Wand, 'there appears to be a debate as to whether a right to participation is a right to be consulted or whether it is the right to give or withhold consent.'[206]

As Franco aptly puts it, "some governments insist that the "C" [in FPIC] means the weaker "consult" instead of the stronger "Consent."[207] This state of affairs was also lamented upon by the Indigenous Peoples' and Extractive Industries Network in their statement to the Forum on Human Rights. They were concerned that lack of common interpretation of FPIC was hindering progress as some corporations would prefer to 'consult' with communities instead of obtaining their consent.[208]

The Network also raised concerns over the lack of standard operating procedures on FPIC. According to the statement, having standard operating procedures would help to create a common understanding of how FPIC should be implemented, and therefore eliminate different interpretations by different stakeholders. This line of thinking was also evident in the presentation by Catacutan in Nairobi, Kenya when she presented on FPIC in Carbon Projects.[209] The development of standard operating procedures for FPIC would go a long way

[205] Ibid at 59.
[206] Wand, opcit at 56.
[207] Jennifer Franco 'FPIC Fever: Ironies and Pitfalls' Burma Policy Briefings' http://www.burmalibrary.org/docs15/FPIC (last accessed 03/03/2018).
[208] Statement from the IPs and Extractive Industries Network to the Forum on Business and Human Rights, 5 December 2012. http://www.usip.org (accessed 08/09/2014).
[209] Delia C Catacutan 'FPIC in Carbon Projects' http://www.slideshare.net/cgiarclimate/fpic-in-carbon-project (Last accessed 08/08/2013).

towards the implementation of the principle as it evolves and emerges in the development sphere.

2.4.3 Relationship between States and Development Agencies

The collusive relationship between governments that seek development at all costs and big corporations, especially in the mining industry, has long been a cause for concern for many communities that have been negatively affected by the implementation of development projects in their areas. This issue was raised quite prominently in the statement by the IPs and Extractive Industries Network referred to above and supported by the authors at the Tebtabba Foundation:

> The role of the State from the global, national and local levels in terms of regulating the behaviour of corporations needs to be strengthened. Unfortunately, what we see is more collusion between the state and the extractive industries to extract the last remaining resources, many of which are in indigenous peoples' territories.[210]

International experiences have shown increasing number of cases where governments have sided with corporations in forcibly removing communities from their lands in order to make way for development projects. State apparatus such as the army and police have occasionally been deployed to quell unrests or to remove communities that have resisted to be relocated without their consent. Triggs echoes this concern when he indicates that the expropriation of indigenous lands and resources for national development is a growing problem as development projects are frequently undertaken on indigenous lands and territories without indigenous peoples' consent or even consultation.[211]

In some instances, the State itself is a developer as it is most common with dams and forestry projects. In such cases FPIC is seen as a right to veto projects.[212] Naturally, due to the unbalanced power relations between the community (mostly poor and marginalised) on one

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[210] Co-authors at the Tebtabba Foundation 'Pitfalls and Pipelines: Indigenous Peoples and the Extractive Industries' http://www.usip.org (last accessed 08/08/2015).
[211] Gillian Triggs 'The Right of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective' in Donald Zillman *et al Human Rights in Natural Resources Development: Public Participation in the Development of Mining and Energy Resources* (2002) at 123.
[212] Wand, opcit at 57.

hand and the State and large corporations on the other, communities are bound to lose the battle and projects to continue without their consent.

2.4.4 Competing Interests within the Community

Conflicting interests of groups or even individuals within one affected community are common within the implementation of FPIC. What may be regarded as being of common good to a given community may not satisfy the needs of some groups or members of that community. However, it is important to note that the communities' need for development and the individuals need to be protected from negative consequences of development initiatives may not necessarily be at loggerheads with each other. In fact, these two aspirations may complement each other.[213]

Taken at its strict interpretation, FPIC presupposes that communities are homogenous entities. However, when States and developers start employing divide and rule strategies the cracks immediately start to show. Although Masaki agrees that a group of indigenous people hold similar interpretation in social reality because of shared social and cultural affinities, he does point out that 'each of them is a multiply positioned because their status as a populace cuts across other attributes such as gender, class and religion.'[214]

The lack of homogeneity in community interests and its consequences have been widely acknowledged by FPIC researchers, amongst them Franco who states that FPIC is 'deployed in communities that are themselves highly differentiated by class, ethnicity, gender, generation and political status, whose real people are embedded in actual existing power structures, which in turn can (and do) influence both the process and outcome of FPIC deployment.'[215] Franco also gives an illustration that the change of water on the one end of the community can negatively affect the other end of the same community and therefore cause conflict and a clash of interests.

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[213] Elaine B Sharp and Michael G Bath 'Citizenship and Economic Development' in RD Brigham and R Mier (Eds.) *Theories of Local Economic Development: Perspectives from Across the Disciplines* (1993) 229.
[214] Kirosaki Masaki 'Recognition or Misrecognition: Pitfalls of Indigenous Peoples' Free, Prior and Informed Consent' in Hickey and Mitlin (eds.) *Rights-based Approaches to Development: Exploring the Potentials and Pitfalls* (2009) at 71.
[215] Franco, opcit at 7.

Masaki argues for what he calls "differentiated solidarity" as opposed to the "single will" or "shared will" notions of decision-making in FPIC. He writes as follows: 'given the hybridity of an indigenous community, it is not feasible to identify its "shared will" regarding whether to give or withhold consent to a particular development project.'[216] Acknowledging that communities are not a homogenous entity can lead to a better implementation of FPIC by eliminating presumed and artificial consensus in the affected communities.

2.4.5 Predetermined Projects or Plans

As indicated somewhere in this chapter, community participation in development projects from the beginning to the end is vital for the success of those projects and is in line with the principles of FPIC. However, developing countries do not follow this approach. It is actually ironic that when communities are empowered to be able to grant informed consent, that is to give or withhold consent in terms of FPIC, they are required to do so within the context of pre-determined projects or plans. This certainly undermines the principle of participation or participatory deliberative democracy.

This approach to community participation actually compromises the FPIC principle. As Masaki puts it, 'the notion of FPIC, given its objective to seek consent to preconceived projects is liable to lapse into political technology…'[217] which presupposes a pre-planned agenda or a programme which is engineered to yield certain results. At the end, communities fail to buy into the projects as such ventures do not accurately reflect or embrace their aspirations. The developers and government agencies seem to assume that they know what is good for the people who have very little choice mainly due to poverty and lack of capacity to make informed choices.

2.4.6 Representation Problem

One of the challenges facing FPIC is the representativeness of the decision-making structures of the affected communities. The question is whether such structures are fully and genuinely representative, inclusive and accountable to the communities. Representation is meant to promote participation in the decision-making processes. But in most cases representation has

[216] Masaki, opcit at 71.
[217] Masaki, opcit at 80.

been associated with elitism, wherein representatives are likely to be elected because they are articulate or educated. As Ife and Tesoriero contend, 'representative democracy involves an effective transfer of power to the elite (those elected) and a consequent disempowerment of 'the people' in whose interest democracy is supposed to work.'[218] Franco puts it even more bluntly:

> There is a reason that many companies, if they do honour FPIC at all, do so often by relying on selected villagers (including chiefs, brokers, entrepreneurs and bullies) to organise consultations, and time and again the results have proven to be disastrous for at least some members of the community who may not "count" because of their difference[219]

Referring to tokenism, Franco raises a pertinent question: 'How do we ensure that FPIC does not degenerate into "window dressing", especially in places where heavy restrictions still exists on freedom of association, freedom of expression, and a free press.'[220]

Elitism and tokenism stifle true participation and are therefore detrimental to FPIC. For FPIC to take roots in development projects genuine representation is needed so that the wishes and needs of those who are adversely affected can be adequately catered for.

2.5 Conclusion

This chapter has endeavoured to define and analyse the FPIC principle within the international and national context. Major issues that were addressed are, amongst others, the origin of the principle; its international and regional status; its applicability at international and regional levels; as well as some of the pertinent challenges relating to the FPIC principle at its current form. The legal sources of the FPIC principle have been mainly the international law and conventions.

The chapter has also endeavoured to link the FPIC principle and its applicability to the concept of 'development', focussing mainly on key concepts such as economic growth,

[218] Ife & Tesoriero opcit at 147.
[219] Franco, opcit at 7.
[220] Ibid.

poverty reduction, quality of life and freedom. These concepts will form a framework of the analysis of the case studies in chapter 6 of this research. The concepts were further linked to key developmental themes such as sustainable development, human rights and development, right to development, the role of State and business in development. A connection or linkage was sought between all these concepts and themes, as well as between FPIC and development.

A conceptual framework of FPIC was also discussed in the chapter. To provide an in-depth framework of the principle, the FPIC principle was broken down into four elements, namely, “free”, “prior”, “informed”, and consent. A proper understanding of the principle is necessary at this very early stage of the research, as these elements will recur throughout the thesis. The FPIC elements will also prove critical in the analysis of the case studies. The table below illustrates the four elements of FPIC, their characteristics and challenges:

ELEMENT	CHARACTERISTICS	CHALLENGES
Free	• Affected communities must freely consent to development; • Consent should be voluntary; • Communities must not be coerced or intimidated into granting consent; and • Communities should not be manipulated into granting consent.	Challenges facing FPIC include the following: • Legal status of FPIC in international Law • Diverse understanding /interpretation of FPIC and lack of standard operating procedures • Relationship between States and development agencies • Competing Interests within the community • Pre-determined projects or plans • Representation problem
Prior	• Pre-project community consultation essential. • Affected community's consent should be sought prior to commencement of development. • Prior consultation enables communities to evaluate and analyse the project before development starts. • Prior consultation should enable affected communities to make informed decisions. • Prior consultation enables affected communities to participate meaningfully throughout the project.	
Informed	• Affected communities should be provided with accurate, full and up-to-date information on the project. • Affected communities should be informed about the scope and impact of the project. • Information on the project should be accessible and easy to understand.	
Consent	• Affected communities should have the choice to grant or withhold consent. • Affected communities should have the capacity to accept or reject the project in their lands.	

Table 1: FPIC Elements, characteristics and challenges

Finally, this chapter also revealed that there are still immense challenges facing FPIC. These include the legal status of FPIC in international law; diverse understanding and interpretation of FPIC; lack of standard operating procedures; relationship between states and development agencies; competing community interests; consenting to predetermined projects or plans; and problems relating to community representation.

All in all, the above conclusions point to the fact that FPIC, despite its many benefits to development, is still at its emerging and perhaps the most difficult stage. However, there seems to be consensus that this is a principle worth pursuing at all levels as the benefits outweigh the challenges.

CHAPTER 3

SOUTH AFRICA AND FREE, PRIOR AND INFORMED CONSENT: POLICY FRAMEWORK ANALYSIS

3.1 Introduction

According to its preamble, the South African Constitution was adopted so as to, amongst others, 'improve the quality of life of all citizens and free the potential of each person.'[221] In chapter 2 of this thesis where the concept of development was analysed in detail, it was established that development entails 'to lead long and healthy lives, to be knowledgeable, to have access to resources needed for a decent standard of living and to be able to participate in the life of the community.'[222] However, in South Africa the noble ideals espoused by the Constitution regarding development have been marred by the triple challenges of poverty, inequality and unemployment.[223]

To address the above challenges, the democratic South African government has since its inception in 1994, embarked on several developmental strategies and policies and enacted legislation aimed at fostering development. The primary purpose of this chapter is to analyse the developmental strategies outlined in chapter 1 to determine the extent to which they embody the principle of free, prior and informed consent (FPIC) or its spirit. To this extent, the chapter will focus on the major strategies: Reconstruction and Development Programme (RDP); Growth, Employment and Redistribution programme (GEAR); Accelerated and Shared Growth Initiative – South Africa (ASGISA), National Growth Path (NGP) and National Development Plan (NDP).

[221] Preamble to the Constitution of the Republic of South Africa, 1996.
[222] Comhla's Voluntary Options 'What is Development' http://www.volunteeringoptions.org/volunteering Development/what is development/tabid/78... (last accessed 09 February 2013).
[223] Statistics South Africa 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (2018) International Bank for Reconstruction and Development.

3.2 Reconstruction and Development Programme (RDP)

Adopted in 1994, the RDP is the first major socio-economic programme or strategy in post-apartheid South Africa.[224] The programme has been described as 'the foundational post-apartheid development framework upon which other initiatives are built.'[225] As further observed by Nutall, the RDP promised much, 'not only for the future of the country but for the future role of development within the new South Africa as a whole.'[226] The South African Human Development Report of the year 2000 described the RDP policy as a benchmark for all government's economic and social policies, through which the state committed itself to the following: 'creating productive employment opportunities for all citizens at a working age; alleviating poverty, low wages and extreme inequalities in wages and wealth; and meeting basic needs and ensuring that every citizen enjoys a decent standard of living.'[227] According to the RDP White Paper[228], the RDP is an 'integrated, coherent socio-economic policy framework'[229] that aims to 'effectively address the problem of poverty and gross inequality evident in almost all aspects of South African society.'[230]

The RDP's focus extended over eight key sectors: housing, water, electricity, health care, land reform, job creation, social security and welfare, education and training. Knight[231] provides the following useful summary of selected goals in each of these sectors:

[224] South African History Online 'The Reconstruction and Development Programme' www.sahistory.org.za>default>files>t... (last accessed 12/06/2018).
[225] Chukumerije Okereke & Patricia Agupusi *Home-Grown Development in Africa: Reality or Illusion?* (2015) at 109.
[226] Jolyon Nutall *The First Five Years: The Story of the Independent Development Trust (1997)* at 205.
[227] South African Human Development Report 2000 (iii).
[228] *The Reconstruction and Development Programme White Paper* Government Notice No. 1954 of 1994 in GG 16085 of 15 November 1994.
[229] RDP White Paper Preamble.
[230] Ibid.
[231] Richard Knight 'South Africa: Economic Policy and Development' www.richardknight.homestead.com/files/sisaeconomy.htm (last accessed 23/10/2018).

Selected RDP Goals	
Housing: Provide well-located and affordable shelter for all by the year 2003. Build one million houses in five years	*Water:* Supply 20 to 30 litres of clean water each day to every person in two years and 50 to 60 litres per day within five years from a point no more than 200 meters from their dwelling.
Electricity: Supply 2.5 million more households and all schools and clinics with electricity by the year 2000.	*Health care:* Give free medical care to children under 6 years and to homeless children; improve maternity care for women; organize programs to prevent and treat major diseases like TB and AIDS.
Land Reform: Implement land reform based on redistribution of residential and productive land to those who need it but cannot afford it and restitution to those who lost land because of apartheid laws.	*Job Creation through Public Works:* A national public works program to provide basic needs such as water supply, sewerage and roads and at the same time create jobs, particularly in poor and rural areas.
Social security and social welfare: A new system to provide for all people regardless of their race, gender or physical disability. A pension system to meet the needs of works in the formal and informal sectors.	*Education and training:* Literacy for all, equal opportunity, 10 years of free and compulsory education, class sizes of no more than 40 pupils, training workers to meet the challenges of the new political and economic conditions.

Table 2: RDP Goals[232]

There is no doubt therefore, as to the importance of the role played by RDP in development in South Africa. The following statistical information makes an impressive reading: over 2.68 million houses were built by the state between 1994 and 2014, resulting in; '12.5 million individuals have been aided by the state and provided with better quality accommodation and some form of an asset in the past 18 years;'[233] By 2014 86% formal households were

[232] Richard Knight 'South Africa: Economic Policy and Development' http://richardknight.homestead.com/files/sisaeconomy.htm. (Last accessed 29/09/2019).
[233] Government Communication Information System, 2015. www.SANews.gov.za (08/09/2016).

electrified in South Africa by 2014;[234] and by 2011 91% households had access to running tap water and sanitation.[235] One important factor to note is that the RDP introduced the concept of both free basic water and electricity.[236]

Although the implementation of the RDP concentrated mainly on housing and infrastructural development, this does not detract from the overall integrative objective and vision of the policy. As aptly put, 'the RDP would link growth, development, redistribution and reconciliation into a unified program, held together by a broad infrastructural programme that would focus on creating and enhancing existing services in the electricity, water, telecommunications, transport, health, and education and training sectors.'[237] Prioritization of infrastructural projects such as housing, water and sanitation was necessitated by historical development patterns in South Africa wherein major parts of South Africa were structurally underdeveloped due to apartheid and other racially-based policies. Due to this historical fact, it was logical and politically essential to start by focussing on more pressing issues of the day such as water, sanitation, housing and electricity supply as these are basic needs for the majority of South Africans.

Due to its reliance on labour intensity, infrastructural development involves a large number of employees, thereby increase employment opportunities to members of the affected communities. This in turn reduces unemployment, alleviate poverty and addresses inequality challenges to some extent.

Coming to public participation' which is an integrative part of FPIC, the RDP White Paper unpacked this overall objective of the policy by indicating that to fundamentally transform the society, the programme must ensure that the country

> develops strong and stable democratic institutions and practices characterised by representativeness and participation; becomes a fully democratic and non-racial society; and

[234] Creamer Media's Engineering News, August 2015. http://www.engineeringnews.co.za/page/home/full (last accessed 22/08/2014).
[235] https://en.m.wikipedia.org/wiki/water_supply_and_sanitation_in_South-Africa (last accessed 22/08/2015).
[236] Ibid.
[237] https://en.m.wikipaedia.org/wiki/recnstruction_and_development_programme (last accessed 08/08/2014).

> becomes a prosperous society, having embarked upon a sustainable and environmentally friendly growth and development path.[238]

The above sentiments are supported by the RDP core principles that advocate for, amongst others, an integrated and sustainable programme; a people-driven process; and growth, development, reconstruction, redistribution and reconciliation.[239] To start with, the process of developing the RDP policy itself was a consultative and inclusive one. In the preface of the RDP document, former State President Nelson Mandela indicated that the policy was a result of widespread consultation within the ANC, its alliances partners and the civil society. 'We actively involve people and their organizations in articulating their needs and aspirations,'[240] said Mandela referring to the consultative process followed in developing the RDP policy.

The above notion is complimented by the fact the RDP has been described as 'an integrated, people-centred development approach... characterised by integration between decision-makers from the public, private and voluntary sectors and the intended beneficiaries of development (i.e. the people).'[241] As pointed out in chapter 2 of this thesis, the people-centred approach to development and meaningful participation by affected members of the public are some of the important features of FPIC.

As Barberton and his co-authors have observed when referring directly to RDP and public participation, 'people must participate in decision-making. Democratization must begin to transform both State and civil society. Democracy is not confined to periodic elections. It is, rather, an active process enabling everyone to contribute to reconstruction and development.'[242]

Despite being hailed as the foundational policy for development in South Africa, the RDP policy has had its fair share of criticism. Lodge has decried the poor infrastructure, particularly in water supply and sanitation, as one of the major obstacles that hindered performance of the RDP.[243] He points out that by the year 2000 there was an increase in the

[238] RDP White Paper, par 1.2.
[239] ibid par 1.3.2 – 1.3.7.
[240] See preface to 'The Reconstruction and Development Programme (RDP): A Policy Framework, 1994.
[241] Davids, Theron & Maphunye *Participatory Development in South Africa* (2009) at 18.
[242] Ibid at 110.
[243] Tom Lodge 'The Reconstruction and Development Programme Delivery and Performance' in T. Lodge *Politics in South Africa: from Mandela to Mbeki* (2003) at 26.

use of rivers, streams and dams by communities looking for water for domestic use. This development, Lodge continues, frustrated the government's free water programme, which at the same year was at 6000 litres per household, per month. The assertion by Lodge is supported by facts on the ground. As will be seen in chapter 6, Nandoni dam was completed eleven years ago but up until now it cannot supply water to the surrounding communities due to the poor infrastructure which has seen water pipes replaced several times due to poor workmanship.[244]

The other RDP sector plagued by poor infrastructure is housing. Although there has been significant improvement in the delivery of houses when it comes to quantity, the quality of those houses leaves much to be desired. As Ogunfiditimi puts it, 'the government focussed on quantitative housing delivery with qualitative shortcomings.'[245] The researcher identified structural defects on project houses which included 'roof leakages, cracks in the walls, walls not being straight and defects in trusses.'[246] This is typical of most RDP houses, and the defects also include plumbing and flooring work.

The other problem that has bedevilled the RDP housing sector is corruption. Government officials and politicians have been accused of selling the RDP houses or accepting bribes in the allocation of the houses. Nelson Mandela Bay Deputy Mayor put matters into perspective when he said the following: 'It is well known fact in this city that you can get an RDP house quickly by paying a bribe… It is simply scandalous that we are subjecting our people, who have trusted us and voted us into power, to this sort of behaviour.'[247]

The wrongful allocation of houses has resulted in many houses being allocated to individuals who are not entitled to receive such houses. This has resulted in fights amongst beneficiaries, with some applicants waiting for decades before receiving the houses that they applied for, if they do at all.[248] One may argue here, that if community members were fully involved in all

[244] Zoutnet, 25 June 2010: 'Nandoni dam will no longer be a white elephant'. http://www.zoutpansberger.co.za/articles/news/8356/210-06-25/nandoni-dam-will-no-loger-a-white-elephant- (last accessed 14/03/2018).

[245] Olaosebikan Ogunfiditimi *Assessment of Structural Quality of Houses Delivered through the People's Housing Projects in South Africa* (2008) at 1.

[246] Ibid.

[247] ENCA 'PE deputy mayor condemns corrupt practices in housing allocation' https://www.enca.com/south-africa/pe-deputy-mayor-condemns-corrupt-practices-housing-allocation (last accessed 16/03/2016).

[248] Department of Local Government and Housing, Gauteng Province 'Illegal Occupation of RDP Houses is a Serious Offence' https://www.gov.za//illegal-occupation-rdp-houses-serious-offence (last accessed 13/10/2018).

aspects of these projects as envisaged in chapter 5 of the RDP, corrupt tendencies would have been minimised, if not completely avoided as community involvement would have led to more transparency and accountability.

All in all, despite the above criticism and the general shortcomings of the RDP, it is evident that the programme provided the foundation for development in the post-apartheid South Africa. As will be seen in the next sections, all developmental strategies and policies in South Africa such as the New Growth Path, Accelerated and Shared Growth Initiative for South Africa and the National Development Plan derive from the RDP**.**

3.3 Growth, Employment and Redistribution Programme

The next development policy after the RDP was the Growth, Employment and Redistribution Programme (GEAR). According to Lewis, 'the GEAR built upon (rather than revised) the strategic vision set out in the RDP by committing government to specific macro targets, and including a phased fiscal deficit reduction plan that was deliberately more ambitious than its predecessor.'[249] Okereke and Agupudi point out that the RDP and GEAR are 'foundational post-apartheid development frameworks upon which other initiatives are built.'[250]

Whereas the RDP was a basic social development policy, GEAR has been regarded as a basic macroeconomic policy aimed at advancing the goals of the RDP of creating employment and better life for all South Africans.[251] This point is re-emphasized by Knight when he states that 'GEAR is a macroeconomic strategy adopted by the Department of Finance in June 1996 as a five-year plan aimed at strengthening economic development, broadening of employment and redistribution of income and socio-economic opportunities in favour of the poor.'[252]

The complementary role of GEAR to RDP is also confirmed by Parsons who adds that 'incorporating the key elements of the RDP, GEAR broadly aims to double South Africa's growth rate to 6% by 2000 – and to maximise the number of jobs created at any given growth rate. It creates an overall framework within which government seeks to reconcile global realities with domestic imperatives.'[253]

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[249] Jeffrey D. Lewis *Policies to Promote Growth in South Africa, Discussion Paper, Annual Forum* 2001 at 4.
[250] Chukumerije Okereke & Patricia Agupudi *Home-grown Development in Africa: Reality or Illusion?* (2015) 109
[251] Richard Knight 'South Africa: Economic Policy and Development' www.Richardknight.homestead.com/files/sisaeconomy.htm (accessed 15/03/2018).
[252] Ibid.
[253] Raymond Parsons *The Mbeki Inheritance: South Africa's Economy 1990 – 2004 (1999)* at 53.

Furthermore, in its introduction, the GEAR policy document describes its long-run vision as rebuilding and restructuring the economy in keeping with the goals of the RDP, as well as confronting 'the challenges of meeting basic needs, developing human resources, increasing participation in the democratic institutions of civil society and implementing the RDP in all its facets.'[254] The relationship between GEAR and the RDP will be explored further below when I analyse the participatory mechanisms (or lack thereof) employed in the development of the GEAR policy and its advancement of democratic institutions.

There are several reasons why the South African Government decided to adopt GEAR. According to Seekings and Nattrass, 'the ANC's 1996 Growth, Employment and Redistribution (GEAR) framework was an attempt to reassure international investors by providing a vision of growth consistent with fiscal discipline, openness to international trade, privatization and macroeconomic stability.'[255] This assertion is supported by Nattrass, Wakeford and Muradzikwa who purport that 'the basic idea is that by running a primary surplus, the government will boost investor confidence to such an extent that the net impact on demand will be positive.'[256] Parsons says 'one of the advantages that the business community sees in the macroeconomic strategy is that … it offers more certainty and predictability in policy. This creates a more secure basis for investment and business decision-making.'[257]

Therefore, it can be concluded that according to government, economic growth through investment would form the basis of development, which would in turn address the social ills identified in the RDP. As will be seen below, a fierce debate rages on as to whether GEAR achieved this objective.

Khafu has summarised the main objectives of GEAR as following:

> The first objective of the GEAR programme was achieving macroeconomic balance in the South African economy – i.e., a reduced budget deficit and falling rate of inflation. The second objective was to make the South African economy get on a 6% growth path by the year 2000. Improved performances in fixed investment and non-gold exports were meant to

[254] See Department of Finance: Republic of South Africa 'Growth, Employment and Redistribution: A Macroeconomic Strategy' 1996.
[255] Jeremy Seekings & Nicoli Nattrass *Policy, Politics and Poverty in South Africa* (2015) at 91.
[256] Nicoli Nattrass, Jeremy Wakeford & Samson Muradzikwa *Macroecomics: Theory and Policy in South Africa* (1997) at 125.
[257] Raymond Parsons opcit at 53.

> propel this growth path. The third objective was redistribution through job creation realised from economic growth and labour market reforms.[258]

Knight seems to provide a detailed breakdown on the GEAR objectives, and states as follows:

> The key goals of the policy as originally outlined were economic growth of 6% in the year 2000, inflation less than 10%, employment growth above the increase in economically active population, deficit on the current account and the balance of payments between 2 and 3 percent, a ratio of gross domestic savings to GDP of 21.5 percent in the year 2000, improvement in income distribution, relaxation of exchange controls and reduction of the budget deficit to below 4 percent of GDP.[259]

All the information quoted above point to one way of describing GEAR: a tight and stringent macroeconomic strategy aimed at appeasing international investment with the hope that the benefits of economic growth would in the long run trickle down to the poorest of the poor and address endemic problems such as the high level of unemployment and acute poverty. As will be discussed immediately below, GEAR did not seem to have lived up to expectations. Some have even associated GEAR with a neo-liberal policy which is inconsistent with the developmental state principles that had been advocated by the RDP.[260]

Knights points out that 'perhaps the most poignant challenge facing South Africa is how it will balance its fiscal policy and its goal of attracting foreign investment with the pressing needs of its people for jobs, housing, land, education and health care – defined as rights in its constitution.'[261] This is where the criticism of GEAR stems from – perceived failure to balance the provision of the basic necessities of the poor people with the need to create an environment which is conducive to attract foreign investment which, it is believed, would stimulate economic growth.

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[258] Yohane Khamfula *Macroeconomic Policies, Shocks and Economic Growth in South Africa* (2004) at 7-8
[259] Richard Knight 'South Africa: Policy and development' http://richardknight.homestead.com/files/sisaeconomy.htm (last accessed 29/09/2019).
[260] Chance Chagunda 'South Africa as a Developmental State' 2004 Briefing Paper at 178.
[261] Richard Knight 'South Africa: Policy and development' http://richardknight.homestead.com/files/sisaeconomy.htm (last accessed 29/09/2019).

The most important and vocal critic of the GEAR policy has been the Congress of South African Trade Unions (COSATU). At its 6th national congress, the labour federation minced no words on expressing its views on GEAR. According to COSATU, GEAR is committed to:

> a bosses' led economic growth, a withdrawal of the state from the economy; cuts in state expenditure, including health and education; job loss in the civil service; large-scale privatisation; deregulation of markets, including cutting of tariffs which will lead to further job loss; labour flexibility and low wages; an overall approach of international competitiveness and export-led growth, unlike the RDP's commitment to meeting the basic needs of the people; and international competitiveness and labour flexibility will lead to greater profits for bosses and greater misery for workers, resulting in lower wages, longer hours, job losses, casualization and sub-contracting.[262]

In short COSATU is of the idea that GEAR has dismally failed to live up to the expectations created by the RDP of economic growth, job creation, poverty reduction, service delivery and equitable distribution of wealth. Barberton *et al* lament that

> government policy has shifted from "people-centred" development approach of the RDP to the adopting of GEAR strategy which, in essence, is a private-sector driven growth strategy. It is ironic that this new growth policy's success is dependent on the good will and interests of the very groups that benefited most from the policies of the apartheid regime.[263]

Other writers seem to agree with the above sentiments and the contention by COSATU that GEAR marginalised the poor. Mokate's advice is that the key to the reduction of poverty and inequality is for government expenditure to target the poor. He points out that 'in order to address inequality, sectorial policies must continue to target the poor, as well as address racial, gender and spatial imbalances in access to basic services.'[264]

When it comes to public participation and advancement of democratic institutions, GEAR does not offer much. However, to its credit, the GEAR policy document does refer to

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[262] COSATU 'Draft Socio-economic Resolutions: COSATU 6th National Congress' https://mediadon.co.za/6th-national... (last accessed 29/09/2019).
[263] Conrad Barberton, Michael Blake & Hermien Coetzee (eds.) *Creating Action Space: The Challenges of Poverty and Democracy in South Africa* (1997) at 5.
[264] R. Makati 'Macroeconomic Context' in Julian May (ed.) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) at 70.

increasing participation in the democratic institutions of civil society as part of its vision.[265] Beside this short phrase, the policy document does not take the issue of public participation any further. Although the policy document also refers to a social contract, this does not refer to public participation in the decision-making process but to working relationship between workers and employers.[266]

The GEAR policy itself was not a product of a public participation process and inclusivity. Nkadimeng is of the view that the State followed an 'elitist approach to decision-making'[267] when formulating GEAR by relying mostly on technical experts, government departments and the business community, and isolating important stakeholders like COSATU in the process.

All in all, the GEAR strategy might have been well-intended, but it achieved limited success as far as development in South Africa is concerned. The policy also did very little to advance public participation in the decision-making process. A sharp shift in macroeconomic strategy such as the RDP should have been preceded by seeking a buy-in from COSATU and other extra-parliamentary and non-governmental interest groups instead of solely relying on technical experts and the business community.

The good thing is that government seems to have realised the shortcomings of GEAR and was willing to take remedial action. This is evidenced by some follow-up development strategies such as ASGISA, New Growth Path and the National Development Plan.

3.4 Accelerated and Shared Growth Initiative for South Africa (ASGISA)

Although the GEAR programme achieved quite a lot in terms of fiscal stability and macroeconomic policy certainty as far as the free market economy is concerned, there is consensus that the programme did not succeed in improving the socio-economic conditions of the poor majority of the South African population. Kearney and Adusola aptly sum up the demise of GEAR and the advent of ASGISA:

[265] See opcit at 245.
[266] See paragraph 9 of the GEAR policy document.
[267] Nkadimeng Mhahlele Geoffrey 'From Miracle to Mirage: the ANC's Economic Policy Shift from MERG to GEAR' www.wiredspace.wits.ac.za/handle/10539/14221 (last accessed 23/10/2018).

> It [GEAR] failed to bring about increased formal employment and more evenly distributed wealth. FDI did not materialise and growth targets were not met. A decision was therefore taken to look closely at how to accelerate growth and ensure rising living standards for the majority and this culminated in ASGISA.[268]

The above sentiment was echoed by the Organization of Economic and Cooperative Development (OECD) report which noted that

> GEAR achieved impressive macroeconomic stabilization, but growth performance remained mediocre, and unemployment, already extreme, continued to rise, along with inequality and poverty. It was therefore decided to take a careful look at how to accelerate growth and ensure rising living standards for the majority.[269]

Indeed, a new strategy was found in the form of ASGISA which replaced GEAR in 2005. The development of ASGISA is said to have been an inclusive consultative process, with government engaging with a wide range of stakeholders including government departments, organised labour and business, religious leaders, youths and women groupings; as well as domestic and international experts.[270] In fact an ASGISA Task Force was formed, comprising of the Deputy President; Ministers of Finance, Trade and Industry, and Public Enterprises; Premiers of Gauteng and Eastern Cape provinces; and the South African Local Government Association. The function of the Task Force was to consult nationally with all relevant stakeholders before the policy document on ASGISA was developed.[271] The Task Force undertook to continue with the consultations at the implementation phase as and when new dynamics presented themselves.[272]

Hirsch indicates that the objectives of ASGISA were to 'halve poverty from about one-third of households in 2004 to less than one-sixth of households by 2014 [and to] halve unemployment from about 30% in 2004 to lower than 15% by 2014.'[273] Gumede sums up this

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[268] Marna Kearney 'Realising the millennium development goals through socially inclusive macroeconomic policies: Assessing development strategies to achieve the MDGs in the Republic of South Africa' UN Department of Social and Economic Affairs Technical Report November 2011 at 7.
[269] *South Africa Economic Assessment* OECD Economic Surveys Vol. 2008/15 July 2008 at 19.
[270] The Presidency: Republic of South Africa 'Accelerated and Shared Growth Initiative – South Africa' 2005. www.daff.gov.za>docs>GenPub>asgisa (last accessed 15/06/2018).
[271] Ibid.
[272] Ibid.
[273] Alan Hirsch 'Accelerated and Shared Growth Initiative – South Africa: A strategic Perspective' 2006 at 1.

aptly when he points out that 'ASGISA intended to accelerate the growth of South Africa's economy, as well as accelerate wealth redistribution.'[274] Of course it is now trite debate as to whether this target was achievable or not, and this point will be discussed in some detail below.

According to the Organization of Economic and Cooperative Development (OECD), 'the most disappointing aspect of post-apartheid economic performance is the emergence and persistence of extreme levels of unemployment, particularly for less skilled younger blacks, together with the continuation of widespread poverty and the widening inequalities.'[275] This line of thinking seems to be the main influencing factor behind the ASGISA strategy. In fact, ASGISA identified six factors which were said to impede economic growth, and which were regarded as key to addressing the problem of inequality and unemployment. These were: currency volatility; cost and efficiency of national logistics system and some infrastructure; shortage of skilled labour; barriers to entry and competition in areas of the economy; regulatory environment and burden on SMMEs; as well as deficiencies in state organization, capacity and strategic leadership.

Of the above constraints, shortage of skilled labour is the most important factor as far as FPIC is concerned. This is because one of the major excuses that has been pandered for not fully involving communities in the projects that affect them was that some, if not most of community members do not possess the requisite skills and experience to participate in these projects.

Despite the above constraining factors, government still had to achieve its objectives as stipulated in ASGISA, and to this extent had to come up with certain interventions or strategies. These interventions focused mainly on the following areas: infrastructure development, education and skills development, sector investment strategies, economic regulatory reforms, macroeconomic issues and public service delivery.[276] Education and skills development are more relevant to this thesis and will be succinctly addressed below.

[274] Vusi Gumede 'Social and Economic Transformation in Post-Apartheid South Africa – Policies, Progress and Proposals' https://www.vusigumede.com>content (Last accessed 25/10/2018).
[275] OECD Economic Surveys *South Africa Economic Assessment* 2008 Vol. 2008/15 at 32.
[276] The Presidency, Republic of South Africa 'Accelerated and Shared Growth Initiative – South Africa' at 5. www.daff.gov.za>docs>GenPub>asgisa (last accessed 14/03/2018).

According to the economist Mike Schussler, 'underlying the inequality statistics are the inequalities in *education* (my emphasis), urbanisation and employment.'[277] 'It is the inequality in education that is driving the inequality in income,'[278] continues Schussler. Government also acknowledges that skills deficit is a serious problem to development in South Africa. The office of the Presidency had this to say concerning ASGISA:

> For both the public infrastructure and the private investment programmes, the single greatest impediment is shortage of skills – including professional skills such as engineers and scientists; managers such as financial, personnel and project managers; and skilled technical employees such as artisans and IT technicians.[279]

It therefore goes without saying that skills and education are in the centre of all development, be it infrastructure, economic development or provision of basic services to the public. Without relevant education and skills, it may not be feasible for an affected community to participate and benefit in developmental projects that are introduced in their areas and are meant to improve their socio-economic conditions. The FPIC principle does not only advocate for capacity building or empowerment that would enable community members to engage meaningfully in matters that concern them, but also to partake in activities that would aid in addressing the challenges of poverty, inequality and unemployment.

ASGISA does not offer much when it comes to public participation by affected communities in the decision-making process in development projects. The policy document on ASGISA does mention active participation by the citizenry but only when referring to the role of financial institutions on social mobilisation.[280] The document also encourages government's social partners to make progress towards the realisation of a social contract with people on economic matters, but no elaboration is provided in this regard.[281]

From the above discourse, one can surmise that ASGISA started on an inclusive consultative process, involving a wide range of stakeholders. However, as much as the consultative

[277] J. Clark 'Income Levels for White South Africans Growing the Slowest' www.moneyweb.co.za/archive/income-levels-for-white-south-africans-growing-the/ (last accessed 29/09/2019)
[278] Ibid.
[279] The Presidency, Republic of South Africa 'Accelerated and Shared Growth Initiative – South Africa (ASGISA): A Summary' at 9.
[280] See ASGISA policy document at 15.
[281] Ibid.

process involved several categories of stakeholders, there is no indication that those communities affected by the development initiatives were directly consulted with. Examples of such affected communities would be a village were a school was to be built, or a township where a library centre was to be constructed. Furthermore, the document does not elaborate on the nature of the actual consultative process that was followed, so that one can determine if the activities of such consultations were mere information sessions or genuine engagement aimed at seeking an informed consent. The policy document also falls short on public participation and democratisation of institutions as espoused in the RDP. Very little, if anything, is said in this regard. There is a mention of public participation and advancement of the social contract, but only in passing.

3.5 New Growth Path

As already alluded to above, ASGISA was replaced by the New Growth Path (NGP) in 2010. The Economic Development Department was tasked with the development of the framework of the new policy, and it purportedly consulted with the main economic ministries, provincial departments of economic development and other stakeholders.[282] Although government claims that a consultative process was followed in coming up with the NGP, government political allies such as COSATU have refuted this allegation, and stated as follows:

> To set the necessary context, COSATU will have to encourage the Alliance to mobilize structures and progressive organs of the civil society in order to set the proper political context that will ensure that the policy-making process is as mass-driven as possible. No genuine shift in policy will be possible unless the masses are involved in policy debates.[283]

If COSATU, representing over 2 million workers in South Africa, claims not to have been engaged in the consultative process, which public did the government consult with when developing the NGP? There is a scant reference to public participation in the NGP document itself. This is when the Minister of the Economic Development Department (EDD), which was tasked with the development of the NGP framework, in his foreword stated as follows:

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[282] South History Online 'The New Growth Path: The Framework' https://www.sahistoy.org.za>sites>files (last accessed 18/06/2018). There are no details about other stakeholders, and it seems like the interaction was mainly with government departments both nationally and provincially.

[283] Congress of South African Trade Unions (COSATU) *Government's New Growth Path Framework: One Step Forward, Two Steps Backward: A Response from the Congress of South African Trade Unions* at 2-3.

'… it [EDD] has expanded on the framework through consultations with main economic ministries and provincial departments of economic development as well *as other stakeholders* (my emphasis).'[284] If this is all it did, then the Department dismally failed when it comes to public participation. Public participation is the pillar of FPIC as discussed in chapter 2 of this research project, and without its application any development policy or programme is bound to run into serious difficulties.

The rationale behind the introduction of the new strategy is said to be government's frustration with the failure by the previous strategies, particularly GEAR and ASGISA to effectively address the problems of poverty and inequality afflicting the poor majority in South Africa. Van der Aardt *et al* note the situation as follows: 'As these programmes [RDP, GEAR, and ASGISA] failed to achieve the above objectives the government announced a fourth programme, the New Growth Path (NGP) on 23 November 2010.'[285]

Welcoming the NGP, the African National Congress stated the following: 'In spite of the number of years of growth prior to the recession and the recovery of the economy from the recession, not enough jobs are being created. The level of unemployment, and the resultant poverty and inequality in the society needs extraordinary measures.'[286] It was further pointed out that 'NGP recognised that structural unemployment remains high; poverty continues to afflict millions; oppression of workers continues; and the inequalities are now deeper than ever before.'[287]

Before considering the objectives of the programme, it could be useful to outline its broad vision. In the words of former South African President Zuma,

> the New Growth Path is our vision to place jobs and decent work at the centre of economic policy. It sets a target of five million new jobs to be created by 2020. It sets out the key job drivers and the priority sectors that we will focus on over the next few years. It is based on

[284] Economic Development Department opcit at 8.
[285] CJ Van Aardt, J. van Tonder & AA Ligthelm *A Broad Review of the New Growth Path Framework with a Specific Emphasis on the Feasibility of its Proposed Targets* at 1.
[286] African National Congress 'ANC Welcomes the Release of the New Growth Path Strategy by Government' www.anc.org.za/content/anc-welcomes-release-new-growth-path-strategy-government (last accessed 15/03/2018).
[287] South African History Online 'South Africa's Key Economic Policy Changes (1994-2013)' www.sahistory.org.za/article/south-africa's-key-economic-changes-1994-2013 (last accessed 15/03/2018).

> strong and sustained, inclusive economic growth and the rebuilding of the productive sectors of the economy.[288]

In line with the vision as set out above, Gumede commented on the NGP programme as follows:

> Introduced in 2010, the NGP places emphasis on job-creation, the need to accelerate decent work and a new policy orientation towards labour intensive approaches. It aspires to grow employment by 5 million by 2020 and reduce narrow unemployment by 10% largely through a public infrastructure programme.[289]

Flowing from the above vision is the main objective of the NGP, which is to 'increase economic growth to sustainable rates of between 6% and 7% per year in order to create five million jobs by 2020, thereby reducing the unemployment rate to 15%.'[290] Therefore considering both the vision and the objective of NGP, one is inclined to conclude that job creation is at the centre of the new programme. Mr Collins Chabane, former Minister in the Presidency for Performance Monitoring and Evaluation, pointed out that the new growth path 'aimed to address unemployment, inequality and poverty by unlocking employment opportunities in South Africa's private sector.'[291] 'The new growth path is a broad framework that sets out a vision and identifies key areas where jobs can be created. The growth path we are announcing today places employment at the centre of economic policy,'[292] the Minister continued. In fact, when introducing the NGP programme, President Jacob Zuma declared 2011 South Africa's year of job creation.[293]

One may submit therefore that whereas ASGISA's main focus was skills development in order to accelerate development, the NGP's main purpose was to promote developmental growth through the creation of decent jobs.

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[288] Economic Development Department *The New Growth Path: Framework* at 3. https://www.brandsouthafrica.com/investments-immigration/business/trends/global/newgrowthpath (last accessed 14/03/2018).
[289] Gumede opcit at 2.
[290] Van Aardt *et al* opcit at 1.
[291] Fin 24 'Government Targets Huge Unemployment Drop' https://www.fin24.com/Economy/Cabinet-targets-huge-unemployment-drop-20101026 (last accessed 14/03/2018).
[292] Ibid.
[293] International Labour Organization Global Jobs Pact *South African New Growth Path Sets Ambitious Target to Create 5 Million Jobs by 2020* at 1.

Next to be examined is how the government intended to achieve the vision and objectives of the NGP. Forrest argues that what sets the new strategy apart from the previous ones is that it 'hones in unemployment and job creation in a way that previous national economic policies have not. It identifies key sectors and cross-cutting activities, termed 'job drivers', where this employment creation can take place.'[294] The 'job drivers', also known as the areas of focus or priority areas, are succinctly discussed below:

On infrastructure, the NGP targeted to create 250 000 jobs a year up to 2015 through infrastructural programmes in energy, transport, water, housing and communications.[295] The main job activities would include construction, operation, maintenance and manufacturing of components for the new infrastructure.[296] This thinking is in line with the developmental approach as advocated by the FPIC principle. However, with the lack of implementation strategies that has characterised many policies in South Africa, this target looks far-fetched and not likely to be achieved.

Labour-absorbing activities would also be introduced across the main economic sectors as follows: agriculture: 145 000 jobs in agro-processing by 2020; mining: 140 000 jobs by 2020, and 200 000 by 2030; manufacturing: 350 jobs in additional industries; and high level services: 250 000 jobs in tourism and business services.[297] Again, the intentions here seem in congruent with the FPIC notion of development, but it is doubtful if these will be realised if previous plans and their fate are anything to go by.

Potential new economies would include the green economy: 300 000 jobs by 2020 in manufacturing, construction, operation and maintenance of the environmentally friendly infrastructure, biofuels and natural resource management; knowledge economy: 100 000 new jobs in information and communication technology, mining related technology, health care and biotechnology.[298] This would be supplemented by the social capital and public services sectors which would yield a number of jobs.[299] In the social economy 260 000 jobs would be

[294] Forrest C *Juggling Jobs: Assessing the New Growth Path and National Development Plan Job Targets* at3.
[295] Economic Development Department '*The New Growth Path: Framework'* at 5-9 https://www.brandsouthafrica.com/investments-immigration/business/trends/global/newgrowthpath (last accessed 14/03/2018).
[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Ibid.

created through *stokvels*, non-governmental organizations and co-operatives; and 100 000 jobs would be created by 2020 in health care, policing, education, community work programmes and youth brigades.[300] Spatial development aimed at producing 500 000 jobs in rural development; whereas in the regional development front 150 000 jobs would be created by 2020 by exports to SADC.[301] All these initiatives are good for development as they would grow jobs and help with the alleviation of unemployment poverty and inequality.

However, not everyone agrees that NGP is as innovative and original as it is purported to be above. Neither is there consensus as to whether this new strategy will propel South Africa to a new growth path different to those already chartered by its predecessors. Kearney and Odusola point out that challenges identified by the NGP are similar to those identified in ASGISA, and these include

> bottlenecks and backlogs in logistics, energy infrastructure and skills; low domestic savings and inadequate level of investment in productive areas of the economy; economic concentration and price collusion; an uncompetitive currency; and a persistent balance-of-trade deficit funded by short-term capital inflows attracted largely by high interest rates by international standards.[302]

If indeed the challenges or constraints that NGP intends to tackle are similar or the same as those identified in ASGISA, the question is why were they not dealt with or eliminated under ASGISA? As this researcher pointed out at the conclusion of the discussion on ASGISA above, government did not review or evaluate the success or otherwise of the previous programmes before ditching them for new ones. This led to the recycling and re-inventing of the same issues and coming up with solutions which are cosmetically different from the previous ones, and therefore failing to take the process of development forward before such programmes are abandoned prematurely for new ones. However, the most important thing to note about the abovementioned challenges relating to both the NGP and ASGISA as indicated in the above-mentioned quotation is that there is hardly anything on people-centred development, and this does not auger well with the spirit of the FPIC principle.

[300] Ibid.
[301] Ibid.
[302] Kearney & Odusola opcit at 22.

COSATU, the fiercest critic of government development and economic policies since the unexplained abandonment of RDP in favour of GEAR, reiterate the fact that NGP is not different from ASGISA and GEAR. COSATU laments as follows:

> The issue is that the NGP document uses the same tools as GEAR to achieve a stable and competitive currency and is completely silent on heterodox tools, such as foreign exchange controls and financial transactions taxes. The rest of the document re-states ASGISA in many respects… The package surrounding micro-economics and social partners' is not new. The latter in particular reinforces the GEAR macro-foundations of the growth strategy.[303]

Come 2013, the NGP which was scheduled to run until 2020 quietly took a back seat with the development space being occupied by the National Development Plan 2030. This programme will be discussed below.

3.6 The National Development Plan

In May 2010 President Jacob Zuma appointed the National Planning Commission (NPC). The mandate of the Commission was 'take a broad, cross-cutting, independent and critical view of South Africa, to help define the South Africa we seek to achieve in 20 years' time and to map out a path to achieve those objectives.'[304] In June 2011 the NPC published a diagnostic report as per its mandate, and in November that year a draft National Development Plan (NDP) was released.[305] The diagnostic report identified the following challenges facing the country:

> The above challenges are not new. The same challenges or constraints (in the words of the NGP) have been cited from the RDP right through GEAR, ASGISA, and NGP. What is important though, is to find out if the NDP offers new solutions to these old problems, and how the spirit of the FPIC principle is applied in the process.

[303] Congress of South African Trade Unions (COSATU) *Government's New Growth Path Framework: One Step Forward, Two Steps Backward: A Response from the Congress of South African Trade Unions* at 2-3.
[304] Bea Drost *National Development Plan Presentation* 2014 Western Cape Spatial Information Forum
[305] Brand South Africa 'The National Development Plan: A vision for 2030' https://www.brandsouthafrica.com/governance/ndp/the-national-development-plan-a-vision-for-2030 (last access 14/03/2018).

The release of the diagnostic report was followed by a public consultation process through which the views of all major stakeholders, including parliament, the judiciary, national departments, provincial governments, development finance institutions, state-owned entities, local government formations, unions, business, religious leaders and non-profit organisations and the public at large were solicited.[306] The wide ranging consultative process is an important step and lays a good foundation for the strategy to succeed. This process is in line with the FPIC principle which places public participation at the centre of any development project. Whether the engagements were meaningful and effective is a matter which needs further investigation.

In August 2012, the NDP was handed over to the President, and the plan was adopted by Cabinet in September that year.[307] In December 2012, the African National Congress (ANC) endorsed the NDP.[308] The NDP was formally launched in January 2013,[309] and from henceforth the process of its implementation began. The plan is meant to address the challenges that have been identified in the diagnostic report referred to above.

The NDP is a broad long-term development strategy based on the following six pillars or priorities: mobilization of all South Africans and uniting them around a common purpose; an active citizenry which holds its leaders accountable; growing an inclusive economy which would raise employment to 24 million by 2030; building and improving human, physical and institutional capabilities; building a capable and developmental state; and fostering of strong, capable and responsible leadership throughout the society.[310]

From the challenges identified in the diagnostic report and the priorities set out in the NDP to address them emanated the main goal of the NDP, which is to eliminate poverty; alleviate unemployment and to reduce inequality by 2030.[311] From the onset, this sounds like a people-centred approach to development, which is also an important ingredient of FPIC, and will be

[306] National Planning Commission *National Development Plan 2030 Executive Summary* at 15.
[307] Brand South Africa 'The National Development Plan: A vision for 2030' https://www.brandsouthafrica.com/governance/ndp/the-national-development-plan-a-vision-for-2030 (last access 14/03/2018).
[308] Helen Suzman Foundation 'The National Development Plan (NDP): The current state of play' www.hsf.org.za/resource-centre/hsf-briefs/the-national-development-plan-ndp-the-current-stte-of-play (last accessed 14/03/2018).
[309] Ibid.
[310] National Development Plan 2030: Summary at 16.
[311] ibid at 14.

examined further in this section. Forrest points out that the achievement of this goal will be measured as follows: 'poverty line (about R418 in 2009 prices per person per month) whereby the proportion of South Africans below this line currently 39% - would drop to zero. Inequality will be measured by a reduction in the Gini coefficient from 0.7 to 0.6 by 2030.'[312]

The NDP identifies several objectives that are key to the achievement of the above-mentioned goal. These objectives are categorised into the following thematic areas: economy and employment; economic infrastructure; low carbon economy; rural economy; human space and national space economy; education, skills and innovation; health and wellness; community safety; social protection; capable and developmental state; and fighting corruption. For the purposes of this research project, only 3 of these objectives will be discussed below, namely economy and employment; economic infrastructure; and education, skills and innovation. The reason for selecting the three objectives is that they cut across all the previous strategies and therefore present a good space for comparative analysis. The selected objectives are also ideal for illustrating the NDP's vision of how people-centred development and FPIC should work.

3.6.1 Economy and Employment

The main objectives under this theme can be summarised as follows:

Creating 11 million jobs by 2030; reducing unemployment rate to 14% by 2020 and to 6% by 2030; total employment to rise from 13 million to 24 million by 2030; the proportion of adults working to increase from 41% to 61%; GDP to increase by 2.7 times in real terms by 2030; GDP per capita to increase to R110 000 by 2030 in constant prices; export volumes to grow by 6% a year by 2030; the rate of savings to rise from 15% of GDP to 25% of GDP; and the level of gross fixed capital formation to rise from 17% to 30%, with public sector gross fixed capital formation reaching 10% of GDP by 2030.[313]

Although the growth projection under this objective look impressive, it is difficult to see how inequality will be reduced or eliminated. According to Statistics South Africa 2011 census,

[312] Forrest, opcit at 5.
[313] Statistics South Africa '2011 Census in Brief' www.statssa.gov.za/census_2011_census_in_brief (last accessed 27/01/2016).

the average annual income per household was as follows: African Blacks – R60, 613; Coloureds – R112, 172; Indians – R251, 541; Whites – R365, 134.[314] Looking at these figures and the 2030 target of R110 000, the average income of an African Black South African will still be lower than the current income of a coloured household.

Be that as it may, one opines that if the above targets can be achieved by 2030, the country would have progressed significantly in the reduction of unemployment which is one of the three challenges – the other two being poverty and inequality. The increment of GDP per capita would also contribute significantly to the reduction of poverty and inequality if the numbers were indeed to be reached by 2030, and this would be a welcomed development as far as FPIC or its spirit, as outlined in this research project is concerned.

3.6.2 Economic Infrastructure

The objectives under this theme are centred on energy (electricity), water, transport and telecommunications. The NDP document sets out the objectives under this theme as follows:

> The proportion of people with access to the electricity grid should rise to at least 90% by 2030, with non-grid options available for the rest; that all people have access to clean, potable water and that there is enough water for agriculture and industry, recognising the trade-offs in the use of water; by 2030, public transport will be user friendly, less environmentally damaging, cheaper and integrated or seamless; and competitively priced and widely available broadband.[315]

Besides providing communities with the much-needed basic services, infrastructure development can play a vital role in job creation which in turn will reduce unemployment, alleviate poverty and reduce inequality as advocated by FPIC. Moreover, if properly managed, infrastructure development can present an opportunity for communities to be fully engaged in the conceptualisation, planning, implementation and the overall management of the project. Such involvement by communities in projects that affect their lives would present to them a platform to be an active citizenry that could hold authorities accountable.

[314] Ibid.
[315] National Development Plan 2030: Summary opcit at 58.

One important weakness of the NDP as far as infrastructure development is concerned, is its failure to deal meaningfully with providing subsidised water and electricity to the indigent members of the society. With the levels of unemployment as high as 25%,[316] and the majority of those employed earning below the living wage, many households cannot afford these basic services. People-centred development as advocated by FPIC is about improving the quality of life of the communities on whose behalf the projects are initiated, and therefore the issue of the poor and indigent people in these communities cannot be side-stepped.

3.6.3 Improving Education, Training and Innovation

One of the main themes that cut across all South African development strategies from RDP to NDP is that of education and training. Skills shortage has been nemesis to South Africa's economic development. The NDP sets out objectives for the improvement of education, training and innovation. These objectives include making early childhood development a priority; expanding science and technology; eradicating educational infrastructural backlog; and increasing the percentage of doctoral graduates in the higher education sector.[317]
My observation is that people-centred development is not feasible where there are high levels of illiteracy and acute lack of skills like in the South African context. Furthermore, intellectual capacity or empowerment is needed if members of the affected communities are to engage meaningfully in development projects in their areas, and to be able to consent for such projects to take place.

3.7 Conclusion

In conclusion, chapter 3 sought to track and trace the evolution of major development strategies and policies in South Africa since 1994, and how they link to the topic of this research project – the *free prior and informed consent* principle. The founding development strategy – the RDP – had all the hallmarks of FPIC, although there might not have been a conscious decision to include the principle. This is evidenced by fact that the epicentre of the RDP was a people-centred development.

[316] Statistics South Africa 'Unemployment Rate' www.statssa.gov.za/?=unemployment+rate&sitem=content (Last accessed 14/03/2018).
[317] NDP opcit at 63.

The strategy that followed the RDP, namely GEAR, saw an emphasis on fiscal policy, and its tenure saw the FPIC-related policies take a back seat. GEAR was replaced by ASGISA which focused mainly on skills development and empowerment, themes that are essential for an FPIC-related development. The introduction of the NGP saw some attempts to return to the people-centred approach to development, but the programme life span was cut short in favour of the NDP – the current South African development policy.

The NDP promises to be a people-centred policy. It places more emphasis on community engagement and participation. The concept of "active citizenry" has taken central stage, and the policy seems to be a good foundation upon the FPIC principle can be grounded. However, it is rather too early at this stage to pass judgment on how the NDP is faring in relation to FPIC, but if the letter of the plan is anything to go by, the document is a good start towards the achievement of this principle.

CHAPTER 4

SOUTH AFRICA AND FREE PRIOR AND INFORMED CONSENT: CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK ANALYSIS

4. 1 Introduction

The preceding chapter outlined South African development policies since the dawn of democracy in the country. An endeavour was made to analyse those strategies in line with the FPIC principle where applicable. In some cases, legislation is used to support or enhance strategies or policies; whereas in other instances strategies or policies derive from legislation, e.g. the RDP was put in place so that the socio-economic obligations imposed by both the law and the Constitution could be realised.

This chapter will analyse the South African legislative framework as far as development is concerned, and try to determine whether free, prior and informed consent is enshrined in any legislation linked to development. The starting point will be the Constitution of the Republic Of South Africa as the supreme law, followed by an analysis of enabling legislation including local government, environment, mining, water and water related laws. Local government legislation is critical because, as will be seen below, municipalities are key drivers of development; environmental laws are of great importance as sustainability is an intrinsic part of development; and mining and water regulatory regimes are paramount since mining and water conservation are part of the biggest development projects in South Africa as will be illustrated by case studies in chapter 5.

4.2 The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the basis of all laws dealing with development in the country. Some of these laws will be discussed and analysed in detail below.

Although development is the task of all three spheres of government, namely local, provincial and national, section 152 (1) of the Constitution places the issue of development primarily upon local government, and reads as follows:

the objects of local government are –

(a) To provide democratic and accountable government for local communities;
(b) To ensure the provision of services to communities in a sustainable manner;
(c) To promote social and economic development;
(d) To promote a safe and healthy environment; and
(e) To encourage the involvement of communities and community organizations in the matters of local government.[318]

The above-quoted section of the Constitution lays the basis for development in South Africa. The section is also in congruent with the spirit of the FPIC principle, and its main points of emphasis can be categorised as follows: government that is accountable to the communities it serves; sustainable development; environment-friendly development; the promotion of socio-economic development; and an active citizenry in development matters.

The issue of an active citizenry as captured in section 152(1) (e) above, warrants further deliberation. Although the Constitution does not explicitly refer to FPIC, participatory democracy is one of the main features of the Constitution which is relevant to this principle. As already alluded to in chapter one, South Africa is a constitutional state, and the political right of all its citizens to participate in all matters that affect them through democratically elected representatives is incorporated in the Constitution. Section 19(2) of the Constitution states that 'every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.'[319]

Section 195 of the Constitution makes it imperative for the public to participate in policy-making. Section 195(1) (e) reads as follows: 'people's needs must be responded to, and the public must be encouraged to participate in policy-making.'[320] This legal assertion links well with the previous chapter as policy making has become an integral part of South African development strategy, and the essence of participatory democracy which is also a critical feature of the FPIC principle.

[318] Section 152 (1) of the Constitution of the Republic of South Africa, 1996.
[319] Section 19(2) of the Constitution of the Republic of South Africa, 1996.
[320] ibid section 195(1)(e).

In two different cases, the Constitutional Court of South Africa has reaffirmed meaningful public participation in policy or law-making process as a constitutional imperative. In *Matatiele Municipality v President of the Republic of South Africa*, the Court, per Ngcobo J, stated as follows:

> Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the preamble openly declares, what is contemplated is 'a democratic and open society in which government is based on the will of the people.' Consistent with this constitutional order, section 118(1) (a) calls upon the provincial legislatures to 'facilitate public involvement in their legislative and other processes…[321]

In *Doctors for Life International v The Speaker of the National Assembly*, Ngcobo J indicated, with reference to section 72 of the Constitution, that

> commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements… It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.[322]

This sentiment is echoed by Naidu who states that "South Africa has one of the most progressive constitutions in the world and public participation is one of the fundamental principles enshrined in virtually all aspects of it."[323]

Another prominent development-related issue of national interest that the Constitution deals with specifically is the environment. Section 24 of the Constitution reads as follows:

> Everyone has the right-
>
> (a) to an environment that is not harmful to their health or well-being;

[321] Matatiele Municipality & Others vs. The President of the Republic of South Africa & Others (CCT 73/05) [2006] ZACC2 para 40.
[322] Doctors for life International v The Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC para 111.
[323] R. Naidu 'Deepening Local Democracy and Participation: Experience from Practice' in B De Villiers *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* Occasional Papers *KAS* (Nov. 2008) at 83.

(b) and to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This section promotes responsible development which balances the economic and social needs of the people, while protecting and preserving the environment for future use and benefits. The legislation dealing with ecology and biodiversity will be discussed in detail below.

What follows next is a succinct discussion focusing mainly on socio-economic rights in the Constitution, especially chapter 2 of the constitution which deals with human rights. Equality or inequality can only be measured by the extent to which socio-economic rights are realized.

Section 9 of the Constitution deals with equality, a dominant theme throughout this thesis as it relates directly to issues of poverty and inequality in the country. Section 9(1) and (2) are to the following effect: 'Everyone is equal before the law and has the right to equal protection and benefit of the law; and equality includes the full and equal enjoyment of all rights and freedoms…'[324] The right to equal protection before the law is said to mean that 'people have the right to the same opportunities and have equal access to resources…'[325]

Following immediately after equality the clause is the right to dignity. Section 10 states that 'everyone has the right to have their dignity respected and protected.'[326] As has been alluded to in detail in the preceding chapter, there is no dignity in poverty and inequality. Poverty, unemployment and unequal opportunities have left most South Africans living under squalid conditions that do not advance human dignity at all. This is contrary to the values expressed in the founding provisions of the Constitution. Section 1(a) of the Constitution describes "human dignity, the achievement of equality and the advancement of human rights and freedoms"[327] as some of the values upon which the Republic of South Africa is founded.

[324] Section 9 of the Constitution of the Republic of South Africa 1996.
[325] *Chapter 1 Bill of Rights and Constitution – Summary of the Constitution* http://www.paralegaladvice.org.za/docs/chap01/04.
[326] Section 10 of the Constitution of the Republic of South Africa, 1996.
[327] Section 1(a) of the Constitution of the Republic of South Africa, 1996.

Lack of access to land is one of the main contributing factors to poverty and deprivation in South Africa.[328] The Natives Land Act[329] was the main legal instrument depriving Black South Africans of land. Through this Act Black South Africans were left with only 13%[330] of the land mass. Section 25 of the Constitution seeks to address this problem through the land reform process. Section 25(5) reads as follows: 'The state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'[331] The Restitution of Land Rights Act 22 0f 1994 was enacted in response to this challenge.

Related to the issue of land is the provision of housing. There is acute shortage of housing in South Africa. Millions of people live in informal settlements composed mainly of shacks, and there are no basic facilities such as water supply and sanitation. The housing backlog was estimated to be around 2.1 million in 2013[332], and there has not been much progress since then. Section 26 of the Constitution addresses the issue of housing and reads as follows: 'Everyone has the right to adequate housing.'[333] In the case of Grootboom[334] the Constitutional court ordered government to take positive reasonable steps to address the situation of the inhumane conditions under which Applicants were living as it is obligated in terms of section 26(2) of the Constitution.

Section 27 seems to address the most basic socio-economic rights. It states that

> everyone has the right to have access to –
>
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Issues relating to services such as water, food and other necessities have been sufficiently addressed in chapter 3, indicating the measures that government has taken to address them. In response to the issue of social security, the South Africa Social Security Agency Act, 2004

[328] Ben Cousins 'Access to Land and Rural Poverty in South Africa' 2012 NRF 'Science and Society' Lecture.
[329] Natives Land Act, 1913.
[330] https://en.m.wikipedia.org/wiki/Natives_Land_Act_1913 (last accessed 10/11/2013).
[331] Section 25(5) of the Constitution of the Republic of South Africa, 1996.
[332] www.ngopulse.org/article/addressing-housing-backlog-south-africa (last accessed 20/03/2016).
[333] Section 26(1) of the Constitution of the Republic of South Africa, 1996.
[334] Government of the Republic of South Africa & Others v Grootboom & Others (CCT11/00) [2000] ZACC 19.

was enacted and resulted in the formation of the South African Social Security Agency which administers social security grants in South Africa.

Section 29(1) of the Constitution states that everyone has the right to a basic education and further education.[335] In our discussion on ASGISA, the need for an educated and skilled society was canvassed in detail, and it was also shown in chapter 3 that disparity in education is the main contributing factor to inequality in South Africa.

South Africa does not seem to have made much inroad in the implementation of the Section 29 clause. Although the government has taken positive steps towards providing free basic education, and some arrangements have been made to make further education more accessible, there has been a wide-ranging concern that our education system does not produce skills and expertise that are relevant to the current labour market.[336] This may explain the high number of unemployed graduates in the country.

Sections 32 and 33 of the Constitution deal with procedural rights which are critical to FPIC, namely the right to access to information and the promotion of administrative justice. Section 32 is to the effect that everyone has the right of access to any information held by the State or another person. In order to realise the objective of this section, the legislature enacted the Promotion of Access to Information Act, 2000. Section 33 is to effect that everyone has the right to administrative justice which is lawful and procedurally fair, and everyone whose rights are adversely affected has the right to be provided with written reasons. For affected communities to take informed decisions they need to have access to all information relating to the projects taking place in their areas. It is also critical that if a decision was taken by authorities to proceed with a project which affected communities deem detrimental, they be furnished with written reasons if they demand as such.

It can be deduced from the above discussion that indeed the South African constitution is a good platform and foundation for FPIC, only if the principles it espouses in this regard are implemented accordingly. For every FPIC-related right that is enshrined in the Constitution, a provision is made for the legislature to enact an enabling legislation that would lead to the

[335] Section 29(1)(a) and (b) of the Constitution of the Republic of South Africa, 1996.
[336] On 16 December 2017, President Jacob Zuma announced free tertiary education from 2018 for poor students from households earning a combined income of up to R350 000 per year. https://m.news24.com/SouthAfrica/News/zuma-announces-free-higher-education-for-poor-students-and-working-class-students-20171216. (Last accessed 08/12/2018).

realisation of such right. As a result, the next sections will focus specifically on development-related legislation that deals with local government, mining, water management and environmental management, with the aim of establishing the extent to which they advance the FPIC principle.

4.3 Land Use and Management Legislation

Land is one of the key commodities when it comes to economic development. According to the Department of Agriculture, Forestry and Fisheries, 'the preservation, development and sustainable use of agricultural land are of vital importance to ensure long term food security in South Africa.'[337] This ties in well with section 27 (b) of the Constitution which is to the effect that everyone has the right to have access to sufficient food. Beside food security, land is vital for infrastructure development which helps in the achievement of other socio-economic rights as outlined in section 27 of the Constitution.

Most legislation regarding land development relates to municipalities, e.g. the Development Facilitation Act, the Local Government Municipal Systems Act, the Municipal Structures Act and the Spatial Planning and Land Use Management Act (SPLUMA).[338] All these Acts emphasise the need for communities to be consulted and to participate in the decision-making processes in all development matters that affect them. This is the essence of participatory democracy, which may be described as an arrangement 'to enable people's direct involvement in political, administrative and other processes which affect them.'[339]

According to Section 3(1) (d) of the repealed Development Facilitation Act, one of the main requirements of the development of State land which was occupied by communities was that such communities should actively participate in the process of land development. This was to be facilitated by officials from the local government. Rogerson, citing the 1998 White Paper on Local Government, refers to "developmental local government" which means 'local government committed to working with citizens and groups within the community to find

[337] Department of Agriculture, Forestry and Fisheries 'Discussion Document on the Preservation and Development of Agricultural Land' at 8. www.pmg-assets.s3-website-eu-west-1.amazon (last accessed 15/03/2018).
[338] Act no. 16 of 2013.
[339] Croft & Beresford opcit 181.

sustainable ways to meet their social, economic and material needs and improve the quality of their lives.'[340]

According to Sokupo, section 16 of the Municipal Systems Act 'obliges municipalities to develop a culture of municipal governance that complements formal representative governance with a system of participatory governance'[341]. Sokupo states further that 'participatory governance requires involvement of the public in core municipal processes like development planning, performance management, the budget and strategic decisions relating to the services'[342]. The African National Congress has indicated that 'development is not about the delivery of goods to passive citizenry. It is about active involvement and growing empowerment.'[343]

Participatory democracy envisages a bottom-up people-centred approach which fosters integrated planning at local level. Cornwall and Coelho, referring to participatory or public budgeting which is a cornerstone of participatory democracy at local government level in Latin America, contend that

> enabling citizens to engage directly in local problem-solving activities and make their own demands directly to state bodies is believed to improve understanding, and contribute to improving the quality of definition and implementation of public programmes and policies… [which policies and programmes] in turn contribute to guaranteeing the access of the poorest to social services, thus enhancing the prospects for economic and political inclusion, and for development.[344]

These sentiments are echoed in the preamble of the Municipal Structures Act which states that

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[340] CM Rogerson 'Local Economic Development in Post-apartheid South Africa: A Ten-year Research Review' in V. Padayachee (ed.) *The Development Decade? Economic and Social Change in South Africa, 1994 – 2004* (2005) 229.

[341] T. Sokupa 'Revitalising Public Participation' http://www.ngopulse.org/article/revitalising-public-participation (Last accessed: 08 February 2013).

[342] Ibid.

[343] African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) at 5.

[344] A. Cornwall & VSP Coelho 'The Politics of Participation in New Democratic Arenas' in A. Cornwall & VSP Coelho "Spaces for Change: The Politics of Citizen Participation in New Democratic Arena" 228.

> there is agreement on the fundamental importance of local government to democracy, development and nation-building in our country… [and] there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a safe and healthy environment by *working with communities* (my emphasis) in creating environments and human settlements in which all our people can lead uplifted and dignified lives.[345]

One of the objects of the Spatial Planning and Land Use Management Act is to provide for inclusive, developmental, equitable and efficient spatial planning. This is to be achieved through the process of spatial justice, which advocates that plans must include everyone.[346] This is very important as the notion of inclusive planning presupposes a consultative process with all affected and interested parties.

The Acts of Parliament discussed above have the following striking commonalities: local government is the centre of development, and such development should be carried out in consultation with the people who are the recipients of service delivery. This is in line with Vision 2030 as articulated in the National Development Plan, and to some extent, the spirit of the FPIC principle. It must, however, be noted that none of the Acts discussed above explicitly require that consent by affected communities be obtained before development projects are undertaken by municipalities. However, there is one land law which directly requires consent - the Interim Protection of Informal Land Rights Act (IPILRA). Section 2(1) of the Act states that no person may be deprived of any informal right to land without his or her consent. IPILRA applies to communal lands including the land held by the South African Development Trust; self-governing territories; former independent states such as Venda, Bophuthatswana, Transkei and Ciskei; and land held under trust arrangements such as the Ingonyama Trust.[347]

[345] Preamble, Municipal Structures Act.
[346] Afesis-corplan 2015 SPLUMA Information Booklet at 5.
[347] Section 1(1)(a-b). Also see M. Clark and N. Luwaka's 'Communal Land Tenure 1994-2017: commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiation of the Parliament of South Africa' Land and Accountability Research Centre, June 2017.

4.4 Environmental Legislation

The main legal framework for environment management in South Africa is the National Environment Management Act (NEMA).[348] The preamble to the Act states that 'inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices.'[349] Poverty and inequality have been recurring themes throughout this thesis, and it is interesting to note that NEMA's main focus is the wellbeing of the people affected by development. This assertion is reinforced by section 2 of the Act which states that 'environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.'[350]

When it comes to public participation, NEMA is clear and concise: 'the law should establish procedures and institutions to facilitate and promote public participation in environmental governance; … and that the law should facilitate the enforcement of environmental laws by civil society.'[351] The most striking aspect about this Act is the recognition of the role of civil society in facilitating public participation. Furthermore, the identification of particular beneficiaries in public participation in highly commendable: 'The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.'[352]

Section 2(f) and (h) states as follows:

> The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation by vulnerable and disadvantaged persons must be ensured.[353]

[348] Act 107 of 1998.
[349] Preamble to NEMA.
[350] Section 2 of NEMA.
[351] Preamble to NEMA.
[352] Section 2(q) of NEMA.
[353] section 2(f) of NEMA.

This is followed by section 2(h) which reads as follows: 'Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.'[354] The significance of the two sections quoted above is that they directly relate to the FPIC principle, particularly the aspect of *prior informed consent*.

When referring to the South African environment, Williams points out that

> Community participation has literally become synonymous with legitimate governance. This began with the negotiated settlement of a range of promissory spaces of participation, such as the RDP of 1994 and the Constitution of South Africa of 1996: the former the outcome of community participation and the latter ensconcing the right to participate in local planning programmes.[355]

The above is supported by Currie and De Waal concerning procedural rights regarding environmental management:

> An administrative body will not be able to make decisions affecting the environment without furnishing reasons for its actions and decisions and will also be obliged to grant a hearing to any person who stands to be affected by its decisions. The administrative justice rights will furthermore ensure accountability and transparency in decision-making process.[356]

The above quotes signify the importance of public participation as both procedural and administrative imperatives, particularly when it comes to environmental management.
NEMA is more of an environment management framework than an enabling legislation. Consequently, there are several Acts of Parliament meant to support NEMA. Each of these laws contains a clause on public participation. Section 73 of the National Environmental Management: Waste Act[357] is to the effect that before a Minister or an MEC responsible for the NEMA exercises any powers in terms of this Act, he or she must issue a notice inviting members of the public to submit written representations on or objections to the proposed exercise of power. The Minister or MEC may also allow oral representations or objections

[354] Section 2(h) of NEMA.
[355] Williams John J 'Social Change and Community Participation: The Case of Health Facilitation Boards in the Western Cape of South Africa' in *Spaces for Change: The Politics of Citizen Participation in New Democratic Arena* (2004) 96.
[356] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 5th ed. (2005) 29-30.
[357] Act no. 59 of 2008.

from any member of the community. Such Minister or MEC is duty bound to 'give due consideration lo all representations or objections received or presented before exercising the relevant power.'[358]

Other environmental management Acts have similar clauses on public participation, crafted in the exact manner. Some of these Acts are the following: section 33 of the National Environmental Management Act: Protect Areas Act, 2003;[359] section 100 of the National Environmental Management Act: Biodiversity Act, 2004[360]; section 57 of the National Environmental Management: Air Quality Act, 2004[361]; and section 53 of the National Environmental Management: Integrated Coastal Management Act, 2008.[362] Section 32 of the Environmental Conservation Act, 1989 as amended[363], is similarly couched.

The fact that a whole range of environmental legislation contains a clause on public participation would resonate well with the spirit of FPIC. In fact, the consent procedure in the 2014 Environmental Impact Assessment Regulations[364] relates almost directly to FPIC. Regulation 39 (1) requires that before a proponent who is not an owner of the land or someone who controls that land applies for an environmental authorisation to perform certain activities on that land, such person must first obtain a written consent from the owner of the land or the person who controls that land. This dispensation is more relevant to the rural areas of South Africa where most of the land is communally owned or is held by traditional leadership on behalf of the community.

The law that stands out as far as the requirement of *consent* is concerned and refers directly to FPIC is the National Environmental Management: Biodiversity Act.[365] Section 82 of the Act is of the effect that an authority may only issue a bio-prospecting permit if the applicants can show that they obtained a prior consent from the affected indigenous community after disclosing all material facts about the prospecting project. This point is of critical importance

[358] Section 73(1-4) of the Waste Act.
[359] Act no. 57 of 2003.
[360] Act no. 10 of 2004.
[361] Act no. 39 of 2004.
[362] Act no. of 24 of 2008.
[363] Act no. 73 of 1989 as amended.
[364] Environmental Impact Assessment Regulations, Regulation Gazette (Government Notice No. 10328 of 2014).
[365] Act No. 10, 2004.

as this seems to be one of the very few Acts that specifically refer to FPIC and the indigenous communities.

4.5 Water Use and Management Legislation

Closely related to issues of the environment is water conservation and management. Dams, such as the Nandoni dam which is one of the case studies in next chapter, are constructed to preserve and supply water for both domestic and industrial use. Therefore, if properly managed, water can significantly contribute to economic development and quality of life. That is the reason it is said that

> water is at the core of sustainable development and is critical for socio-economic development, healthy ecosystems and for human survival itself. It is vital for reducing the global burden of disease and improving the health, welfare and productivity of populations. It is central to the production and preservation of a host of benefits and services for people.[366]

Furthermore, dam construction and water conservation can create thousands of jobs and job opportunities. This can assist in the reduction of unemployment, poverty and inequality.

The leading pieces of legislation dealing with water management in South Africa are the National Water Act, 1998[367] and Water Services Act, 1997[368] and their Regulations. Besides ensuring the conservation and protection of water resources, other main features of the National Water Act as far as this thesis is concerned are the following:

> promoting the efficient, sustainable and beneficial use of water in the public interest; facilitating social and economic development; providing for growing demand for water use; protecting aquatic and associated ecosystems and their biological diversity; reducing and preventing pollution and degradation of water resources; and promoting dam safety."[369]

[366] United Nations Department of Economic and Social Affairs 'Water and Sustainable Development' www.un.org>waterforlifedecade>images (last accessed 15/03/2018).
[367] Act no. 36 of 1998.
[368] Act No. 108 of 1997.
[369] Section 2 of the National Water Act.

> Most importantly, to achieve these objectives, the Act seeks 'to establish suitable institutions and to ensure that they have appropriate *community, racial and gender representation* (my emphasis).'[370]

Deducing from the above, the main objectives of the Act has been summarised as follows:

> the Act has a clear socio-political objective which includes the promotion of equitable access to water, redressing the results of past racial and gender discrimination and facilitating social and economic development. However, it also has an environmental aim which is to protect aquatic and associated ecosystems and their biological diversity, and to reduce and prevent pollution and the degradation of water resources.[371]

The above sentiment is very important as it places the Act squarely into realm of development which must address the past inadequacies which have resulted in poverty and inequality, at the same time focusing on development which addresses the current needs, without neglecting the sustainability of such development by ensuring environmental protection and conservation.

The Water Services Act seems to play a complementary role to the National Water Act. Its main purpose is to provide for 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being.'[372] Therefore, while the National Water Act deals with water management, the Water Services Act 'provides the mechanisms for ensuring that all South Africans have access to a basic water supply and sanitation.'[373] It is important to note that both Acts emphasise advancement of social, economic and political rights as well environmental rights as their main objectives.

The next level of analysis as far as this research project is concerned is the extent to which the two Acts accommodate the requirements of FPIC, if they do so at all. To do so one needs to examine how the Acts provide for the requirement of *consent* from the affected communities before any development project relating to water management and provision of water services is embarked upon. The two Acts do not require that consent by affected

[370] Ibid.
[371] Norman Brauteseth and Associates 'Notes on the Water Services Act and the National Water Act: Part 2' at 1. www.nbalaw.co.za/7963.html (last accessed 15/03/2018).
[372] Section 2 (a) of the Water Services Act, 1997.
[373] Norman Brauteseth & Associates opcit at 1.

communities be obtained but seem to advocate for a form of a consultative process in which the affected parties are notified about the impending project, and they are called upon to comment or object within a set period.

Section 5 (5) of the National Water Act is to the effect that before establishing a national water resource strategy the Minister must give a notice calling on all interested persons to comment on the strategy, and that the Minister is bound to 'consider all comments received.'[374] Pre-project consultation is very important as it allows the authorities to identify the actual needs of the communities, and to promote public participation from the inception of the project.

The same type of notice is required under sections 8 and 10 of the Act which deal with the catchment management strategies. Section 39 which deals with general authorisations for water use also calls for the same notice and the same procedure and process to make comments and lodge objections if there are any.

The Water Services Act restricts consultation to the water services development plan. Section 14 of the Act, referring to the draft development plan, reads as follows:

> 14. (1) A water services authority must—
> (a) take reasonable steps to bring its draft water- services development plan to the notice of its consumers, potential consumers, industrial users and water services institutions within its area of jurisdiction;
> (b) invite public comment thereon to be submitted within a reasonable time; and
> (c) send copies of the draft water services development plan to the Minister, the relevant Province and all neighbouring water services authorities.[375]

Referring to the adoption of the final development plan, the Act reads as follows:

> 15 (1) A water services authority must consider all comments received by it before adopting a development plan.
> (2) A water services authority must, on request, report on the extent to which a specific comment has been taken into account or, if a comment was not taken into account, provide reasons thereof.[376]

[374] Section 5 (5) of the National Water Act.
[375] Section 14 (1) of the Water Services Act.

As already pointed out, the consultative processes of both the National Water Act and the Water Services Act do not satisfy the FPIC requirements, that is meaningful engagement with affected communities in order to solicit their free prior and informed consent. Although there are provisions for submitting comments and objections, the consultative processes employed in both Acts still fall short of fully engaging with affected communities with genuine intention to empower them to be able to agree or disagree to development projects taking place in their area.

4.6 Mining Laws

Mining forms an integral and essential part of development in South Africa and probably most parts of Africa. As Harvey points out, 'sub-Saharan Africa is heavily dependent on mining for spurring economic growth: the average ore and metal exports (as a percentage of total merchandise exports) is 18.9%.'[377] It is for this reason that three out of the four case studies that will be discussed in the next chapter concern mining companies, namely Anglo Platinum, Coal of Africa and Makhado Project.

However, one must hasten to point out that there are divergent views about the role of mining in development, particularly when it comes to developing countries. One view, which is more conventional or traditional, is that mining brings about development to local communities; and the other view, which is more recent and modern, has taken a critical look into mining and development and portrays mining as exploitative and detrimental to the communities in which the mining activities take place.

Davis and Tilton nicely sum up the traditional view, and state that

> countries that possess rich mineral deposits are fortunate. Such deposits are assets, and so are part of a country's natural capital. Like an individual or family, the more capital and wealth a nation possesses, the richer and better off it is. In this view of the world, mining is the key that converts dormant mineral wealth into schools, homes, ports, and other forms of capital that directly contribute to economic development.[378]

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[376] Section 15 (1) and (2) of the National Water Act.

[377] Ross Harvey 'Mining and Development: Lessons Learnt from South Africa and Beyond' (2014) 86 SAIIA Policy Briefing at 2. https://www.africanportal.org>documents (last accessed 15/03/2018).

[378] Graham Davis and John Tilton 'Should Developing Countries Renounce Mining? A Perspective On The Debate' 1. https://www.researchgate.net>publication (accessed 15/03/2018).

Meyersfeld holds a completely opposite view to the traditional proponents, and she is rather scathing in her criticism of mining operations in poor communities. She contends as follows:

> The reality is that mining operations often result in worse conditions after the conclusion of the operations, than existed before mining began. This is regression; not progress. While mining certainly brings profit, this profit does not result in social and economic development of affected communities. This is the 'myth of mining'…[379]

No matter which position one takes, the reality is that for over a century mining has taken a centre stage when it comes to developmental projects in South Africa. A city such as Johannesburg in the Gauteng Province was founded on gold mining; whereas in areas such as Musina, Gapila and other mining towns the communities are not well off after decades of mining operations. Hence one is inclined to agree with Davis and Tilton that 'one uniform policy toward all mining in the developing world is not desirable.'[380]

As already pointed out, mining operations contribute significantly to the South African economy, and the industry is highly regulated. The leading piece of mining legislation in the country is the Mineral and Petroleum Resources Development Act, 2002 (MPRDA)[381] and its Regulations. Relevant to the matter under discussion in this assignment, section 10 of this Act deals with the issue of consultation with parties that may be affected by the granting of a mining right in their area. It reads as follows:

> 10 (1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner-
>
> (a) make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question; and
> *(Section 10(1) (a) substituted by section 7 of Act 49 of 2008 with effect from 7 June 2013)*
> (b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.[382]

[379] Bonita Meyersfeld 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2017) 2(1) Business and Human Rights Journal 31-33 at 32.
[380] Davis and Tilton opcit at 1.
[381] Act No. 28 of 2002.
[382] Section 10 (1) of MPRDA.

Judging by the content of this section, the Act falls short of the requirements of FPIC as articulated in Chapter 2 of this research project. Calling for comments by interested and affected parties does not even come close to meaningful engagement with communities to obtain their consent. In fact, seeking and obtaining community consent is not a requirement or prerequisite for the granting of a mining licence.

The Regulations to the Act do not offer much assistance either in this regard. All that the Regulations do is to compel the Regional Manager to issue a notice to the effect that an application has been accepted, as well as ensuring that such notice is widely publicised and accessible to the public. Like the Act, the Regulations also require members of the public to comment or lodge objections within specific time frames. The process and procedure outlined by the Regulations is not in any way helpful in promoting meaningful engagement with the affected parties or communities to the extent that they are empowered to grant or withhold their consent.

The Constitutional Court has weighed in on the need for meaningful engagement in the mining case of Bengwenyama Minerals.[383] In this case the Department of Mineral Resources awarded a prospecting right to Genorah Resources (1st Respondent) and turned down a similar application by Bengwenyama-ye-Maswati Trust which is a community that owned the land after their successful land claim. The court decried the fact that there was no meaningful consultation with the community either by the Department or Genorah Resources as required by the MRPDA.[384]

In paragraphs 64 and 65 of the judgment, Justice Froneman indicates that one of the purposes of consulting with the land owners is to determine and inform them about the impact the granting of a prospecting right on their land. Paragraph 66 is more relevant to this discussion, as the learned Justice shows that another purpose for consultation is to provide the land owners, who are the community in this case, with sufficient information for them to make an informed decision in case they made representations to the Department regarding the granting of the prospecting right. The judge also emphasised that consultation, even at an early stage of the project, should be in good faith. Humby argues that 'a good faith standard should

[383] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC).
[384] Ibid para 19.

require that mining applicants invest more time and money in the public participation process.'[385] This pronouncement by the Constitutional Court is very important as it provides a deeper insight into the meaning of consultation in the MPRDA, and therefore dispensing with the narrow interpretation that has been associated with the Act regarding meaningful engagement.

In the case of Maledu and Itereleng Bakgatla Minerals[386] the Constitutional Court cemented the requirement of FPIC in mining projects when it held that communities have the right to decide what should happen to the land in which they have interests, and that such communities should not be deprived of these rights without their consent as outlined in the Interim Protection of Informal Land Rights Act (IPILRA).[387] Section 2 (1) of IPILRA states that 'subject to the provisions subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights, no person may be deprived of any informal right to land without his or her consent.'[388]

In the matter of Baleni and the Minister of Mineral Resources[389] the Northern Gauteng High Court, taking a leaf from the Constitutional Court in *Maledu,* directly addressed the issue of informed consent in the granting of mining rights. In this case the court concluded that the community of Umgungundlovu, which held informal rights to the land on which a mining right was granted, could not be deprived of such rights by the Minister without obtaining their full and informed consent in line with IPILRA.

More interestingly, the court in this case clarified the position of two pieces of legislation relating to mining that seemed to be in contrast of each other, that is the MPRDA and IPILRA. In this regard the court indicated that

> The MPRDA and IPILRA must be read together. In keeping with the purpose of IPILRA to protect the informal rights of customary communities that were previously not protected by the law, the applicants in this matter therefore have the right to decide what happens with

[385] Tracy-Lynn Humby 'The Bengwenyama Triology: Constitutional Rights and the Fight for Prospecting on Community Land' (2012) 15(4) Potchefstroomse Elektroniese Regsblad at 6.2.
[386] Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41.
[387] Interim Protection of Informal Land Rights Act, No. 31 of 1996.
[388] Section 2(1) of the Interim Protection of Informal Land Rights Act, 1996.
[389] Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP).

> their land. As such they may not be deprived of their land without their consent. Where the land is held on a communal basis - as in this matter - the community must be placed in a position to consider the proposed depravation and 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.[390]

On closer scrutiny, it is indeed apparent that whereas the MPRDA requires full consultation with the holders of informal rights prior to the granting of a mining right, IPILRA requires full informed consent by communities before such process can take place. The two processes complement each other. The contents of the two concepts, that is *consultation* and *consent*, have already been fully dealt with in this thesis.

4.7 Conclusion

The main objective of this chapter was to provide an in-depth analysis of the South African development legislative framework, and to link same to the FPIC principle. To this end, the Constitution and legislation relating to land management, environment, water management and mining were identified and analysed.

The Constitution covers the whole spectrum of socio-economic rights which need to be taken into consideration when development takes place. Stemming from the Constitution are enabling laws relating to development, mainly focussing on local government, mining, land reform and environmental management. The most striking commonality in all the legislation that was analysed and relevant to the FPIC principle is the requirement for public participation and meaningful public engagement which is at the centre of participatory democracy. This stems from the Constitution which has embraced public participation as the cornerstone of participatory democracy. Naidu captures this sentiment accurately when he states: 'South Africa has one of the most progressive constitutions in the world and public participation is one of the fundamental principles enshrined in virtually all aspects of it.'[391]

[390] Ibid at 79.

[391] R. Naidu 'Deepening Local Democracy and Participation: Experience from Practice' in Bertus de Villiers *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) Konrad-Adenauer-Stiftung Occasional Papers at 83.

Furthermore, the concept of public participation forms a common and essential link between this chapter, the preceding chapter and the subsequent chapter of this thesis. Regarding the policy framework, the NDP, which is currently the leading development strategy in the country, puts public participation in the forefront. When coming to the legal framework, the Constitution has the fundamentals of public participation 'enshrined in virtually all aspects of it,'[392] and several development-related legislations stem from it. Public participation also features prominently in all the four case studies featuring in the next chapter.

This chapter also identified the 2014 EIA Regulations as one instant where there is nexus between the concept of *consent* and public participation. The written consent of the land owner, the person or institution under whose control the land falls, is required before the proponent applies for the permit to perform any activity on that land. Although IPILRA does not directly refer to FPIC, the requirement that consent should be sought from the people who possess informal rights on the land relates to the principle. However, amongst all the laws that have been discussed in this chapter, the Act that refers directly to FPIC is the NEMA: Biodiversity. This is the only Act which this researcher has come across that relate specifically to FPIC and *indigenous communities*. In this regard, the Act gives hope that the concept of FPIC is not lost to the South African development discourse.

The Constitutional Court decision in the Bengwenyama case has helped to expand the duty to consult in terms of the MRPDA. According to this decision, applicants for prospecting rights have the duty to consult land owners in order to provide them with sufficient information regarding the application. This information will assist the land owners, or the community in this case, to understand the impact of granting the prospecting permit, and to make an informed decision in determining whether to oppose the application or not.

[392] Ibid.

CHAPTER 5

CASE STUDIES: AN ANALYSIS

5.1 Introduction

After establishing the meaning of the FPIC principle, its origin and its status within the South African developmental context, it is now opportune to relate the research findings of the past four chapters to the case studies. The aim of this chapter therefore is to analyse the identified projects and to establish the extent to which the FPIC principle was applicable in the implementation of such projects; as well as determining the extent to which the principle resonates with the implementation of major infrastructure projects in a South African context in general. As highlighted in Chapter 1, four projects have been identified as case studies for this research. These cases are the Mogalakwena platinum mining project (Ga-Pila relocation project); the Luvuvhu River Government Water Scheme (Nandoni Dam project); Vele Colliery mining project at Mapungubwe heritage site; and Makhado mining project (Makhado Project. All these projects are based in the Limpopo Province of South Africa, and I introduced and justified them in chapter 1 of this thesis.

Nandoni dam project is a government venture, whereas the other three projects are run by private corporations. Both Vele Colliery and Makhado Project are owned by the Limpopo Coal Company (LCC), a wholly-owned subsidiary of Coal of Africa Limited (CoAL).[393] CoAL is registered in Australia, but the group's principal operating activities are based in South Africa.[394] Mogalakwena Mine (formerly known as Potgietersrus Platinum Mines Ltd) is run by Anglo American Platinum Ltd (Anglo Platinum)[395] which is a local company with strong international presence and owned by mining giant Anglo-American Corporation.

Recalling the criteria for the selection of projects in chapter 1, Anglo-Platinum was identified to analyse a relationship between national corporations and local communities impacted by their business activities. Although, like Vele Colliery and Makhado Project, Ga-Pila project

[393] Coal of Africa 'Our Business' http://www.coalofafrica.com/our-business (Last accessed 28/01/2018); and http://www.coalofafrica.com/assets/downloads/Vele-Profile-22November2016.pdf. (Last accessed 28/01/2018).
[394] Coal of Africa 'Investors and Media' http://www.coalofafrica.com/investors-and-media/aim-rule26 (Last accessed 28/01/2018).
[395] Coal of Africa 'Mogalakwena Mine Profile' http://www.angloamerican.com/media/our-stories/mine-profile-mogalakwena-06May2015 (last accessed 28/01/2018).

involves a mine, the project is different from the two in that there was a resettlement of a community to make way for mining activities. Furthermore, Anglo Platinum, unlike Vele Colliery and Makhado Project, is a South African company and therefore provides a local perspective in the discussion. The other important factor about the Ga-Pila project is that it was introduced pre-1994, that is before the major laws concerning public participation and consent in the mining sector were enacted. The only similarities between Ga-Pila project and Nandoni Dam project is that both pertain to development-induced relocations of communities.

Nandoni dam represents a project where a national government is directly involved in a development project. Like most major development projects, Nandoni has potentially compromised the rights of people that are supposed to benefit from such a venture. This is the case because the project involved a relocation of over 400 households[396] to make way for the dam. Therefore, it is crucial to investigate the extent, if any, to which FPIC, or at least the spirit of the principle, was applied. Another interesting factor is that Nandoni Dam project was conceptualised post 1994, that is after most of the current laws that require public participation and to some extent consent in development projects were already in existence, albeit at their early stages.

As opposed to Nandoni Dam which is a government project, Vele Colliery and Makhado Project are privately-owned mining projects. Another distinguishing factor, compared particularly with Anglo Platinum, Vele Colliery and Makhado Project are owned by an Australian-registered multinational corporation, CoAL. The two ventures therefore provide an international perspective to the discussion. They also link to the role of multi-national corporations that was dealt with in chapter 2 of this thesis.

Coming to Vele Colliery and Makhado project, the two ventures have a lot in common. Both are mining companies; they both mine in coal and the same type of coal; they are situated in the same geographical area; and both are owned by the same company - CoAL. Furthermore, both projects were initiated when some of the major laws that require public participation and consent by affected and interested parties were in operation, that is between 2007 and 2015.

However, for the purposes of this research, there is a major difference between Vele Colliery and Makhado Project. Vele Colliery was established at the time when major laws governing

[396] BKS Consulting Engineers 'Nandoni Dam Relocation Action Plan' at 9.

consultation and community participation in development projects were still at an elementary stage or in the process of being developed and introduced; whereas CoAL was granted the mining right for Makhado Project in 2015 when the current laws dealing with participation and consent were already in existence and operation for some time. This difference is apparent in the fact that CoAL failed dismally when it comes to community participation and seeking of consent at the initiation and during the operations of Vele Colliery project; whereas there is a huge improvement in this regard when it comes to Makhado Project. I will elaborate on this fact when I deal with each case study.

A common thread runs through all the case studies mentioned above, in that they are all associated with development, and therefore invoke the need for the implementation of the FPIC principle. Despite efforts made on the part of the project protagonists, all the projects have given rise to controversy based on alleged lack of consultation or forced removals, as discussed below.

Furthermore, in three of the four projects, there was external involvement at some point by organizations such as the Office of the Public Protector, the South African Human Rights Commission, Centre for Applied Legal Studies, Action Aid, and even a court of law. Most relevant to this research, is the fact that these interventions were purportedly necessitated by lack of public participation or engagement. In addition, both Nandoni dam and Ga-Pila resettlement projects were, and still are, associated with violent protests and resistance; purportedly due to lack of effective community engagement.

Another prominent feature in all these case studies is the issue of community involvement throughout the entire project. Consequently, this research focuses on the involvement throughout the conceptualization and planning of these projects; decision-making during the implementation phase; and the actual realisation of the benefits yielded by the projects in the form of jobs, improved quality of life, education and general development.

Thus, in analysing these cases I focus on the following: how the project was conceived; its intended contribution to poverty alleviation and reduction of inequality; the applicable legislation, especially as it pertained to consultation with communities; the consultative process followed; the end results and the applicability or otherwise of the FPIC principle in the project. The analyses in this chapter will conclude by examining the consultative process

followed, to establish if such a process satisfied the basic elements of the FPIC principle as discussed in chapter 2 and illustrated in Table 1.

Before looking into specific case studies, it may be opportune to succinctly discuss the concept of "community". The reason is that FPIC is all about communities, and the case studies below all involve communities that had to relocate to make way for the developmental projects, or whose full consent was supposed to be sought before such projects could take place. According to the Mineral and Petroleum Resources Development Act, a community is a 'coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law.'[397] The definition by this Act is crucial, as the MPRDA is the tenant of mining legislation, and three out of four case studies in this thesis concern mining.

Within the context of land reform, a "community" was described as 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group.'[398] Both Vele Colliery and Makhado Projects are claimed lands, and therefore a definition of a community from this perspective adds great value to the discourse of this thesis. In both definitions a community the requirement for "coherency" and "shared" or "common" rules is very prominent. The definitions can assist the development agencies in determining what and who the community is, so that they can engage with the right people in their community consultation processes.

Following below are the four case studies, namely Anglo American's Ga-Pila project, Nandoni Dam project, Vele Colliery and Makhado Project. The reasons for choosing the case studies have been alluded to above.

[397] Section 1 of the Mineral and Petroleum Resources Development Act, 2002.
[398] Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd (CCT69/06) [2007] ZACC 12.

5.2 The Case Studies

5.2.1 Ga-Pila Relocation Project (Anglo Platinum Mine)[399]

(a) Introduction

Anglo Platinum's Potgietersrus Platinum Limited (PPL),[400] a division of Anglo Platinum Corporation, commenced its mining activities at Mogalakwena area, outside the town of Mokopane (formerly known as Potgietersrus) in 1993.[401] The mine, which is currently known as Mogalakwena Platinum Mine, is the largest opencast platinum mine in South Africa.[402] As illustrated in figure 1 below, Mogalakwena Local Municipality is situated in the Waterberg District of the Limpopo Province. The company operated an opencast platinum mine in the area. Mogalakwena is an impoverished rural area where unemployment is very high, at 40.2%.[403] Naturally, the expectation by affected communities would be that the mine was going to bring about the much-needed jobs and infrastructural development in the area. In 1998, Anglo Platinum started expanding its mining activities in the Mogalakwena area.[404]

[399] The following documents will be used as the main sources in this case study: SAHRC 'Report into Anglo Platinum and Affected Communities Around the PPL Mine, Limpopo' 2008 (SAHRC Report); Farrell L, Mackres E & Hamann R 'A clash of cultures (and lawyers): A case study of Anglo Platinum and its Mogalakwena mine in Limpopo, South Africa' (2009) Unit for Corporate Governance in Africa, University of Stellenbosch Business School; M. Curtis 'Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa' Report for Action Aid, 2008 (Action Aid Report).

[400] Currently known as Mogalakwena Platinum Mine.

[401] Anglo American 'Mine Profile - Mogalakwena' www.angloamerican.com/about-us/our-stories/mine-profile-mogalakwena (last accessed 26/01/2018).

[402] KH Plant 'South Africa's Biggest Open Pit Mines' https://www.khplant.co.za>blog>article (last accessed 15/03/2018).

[403] Statistics South Africa. www.statsa.gov.za (Last accessed 10/03/2017).

[404] Business and Human Rights Resource Centre 'Anglo Platinum Lawsuit' https://business-humanrights.org/en/anglo-platinum-lawsuit-re-displacement-in-so-africa (last accessed 16/03/2016).



Figure 1: Waterberg District Map[405]

Ga-Pila is one of the main mining villages in the Mogalakwena area, others being Ga-Puka, Ga-Molekane and Ga-Chaba. Ga-Pila is located on the farm called Sandsloot.[406] Figure 2 below illustrates the locality of Mogalakwena mining communities, including Ga-Pila (described as Ga-Mapela in the map). It is also one of the villages directly affected by the expansion of the mining activities envisaged by Anglo Platinum.

[405] Map courtesy of www.municipalities.co.za. https://municipalities.co.za/map/130/waterberg-district-municipality (last accessed 25/01/2018).
[406] Information provided by Mindat https://www.mindat.org>maps (last accessed 15/03/2018).

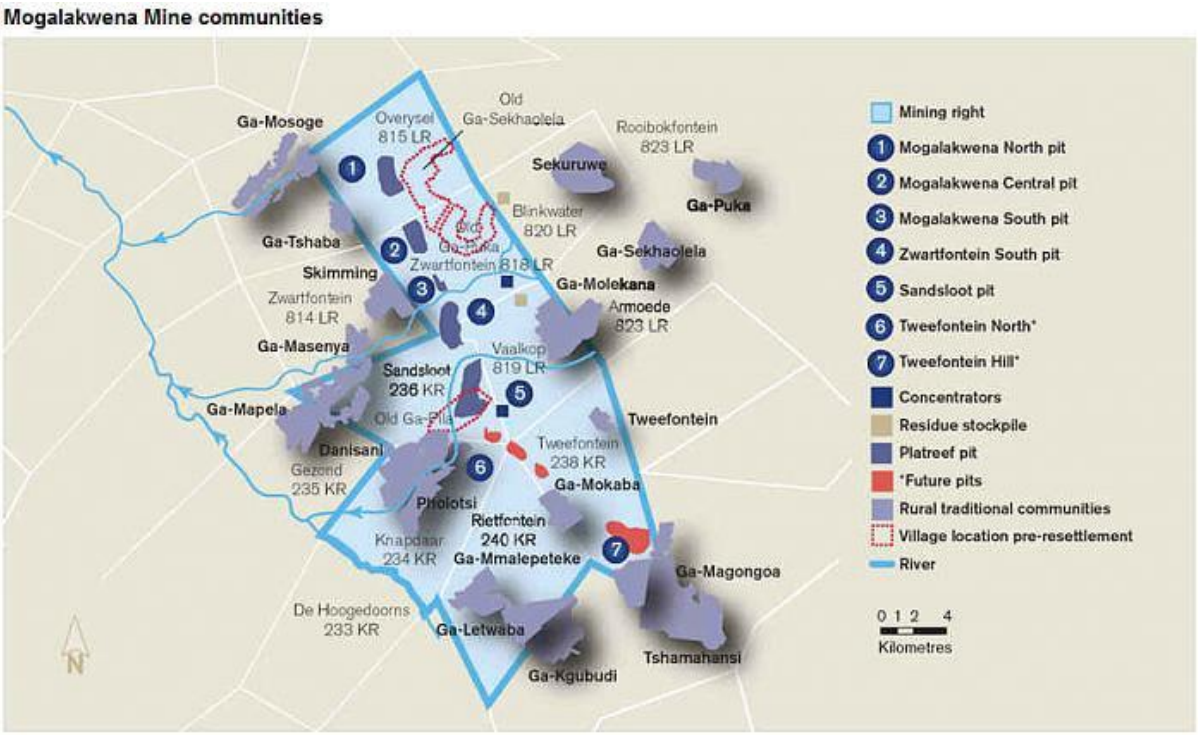


Figure 2: Mogalakwena Mine communities (including Ga-Pila) map[407]

Due to this need to expand mining activities in the area, it was considered imperative that the entire Ga-Pila village should relocate as the whole area would be subjected to the operations by the mine. The village was to be relocated to an area called Sterkwater, which was about 25 kilometres away from Sandsloot.[408] The proposal by Anglo Platinum was that the villagers would be provided with modern houses and roads, and that the Municipality would provide them with running water from underground.[409] A gratuitous relocation cash payment of R5000 was also offered to each family affected by the relocation process.[410]

(b) Contribution to Poverty Alleviation and Inequality Reduction

As detailed in the preceding chapters, the overall objective of development is to alleviate poverty and reduce inequality. As already pointed out, mining has traditionally formed the backbone of economic development in South Africa, starting with the discovery of diamonds in Kimberly and gold in Johannesburg in the late 1800s.[411] The discovery and mining of

[407] Map courtesy of Mapsofworld.com 2013-14. https://www.google.co.za (last accessed 27.09.2017).
[408] Information provided by Distance Between, www.distancesbetween.co.za>suburbs (last accessed 15/03/2018).
[409] Source: Partofnopart.blogspot https://partofnopart.blogspot.com>no-q (last accessed 15/03/2018).
[410] Ibid.
[411] South Africa Online 'Discovery of Gold in 1884' www.sahistory.org.za/article/discovery-gold-1884 (last accessed 15/03/2018).

platinum in Mogalakwena (which covers Ga-Pila village) brought with it the same expectations – that it would usher in economic development and social upliftment.

According to Anglo Platinum, the mining operations at Mogalakwena area brought about several development opportunities and real benefits in the form of job opportunities and infrastructure development such as roads, electricity, tap water, schools and health facilities.[412] However, facts on the ground indicate that the situation in Ga-Pila did not improve after the resettlement, as the community complained that there was not sufficient land in the new area; the water in the new area was said to be polluted; the graves were not relocated in accordance with customs and culture; issues relating to traditional governance were allegedly ignored; and that there were no schools in the new area, and children were forced to commute to another village for schooling purposes.[413]

The resettlement has had a profound impact on the socio-economic conditions of the Ga-Pila residents, particularly in relation to poverty alleviation and elimination of inequality. Action Aid, an international human rights and development non-governmental organization, heard of the plight of the Ga-Pila community and launched an investigation into the relocation project, commencing from 2007.[414] Its findings were damning against both the mine and the Limpopo provincial government that granted Anglo Platinum the licence to expand its operations in the area. The organization found that Anglo Platinum violated several constitutional rights such as the right to food, housing, healthy environment and responsibility to sustainable development when relocating people of Ga-Pila village.[415]

Regarding the right to food, section 27 (1) (b) of the Constitution states that everyone has the right to have access to sufficient food and water. When one considers that the relocated people lost 18 000 hectares of agricultural land,[416] there is no question that their right to access food was severely impacted upon. Moreover, cutting of water supply to the remaining families was a clear violation of their constitutional right to have access to sufficient water.

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[412] Anglo American 'Mine Profile: Mogalakwena' www.angloamerican.com/about-us/our-stories/mine-profile-mogalakwena (last accessed 26/01/2018).
[413] Mark Curtis 'Precious Metals: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa' Action Aid Report, 2008 at 7.
[414] Ibid.
[415] Curtis opcit at 41.
[416] Christopher Rutledge 'Minister Ramathlodi: More of the Same, or the Same, Just More' 2014 Ground Up https://www.groundup.org.za/article/minister-ramathlodi-more-same-or-just-more_1888/ (Last accessed 28/01/2018).

Coming to housing, section 26 of the Constitution states that everyone has the right to have access to adequate housing. Forced removal, directly or indirectly, deprives people of their right to accommodation of their own choice. Although those who finally agreed to be relocated were provided with new houses, there were complaints about the sizes and quality of the houses.[417] For those who refused to move, their houses were impacted upon by the mine blasting which caused the houses and windows to crack.[418]

The right to a healthy environment is also paramount, and section 24 (a) of the Constitution reads as follows: 'Everyone has the right to an environment that is not harmful to their health or well-being.' Beside the physical damages to houses, the remaining households complained about massive dust from the blasting activities.[419] Mining dust is detrimental to human health. There was also a complaint that the water in both the old and new settlement areas was contaminated due to mining activities.[420]

Anglo Platinum also had the duty and responsibility to promote sustainable development.[421] Section 24 (b) (iii) of the Constitution is to the effect that 'everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that … secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.' It is difficult to classify the Ga-Pila relocation project as one that promotes economic and social development. The water pollution and dust cannot be said to be environmental friendly.

Consequent to the above findings, Action Aid came up with several recommendations, which can be summed up as follows: Anglo Platinum was to ensure that all resettled villages had adequate drinking water and that water pollution was remedied; the company complied with the environmental and social requirements of the Mineral and Petroleum Resources Development Act; equity participation and/or community royalties formed a package for

[417] Mail and Guardian 'Forcibly Removed Village Wants Probe' https://mg.co.za/article/2004-09-23-forcibly-removed-village-wants-probe-talks (last accessed 16/03/2016).
[418] Corporate Research Project 'Anglo American Rap Sheet' https://www.corp-research.org/Anglo-American (last accessed 15/03/2018).
[419] Mining Weekly 'Corporate Arrogance Behind Mining Protests' https://www.miningweekly.com/article/corporate-arrogance-behind-mining-protests-2 (last accessed 16/03/2016).
[420] Ibid.
[421] Ibid.

historically disadvantaged communities in mining areas; and that reparations are increased to fully compensate for all losses.[422]

One of the general recommendations by Action Aid was that the South African Human Rights Commission (SAHRC) should investigate the violation of human rights at Ga-Pila by Anglo Platinum. After receiving the recommendation from Action Aid, the South African Human Rights Commission (SAHRC) embarked on its own investigation, as recommended. In 2008, the Commission investigated the matter and released a report which stated that Anglo Platinum had failed in the following respects: to provide adequate farming land to the communities; to ensure adequate access to water to communities; to provide full monetary compensation for loss of land; and to ensure that post-relocation communities would receive adequate services.[423] The report also points out that Anglo Platinum caused the electricity of the residual community to be cut off.[424]

Therefore, from the two above investigations, coupled with the mood of the community on the ground such as service delivery protests, it can be concluded that the resettlement process did not do much to alleviate poverty and eliminate inequality at Ga-Pila village. The converse seems to be the case, instead.

(c) Consultative Process Followed

The consultative process in the Ga-Pila project seems to have faltered from the start. Although an environmental impact assessment is said to have been conducted,[425] this researcher was not able to obtain the report from anywhere, including the mining company itself. This document could have indicated if public participation was conducted, and to what extent, before mining activities began at Ga-Pila. What is evident though, is that there was no relocation action plan (RAP) for the Ga-Pila relocation project.[426] As will be seen in the Nandoni Dam case study that follows below, the RAP affords communities an opportunity to be involved in the development of relocation policies and communication structures.

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[422] Ibid.
[423] SAHRC 'Report into Anglo Platinum and Affected Communities around the PPL Mine, Limpopo' (2008) at 42.
[424] Ibid.
[425] Dean Pelser 'Ga-Pila Relocation Project: Project Overview' Presentation on 05 March 2003. https://www.angloamericanplatinum.com>Files/ga-pila-facility-visit.pdf (Last accessed 28/01/2018).
[426] Lean A. Farrell, Eric Mackres & Ralph Hamann 'A clash of cultures (and lawyers): A case study of Anglo Platinum and its Mogalakwena mine in Limpopo, South Africa' (2009) Unit for Corporate Governance in Africa, University of Stellenbosch Business School at 7.

Be that as it may, some form of engagement between the mine and community did take place at Ga-Pila. To facilitate the relocation of the Ga-Pila villagers, PPL formed a Section 21 company which was supposed to comprise of community, government and company representatives with the main aim of advancing community interests and to act as a communication vehicle between the community and the mining company.[427] However, the section 21 company ended up being comprised solely of directors appointed by the corporation without consulting the community, although some of them were from the community.[428] The directors earned monthly salaries from the company and never reported or consulted with the communities.[429]

Negotiations did not start on a good footing, and I surmise this was because of the unsound relationship between the section 21 company and the community. To start with, the villagers needed guarantees on the amount of monetary compensation (they wanted at least R100 000 per household);[430] structure and quality of houses; relocation of cultural sites and graves; as well as the provision of farming land as they lived on subsistence farming.[431] Villagers also wanted an undertaking that they would access jobs at the mine.[432]

There was no agreement between the parties for several years. In 2003 about 7000 inhabitants of Ga-Pila village relocated to the farm Sterkwater.[433] By this time PPL had commenced with the expansion of its activities and most residents had no option but to relocate to the new settlement. Twenty-eight families comprising around 150 people refused to relocate, and suffered the consequences.[434] Those who resisted and remained in the area suffered from mining dust and cracked houses as the mining operations approached their homes.[435] There are reports that electricity and water supplies to the remaining households were cut off,[436]

[427] Mines and Communities https://www.minesandcommunities.org/article.php?a=4153 (last 16/03/2016).
[428] Ibid.
[429] Ibid.
[430] Mail and Guardian 'Forcibly Removed Village Wants Probe' https://mg.co.za/article/2004-09-23-forcibly-removed-village-wants-probe-talks (last accessed 16/03/2018).
[431] Indigenous Peoples Issues and Resources https://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id (accessed 08/08/2011).
[432] The Daily Vox 'Why Ga-mapela Residents are Burning their Small Limpopo Town' https://www.thedailyvox.co.za/why-ga-mapela-residents-are-burning-their-small- (last accessed 16/03/2016).
[433] Mines and Communities https://www.minesandcommunities.org/article.php?a+4153 (last accessed 16/03/2018).
[434] Mark Curtis 'Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa' Report for Action Aid (Action Aid Report), 2008 at 14-17.
[435] Ibid.
[436] Ibid.

although the mine denies responsibility for this this. The cutting of water, electricity and failure to provide the remaining families with basic services was deemed by the community to be a ploy to coerce the people into relocating.

It is contended that the Ga-Pila resettlement process bears all the hallmarks of a forced removal or dislocation. Villagers were not offered the choice of being resettled or not. They also claim they were not fully informed of their rights, and were thus unable to negotiate the terms of the compensation or relocation.[437] The consultations that were held by the mine were done with the directors of 'section 21' companies established by the mine for that purpose. Anglo Platinum refused to talk directly to the broader community and continues to do so.[438]Although the directors of this company were selected from the community (15 members),[439] the structure had no legitimacy at all within the community as it was regarded a vehicle to advance the interests of the mine.[440] The mine completely ignored community structures, including non-governmental organizations which had long operated within the community.[441] Traditional leadership, which should act as the unifying authority when there are disputes of this nature, had long lost moral authority as it was perceived to be taking sides with the mine, hence the tribal office and the Chief's house were destroyed during one of the numerous protests.[442]

The complete breakdown of communication between the mine and the community led to immense frustration that culminated in protests, which at times turned violent.[443] The Community, desperate to be heard, would sometimes destroy the little assets or infrastructure that they had. Protests have bedevilled this project from inception to date, with the latest march which later turned violent taking place in September 2015.[444] This confirms the assertion by the Bench Marks Foundation that 'if communities feel they are being unfairly

[437] Ibid.
[438] Ibid.
[439] Ibid.
[440] Mines and Communities https://www.minesandcommunities.org/article.php?a=4153 (last accessed 09/09/2017).
[441] Ibid.
[442] The Daily Vox 'Why Ga-mapela Residents are Burning their Small Limpopo Town' www.thedailyvox.co.za/why-ga-mapela-village-are-burning-their-small-li... (last accessed 16/03/2016).
[443] The Timeslive 'Anger Boils at Mine' http://www.timeslive.co.za/thetimes/2015/09/08/Anger-boils-at-mine (last accessed 16/03/2016).
[444] The Daily Vox 'Why Ga-mapela Residents are Burning their Small Limpopo Town'http://www.thedailyvox.co.za/why-ga-mapela-residents-are-burning-up-their-small-limpopo-town (Last accessed 24/10/2017).

treated or inadequately compensated, mining can lead to social tension and sometimes to violent conflict.'[445]

Furthermore, Action Aid found that Anglo Platinum failed to consult adequately with the affected communities.[446] The organization recommended that local communities should have the right to be fully consulted and give informed consent before mining rights are awarded, and that the affected communities should be empowered to enable them to engage meaningfully when they negotiate agreements and compensation with the development agencies.[447]

The SAHRC also expressed 'serious concern that the communities were not given the opportunity to legitimately input into the relocation planning and as such have become resistant to the whole process.'[448] This is indeed contrary to the objectives of the FPIC principle. It is ironic that although the mining corporation spent millions building houses for the relocated communities and developing infrastructure such as roads, water and electricity supply, communities still resisted to be relocated, leading to serious conflicts between the two parties. This is testimony to the fact that the corporation's consultative strategy was totally ineffective.

After its findings, the SAHRC made recommendations which could assist in alleviating the conflicts as they generally present themselves not only to the Ga-Pila community but to all Anglo Platinum mines within and around the proximity of the Mapela Tribal Authority. A general and long term recommendation as far as consultation is concerned was that the company 'must move beyond a compliance-based approach to resettlement and should strive for a genuine and meaningful engagement with communities particularly in the following areas: consultation; achievement of free, prior and informed consent; and grievance redress process.'[449] The SAHRC report is only one of the few that directly referred to FPIC at that time.

Recommendations by the SAHRC in relation to medium to long term issues focussed mainly on relationship building, with a particular attention paid to the delegation of decision-making

[445] Bench Marks Foundation 'Mining and Community Engagement Principles' www.bench-marks.org.za/campaigns/mining_community (Last accessed 24/10/2017).
[446] Action Aid report, opcit at 14-17.
[447] Ibid.
[448] SAHRC Report opcit at 85.
[449] Ibid at vii.

consultation and process management to s21 companies; the role and responsibilities of the Mogalakwena Municipality; relationship between the community and Mapela Tribal Authority; and community relationship with the South African Police Service. The most important pronouncement by the SAHRC in relation to relationship building is regarding community consent. It was stated that

> the recommendations made by the SAHRC in this report concerning the *obtaining of free prior informed consent of affected communities* (my emphasis) apply equally to State undertakings. This recommendation remains despite the legislative standard being one of "consultation" by the mining company, and is again an attempt to move beyond compliance.[450]

The last part of the SAHRC recommendations ends with institutional processes, chief amongst which is the issue of participatory democracy. The report pointed out that 'communities should ultimately be empowered to actively participate in processes that affect them, have certainty as to possible outcomes, processes and grievance redress mechanisms.'[451] It was recommended that a new relocation committee inclusive of all stakeholders, particularly community representatives, should be established.

There is no evidence that the recommendations by both Action Aid and the SAHRC were implemented by Anglo Platinum. Even though the SAHRC undertook to monitor the implementation of its recommendations, there is also no evidence of this ever-taking place. Even though the recommendations by both these institutions cannot be said to fully meet the requirements of FPIC, their implementation would have gone a long way towards fostering the spirit of this principle.

(d) Applicable Legislation

There are several pieces of legislation that were relevant to the Ga-Pila relocation process as it unfolded. These Acts include, but not limited to land management, mining, water and environmental laws. I will succinctly discuss these laws below but only to the extent that they were applicable to the Ga-Pila consultative process at the time of the initiation and implementation of the project, and the extent to which they framed public participation and the entire FPIC process.

[450] Ibid at x.
[451] Ibid at xii.

(i) Land Management Legislation

Borrowing from the preceding chapter, the main land management pieces of legislation are Local Government Municipal Systems Act, 2000; Municipal Structures Act, 1999; and the Spatial Planning and Land Use Management Act (SPLUMA), 2013.[452] All these Acts advocate for some form of community engagement in the process of developing land occupied by people or communities. Another important factor to note is that all these Acts came into existence after the initiation stage of the project, as the project commenced in 1993. However, all these laws were effective during the implementation stage of the project as they were enacted after 1994.

According to Section 3(1) (d) of the now repealed Development Facilitation Act, 1995 (which was applicable at the time), one of the main requirements of the development of State land which was occupied by communities was that such communities should actively participate in the process of land development. Although the law that repealed this Act, SPLUMA, does not explicitly say anything about community participation, it however provides for equity in the application of spatial development planning and land use management systems. It should be noted that according to the FPIC principle, equity in development cannot be attained without meaningfully engaging the communities to solicit their consent.

Anglo American mining project at Ga-Pila is part of local development in that area. For the development process to be equitable, a proper and meaningful engagement with the community should have preceded the implementation of the project. This would have ensured that the relocation process, if the community consented to it, ran smoothly. However, it should be noted that none of the applicable identified laws were applicable at the initiation stage of the project, and although at the project implementation stage there were laws that encouraged community participation, none of them explicitly called for consent, particularly FPIC.

[452] All these Acts were cited in full and discussed in detail in the preceding chapter.

(ii) Mining Laws

The law applicable at the time of the initiation of mining at Mogalakwena was the Minerals Act, 1991.[453] This Act did not require consultation with, or consent from affected communities before a mining project could commence on communal lands. It is therefore difficult to judge the action of the mine in relation to FPIC during this time.

The Minerals Act was repealed by the Minerals and Petroleum Resources Development Act, 2002 (MPRDA). Recalling the discussion in the preceding chapter that dealt in detail with the legislative frame regarding mining in South Africa, although this Act does not directly require that consent be obtained from affected communities before mining activities take place in their areas, section 10 thereof does provide for a consultative process to be undertaken. This section requires that a general notice be made after an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question by the Department of Mineral Resources. The notice should call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.

As indicated in chapter 5, this requirement falls short of the FPIC principle which is to the effect that consent by the affected communities must be sought before any mining activities can be carried out in the areas belonging to such communities. However, the fact that the law falls short of calling for the implementation of a meaningful consultative process along the FPIC principle or its spirit, and that the Act was only enacted after the commencement of mining in Mogalakwena, does not exonerate Anglo Platinum from failing to engage in such process. There is no evidence that Anglo Platinum did more than what was required by the Act in Ga-Pila. One surmises that if a consultative engagement was embarked upon with the intention of seeking participation from the Ga-Pila community, the company would have had an opportunity to meaningfully engage with them before the commencement of the relocation process, obviating the fall out with the community that ensued later.

[453] Minerals Act, 1991 (Act 50 of 1991).

(iii) Environmental Laws

As articulated in the chapter on legislation (chapter 5), National Environment Management Act (NEMA) is the only Act that could be found for the purposes of this research project to explicitly require the implementation of the FPIC principle in the facilitation and promotion of public participation in environmental governance processes. Unfortunately, there is no indication that Anglo Platinum did embark on this process during the relocation of the Ga-Pila community. Problems relating to dust and other environmental unfriendly activities during the relocation at Ga-Pila could have been detected earlier and a strategy developed to manage them if community engagement was a priority from the inception of the project.

(iv) Water Laws

Going back to the Constitution, section 27 of the constitution provides for the right to sufficient water to everyone. The leading legislation dealing with water management in South Africa are the National Water Act, 1998 and Water Services Act, 1997 and their Regulations. The main objectives of these Acts are the promotion of equitable access to water and economic development. All development related objectives cannot be achieved without the requisite engagement with the affected communities.

As already pointed out, the Ga-Pila community complained of water shortages and polluted water resources, especially for the families that resisted to be relocated from Ga-Pila village. At one stage, Anglo Platinum even went to the extent of disconnecting water supply to the households that were resisting relocation.[454] This is an extreme example of what happens when consultative processes alongside the FPIC principle or its spirit break down or fail to take place.

(f) Application of FPIC Principle

As seen in chapter 2, the main ingredients of the FPIC principle are public participation and community engagement. Other benefits such as improved life quality, sustainable development and equity are benefits that derive from a proper consultative process. Through public participation and community involvement the mine could have accurately diagnosed

[454] Action Aid report, opcit at 14.

the needs and aspirations of the communities. This would have made it possible for Anglo Platinum to respond positively to the situation at Ga-Pila, avoiding the perpetual conflicts that have beset the project since inception.

The first and most profound error that Anglo Platinum made is what John Capel of Bench Marks Foundation calls 'corporate arrogance'.[455] From the onset the company ignored community structures and neglected to encourage the formation of structures that would represent communities during the relocation process. Instead, Anglo Platinum regarded a section 21 body, which was a product of its own formation, as a structure to liaise with the community on all matters relating to the relocation.

Anglo Platinum completely refused to engage directly with the communities and NGOs that were operating within the Ga-Pila community.[456] This was a recipe for disaster. It can be surmised that violent community protests that persist until the present moment at Ga-Pila and other villages under the Mapela Tribal Authority are a direct result of this error of judgment by Anglo Platinum.

No matter how genuine Anglo Platinum's actions were, but without consulting with the community it all came to nothing. 'We have some buildings that have been built by the mines, but we don't know who the mines have actually consulted. We just woke up one day and find people building something, but in the end, we don't know who has been consulted,'[457] lamented one resident. It is this type of frustration that rendered the Ga-Pila relocation project unworkable from the start.

In chapter 3 it was pointed out that community development is about improving people's quality of life, including increased standards of living. In one media statement on Ga-Pila relocation, John Capel pointed out as follows: 'The common cry of communities is to have a way to lift themselves out of the destitution created by mining.'[458] The investigations by both

[455] Bench Marks Foundation Media Statement 'Corporate Arrogance behind Mining Protests' www.bench-marks.org.za (last accessed 08/09/2019).
[456] Mines and Communities https://www.minesandcommunities.org/article.php?a=4153 (accessed 16/03/2016).
[457] Daily Vox 'Why Ga-Mapela Residents are Burning up their Small Limpopo Town' http://www.thedailvox.co.za/why-ga-mapela-residents-are-burning-up-their-small-li... (last accessed 2016/03/16).
[458] Bench Marks Foundation 'Corporate Arrogance Behind Mining Protests' Mining Weekly http://www.miningweekly.com/article/corporate-arrogance-behind-mining-protests-2... (last accessed 20/03/2014).

Action Aid and the SAHRC above indicate that the situation deteriorated, going from bad to worse. From these one can see that the rights of the affected people to sufficient water, food and a healthy environment were negatively impacted. This outcome is not surprising, as it can be argued that due to insufficient or no consultation with the affected communities, the mine failed to properly identify community needs and consequently, could not address them.

Closely related to the quality of life is the issue of sustainability. With the destruction of their agrarian livelihoods, damages to their houses due to mine blasting, as well as polluted water sources due to mining activities, residents of Ga-Pila cannot be said to enjoy sustainable development. As Capel points out when referring to the situation at Ga-Pila, 'the people suffer land contestation that directly impacts on their rural life style, air quality and water pollution. Sadly, this is all that is on offer to communities – not development or employment.'[459] The SAHRC did recommend that both the Mogalakwena Municipality and Anglo Platinum make the issue of agricultural land and clean, healthy water a priority.[460]

Compensation should be fair and equitable, and should also contribute to improved quality of life and sustainable development. Compensation can be both monetary and non-monetary. Non-monetary compensation is usually long term and can be in the form of share-benefit schemes, equity shares, community infrastructure or land. In line with the FPIC principle, compensation should never be imposed upon beneficiaries, no matter how fair it might seem to be. Equitable compensation should be the product of engagement with the affected communities.

The Ga-Pila community members were compensated by new houses on like-for-like basis, meaning that the new houses were to be equal to the old dwelling in square meters.[461] They were also provided with a once-off cash payment of R5000 per household.[462] All in all, the type of compensation that the Ga-Pila community received did not enhance their quality of life at all. Neither did the compensation contribute to sustainable development for individuals and the community at large. When writing to the Department of Land Affairs, Richard Spoor,

[459] Bench Marks Foundation 'Corporate Arrogance Behind Mining Protests' http://www.miningweekly.com/artcle/corporate-arrogance-behind-mining-protests-2 (last accessed 2016/03/16).
[460] SAHRC report, opcit at 85.
[461] Action Aid report, opcit at 14-17.
[462] Ibid.

a lawyer for the Mohohlo community which is one of the villages under the Mapela Tribal Authority which was facing the same fate as Ga-Pila, said the following:

> From the perspective of the Mohlohlo community they will lose homes and several thousand hectares of arable land. The homes will be replaced on a like for like basis. There is no internal plumbing in any of the houses and they will continue to use dry pit toilets save that the pit is now a large polyurethane tank. The arable land will not be replaced and almost 7000 families will have lost an important means of subsistence plunging them into greater poverty and reduced food security.[463]

As already indicated, the circumstances surrounding the Mohlohlo village relocation are a replica of what took place in the adjacent Ga-Pila village. The compensation that people received was neither fair nor equitable. As can be seen from the quote above the community was left far worse off than they were previously. The same lawyer described the relocation at Ga-Pila as 'calamitous'.[464] Again, this is a less than ideal outcome due to the disregard of public participation and community engagement.

(g) Conclusion

I would like to conclude this section by reflecting on the key elements of the FPIC principle, and the extent to which to FPIC challenges were present in this case study. These elements are "free", "prior", "informed" and "consent". The purpose of this reflection is to establish the applicability of the FPIC principle to the Anglo Platinum Ga-Pila relocation project, and how, if at all, was the FPIC principle or its spirit was applied.

(i) 'Free' Consent

One of the main considerations of free consent is an element of voluntariness. Voluntariness implies that communities are not manipulated or unduly influenced by developers or developing agencies. Manipulation may include the enticement of affected communities or their members by offering them benefits in the form of cash, economic and infrastructure development, as well as jobs. In most cases, such undertakings do not materialise, leading to

[463] Richard Spoor's letter to Director-General, Department of Land Affairs dated 26 May 2007. http://www.minesandcommunities.org/article.php?a=4153 (last accessed 16/03/2016).
[464] Ibid.

distrust between affected communities and the developers. This loss of trust inevitably leads to conflicts and negatively impacts on the project.

Residents of Ga-Pila were offered incentives in the form of cash, modern houses and infrastructure development. Despite all this, not everyone in the community was swayed or persuaded to relocate. As has been seen above, about thirty families stayed put, refusing to move to the new location. However, even those who opted to relocate later complained about issues such as poor quality of houses, lack of clean water and lack of provision of certain promised services. Therefore, this case can be classified into two categories as far as voluntariness are concerned: firstly, that Ga-Pila residents were never afforded a chance to freely decide to relocate; and secondly, that even those who chose to relocate either had no other option or did not fully comprehend the consequences of that move.

(ii) "Prior" Consent

Consent from the affected communities need to be solicited and obtained at the conceptual stage of the project, that is when the project is still just an idea. This involves sharing the idea of the intended project with the affected communities and getting their buy-in into the project. The process involves a great deal of consultations and negotiations.

There is no indication that the process outlined above was followed at Ga-Pila. Whatever consultations or negotiations that took place between the parties were not about seeking the consent by the Ga-Pila residents for the expansion of the mine. These engagements took place when the decision by the mine to expand was already made and received the blessing of the Provincial government.

(iii) "Informed" Consent

Affected communities need to make an informed choice when they decide if a project should go ahead. An informed community is capable of saying "yes" or "no" to a project. Therefore, an informed community is a capacitated community as illustrated in chapter 2 of this thesis.

In the case of Ga-Pila, there is no evidence whatsoever that Anglo Platinum attempted to capacitate the community to make an informed choice. In fact, as pointed out above, the community was never afforded an opportunity to choose. The decision to move the

community was already concluded between Anglo Platinum and government before the community was engaged with. Anglo Platinum did not satisfy the "informed" consent requirement of the FPIC principle in the Ga-Pila relocation project.

When it comes to challenges facing FPIC in general, the Ga-Pila project has had its fair share. To start with, there were no pre-project consultations by Anglo Platinum with the affected communities. The company could not even avail its environmental impact assessment programme or report which could have shed some light on community participatory activities, if any. There were also problems regarding representation as the affected community rejected the steering committee formed by the company, even though the committee was comprised of members of the community. The hand-picking of steering committee members who also received monthly allowances from Anglo Platinum divided the community into interest groups, with those support the relocation on one hand and those opposing the move on another hand.

(iv) Consent

Two main factors about consent are that communities affected by development projects should be at liberty to consent to, or reject proposed projects from taking place in their lands, and to have the capacity to be able to grant or withhold such consent. Communities should be able to say "yes" or "no" to any project taking place in their lands.

Considering that the affected community was not involved at the initial stage of the Ga-Pila relocation project, it is apparent that these communities never had the opportunity to grant or withhold their consent, not to mention being capacitated to make such a choice. From the discussions above, it is clear that efforts to involve the affected community were introduced very late in the project, and were not successful – a case of too little too late.

5.2.2 Nandoni Dam Project[465]

(a) Introduction

The Nandoni Dam project is a government water scheme implemented through the then Department of Water Affairs and Forestry (DWAF).[466] It is part of the Luvuvhu River Government Water Scheme, which is an infrastructure development project alongside the Luvuvhu River aiming to improve water supply within the Vhembe District as well as adjoining Districts such as Mopani and Capricorn. The dam is located between Thohoyandou and Malamulele towns, in the Vhembe district of Limpopo Province. The Luvuvhu River stretches from the Zoutpansberg mountain range near Louis Trichardt in the north, to the most eastern of the Vhembe District where it joins the Limpopo River in the Kruger National Park. **Figure 3** below illustrates the Vhembe District map.[467]



[465] The main sources of information for this project are: the Relocation Action Plan (RAP) for the Nandoni Dam Project prepared by BKS (Pty) Limited and dated August 1999; Policies and procedures relating to compensation, graves, relocation of households, relocation of businesses, environment and employment as contained in the RAP compiled by BKS and dated August 1999; Sustainable Utilization Plan (SUP) for the Nandoni Dam Project prepared by Van Riet Louw Landscape Architects and dated May 2003; legislation such as Mineral and Petroleum Resources Development Act 28 of 2002, National Water Act 36 of 1998, Water Services Act 108 of 1997 and World Heritage Convention Act 49 of 1999; White Paper on National Water Policy, 1997; Environmental Management Plans for the Nandoni Dam Project prepared by Bester A.N and dated May 1998; the Constitution of the Republic of South Africa, 1996; minutes of stakeholder meetings dated 21 April 2001, 10 June 2001, 28 August 2001, 30 October 2001, 16 April 2002 and 18 to 19 May 2002 respectively; and the Public Protector Report on Nandoni Dam dated May 2009.

[466] Which is currently the Department of Water and Sanitation (DWS).

[467]

The dam is 2.2 kilometres long with catchment area of 1380 square kilometres and a net storage capacity of 164 million cubic metres.[468] The construction of the dam commenced in 1998 and was completed in 2005.[469] Nandoni dam locality map is illustrated in figure 4 below.

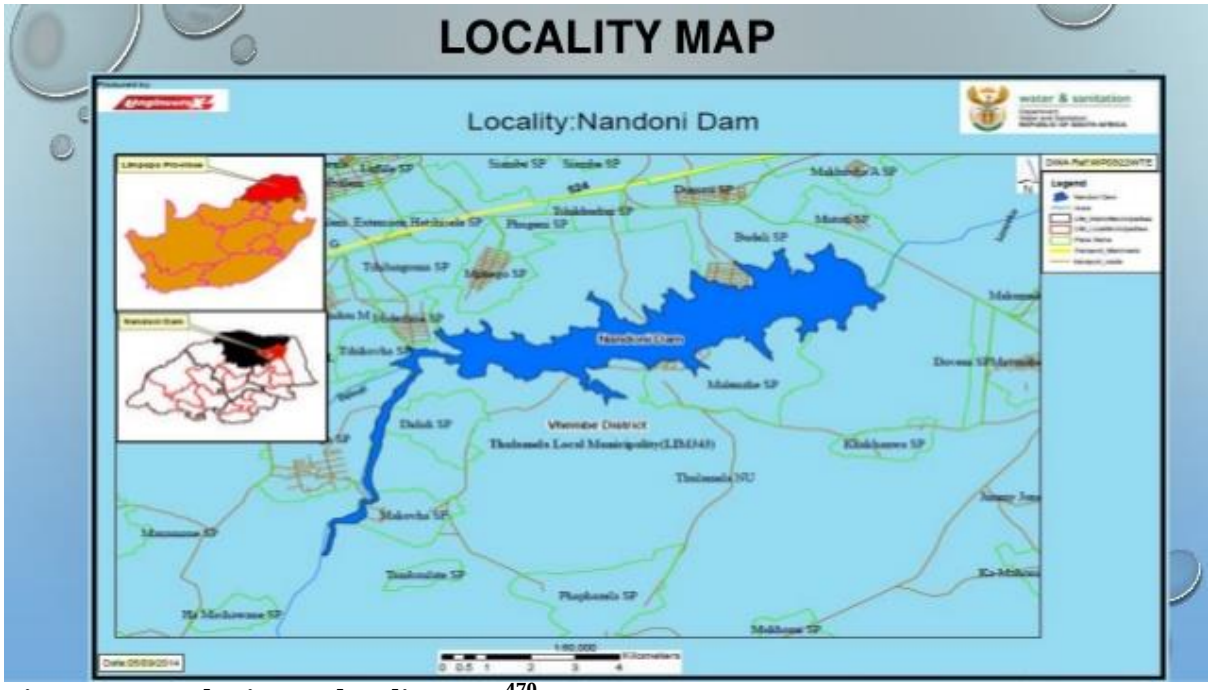


Figure 4: Nandoni Dam locality map[470]

It may be useful at this stage to introduce Vhembe District demographics to illustrate how the project would benefit communities in this area. Vhembe District Municipality is a category C[471] municipality which at the time of the construction of Nandoni dam was divided into four local municipalities, namely Makhado, Thulamela, Mutale and Musina. Nandoni dam is situated in the Thulamela local municipality, and straddles three traditional authorities, namely Mphaphuli, Mulenzhe and Tshivhase.

Table 1 below provides a detailed statistical breakdown of the Vhembe District and its local municipalities as at August 2011. This information is very important in indicating

[468] BKS (Pty) Ltd 'Relocation Action Plan (RAP) for the Nandoni Dam Project' August 1999 at 8.
[469] PMG 'Committee Meeting Reports' https://pmg.org.za/committee-meeting/17911/ (last accessed 27/01/2018).
[470] Slideshare.net: https://www.google.co.za/search?q=NANDONI+DAM+LOCALITY+MAP&tbm (Last accessed 24/10/2017).
[471] Section 155 (1) (c) of the Constitution describes a category C municipality as a municipality that has executive and legislative authority in an area that includes more than one municipality.

demographical dynamics in the District, and how the Nandoni dam project can contribute in the alleviation of poverty, creation of jobs and the reduction of inequality.

Municipalities within the District	Area (km2) in 2009	Area (km2) after 2011 Local Government Elections & % change		Population	No. of Households	Poverty Rate
Vhembe District Municipality	21,121.15	25,596.47	21.19%	1,232,218	285,375	55.85%
Makhado Local Municipality	8,299.70	8,299.70	-	468,830	113,339	64.29%
Musina Local Municipality	7,576.84	7,576.84	-	56,835	14,112	24.21%
Mutale Local Municipality	2,345.92	3,886.21	65.66%	107,532	20,941	66.08%
Thulamela Local Municipality	2,898.69	5,833.72	101.25%	599,021	136,982	68.81%

Table 3: Statistics of the Vhembe District and Local Municipalities[472]

(b) Contribution to Poverty Alleviation and Reduction of Inequality

The purpose of the project was to construct a dam, which would supply water to several rural communities in the Vhembe and Mopani Districts. According to Tempelhoff and Tempelhoff the main objective of the Nandoni dam project was to 'secure a bulk storage site for the region and provide a water treatment plant that would provide sufficient water for domestic and other consumers in the eastern part of the Soutpansberg region.'[473] These areas are known for severe water shortages. The idea of providing a steady supply of water to the region emerged in the 1980s after a series of droughts left many surface and underground resources dry, and communities were not receiving sufficient water.[474] The idea gained momentum in the 1990s due to rapid urbanisation in the region, which placed additional demand on water resources, especially for domestic uses such as sanitation.[475]

[472] Vhembe District Municipality Profile Department of Co-operative Governance and Traditional Affairs, August 2011 at 5.
[473] Tempelhoff, E & JWN Tempelhoff, Johan WN 'Water Procurement and the Environment: A comparative History of South Africa's Nandoni and De Hoop Dams 1994 – 1997' 2007 New Contree at 53 www.academia.edu/3192708/water_procurement_and_the_environment_A_comparative_history_of_south_africa's_Nandoni_and_De_Hoop_dams_1994-2007 (last accessed 15/03/2018).
[474] Ibid.
[475] Ibid.

Sufficient water supply is essential for these rural areas as they rely mainly on an agrarian economy for subsistence. Adequate clean water supply is also vital for basic domestic use, such as drinking, cooking, sanitation and washing. The construction of this dam was also intended to provide a boost to the local economy and increase employment opportunities through tourism (several lodges and picnic sites have already been constructed around the dam); fishing (a multitude of fish hawkers have sprung up within the dam vicinity); and brick-making businesses.[476] Three hundred and forty workers, 183 of them from the affected communities, were employed during the construction of the dam.[477]

Despite these envisaged developmental gains, the construction of the dam negatively affected 33 villages.[478] In its 2009 report, DWAF conceded that the development of the Nandoni dam had major impacts on the social, economic, political and ecological environment. The report described the main negative impacts as follows:

> (a) the impacts on the flow regime downstream of the dam, (b) the need to relocate 465 households from parts of the five rural communities to make available land required for the project, (c) 2100 subsistence farmers had to be allocated alternative resources for their own food production, (d) about 1000 graves had to be relocated from the land affected by the project and (e) important archaeological sites [were affected] …[479]

Complaints by affected communities against DWAF were received by the office of the Public Protector in Limpopo Province. These complaints were from 10 of the 18 directly villages, namely Mutoti, Budeli, Mulenzhe, Mphego, Tshiulungoma, Dididi, Tshitomboni, Muledane, Tswinga and Tshaulu.[480] These complaints related to, amongst others, insufficient or lack of compensation for loss of land; inadequate or no compensation for loss of domestic and commercial fruit trees; lack of dam safety; poor quality houses; lack of toilet facilities; failure to relocate graves; poorly constructed infrastructure; poor communication; and failure to secure traditional medicinal plants. Figure 5 below shows a picture of the area depicting some of the affected communities.

[476] https://en.m.wikipedia.org>wiki>Nandoni_Dam (last accessed 15/03/2018).
[477] Templeton & Templeton opcit at 16.
[478] Public Protector Report at 10.
[479] Ibid.
[480] Public Protector report opcit at 11.



Figure 5: Nandoni dam and surrounding areas[481]

Some villages such as Budeli, Mulenzhe, Dididi and Tshiulungoma were so directly affected that some homesteads had to be relocated.[482] In the end 405 homesteads were relocated.[483]

Those who lost homesteads were to be provided with new modern houses with facilities such as toilets and fences. In all instances, land meant for relocation purposes was identified within a village by the Dam Zoning Committee comprising of affected residents, traditional councils, consultants hired by the DWAF (BKS consulting), Department of Land Affairs and DWAF officials.[484] This approach obviated jurisdictional disputes that could have stemmed from traditional leadership as the affected villages fall under different Tribal Authorities such as Tshivhase, Mphaphuli and Mulenzhe.

Other communities mainly lost agricultural land for crop production, grazing and fruit trees. Those who lost land rights were to be provided with alternative land, and where this was not

[481] Nandoni Dam, Thohoyandou: https://en.wikipedia.org/wiki/Nandoni_Dam (Last accessed 24/10/2017).
[482] Public Protector report opcit at 10.
[483] Ibid.
[484] Public Protector Report, opcit at 14.

possible, monetary compensation would be paid. Monetary compensation was also to be paid for loss of crop production. A flat rate of R11 000 per hectare was supposed to be paid to each homestead that lost land rights in agricultural land.[485]

According to the Relocation Action Plan, there were four basic principles that governed the relocation process, namely:

(i) Mitigation of Social Impacts

Several policies were developed to assist in the mitigation of social impacts. These policies related to the relocating of graves; relocating of households, misanda (headmen), clinics, churches and community buildings; and acquisition of access to land and mitigating the loss of crop production, grazing, orchards and natural resources.[486]

(ii) Developmental Approach

In coming up with the RAP, consideration was taken of the Vhembe District spatial development strategy with the aim of the 'upliftment and socio-economic empowerment of individual and communities, the managed use of natural resources and the deliberate coordination of project activities with actions aimed at satisfying local needs.'[487] It can be concluded therefore, that the plan aimed at poverty reduction, economic growth and sustainable development.

(iii) Empowerment

The RAP also aimed at empowering affected communities by providing them with skills, job opportunities, economic enhancement and organizational as well as participative experience. Participative experience would be gained through the representation of community representatives in structures such as the Project Steering Committee, Community Action Committee and other subcommittees such as recruitment and training.

[485] As per the Public Protector Report and the cash policy as contained in the RAP.
[486] Other policies related to recruitment, training, relocating of businesses and communication.
[487] Nandoni Dam Relocation Action Plan, May 2000 at 5.

(iv) Compensation

The basic principles adopted in the RAP in relation to compensation were as follows: 'compensation must be fair; compensation in kind is preferred over cash; and compensation must always be negotiated between the parties and agreed before implementation commences.'[488] Compensation was necessary to mitigate the loss of homes, land, medicinal plants, access to cultural sites, as well as access to fuel wood.

Although the above relocation principles do not relate directly to the FPIC principle, they do resonate well with the spirit of the principle in several ways. The introduction of policies relating to mitigation of social impacts presupposes a negotiated process as community members would be consulted on how best to deal with sensitive and sentimental social processes such as the relocation of graves, places of worship and medicinal plants. The developmental approach advocates for the identification of local needs before a project is introduced. Meanwhile, the emphasis on participative experience as a form of empowerment resonates with the theme on active citizenry. In addition, another negotiated process was the nature and amount of compensation that would be discussed and agreed upon between DWAF and the affected communities.[489]

(c) Consultative Process Followed

(i) Pre-Project Community Engagement

There is no evidence that DWAF engaged with affected communities at the conceptualisation stage of the project. Ideally, affected communities must be part of the project from inception to finish. It is more critical that communities effectively participate at the preparation and planning stage, as it is during these phases that the needs and aspirations of the affected people can be articulated and assessed.

However, the recognition for community involvement and participation in the Nandoni dam project started to emerge during the compilation of the relocation plan (RAP) and the sustainable utilization plan (SUP). This is quite late in the project as the RAP was compiled

[488] Ibid at 6.
[489] Apparently this discussion did not take place, and no agreement was reached as compensation forms one of the complaints that were referred to the Public Protector.

by BKS consultants only in August 1999[490] and the SUP in May 2003.[491] The RAP contains all the policies regarding the relocation process;[492] and the SUP sets out a policy framework for the protection, utilization, development and management of the Nandoni Dam water resource to ensure that access and use of the dam is equitable and to the benefit of all people.[493]

According to the RAP, public participation by affected communities is a 'fundamental component of the development process and is an essential mechanism by which the objectives of the RAP can be met in an acceptable and successful way.'[494] It is interesting to note that the document states that public involvement ensures 'freedom of choice, freedom of association/disassociation, and to be treated with dignity.'[495] However, the document goes further to state that communities would be represented in this regard by the Community Action Committee (CAC) which, as we will see below, was disbanded by DWAF when it refused to be controlled by the Department.

Public participation is said to have been followed throughout the development of the SUP, and the process involved 'the identification of all interested and affected parties; the answering of questions and noting of concerns; identification of important issues, problems and conflicts and the noting of the alternatives; and the elimination of false expectations and preconceptions.'[496]

DWAF consultants convened several consultative meetings with community structures and sometimes with entire communities during the development of the SUP. For example, meetings were held at the Nandoni dam construction site on the following dates: 21 April 2001, 10 June 2001, 28 August 2001, 30 October 2001, 16 April 2002 and 18 to 19 May 2002.[497] Although one may deem these meetings as too few for the processes of developing a

[490] BKS 'Department of Water Affairs and Forestry Luvuvhu River Government Water Scheme Relocation Action Plan for Communities Directly Affected by the Construction of the Nandoni Dam in the Luvuvhu River' 1999 at (i).
[491] Van Riet and Louw Landscape Architects, 'DWAF Sustainable Utilization Plan for the Nandoni Dam in the Thohoyandou District of the Limpopo Province' 2003 at i.
[492] Nandoni RAP, opcit at (ii).
[493] Nandoni SUP, opcit at (iii).
[494] Nandoni Dam RAP at 7.
[495] Ibid.
[496] Nandoni Dam RAP, at 21.
[497] Appendix 2: Nandoni Dam RAP.

complex plan such as the SUP, an endeavour to involve affected communities in the planning stage needs to be recognized.

(ii) Consultative Structure

The dam project design envisaged an elaborate consultative structure. To facilitate the implementation of the project, several committees were formed by BKS, including the Project Co-Coordinating Committee (PCC), Project Steering Committee (PSC), Coordinating Policy Committee (CPC), Community Action Committee (CAC), and Relocation Action Committee (RAC). The overall function of these committees was to see to it that the project ran smoothly, and that members of the community were involved in the project by way of representation through these committees.

Of critical importance as far as public participation is concerned, is the institutional framework and communication structures of the project which comprised as follows:

(a) Coordinating Policy Committee (CPC)

This committee, which was responsible for the development of the RAP and all the relocation policies, comprised of the Office of the Premier of the Limpopo Province; Provincial Departments of Agriculture, Land and Environmental Affairs, Housing, Local Government and Traditional Affairs, and Water Affairs; Traditional Authorities (2 Chiefs); Transitional Local Councils (TLCs); and DWAF. It is concerning that the Community Action Community, which comprised mainly of community representatives as will be seen in (ii) below, was not directly represented in the CPC.

(b) Community Action Committee (CAC)

This structure was meant to represent the affected communities at the lowest level and comprised of 52 members. These members included 2 chiefs, 3 TLC councillors, 2 traditional healers, 2 business representatives, 4 representatives from each affected village and 1 representative from Madzivhandila Agricultural College.

All affected members of the public and tribal authorities were represented in the CAC through village representatives who participated in various sub-committees such as Housing, Land and Grazing, Infrastructure, Cultural Affairs and others. The CAC reported to the

Project Steering Committee, and was also represented in this structure through its chairperson, as an attempt to ensure that community members had some form of representation at the highest level of the project structure. If properly utilized, the CAC would have therefore formed a vital communication link between the PSC and affected individuals or communities.

Furthermore, and as alluded to above, the CAC was not directly represented in the CPC, which was responsible for the development of all policy guidelines, procedures and agreements. These policies were embodied in a document called the Relocation Action Plan (the RAP), which contains most of the agreements between DWAF and other stakeholders. It is submitted that failure to have the CAC directly represented in the CPC deprived the entire project of a vital voice from the affected communities.

The omission of the CAC from top communication and governance structures of the project later proved to be a serious mistake, as was to be seen when DWAF ultimately disbanded this critical committee. The disbanding of the CAC will be discussed later in this section.

(c) Relocation Action Committee (RAC)

This committee comprised of 2 chiefs, DWAF, TLCs involved, and the CAC Executive (5 members). The committee was responsible for the following sub-committees: infrastructure, land and grazing, housing and cultural affairs.

(d) Dam Zoning Committee (DZC)

The main function of this structure was to consider issues pertaining to the rezoning and planning activities of the new dam and communicating these to all role players and stakeholders, including affected communities, consultants, tribal authorities, government departments and municipalities.

(e) Project Steering Committee (PSC)

This committee was responsible for the implementation of the RAP. It comprised of 1 representative from the Coordinating Policy Committee, Relocation Action Committee and the Community Action Committee.

(iii) Complaints by Communities

Some members of the above-mentioned communities were not satisfied with some aspects of the relocation process. The grievances largely centred on issues relating to compensation, including unilateral determination of compensation amounts; inadequate or no compensation for loss of production and land rights; insufficient or no compensation for fruit trees in residential yards; no or inadequate compensation for fruit orchards or farms; lack of compensation for yard walls; lack of compensation for relocation expenses; and insufficient or no compensation for symbolic graves or reburial rituals. Other grievances related to poorly constructed houses; leaking roofs and gutters; poorly erected fences or no fences at all; lack of toilet facilities or facilities constructed on wrong sites; insufficient de-bushing or no de-bushing at all; inadequate or no water supply; families not relocated; lack of secure access to the river; wire cattle kraals; and inadequate sport grounds.

Affected members of the community voiced their dissatisfaction through the CAC. However, this structure ceased to function during 2003 when DWAF stopped funding it. The reason DWAF stopped the funding was that it regarded the CAC as partisan and advancing only community interests. The dissolution of the CAC deprived members of the community of a platform to air their grievances. It is for this reason that the affected communities approached the Office of the Public Protector for assistance.

(iv) Investigation and report by Public Protector

During April 2004, the OPP received over 300 complaints from Budeli village, one of the communities affected by the relocation process.[498] Other affected communities followed suit, and by May 2006 the number of individual complaints exceeded 700.[499] These communities had organised themselves into one group, and appointed a leadership comprising of at least one member from each village. This leadership group appointed their own leader who played an active role in organising the affected communities and collecting the complaints and taking them to the office of the Public Protector.

As already indicated above, the complaints related, amongst others, to insufficient or lack of compensation for loss of land; inadequate or no compensation for loss of domestic and

[498] Public Protector report, opcit at 14-42.
[499] Ibid.

commercial fruit trees; lack of dam safety; poor quality houses; lack of toilet facilities; failure to relocate graves; poorly constructed infrastructure; poor communication; and failure to secure traditional medicinal plants.[500] It is important to point out that none of the complaints were about the dam itself. Seemingly complainants were only concerned about poorly managed impacts and relocation processes and inadequate or no compensation.

The OPP investigated the complaints and tried to resolve them through dialogue between DWAF and the affected communities. Although some issues were resolved, for example, payment of outstanding monetary claims, several key complaints remained unresolved. Due to the complex nature of some of the issues, and the length of the time that it was taking to resolve the disputes, the Public Protector decided to embark on a public hearing. The public hearings took place from 9 until 12 May 2006.[501] I have first-hand account on how the hearing unfolded as I was part of the Public Protector's team. The public hearing unfolded as described below.

The public hearing process was conducted in an inquisitorial manner. The Public Protector issued formal subpoenas to all role players that he wanted to participate in the hearings. These role players included community representatives; government officials from national, provincial and local levels; DWAF officials; consultants who worked on the dam; and traditional authorities. Community representatives were called upon to present complaints from their communities; government officials from Departments such as the then Minerals and Energy and Agriculture were invited based on their expertise in areas such as blasting and food production; traditional authorities needed to be present for land ownership and social cohesion; local government officials were needed in regard to spatial planning and land development; social consultants needed to explain the communication and consultative processes that were followed; and BKS was to provide insight into the process of constructing the entire dam as they were responsible for the development of the RAP and its implementation.[502]

Each community representative presented their complaints. Experts from different government departments and other institutions were asked to present on the role that they played throughout the project as well as their future roles. The Public Protector posed

[500] Ibid.
[501] Ibid.
[502] Nandoni SUP, opcit at (i).

questions to all the presenters including community representatives. Representatives of different role players could cross-examine community representatives, whereas the same opportunity was not afforded to community representatives. This was a glaring flaw in the process as community representatives later indicated to the investigating team that they felt like they were before a court of law whereas all they wanted was for the Public Protector to help resolve their complaints.

After oral presentations and examinations, the Public Protector and his team embarked on a site inspection. The team inspected structures which were said to be defective or poorly constructed, such as houses, fences, animal enclosures, water supplies and access roads. Structures such as schools, houses and churches that were said to be too close to the dam water but not relocated or protected were also inspected. In all these instances community representatives were asked to point at the alleged defects, and concerned role players could make their inputs or to respond. Again, this process seemed skewed against the communities.

The public hearing process brought the investigation to finality, and a preliminary report was issued after that. In the report, the OPP made the following key findings:

(a) Dam Safety

In respect of dam safety, the OPP report found that there were no controlled access measures in place to the dam, and that this had led to 16 drowning cases at the time of issuance of the final report in 2009.[503] By October 2015 the number of drowning cases had risen to 37.[504] Although the relocation action plan provided for the creation of safe water points, to provide the affected communities with access to the dam for purposes of bathing, washing, cultural (initiation) and social activities and drinking points for livestock,[505] this was never done and there were no safe points for such activities at the date of issuance of the OPP report.

Furthermore, some homesteads that were not relocated were very close to the dam water,[506] and therefore families were exposed to the danger of water animals such as crocodiles and hippos. There were also reports of crocodiles and hippos that were spotted in residential

[503] Public Protector Report, opcit at 14-42.
[504] Sowetan Live 'Nandoni Dam Claims yet Another Victim' http://www.sowetanlive.co.za/news/2015/10/31/nandoni-dam-claims-yet-an-other-vic... (last accessed 24/10/2017).
[505] Public Protector Report, opcit at 14-42.
[506] Ibid.

areas.[507] Despite these dangers, there were no security measures in place around the dam for the protection of both humans and domestic animals.

During the discussion with the OPP around the safety issue surrounding the dam, DWAF indicated that it was not its responsibility to fence off the dam as proposed by the affected communities. They expressed the view that the responsibility as far as dam safety was concerned was limited to flooding, and that members of the communities would need to take care of themselves, their children and livestock.

The above developments indicate that there is a different interpretation and understanding of what the community expected from DWAF when it comes to dam safety in one hand, and how the Department understood and interpreted its role. This points to a flawed consultative process, as according to the FPIC principle, communities must make informed decisions when consenting to development projects in the territories. Furthermore, the FPIC principle requires that roles between communities and the developer be clearly defined. Clearly, this was not the case in this instance.

(b) Compensation

When it comes to compensation for loss of land, the OPP found that despite several engagements between DWAF and communities, there was no agreement between the two parties on the amount of compensation for loss of land.[508] Initially, engagements between DWAF and affected communities took place in the CAC.[509] When the CAC was disbanded by DWAF affected communities formed their own committee. This is the same committee that took the complaints by communities against DWAF to the OPP.

Despite this disagreement, DWAF proceed unilaterally to implement the amount of R11 000 per hectare.[510] As will be seen below, this approach does not auger with the spirit of the FPIC principle. In any event, the Public Protector indicated that even if there was such an agreement, no monetary compensation would be adequate to sustain the affected communities, more so as the land was their only source of income.[511]

[507] Ibid.
[508] Public Protector Report, opcit at 53-67.
[509] Ibid.
[510] Ibid.
[511] Ibid.

The OPP report further indicated that it was conceded at the public hearing and subsequent meetings during the investigation that alternative land was the only option that would satisfy the needs of the communities for sustainable subsistence.[512] However, according to DWAF no alternative land could be found in the area.[513]

Commercial orchards farmers were only compensated for the loss of land rights, but not for the loss of fruit trees, equipment and loss of production.[514] 'The decision to pay commercial farmers only for the loss of right to land use and not for their actual fruit trees as well as their equipment was unfair,'[515] found the Public Protector. The amounts of monetary compensation were also said to be unreasonable. Just like with cash crops, commercial farmers were also offered R11 000 per hectare for loss of right to land use. Commercial farmers, who were part of the affected communities but farmed for commercial purposes as opposed to subsistence farming, objected to being compensated on the same scale as those who used land for subsistence cash crops.[516] DWAF never entertained this concern and proceeded to implement payment according to this scale. Again, this type of heavy-handedness posed problems later as the farmers continued to object.

The Public Protector also found that DWAF did not pay compensation for domestic fruit trees to some claimants; and in some instances, claimants were under-compensated.[517] To compound matters, in all affected villages there were certain individuals who were not paid monetary compensation at all for their loss of land rights.[518]

The fact that there was a problem with the principled basis upon which different kinds of compensation were determined, as well as disagreement on the amount of compensation, re-emphasizes the flawed nature of the consultative process. One can deduce from this that there was no genuine effort from DWAF to obtain consent in the FPIC sense from affected communities. This problem is compounded by the fact that despite serious disagreements over these issues DWAF went ahead and implemented the compensation structure.

[512] Ibid.
[513] Ibid.
[514] Ibid.
[515] Public Protector Report, opcit at 56.
[516] Ibid.
[517] Public Protector Report, opcit at 53-67.
[518] Ibid.

(c) Infrastructure

Relating to infrastructure, the OPP findings were to the effect that DWAF fell short of carrying out the project as agreed with the communities.[519] This, I opine, led to a state of mistrust and tension which would persist until this very day.

In summary, the report found that 29 houses had defects that required attention from DWAF; there were 11 cases at Mulenzhe village and 2 at Budeli village where monetary payments for *maguvha* (mud yard walls) were still outstanding; some families were not provided with toilets (latrines) at all while in other instances the construction of the toilets were left unfinished; some new stands were not de-bushed or cleared of trees, shrubs, excess soil, termite hills and boulders; no water taps were installed in the residential sites as allegedly undertaken by DWAF; domestic animals' enclosures were replaced or compensation paid; DWAF failed to provide some homesteads with quality fences, and in some instances, no fences were provided at all, whereas in others fences were not completed; except at Mutoti village, DWAF failed to facilitate the electrification of the new residential areas by ESKOM as agreed; DWAF failed to relocate some of the graves; medicinal plants were transplanted, but died out for lack of care; DWAF did not make proper arrangements for a proper nursery when the plants were transplanted; the ritual structure for the Mphego Head kraal was not rebuilt or compensated for; and no compensation was paid for 2 boreholes at Mutoti village.[520]

In its report the OPP recommended that all the defects identified above should be attended to by DWAF within a reasonable time and a progress report be submitted after 6 months.[521] Of critical importance, the interim report recommended the formation of an inclusive complaints resolution committee (CRC) that would be tasked to implement the findings of the public protector.[522] If one was to interpret this recommendation by the Public Protector in accordance with the FPIC principle, it relates to the need to establish a relationship between the authorities, private operators or consultants and communities to address and remedy the defects identified in the report.

[519] Ibid.
[520] Ibid.
[521] Ibid.
[522] Office of the Public Protector, Nandoni Dam Interim Report, June 2006 at 51.

(v) Community Frustration with the Process

All outstanding monetary compensations and the relocation of graves were finalised during the investigation by the OPP. However, issues relating to amount of monetary compensation, commercial orchards, infrastructure, dam safety, cultural and medicinal plants are still outstanding to this day. As pointed out above, once the CAC was disbanded by DWAF communities had no other forum through which to air their grievances or to engage with the authorities concerning their dissatisfactions.

Residents of Budeli village, which is one of the relocated villages and settled very close to the Nandoni dam, as well as other adjacent communities have engaged in several protests, barricading roads and burning tyres as they complain about lack of water in the new location (as even the street taps were often dry) and lack of dam security as many locals have drowned in the dam.[523] One of the most violent protests was in November 2014 when Budeli and Dumasi residents completely closed the roads to the Kruger National Park and Malamulele Township. [524] 'The communities will not stop this protest until service delivery is served' – vowed a civic leader from Budeli village.[525]

I submit that the frustration by communities stems from a flawed consultative process. The disbanding of the CAC shows the extent to which DWAF was prepared to go to impose its will on the affected communities. It also points to the fact that the establishment of the consultative or communication structures by DWAF was nothing but a charade to conceal the actual intention which was to control the communities. Hence immediately when the CAC did not serve this purpose it was immediately disbanded, leaving affected communities without direction and nowhere to express their frustration.

(d) Applicable Legislation

As the legislative framework has already been discussed in detail in chapter 5 of this thesis, the focus in this section will be on the actual consultative or participatory process envisaged in various pieces of legislation and laws. Therefore, the purpose of this section will be two-fold: the identification of the legislation that was applicable at the time of the project; and

[523] Ibid.
[524] Sowetanlive *Turbulence Resurfaces Around Nandoni –Waterless Residents Go on the Rampage* http://www.sowetolive.co.za/news/2014/11/08/turbulance-resurfaces-around-nandon... (last accessed 15/03/2018).
[525] Ibid.

how that legislation framed public participation and the FPIC process in general. The following Acts will be discussed: Local Government land management legislation, environmental management legislation and water management legislation.

(i) Local Government Land Management Legislation

As pointed out above, under the banner of 'empowerment', the RAP emphasises the role of community or public participation in the construction of Nandoni dam. As already discussed, the Constitution also places a premium on public participation in decision-making by communities in development matters that affect them. The same constitution places the responsibility of community development upon the shoulders of local government.[526]

As discussed in the preceding section, several enabling Acts of Parliament have been enacted to fulfil constitutional mandate of local government regarding development. These Acts include the Development Facilitation Act (DFA), Municipal Structures Act, Local Government Municipal Systems Act and Spatial Planning and Land Use Management Act. The DFA was in existence at the inception of the Nandoni dam project as it was enacted in 1995 and the project commenced in 1998. This Act emphasised the requirement for communities to be consulted and to participate in the decision-making processes in all development matters that affect them.

The Municipal Structures Act and the Municipal Systems Act came into effect immediately after the commencement of the project, that in 1999 and 2000 respectively. They both emphasise the right of affected communities to be consulted and to participate in developmental project in their areas. Although the two Acts did not exist at the inception and commencement of the project, they were still applicable at the implementation stage of the project, and therefore their FPIC-related requirements should have been considered by the developers. For its part, SPLUMA only came into effect in 2013, after Nandoni dam was completed, and repealed the DFA.

(ii) Environment Management Legislation

The leading environmental management legal framework is the National Environment Management Act, 1998 (NEMA). This Act has been discussed in detail in the preceding

[526] Sec 152 of the South African Constitution, 1996.

chapter. Suffice to say however, that NEMA strongly emphasizes the role of public participation in environmental governance. This Act was promulgated in the same year that the Nandoni dam project commenced, and therefore its provision were fully applicable, at least during the implementation stage of the project.

Environmental impact assessments were conducted for Mulenzhe, Budeli and Tshilungoma villages.[527] Affected members of these communities participated in the process by way of interviews. The aim of the interviews was solely to determine the suitability of the area to which the affected families were to be relocated, and not to seek consent. In my view, DWAF should have used this opportunity to educate the public about environmental management, and to develop structures that would involve communities in environmental governance and management.

Again, public participation in these environmental assessments should not be confused with pre-project public participation seeking consent from affected communities for the project to proceed. There is no record that pre-project public participation exercise was conducted in the Nandoni dam project.

(iii) Water Management Legislation

As highlighted in chapter 5, the main pieces of legislation dealing with water management in South Africa are the Water Services Act (Act no. 108 of 1997) and National Water Act (Act No. 36 of 1998) and their Regulations. These Acts came about as initiated by the White Paper on National Water Policy for South Africa.[528] The white paper's main objective was to introduce the reform of water laws which would ensure that 'all South Africans gain access to sufficient water to meet basic domestic needs.'[529]

The two Acts were promulgated in 1997 and 1998 respectively, and therefore could have been applicable during the inception and implementation of the Nandoni dam project. However, as it was fully alluded to in chapter 5 of this thesis, the South African water legislation concentrates more on water management and say very little about public participation and engagement. It was also pointed out that the consultative processes set out

[527] Annexures 7-9 of Nandoni Dam RAP.
[528] Published by DWAF, April 1997.
[529] White Paper on National Water Policy for South Africa, para 2.1.8.

in the two Acts, which simply require the public to comment within a certain period before approval of a project is granted, falls short of the principle and spirit of FPIC.

It is interesting to note, however, that the Nandoni dam RAP prioritises public participation and consultation, and created structures to meet these objectives. Ironically, DWAF went on to suppress the same structures that it created to promote public participation, such as the CAC.

(e) Application of the FPIC Principle to the Nandoni Dam Project

Based on the RAP, the principles guiding the construction of the dam were quite noble. The overarching principle was that the people who had been forced to relocate to make way for the dam should not be worse off than they were before the project.[530] Other principles, which essentially relate to participatory democracy, included the following: equity among individuals; reasonableness; openness and transparency; and inclusivity.[531]

The above principles are generally in line with the letter and spirit of FPIC, and a closer scrutiny is necessary to establish if indeed this is the case. To achieve this objective, four factors that are relevant to FPIC have been identified for a detailed deliberation, namely participation, improvement in quality of life, equity, and sustainability.

As for participation, Mr Ronnie Kasrils MP, the then Minister of Water Affairs, once stated as follows: 'You need to remember that there are never easy answers to the questions posed, but with proposals for large dams, there can only ever be trade-offs with both positive and negative consequences. That is why the broadest possible participation is essential when engaging in the decision-making process.'[532] Stein equates the National Water Act, 36 of 1998 with the sentiments expressed by the World Dams Commission which 'recognizes that in the past, many groups did not have an opportunity to participate in decisions that imply

[530] Compare this requirement to Towle's assertion that development is "an instrument to improve quality of life and standards of living, and fundamentally refers to the reduction of poverty." KL Towle *Towards a Broader Understanding of Development in South Africa,* Thesis submitted to the Faculty of Arts at Wits University for a Masters of Arts Degree in Development Studies (2004) at 2.

[531] UN Environmental Programme Dams and Development Project Secretariat 'IAIAsa Premium Award for the Nandoni Dam Relocation Project' http://www.unep.org/dams/documents/ell.asp?story-id=129 (last accessed 08 August 2011).

[532] Robyn Steyn 'South Africa's Water and Dam Safety Legislation: A Commentary and Analysis on the Impact of the World Commission on Dams Report, Dams and Development' (2001) American University International Law Review 16(6) at 1590.

major risks for their lives and livelihoods. In the past, these groups were denied a stake in the development decision-making process commensurate with their exposure to the risk.'[533]

Considering the structural framework and the communication design in the Nandoni RAP, the project contains some elements of the FPIC principle, at least in theory. However, if the report of the Public Protector is anything to go by, the Nandoni dam project did not do well in implementing its own policies and guiding principles in this regard. This is the case because, for example, a structure like the CAC which represented the people on the ground was not allowed to function independently. When this structure was deemed not to fulfil the wishes of DWAF, it was immediately disbanded. Allowing the CAC and other community-based structures to function independently would have advanced the requirements of participatory democracy in that communities would have been able to express their aspirations to the fullest.

Furthermore, considering the way that affected communities were represented in the RAP committees, there is very little chance, if any, that these communities could genuinely influence policy in the relocation process. The pyramid-like governance structure of the Nandoni dam project confined most community representatives to the lowest level, which is the CAC that had 52 members. The number of representatives drastically declined when it came to the structures in the upper echelon of the ladder. For example, only 5 members of the CAC sat in the RAC, and none in the CPC and PSC. The CPC and the PSC were policy and decision making structures and community representation at that level was paltry and almost non-effective.

Drawing from chapter 2 of this thesis, some of the core values of stakeholder participation are that

> stakeholders have a say in decisions about actions that affect their lives; stakeholders' contributions genuinely influence decisions; sustainable decisions are achieved by meeting the needs of all participants…; the involvement of those potentially affected is sought out and facilitated; participates are involved in defining how they participate; stakeholders are

[533] Ibid.

provided with the information so they can participate; and stakeholders are informed how their input influenced the decision as a result of their participation in the process.[534]

The above values of stakeholder participation are in line with the FPIC principle and are to ensure that the public is well-informed prior to the obtaining of their consent. It is apparent that the principles alluded to above were not applied in the Nandoni dam project. In fact, stakeholder management problems in Nandoni dam started at the planning stage. There were disagreements on fundamental issues which DWAF and BKS (the consulting agent) failed to resolve such as the families that needed to be relocated, the compensation amounts, relocation of graves, relocation of medicinal plants, cultural and safety issues.

To make matters worse, DWAF dissolved the CAC which was the only liaising structure between the Department and the community. By dissolving this structure, DWAF effectively destroyed a participation platform for the community, resulting in the turmoil that followed in the form of protests, which at times were violent. The community went to an extent of cutting all ties with the social consultant who was hired by BKS – an engineering consulting company which was procured by DWAF to construct the dam.

The second issue to consider is the improvement in the quality of life of the people who were relocated to make way for Nandoni dam. As discussed in detail in chapter 3 of this thesis, improved quality of life refers to the fulfilment of basic human socio-economic needs.

As already pointed out, the overarching principle for the relocation process in the Nandoni dam project was that affected people would not be worse off than they were before relocation. It cannot be said that this objective was achieved, because when one considers the outcome of the investigation by the Public Protector and persistent community protests for basic services, it is apparent that although on paper the construction of Nandoni dam promised to improve the quality of life for the affected communities, the way the project was executed left these communities frustrated and feeling short-changed.

Closely related to the issue of improvement in life quality is equity in the form of compensation to the relocated people. The people affected by the relocation due to the construction of Nandoni dam were compensated by way of building them new houses, replanting of fruit and medicinal plants (although these died out immediately after planting),

[534] UNEP Dams and Development Project 'Dams and Development: Relevant Practices for Improved Decision-making' (2007) at 34.

as well as monetary payment for loss of land rights, fruit trees, graves and some infrastructure. All types of compensation were characterised by disputes.

The main problem with the Nandoni project is that compensation focussed mainly on cash and in-kind payment such as the building of new houses and replacement of fruit trees and lost assets. Although monetary and in-kind compensation is important, there are other compensatory mechanisms which can lead to long-term development and sustenance. These mechanisms include non-monetary benefit-sharing schemes such as community development projects (clinics, schools, electrification, roads maintenance, meeting places, etc.); as well as monetary benefit-sharing schemes such as equity sharing, revenue sharing, development funds, access to financial services, and so forth. Unfortunately, all these other options were not exercised in the Nandoni project.

One study assessed the socio-economic benefits yielded by Nandoni dam as follows:

> Nandoni Dam was constructed amidst much fanfare regarding the social and economic benefits that would accrue to the local communities. Although not specifically stated, tourism was implied, which could lead to employment and the general upliftment of these communities. The potential of tourism enterprises, such as camping, picnics, sport, water recreation, and environmental conservation, were envisaged by persons living near the dam. However, very little has materialized, not even the provision of roads, electricity and water infrastructure.[535]

In his report the Public Protector emphasised the fact that no amount of monetary payment could sufficiently compensate for the loss of affected communities' livelihoods. Instead of opting for once-off solutions, the government should have sought and explored long term sustainable solutions in the form of benefit-sharing schemes mentioned above, as well as others.

Lastly, to be successful, a development project, such as the Nandoni dam, must be sustainable. As seen in chapter 2 of this research assignment, sustainable development can roughly be defined as taking care of the present human developmental needs and at the same time preserving the ability and opportunities of future generations to meet their own needs.

[535] P. Manavhele & JP Spencer 'Assessment of the Potential for Sustainable Community Tourism Development: A Study at the Nandoni Dam in Limpopo Province, South Africa' (2012) African Journals Online 18(3) at 1. http://reference.sabinet.co.za/print_document (accessed 16/03/2016).

Parlak argues that there is a need to link dam sustainability and the key concepts of sustainable development, which he lists as follows:

> human centred development; the decrease or elimination of poverty; building trust and rendering people 'able'; democracy: participation of the public, improvement of NGOs, governance etc.; social justice; a development that does not harm the quality of environment or protects natural resources; justice in the inter-governmental distribution; and putting together economy with ecology at the decisions at every level.[536]

The above assertion places the issue of sustainable development at the centre of human development, and considering the above discussion on Nandoni dam project in relation to participation, quality of life and equity the sustainability of the projects as far as human development is concerned cannot be ascertained. Stein points out that 'dams are only a means to an end and the 'end' that any project achieves must be the sustainable improvement of human welfare (i.e. significant advance of human development on the basis that it is equitable and sustainable).'[537] Therefore the dam may succeed in pumping out gallons of water for domestic and agricultural use throughout the Vhembe and Mopani districts, but if the communities and people affected by the relocation have reaped only perpetual poverty and misery, then the project cannot be defined as sustainable. This is more so when it comes to inter-generational equity, as the main purpose for sustainable development is to use the land in a way that it would be preserved to meet the needs of future generations.

(f) Conclusion

To conclude, I will succinctly reflect on the key elements of the FPIC principle as discussed in chapter 2 of this research project and the Ga-Pila case study above. These elements are "free", "prior", "informed" and "consent". The reason for this exercise is to attempt and establish how the Nandoni dam project has fared in incorporating the FPIC elements during all the phases of the project, that is, from the conceptualisation (initiation) to the finalisation stage.

[536] Palark opcit at 291.
[537] Stein opcit at 1575.

(i) 'Free' Consent

Although there is no evidence that affected communities in the Nandoni project were manipulated to consent to the construction of the dam in their area, they were nonetheless promised fair monetary compensation, improved infrastructure and economic opportunities. All these promises never took place to the satisfaction of the beneficiaries. There were disputes about paltry cash payments, poorly-built houses and poorly-constructed infrastructure. In certain cases, individuals complained about non-payment of monetary compensation, or the infrastructure that was not provided as undertaken.

The fact that Nandoni communities have embarked on several protests citing non-fulfilment of undertakings by DWAF and claiming that they were short-changed, can be interpreted as indicating that their consent was not entirely free. Simply put, if communities had known that the situation would end up worse off than before the project started, they would have not consented to the project taking place.

(ii) "Prior" Consent

As seen in chapter 2, consent from affected communities needs to be secured by the developer through a meaningful consultative and negotiated process. Such consent must be obtained prior to any approval by the developer for the project to take place, or any commencement of the activities relating to the project. Unfortunately, there is very little evidence indicating engagement between the affected communities and DWAF prior to the commencement of the project.

However, the RAP does hint to some consultations with affected communities during pre-feasibility studies, stating that 'when clarity was obtained concerning development proposals the directly affected communities were included in the consultative and planning procedures to confirm the feasibility of development proposals.'[538] The RAP also states that the need to relocate households to make way for the dam was discussed with chiefs, territorial councils and communities during the feasibility studies. The document concludes by indicating that

[538] Nandoni Dam RAP, opcit at 3.

'the directly affected communities recorded their positive support for the development proposals in reports to the PSC.'[539]

The above-mentioned processes seem to have taken place after the decision to construct the dam was already taken by DWAF. In fact, the RAP indicates that the feasibility studies took place after DWAF had already decided to construct the dam.[540] There is no indication that DWAF did have any consultation with communities before this time. Therefore, it is difficult to conclude that DWAF complied with this element of the FPIC principle.

(iii) "Informed" Consent

Informed consent involves competency or capacity to make decisions and understanding the information regarding the project as a whole. Therefore, an informed community is a community that has been empowered to make its own decisions. This is a community which can say "yes" or "no" to a particular proposal without undue influence from the developers or their agencies or the elite in the communities who stand to gain if the projects go ahead. The capacity to make an informed choice comes through empowerment, which comes through a deliberate effort to develop community members to a level that they can effectively engage in public discourse and possess the ability to exercise political judgment.

There is no evidence that the exercise to empower Nandoni communities to make informed choices ever took place. All the meetings were just information sessions to inform them about the benefits that would accrue to them when the project started to operate. It cannot be said that DWAF consulted with these communities to capacitate them to either give or withhold their consent. Again, DWAF cannot be said to have complied with this element of the FPIC principle.

Nevertheless, as compared to the first case study, Anglo Platinum's Ga-Pila project, Nandoni dam project has shown significant strides as far as public participation is concerned. Public participation policies were created and formed part of the RAP, even though they were not fully implemented. According to my knowledge, Nandoni Dam was the first major government project in South Africa to have a relocation action plan that sought public

[539] Nandoni Dam RAP, opcit at 4.
[540] Ibid.

participation in its implementation of the relocation process. The SUP, although implemented late into the process, was produced after affected communities were widely consulted, and it can be argued that the final product was a result of a community engagement process. Therefore, although the project was nowhere near the full implementation of FPIC, the steps taken in compiling both the RAP and the SUP reflect the spirit of that principle.

Referring to the grid in table 5 above, the most prominent challenge that prevailed in the Nandoni project is that of representation. As we have seen in the section dealing with the consultative process above, communities were not adequately represented in the Nandoni project structures. The situation got so bad that even the CAC, which comprised of communities on the ground, was disbanded by DWAF and BKS. There is also no evidence of pre-project consultation with affected communities. Although affected communities were invited to participate in the development of policies, this was after the decision to construct the dam was already taken. This presupposes a pre-determined project as appears in table 5. It is important to note that unlike in the Ga-Pila project, there was no issue of competing interests amongst affected communities in the Nandoni project.

(iv) Consent

With reference from the table above, consent in the FPIC sense is about affected communities deciding whether to grant or withhold approval for a development project taking place in their lands. Furthermore, only a community which has the capacity to make such a decision can genuinely make a choice in this regard.

For its part, DWAF attempted to involve the affected communities at an early stage, including the development of relocation policies and including them in consultative and communication structures of the Nandoni project. However, there is no evidence of any pre-project consultation with communities. This makes it impossible to determine if the communities' consent was sought before the decision to come up with the project was taken. Although considerable efforts were made to involve the communities in most the activities of the project at the implementation stage of the project, these efforts were not made to seek consent from the communities for the project to go ahead, but to facilitate the smooth implementation of the project.

5.2.3 Vele Colliery – Mapungubwe Mining Project[541]

(a) Introduction

Vele Colliery, popularly known as Mapungubwe mining project, is situated approximately 80 kilometres to the north-western side of Musina, and about 180 kilometres from Makhado (Louis Trichardt) in the Vhembe District of Limpopo Province.[542] The project is a mere 7 kilometres away from the Mapungubwe National Park, which is a world heritage site.[543] Figure 6 below shows Vele Colliery locality map.

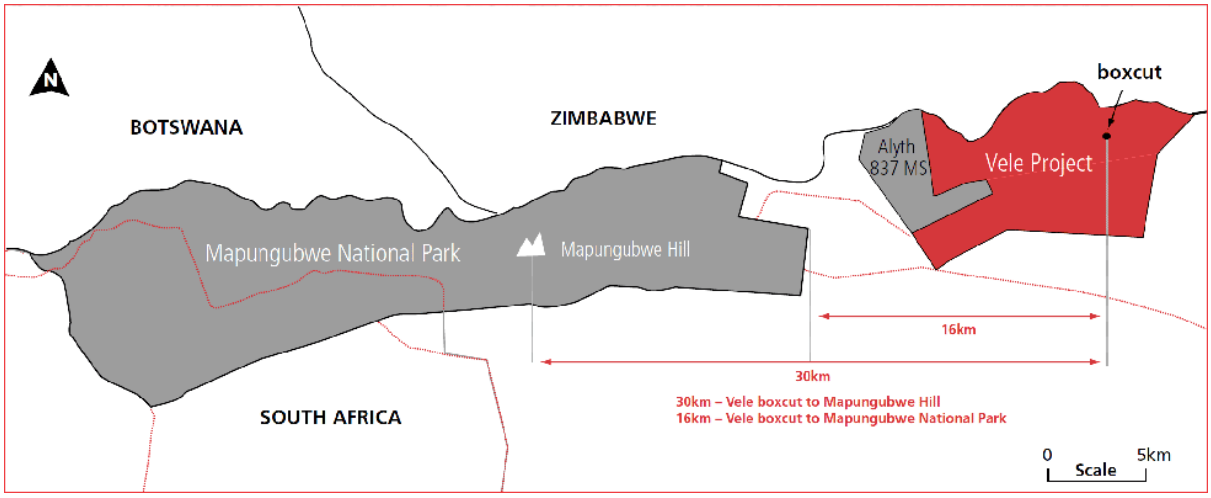


Figure 6: Vele Colliery Locality Map[544]

Mapungubwe World Heritage Site (Mapungubwe) is an Iron Age site which is said to have been the centre of the Mapungubwe pre-colonial kingdom that existed between 1075 and 1220 AD.[545] It is situated in the confluence of the Shashe and Limpopo rivers in the far north of the Limpopo Province, and was declared a botanical reserve in 1922, discovered as an archaeological site in 1932, was declared a national monument in the 1980s and gained a

[541] Main sources: Vele Colliery Project Environmental Management Programme, May 2009, Jacana Environmentals cc; Vele Colliery Participation Report, May 2009, Naledi Development Restructured (Pty) Ltd; 'Vele Profile' Coal of Africa 22 November 2016; 'Changing Corporate Behaviour: the Mapungubwe Case Study' Centre for Applied Legal Studies February 2014; 'Makhado Profile' Coal of Africa 21 November 2016; Makhado Mail Launch Issue 1 Coal of Africa September 2016; Makhado Mail issue 2 Coal of Africa December 2015.
[542] CoAL 'Vele Profile' 22 November 2016 at 3.
[543] Peace Parks Foundation 'Greater Mapungubwe' www.peaceparks.co.za/news.php?pid=1097&mid=843&lid=103 (last accessed 15/03/2018)
[544] Coal of Africa Limited 'Vele Operations' 2016. www.coalofafrica.com/our-business/operation-vele (last accessed 09/10/2017).
[545] South African History Online 'Mapungubwe' http://www.sahistory.org.za/article/mapungubwe (last accessed 28/10/2017).

South African National Park status in 1995.[546] In July 2003 Mapungubwe was declared a World Heritage Site by the United Nations Education, Scientific and Cultural Organization (UNESCO).[547] Mapungubwe forms part of the Mapungubwe National Park and Heritage Site which in turn forms part of the Greater Mapungubwe Trans-Frontier Conservation Area which includes the Tuli Block (Botswana) and the Tuli Safari Area (Zimbabwe).[548] Figure 7 below illustrates the Mapungubwe Trans-Frontier Conservation Area.



Figure 7: Mapungubwe Trans-Frontier Conservation Area Map[549]

Mapungubwe National Park and Heritage site is rich in flora and fauna. Sandstone formations, riverine forests, mopane woodlands and baobab trees form part of the site. This is complemented by a variety of wildlife in the form of elephants, giraffes, white rhinos, lions,

[546] Ibid.
[547] UNESCO 'Mapungubwe Cultural Landscape' http://whc.unesco.org/en/list/1099 (last accessed 07/06/2017).
[548] South African National Parks 'Mapungubwe National Park' https://www.sanparks.org/park/mapungubwe/ (last accessed 15/03/2018).
[549] South African National Parks 'Mapungubwe National Park' 2004-2017. https://www.sanparks.org/parks/mapungubwe/tourism/map.php (last accessed 09/10/2017).

leopards, hyenas, gemsbok, elands as well as birds such as the kuris, bustards, tropical booboos and pel's fishing owls.[550]

Mapungubwe National Park and Heritage Site was opened to the public in September 2004,[551] ushering in eco-tourism and cultural travel prospects which will economically benefit the Limpopo Province and its population. As Caruthers has stated, "Mapungubwe holds the promise of a considerable practical benefit for expanding the tourism industry and the accompanying developmental infrastructure into the Limpopo valley."[552] The author continues and indicates that 'it is inherent in modern heritage sites to become major sources of employment and revenue alike.'[553]

Mapungubwe's world heritage status has enhanced the image and profile of Limpopo Province. The Order of Mapungubwe, the highest national decorative honour that recognizes excellence in science and creativity, is named after this site.[554] Other major eco-tourism programmes inspired by Mapungubwe include Mapungubwe Tourism Initiative and the Mapungubwe Arts Festival.[555]

In March 2010, Coal of Africa Limited (CoAL), an Australian-owned company, obtained a mining right for its Vele Colliery subsidiary to mine coal next to the Mapungubwe National Park, and just 7 kilometres from the world heritage site.[556] The right was granted by the Department of Mineral Resources (DMR) on 29 January 2010 and its validity period runs from March 2010 until March 2040.[557] After the granting of this right CoAL managed to acquire several rights which would allow it to commence with the mining activities, namely the integrated water use licence which was granted by the Department of Water and Sanitation (DWS) running from March 2011 to March 2016; and the section 24G NEMA

[550] Ibid.
[551] Brand South Africa 'Mapungubwe National Park' https://www.brandsouthafrica.com/tourism-south-sfrics/travel/cultural/mapungubwe-nationalpark (last accessed 15/03/2018).
[552] Jane Caruthers *Mapungubwe: A Historical and Contemporary Analysis of a World Heritage Cultural Landscape* (200) Koedoe 49(1) at 3.
[553] Ibid.
[554] Department of Arts and Culture 'The Order of Mapungubwe' www.dac.gov.za/order-mapungubwe>documents (last accessed 28/10/2017)
[555] Ibid.
[556] Coal of Africa 'Vele Profile' 22 November 2016 at 5.
[557] CoAL 'Vele Profile' 22 November at 2-6.

rectification issued by the Department of Environmental Affairs (DEA).[558] The actual mining operations commenced in January 2012 and lasted until June 2013.[559]

As indicated in the introduction of this case study in chapter 1 of this research project, the move to commence with the mining activities was vehemently opposed by various stakeholders, including environmentalists and local communities that had historical connections to the area. The environmentalists were represented by the Mapungubwe Action Group which consisted of the Endangered Wild Life Trust, the Association of Southern African Professional Archaeologists, Peace Parks Foundation, WWF, Bird Life of Southern Africa and the Wilderness Foundation of South Africa.[560] The Mapungubwe Action Group's main concern was that mining at Mapungubwe would have negative impacts ecologically, archaeologically and culturally.[561] In addition, indigenous communities who are the custodians of cultural and religious rites in the Mapungubwe, and are also land claimants in the area, were not consulted before the mining right was issued to obtain their consent.[562]

The stakeholders were also concerned about the usage of water in the area for mining activities. The mining company was accused of using the water for its mining activities without obtaining a water use licence from the Government.[563] In fact, the Government had initially turned down the application by the mining company to conduct mining in the area.[564] One of the reasons for turning down this application was that the company did not follow the correct procedures, and had failed to consult with the relevant stakeholders.[565] The Government later turned around and approved the application and fined the mining company about R9 million.[566] It needs to be noted that at the commencement of its operations in 2010 Vele Colliery operated without a water use licence.[567] The company was also penalised for

[558] Ibid.
[559] Ibid.
[560] http://mg.co.za/article/2010-08-05-mapungubwe-action-group-take-aim-at-mining-firm (accessed 13/10/2012).
[561] Ibid.
[562] http://www.iol.co.za/thestar/mapungubwe-mining-an-affront-to-ancestors-1.1110801 (accessed 08/08/2011).
[563] https://www.savemapungubwe.org.za/appeal.php (last accessed 13/10/2012).
[564] http://www.news24.com/printArticle.aspx?iframe&aid=66c14ca0-5ed2-44f2-9df3-95 (last accessed 13/10/2012).
[565] http://www.savemapungubwe.org.za/appeal.php (last accessed 13/10/2013).
[566] http://www.fin24.com/Companies/Mining/Mapungubwe-mine-still-under-fire-201111 (accessed 13/10/2012).
[567] http://www.news24.com/SouthAfrica/News/Mine-could-destroy-mapungubwe-20100 (accessed 08/08/2011).

clearing a huge tract of protected indigenous vegetation without a requisite permit to make way for its mining operations.[568]

The main stakeholders in the area are farmers, farmer workers, environmentalists, the Kruger National Park and land claimants in terms of the government's restoration of land rights programme. The affected stakeholders, led by the Action Group, went to the extent of taking government and the mining company to court in order to interdict CoAL from continuing with mine construction activities while the appeal was still pending.[569]

(b) Contribution to Poverty Alleviation and Reduction of Inequality

Taking into consideration the cultural, economic and environmental value of the Mapungubwe national park, as well as the potential economic value of mining in the area, ideally Vele Colliery should offer a lot of prospects as far as development is concerned. This would in turn lead to the eradication of poverty and inequality. As already established in the preceding chapters as well as the above section in this chapter, development projects, of which mining is one of them, ought to bring about jobs and employment opportunities; infrastructural development in the form of sewage systems, piped water, electricity and roads; as well as socio-economic facilities such as schools and hospitals.

The initial plan was for Vele Colliery to employ 2600 workers between 2009 and 2011, including 100 full-time and 2500 contract staff.[570] The Vele Colliery environmental management programme (EMP) breaks down the project's employment projections as follows: during the construction phase which will extend for a period of 3 years, contractor labour was expected to reach 2500 with most employees drawn from the local area, with indirect employment opportunities amounting to 13 642; 826 permanent workers would be employed during the operational phase, directly impacting on the livelihood of about 1495 people; 32908 indirect opportunities would be created during the operational phase; and the mine closure operation was expected to provide employment for between 250 and 826 people over a five-year period, following the end of mining activities in the project.[571]

[568] Ibid.
[569] Ibid.
[570] Mining Technology. www.mining-technology.com/projects/vele_colliery_project/ (last accessed 15/03/2018).
[571] Vele Colliery Project Environmental Management Programme (EMP) at 3.

In addition to providing employment opportunities to locals, it was also estimated that Vele Colliery would contribute R1.8 billion to the South African Gross Domestic Product (GDP) during the three-year construction phase; R7.6 billion per annum to the South African GDP during the operational phase, R4.9 billion of which would go straight to the GDP of Limpopo Province.[572] The EPM also indicates as follows:

> The impact of the construction phase on Capital formation is forecasted to amount to R4.8 billion in South Africa of which 46% is expected to be created in the Limpopo Province. In addition, the impact of the Operational phase on Capital formation is forecasted to amount to R14.5 billion per annum in South Africa with 51% of that amount in the Limpopo Province.[573]

The Broad-Based Black Economic Empowerment programme of Vele Colliery also looked very impressive. In 2009 Eyesizwe Coal (Pty) Ltd held 20% shares, Shangoni Management Services 6% and Coal of Africa held the remaining 74%.[574] It must also be noted that another empowerment company, Mvelaphanda Group, held a 17% stake in Coal of Africa itself; whereas African Management Limited ("AML"), a private equity initiative between Mvelapanda Holdings (Pty) Ltd and Och-Ziff Capital Management Group LLC (New York), held 17.33% shares in CoAL. This figure would increase to 26.29% when AML was issued with 50 million options. Motjoli Resources (Pty) Ltd, a 100% black owned company, held a stake of 1.03% in CoAL.[575]

On the procurement front, CoAL had committed itself to purchasing goods and services from suppliers that are black-owned and managed.[576] In addition, CoAL was certified by Emex as being a Level 8 (more than 30% but less than 40%) contributor,[577] even before the Mvelaphanda group secured a stake in the company.[578]

Therefore, there is no doubt that if the above data and projections is anything to go by, Vele Colliery would significantly contribute to the socio-economic development of the region and

[572] Ibid.
[573] Ibid.
[574] Vele EMP opcit at 4.
[575] Vele EMP at 5.
[576] Vele EMP at 6.
[577] Ibid.
[578] Ibid.

the country. This would indeed go a long way in improving the quality of life in this impoverished region.

However, the above targets were never achieved. By August 2013 Vele Colliery had suspended its operations, and retained only 7 maintenance employees and 31 contractors, out of the 358 staff complement it had before operations ceased.[579] Significantly though, more than 70% of those initially employed were from the local areas, mainly Musina and Alldays.[580]

The suspension of the company's operations was due to non-compliance with certain regulations and failure to reach its operational target.[581] The failure to attain its production target led the company to realign its operations, including resorting to underground mining and not limiting itself only to open cast mining as was previously the strategy.[582]

Unfortunately, the turnaround strategy got to a very slow start, although there is evidence that some of the compliance issues that got the company into trouble in the first place are being sorted out. The mine has not yet resumed with its operations to date, although there are indications that compliance issues that led to the suspension of the operations have largely been addressed.[583]

It is important to note that some major woes that befell Vele Colliery and led to the suspension of its operations stemmed from lack of proper engagement and co-operation with its major stakeholders. At some stage the mine was operating without a water use licence and went on to clear large portions of indigenous vegetation without permission to do so from the relevant authorities. This was contrary to the mine's approved environmental management plan, and led to a collision course with both government and environmental activists.

The above action by the mine was also contrary to the principles of sustainable development which features prominently in FPIC. Sustainable development envisages that the exploitation of natural resources in the affected area would lead to long-lasting economic development and that such resources will be preserved for future generations. In the long run, sustainable

[579] CoAL 'Vele Profile' 22 November 2016 at 2.
[580] Ibid.
[581] Coal of Africa Limited 'CoAL Profile' 22 November 2016 at 39.
[582] Ibid.
[583] CoAL 'Vele Profile' 22 November 2016 at 3.

use and management of natural resources leads to alleviation of poverty and reduction of inequality.

Furthermore, it must be borne in mind that Mapungubwe National Park was founded on scientific and ecological principles.[584] As one stakeholder accurately pointed out, "once water has been used up, it cannot be recreated; once the dust and the noise have affected the agricultural farms, their business cannot be revived. Once heritage sites have been destroyed, they cannot be recreated."[585] Indeed proper and meaningful communication and engagement with stakeholders, especially the indigenous occupiers of the land, go a long way in the preservation and sustainable utilization of the natural resources on the land.

Another important factor to note is that the entire area upon which the mine operates is claimed by previous occupiers under the government's land rights restitution programme, including the Machete, Tshivhula and Dongola clans.[586] This group needs to be recognised and be compensated. So far there is no proof that land rights claimants who were dispossessed of their land by the erstwhile government in the first half of the 20th century were ever taken into consideration by CoAL when the company embarked on the project. Adequate compensation for claimants would contribute significantly to the alleviation of poverty within the dispossessed community.

Despite all its troubles, CoAL has continuously managed to contribute to the economic development of the community within which it operates. It has managed to do this through its social and labour plan which the company sees as 'as a key driver for socio-economic transformation, as it seeks to create jobs, enable SMME and enterprise development, and create meaningful and sustainable economic opportunities outside of the mining operation.'[587] On the first five years of its social labour plan the company points out that its bursary fund produced 35 graduates in the fields of finance, environmental science, geology and engineering at the cost of R11 million; invested R1 million in the Musina Agricultural Youth Project; adopted Renaissance Secondary School in Musina; invested R6.5 million for

[584] http://www.asapa.org.za/index.php/news/entry/asapa_response_to_mining_in_mapun (last accessed 13/10/2012).
[585] 'Mining Threatens Mapungubwe Heritage Site' http://thegreentimes.co.za/mining-threatens-mapungubwe-heritage-site (last accessed 10/04/2016).
[586] This information was gleaned from the files in the Limpopo Land Claims office.
[587] CoAL 'Vele Profile' November 2016 at 10.

the school's renovations and upgrading; and R4 million invested in the Musina Municipality's project.[588]

From its inception in 2009 the Vele Bursary Fund referred to above is said to have produced 41 graduates in the Vhembe District in the fields of engineering, accounting and geology.[589] At the time of writing this thesis there were 7 students at university financed by the bursary fund.[590] The sidewalk project employed 35 Musina residents.[591]

Considering all these community investments, it can be concluded that Vele Colliery contributed, albeit to a limited extent, in the alleviation of poverty and reduction of inequality in the Vhembe District and more particularly in the Musina Municipality where it operates. The company has done this despite its trying circumstances, and hardly in operation due to regulatory issues and the slow pace of its turnaround strategy.

(c) Consultative process followed

In this section I will consider and analyse the consultative process which Vele Colliery embarked upon before and after the commencement of mining operations. The focus will be on the availability or otherwise of a structured consultative process, and the effectiveness of such process. Vele Colliery's public participation report, which was produced in terms of the EMP, provides useful insight on how the consultative process unfolded, until the commencement of operations at the mine.

According to its EMP, Coal of Africa has had a very comprehensive stakeholder management processes from the beginning of the Vele Colliery project. This is substantiated by the company's May 2009 Public Participation Report[592] which details the initial consultative process followed. According to this report, the consultative process unfolded as follows:

The first step was the compiling of the interested and affected parties register after the identification of such parties. The interested and affected parties included national and

[588] Ibid.
[589] Ibid.
[590] Ibid.
[591] Ibid.
[592] The report was prepared by Naledi Development Restructured (NDR) (Pty) Ltd, a consulting company procured by Coal of Africa to conduct its public participation and consultation process.

provincial government authorities; municipalities; land owners (farmers); neighbouring farmers and communities; environmentalists; as well as land claimants.[593]

The next step was the compilation of a background information document. The document provided the justification of the project, and highlighted the requirements and activities to be followed in the execution of the project. The document was distributed to all registered interested and affected parties for their comments from July 2008.[594]

The above process was followed by advertisements and notices on the project. Thirteen advertisements and notices were placed in newspapers and public places from August 2008 to February 2009.[595] The newspapers used were the Zoutpansberger and Limpopo Mirror (which circulate in the entire Vhembe District), as well as the Citizen (which is a national newspaper). Other notices were placed at public places such as Palm Filling Station, Dongola Ranch, Weipi Road T-Junction with Pontdrift road R572, Hannaline Boerdery & Noordgrens Landgoed T-Junction with Weipi road, Noordgrens entrance to Limpopo River boundary road, Musina Civic Centre Building – Cashier notice board, and Musina Post Office – entrance notice board.[596]

Whether the advertisements were adequate and effective or not will be the subject of further discussion below.

Another form of consultation was meetings with interested and affected parties. These meetings took place between 31 July 2008 and 20 November 2008.[597] The interested and affected parties that were consulted and met with included national and provincial departments; municipalities; directly affected land owners and their neighbours; environmentalists and land claimants.

CoAL met with groups of stakeholders separately and at different times. These meetings covered the entire stakeholder spectrum. A meeting held on 28 September 2008 was attended by the following government departments and their agencies: Land Affairs, Minerals and

[593] Vele Colliery EMP at 4-8.
[594] Vele Colliery Public Participation Report, May 2009.
[595] Ibid.
[596] Ibid.
[597] Ibid.

Energy, Housing, Agriculture, Water Affairs; Environmental Affairs; Land Claims Commission, SANPARKS, Limpopo Tourism and Parks and Office of the Premier.[598]

Another meeting was held on 23 January 2009 with the following institutions: Department of Environmental Affairs and Tourism; Limpopo Economic Development, Environment and Tourism; SANPARKS; South African Heritage Resources Agency; the Transfrontier Conservation Area Coordinator; and Peace Parks Foundation. An introductory meeting was held with the Musina Local Municipality and Vhembe District Municipality.[599] The meeting was used to present the Vele Colliery project to the municipalities and for Coal of Africa to get information and recommendations from these municipalities relating to the upcoming project. The information gathered from these two institutions would also be used by the company in the compilation of a social labour plan.

Several meetings were also held with land owners or directly affected farmers.[600] CoAL also met with neighbouring farmers, who were likely to be affected indirectly by mining operations, and encouraged them to raise their concerns.[601] Again, this was an endeavour by CoAL to ensure that consultations cover a broad spectrum of affected and interested parties.

A meeting was held with the Tshivhula community, which has lodged a land claim on the area where the mine operated.[602] Other land claimants who purportedly claimed land around the mining area but not directly affected such as the Machetes and Dongolas, were invited to the Open Day meeting where all stakeholders, interested and affected parties were briefed about Vele Colliery project and its prospects.[603]

A participatory process was also followed in relation to the scoping report. After the report was completed it was availed to all registered interested and affected parties through post, e-mails and hand delivery.[604] The report was also made available at Musina Local Municipality and Vhembe District Municipality. Registered interested and affected parties were given 60

[598] Ibid.
[599] Ibid.
[600] The affected farms were the following: Overflakte 125 MS RE, owned by B. Dillman, title deed no. T78260/1989; Overflakte 125 MS Portion 5 owned by W. Esterhuyse, title deed no. T20062/964; Overflakte 125 MS Portion 4 owned by E. Esterhuyse, title deed no. T20062/964; Overflakte 152 MS Portion 3 owned by @E. Esterhuyse, title deed no. 20063/964; Bergen of Zoom MS, title deed no. 7712/871; and Semple 119 MS.
[601] Vele Colliery Public Participation report at 7.
[602] ibid at 8.
[603] Ibid.
[604] ibid at 9.

days to comment.[605] Most comments raised concerns about the impact that mining would have on Mapungubwe as a heritage site, as well as on the biodiversity in the area.[606] The public participation facilitators seemed to be convinced that most of the registered interested and affected parties welcomed the mining project in the area.[607] The participatory process that was followed in relation to the scoping report was also employed when the environmental impact assessment and management programme report were finalised and distributed.[608]

Despite the above seemingly elaborate consultative process followed by the mining company some major stakeholders were not satisfied that adequate engagement had been carried out by the company before the commencement of mining the area. Other stakeholders did not think that mining in the area was a good idea at all, mainly due to the historical, cultural and archaeological importance of the Mapungubwe area. Mr Vele Neluvhalani, who was a member of the Commission on the Promotion and Protection of Rights of Cultural and Linguistic Communities at the time, indicated that 'it would be an offence to our ancestors to start mining in the area. Once we tamper with Mapungubwe, we will be tempering with the past… everyone in South Africa should be united to help preserve Mapungubwe'[609]

The most vehement and vocal opposition to the Vele Colliery mining project came from environmentalist organizations. The environmentalists were represented by the Mapungubwe Action Group. The Action Group was concerned about the negative impact that the mine would have on Mapungubwe ecologically, archaeologically as well as culturally.[610] As the commencement of mining was looming, the stakeholders opted to appeal the decision by the Department of Mineral Resources to grant mining rights to Coal of Africa, as well as the granting of licences by the Department of Water Affairs and the Department of Environmental Affairs. Key amongst the grounds of appeal against the Department of Mineral Resources was that 'the decision maker did not have necessary facts before her that would enable her to take a decision of the application due, inter alia, to the absence of proper

[605] Ibid.
[606] ibid at 10.
[607] Ibid.
[608] Ibid.
[609] Masoka Dube 'Mapungubwe Mining an Affront to Ancestors' The Star 03 August 2011. http://www.iol.co.za/thestar/mapungubwe-mining-an-affront-to-ancestors-1 (last accessed 08 August 2011).
[610] http://www.ewt.org.za/FORYOU/LatestNews/tabid/85/EntryId/6/Fight-to-Save-the-M (last accessed 13/10/2012).

consultation with interested and affected parties and communities, and the non-finalisation of the EMP.'[611]

The appeal failed, and as the date of the commencement of mining drew closer, the Mapungubwe stakeholder coalition decided to take the matter to court. On 3 August 2010, an application was lodged with the South Gauteng High Court with the aim of interdicting the mine from commencing with its operations at Mapungubwe National Park.[612]

After the court application several negotiations ensued between Coal of Africa and the Save Mapungubwe Coalition. This led to the signing of a memorandum of understanding (MOU) between the parties, which in turn led to the withdrawal of the court proceedings. The gist of the MOU was captured in clause 3 of the agreement, which reads as follows:

> The parties hereby agree to commence negotiations with each other in good faith and with the aim of setting a benchmark for best practice in relation to managing and mitigating the impacts of mining and related activities at the Vele Colliery on the environment, specifically including the impact on water and heritage resources, in accordance with applicable management plans and the applicable regulatory framework.[613]

One can say that through the court action the Save Mapungubwe Coalition was able to force a more empowered position, hence the signing of the MOU which gave them more access to participate in the environmental management of the Vele Colliery. In fact, the group was so empowered that when CoAL could not adhere to the terms of the agreement, Save Mapungubwe Coalition pulled out of the MOU. The Centre for Legal Studies had this to say about the Action Groups move: "Having lost trust in CoAL and concerned that it could not be party to an agreement in the absence of material information, the Coalition took a decision to exit the MoU. The Coalition notified CoAL in September 2012 that it was withdrawing from the MoU."[614]

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[611] Centre for Applied Legal Studies 'Changing Corporate Behaviour: the Mapungubwe Case Study' (2014) The Centre for Applied Legal Studies Research Report at 21-22.

[612] Mail and Guardian 'Mapungubwe Action Group Takes Aim at Mining Firm' https://mg.co.za/article/2010-08-05-mapungubwe-action-group-take-aim-at-mining-firm (last accessed 29/10/2017).

[613] Memorandum of Understanding between Coal of Africa Limited and its subsidiary Limpopo Coal Company Pty Ltd and Save Mapungubwe Coalition, consisting of the Endangered Wildlife Trust, BirdLife South Africa, Wilderness Foundation South Africa, World Wide Fund for Nature South Africa, Mapungubwe Action Group and the Association of Southern African Professional Archaeologists, 24 November 2011 at 1. https://www.ewt.org.za>media>Save (last accessed 15/03/2018).

[614] Bird Life https://www.birdlife.org.za>documents (last accessed 15/03/2018).

The actual withdrawal took place on 7 December 2012 when the Coalition joined the Environmental Monitoring Committee for the Vele Colliery (EMC).[615] The EMC is a body comprised of multiple stakeholders and is set up in terms of the section 24G environmental authorisation and the water use licence to monitor the mining company's compliance with the conditions of these licenses and authorisations.[616] Apparently, the Coalition felt that it would be more effective playing a monitoring role than being partner to the mining company.

However, the collapse of the MoU was a serious drawback to a promising partnership. The partnership would act as a platform to ensure that a proper consultative engagement with all affected stakeholders would be adhered to always. This is so because the Action Group did not advance only the environmental interests but also issues relating to culture, archaeology and land claims.

(d) Applicable Legislation

Several South African laws are applicable to the Vele Colliery situation. These include the Mineral and Petroleum Resources Development Act, National Environment Management Act, Restitution of Land Rights Act, National Water Management Act and the Water Services Act.[617] All these laws were already promulgated at the initiation of this project, and therefore their provisions as far as public participation and consent should have been applicable to the Vele Colliery mining project. In analysing the applicability or otherwise of these laws, more emphasis will be placed on stakeholder engagement and public participation, as well as the actual consultative processes that have been followed by CoAL during the initiation, commencement and implementation of the project.

(i) Land Management Legislation

The most relevant land management Act in this case study is the Restitution of Land Rights Act, 1994. Lack of access to land is one of the main contributing factors to poverty and deprivation in South Africa. Section 25 of the Constitution seeks to address this problem through the land reform process. Section 25(5) calls for an enabling legislation to promote access by citizens to land. The Restitution of Land Rights Act 22 of 1994 was enacted in

[615] Ibid.
[616] MC Mining 'Vele Profile' www.mcmining.co.za>240-vele-profile (last accessed 16/03/2018).
[617] Full citations of these Acts have already been provided in the preceding sections of this chapter.

response to this call. The question to be explored is how this Act deals with issues relating to public participation and consultation in its quest to promote land reform in the country. Fortunately, this Act was enacted long before the commencement of the Vele Colliery project.

As already indicated above, the entire land within which Vele Colliery operates is under land claim by the following communities: Machete, Dongola and Tshivhula. The Act does not seem to protect the rights of these communities in cases where mining licences are to be granted. The best protection offered by the Act to land claimants is in terms of section 11(7)(aA) which, as seen in chapter 5, states that once a land claim is gazetted and a notice to this effect has been given to the land owner and all other interested parties,

> no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of
>
> (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit; (ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit.[618]

An inspection of the files in the above land claims in the Limpopo Regional Land Claims office revealed that all these claims were already accepted in terms of Rule 3 and gazetted in terms of section 11 of the Restitution of Land Rights Act by the Land Claims Commission by 2009, which is before the company obtained the licence to mine in the area. A perusal of the claims files revealed that the Commission did not receive such communication from any of the land owners before the land could be alienated to CoAL for its mining purposes.

The provisions under section 11, although they may not be directly linked to a consultative process, are clearly meant to protect claimants so that they may not take over destroyed land or property that is burdened with all sorts of obligations. The Land Claims Commission is the custodian of the claimed land before such land is transferred to claimants. Granted that this

[618] The section is quoted in this chapter in full for emphasis.

may not be the fault of CoAL *per se* as the land owner is obligated to provide such a notice, however the company will bear the repercussions of this flawed process as the claimants, after gaining ownership of the land, may challenge the whole transaction. This situation also points to the extent to which consultation is taken into consideration generally within the South African development context.

(ii) Mineral Laws

The Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) and its Regulations is the leading piece of mining legislation in the country. It is also the most relevant law for this case study as the Vele Colliery project commenced after its enactment.

Section 10 of this Act deals with the issue of consultation with parties that may be affected by the granting of mining right in their area. It provides for the Department of Mineral Resources to publish a notice to inform the public about a receipt of an application for a prospecting right, mining right or mining permit, and to call upon interested and affected persons to comment on the application within 30 days of the publication of such notice.

CoAL seems to have complied with the technical requirements of the Act, and the Department seems to have fulfilled its legal obligations by publishing the notice and calling for comments within the prescribed time. However, both these institutions did not comply with the FPIC requirements of public participation and consent. Again, in this instance one cannot place the blame on the mining company but the mining legislative regime in this country.

(iii) Water Management Laws

The leading pieces of legislation dealing with water management in South Africa are the Water Services Act (Act no. 108 of 1997) and National Water Act (Act No. 36 of 1998) and their Regulations. The main objectives of the two Acts, as well as the provisions relating to the consultative processes and public processes, were fully discussed in the preceding chapter.

As it was established in the previous chapter, when it comes to the consultation and public participation processes, the two water Acts seem to fall short of the FPIC principle requirements. Both Acts do not require that consent from affected communities be obtained

before the commencement of any development project in their areas. Instead these Acts advocate for a form of a consultative process in which the affected parties are notified about the impending project and are called upon to comment or object against the application within a certain period.

(iv) National Environment Management Act

The main legal framework for environment management in South Africa is the National Environment Management Act, 1998 (NEMA). As established in the preceding chapter which deals with legislation, all Acts under NEMA require that certain procedures be followed regarding the consultative and public participation processes. In addition to the normal notices that need to be placed and responded to within certain periods, these requirements include the *seeking of consent* from the affected communities before a project commences, which is the focus of the FPIC principle.

In Vele Colliery, even though the EMP and the public participation reports claim that NEMA requirements as far as the consultative and public participation processes are concerned were adhered to, this was vehemently disputed by environmental activists and other key stakeholders. As has been indicated in the preceding section, these stakeholders even went to an extent of taking CoAL to court for, amongst others, failure to engage with interested and affected parties before the commencement of mining at Mapungubwe.

Other NEMA provisions which are relevant to the Vele Colliery situation are those found in the 2014 Environmental Impact Assessment Regulations and the National Environmental Management: Biodiversity Act. Regulation 39 (1) requires that before a proponent who is not an owner of the land or someone who controls that land applies for an environmental authorisation to perform certain activities on that land, such person must first obtain a written consent from the owner of the land or the person who controls that land. This assertion is quite relevant to the Mapungubwe situation as the land in which the mine operates is under claim by the originally disposed communities.

Furthermore, section 82 of the Biodiversity Act states that an authority may only issue a bio-prospecting permit if the applicants can show that they obtained a prior consent from the affected indigenous community after disclosing all material facts about the prospecting

project. This is very important, and apparently, this process was not followed in the Vele Colliery mining project.

(e) Application of FPIC to the Vele Colliery Mining Project

Public participation as a form of stakeholder engagement is one of the key requirements of the FPIC principle. Participation requires full and meaningful engagement with affected communities or people, and therefore the complaints by traditional communities and by the Save Mapungubwe Coalition which ended up in court are evidence enough that Coal of Africa did not fare well in this regard. According to a research report by the Centre of Applied Legal Studies, "some local stakeholders, including the Balemba community, were never consulted."[619] Of course this is denied by Coal of Africa. The company has repeatedly pointed out that all communities who had shown some interest in the mining area, even though they did not lodge any land claims, were invited to its open day function which was intended to introduce the project to the broader community and to receive inputs and comments from all stakeholders.[620] At most, the open day event was more of an information session and a show off than a consultative process. This falls way short of the FPIC requirements of community engagement as discussed in chapter 2 of this thesis.

When directly asked by the Benchmark Foundation if Coal of Africa accepted the FPIC principle, the company responded as follows:

> CoAL subscribes to the principle of meaningful, collaborative and inclusive engagement with communities that are or would be affected by our operations, and to many aspects of the principles of free prior and informed consent (FPIC). The concept of FPIC, particularly in its most uncompromising interpretations, is not embedded within SA legislation as the sovereign right to make decisions regarding the development of natural resources remains with the State. That said, the Minerals and Petroleum Development Act (MPRDA) requires a mining company to identify Interested and Affected Parties (I&APs), and to engage and consult in respect of potential impacts and benefits of the project as well as mitigating measures.[621]

Although the above response by Coal of Africa shows that the company does not fully subscribe to the requirements of FPIC, it can be conceded though that its endeavours to

[619] Ibid at 18.
[620] CALS opcit at 32.
[621] Letter by Coal of Africa dated 26 February 2015 in response to questions raised by the Benchmark Foundation in relation to the Vele Colliery and Makhado projects.

comply with the MPRDA, and its attempts to involve a wide range of stakeholders including the land claimants, traditional leadership and municipalities, do accord to some extent to the spirit of FPIC. The response also highlight an important issue relating to the applicability of FPIC in general: unless there are efforts at political level to entrench the principle into the development dispensation in the country, it cannot be expected of private developers to implement FPIC partly or in full. In this case Coal of Africa did its best to implement the MPRDA, and the Act does not require compliance with FPIC.

(f) Conclusion

As was the case with the preceding two case studies, I will conclude the analysis of the Vele Colliery project by recalling the key elements of FPIC, namely "free", "prior", "informed" and "consent". I will analyse these elements in order to evaluate how the project fared as far as FPIC is concerned.

(i) "Free" consent

From table 6 above, communities must freely consent to development, and such consent should be voluntary. This means that communities should not be coerced, manipulated or intimidated to grant the consent.

Although there is no evidence of coercion, intimidation or manipulation in the Vele Colliery project, similarly there is no evidence that communities were consulted and their consent sought before the project could be introduced in the area. In the absence of such evidence, it serves no purpose at all to determine whether the consent was free as no consent was ever sought in the first place.

(ii) "Prior" consent

The "prior" element suggests that consent should be sought from affected communities before commencement of development in their lands. This makes pre-project consultation very important in that it allows communities to evaluate and analyse the project before granting or withholding their consent. This is a precursor to communities making an informed decision, and to participate meaningfully throughout the project.

Again, there is no evidence of pre-project consultation in Vele Colliery project. In fact, even during the compilation of the environmental assessment management programme, the main aim was to collect technical data instead of seeking consent from affected communities.

(iii) "Informed" consent

Informed consent presupposes that affected communities would be provided with accurate and up-to-date information about the project. This information would include the advantages and disadvantages that the project would bring to the community. The scope and impact of the project, including the environmental aspect, is supposed to be disclosed to the community.

Again, Vele Colliery did not do well in this regard. Coal of Africa never developed any programme to consult and engage continuously with the affected communities. This lack of engagement and communication led to conflict with major stakeholders as well as affected and interested parties including indigenous communities, farmers and environmentalists.

(iv) Consent

Taking into consideration the two key factors relating to consent, namely that communities should have the choice to grant or withhold their consent to development project, and that such communities should have the capacity to make such decision, it is difficult to see how the Vele Colliery project fulfilled the "consent" element of FPIC. As indicated in the main discussion above, Coal of Africa leadership indicated that they were not obligated to consult with affected communities to get their consent as mineral rights belonged to the State and not owners of the land or those who occupy it. Accordingly, the company focussed mainly on obtaining the mining rights from government and ensured that it met all the regulatory requirements in this regard.

Statutory requirements for obtaining approval for mining rights such as the publication of notices for 30 days to allow for public comments, were duly complied with. As already indicated several times in this thesis, this requirement is not meant to seek consent from affected parties in the FPIC sense but to raise objection which are mainly on technical grounds.

5.2.4 Makhado Project

(a) Introduction

In May 2015, Coal of Africa Ltd (CoAL) was granted a mining right by the Department of Mineral Resources for the Makhado Project.[622] Just like Vele Colliery, Makhado Project is a coal mining venture. Construction of the mine was scheduled to start in 2017 and commercial production in 2018.[623] According to the company, the open cast mine will produce 2.3 million tonnes of hard coking and 3.2 million tonnes of thermal coal over a 16-year period.[624]

In September 2017, CoAL announced its downscale plan for the Makhado Project, which would henceforth be known as Makhado Lite Project.[625] The downscaled plan envisages that the construction phase would be reduced from 24 months to 12 months at a reduced cost.[626] Production will still commence in late 2018 as there were delays caused by opposition for the mine to operate in the area. This opposition was led by affected groups in the area including the Vhembe Mineral Resources Stakeholders Forum, Makhado Action Group and Mudimeli community.[627] These groups objected to the granting of the Environmental Authorization (EA) by the Limpopo government to CoAL for the Makhado Project. They even went to court to interdict CoAL from proceeding with further activities on the project pending the outcome of the review of the granting of the environmental authorisation.[628]

The project is situated 35 kilometres north of the town of Louis Trichardt (also known as Makhado) and about 50 kilometres before Musina in the Vhembe District of Limpopo Province.[629] Makhado project also lies 48 kilometres east of Vele Colliery.[630] The Project is

[622] Coal of Africa Limited 'Makhado Profile' 21 November 2016.
[623] Ibid at 30.
[624] Coal of Africa Limited 'Makhado Profile' 21 November 2016 at 3.
[625] www.crown.co.za/latest-news/modern-mining-latest-news/5113-coal-of-africa-reviews-its-flagship-makhado-project (last accessed 15/03/2018).
[626] Ibid.
[627] https://www.zoutnet.co.za/articles/news/20848/2013-08-29/new-forum-unites-against-mining-in-vhembe-area (last accessed 16/03/2018).
[628] Vhembe Mineral Resources Stakeholders Forum and Others v MEC, Department of Economic Development, Environmental and Tourism (Limpopo Provincial Government) and Others (78690/14) [2015] ZAGPPHC 1043 (8 December 2015). Unreported. www.saflii.org/za/cases/ZAGPPC/2015/1043.html (last accessed 13/03/2018)
[629] Coal of Africa Limited 'Makhado Project' 21 November 2016 p2.
[630] Ibid.

located on the following farms: Fripp 645 MS, Tanaga 648 MS, Windhoek 649 MS, Lukin 643 and Salaita 188 MT.[631] Figure 8 below indicates the locality map of Makhado Project.

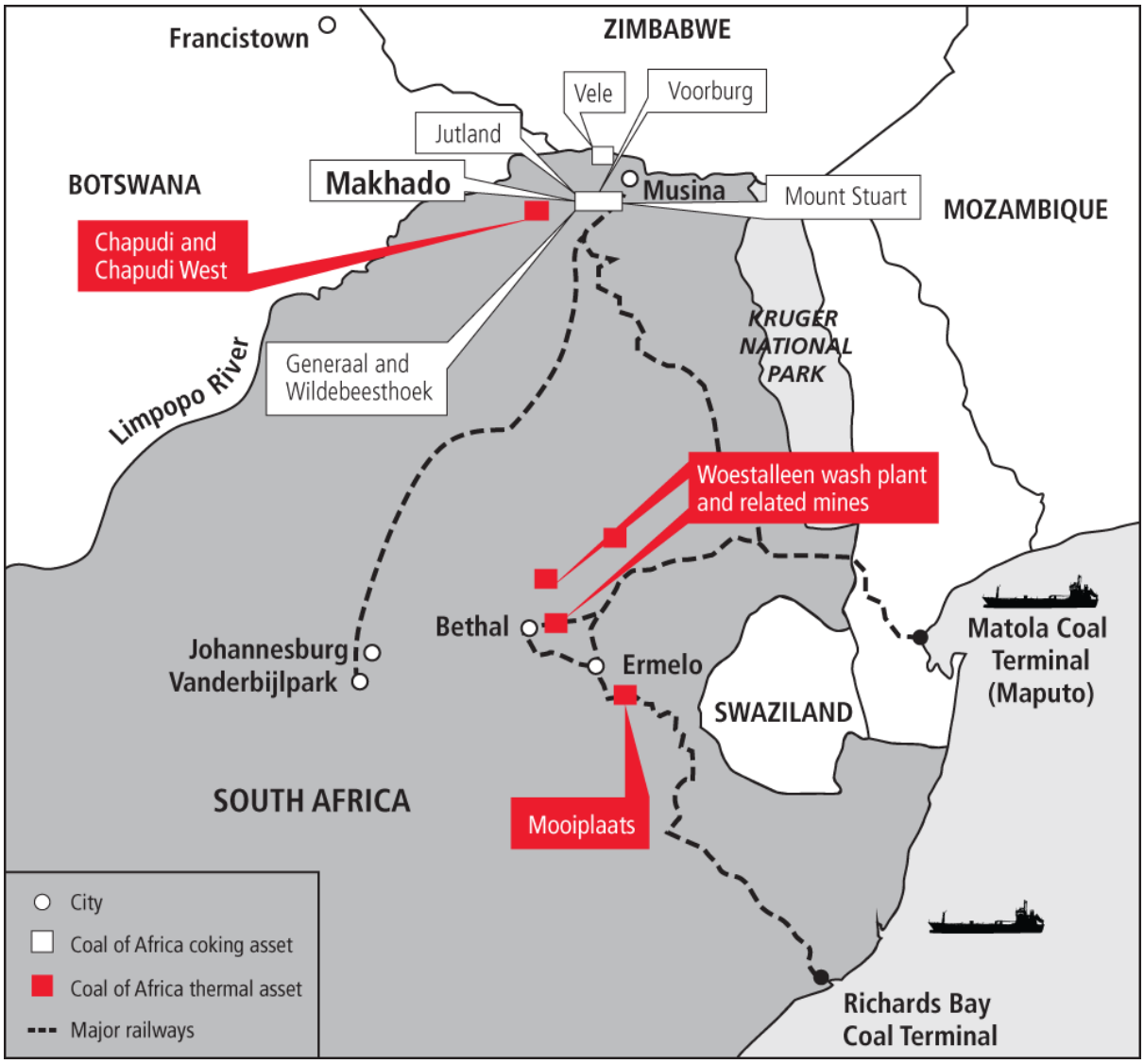


Figure 8: Makhado Project Locality Map[632]

Indigenous communities of Mulambwana, Kuvule and Mudimeli have lodged land claims on Farm Fripp, whereas the Musekwa community has lodged a claim on farms Lukin and Salaita.[633] Other affected communities are Makushu, Pfumembe and Musholombi.[634] This information is crucial as the way that Coal of Africa engaged with these affected

[631] Ibid.
[632] Coal of Africa Limited (2016) 'Makhado Project' http://www.coalofafrica.com/our-business/projects/project-makhado (last accessed 09/10/2017).
[633] Ibid.
[634] Ibid.

communities before and after obtaining the right to mine the area would indicate the extent to which its activities conformed to the principle and/or spirit of FPIC. It will also show if these communities and those adjacent to them benefited from the project, as one of the major aims of a project of this magnitude is to benefit the affected communities in socio-economic terms.

The next sections will explore the contribution of the project towards the alleviation of poverty amongst the above-mentioned communities.

(b) Contribution to Poverty Alleviation and Reduction of Inequality

Through Makhado Project, Coal of Africa promises to bring about major socio-economic development to the Makhado local municipal area, Vhembe district, Limpopo Province and South Africa. The company has developed a socio-economic model which focuses on job creation, preferential procurement, skills development, community investment, social and labour planning, as well as equity and ownership.[635] However, as we have seen with the preceding case study, what is written on paper does not always translate into action.

The company has also embarked on several strategies to identify and address the socio-economic needs of the affected communities. One of the activities to assess the needs of communities is the *social economic survey* programme.[636] This is a community profiling programme which focuses on demography, socio-economic determinants, skills audit, needs analysis, enterprise and supplier audit, as well as heritage and culture profile. The survey involves what Coal of Africa terms a "qualitative and quantitative survey"[637] in which adults in each household of the affected communities are interviewed to 'provide a greater understanding of the environmental and social context of the communities, enabling adequate mitigation measures, and a maximization of potential opportunities and benefits.'[638]

When it comes to employment, the project aims to create 2500 jobs plus 100 contractors in its first 24 months,[639] which is a construction phase. At least 60%[640] of these jobs will be ring-fenced for members of the affected communities. The community members will be developed and trained for these jobs before the commencement of the construction phase through Coal

[635] Coal of Africa 'Makhado Profile' 21 November 2016.
[636] Coal of Africa 'Makhado Mail' Issue 2 December 2015.
[637] Ibid.
[638] Coal of Africa 'Makhado Profile' 21 November 2016 at 10.
[639] Ibid.
[640] Ibid.

of Africa's Sustainable Value Model. About 1100 permanent jobs are envisaged for the operations phase.[641]

The community will be prioritised when it comes to procurement, with certain project ring-fenced for community participation. Members of the communities will be empowered in the procurement field through the company's Supplier Development Programme. This programme will be supported by a Supplier Development Fund which will cost the company around R5 million.[642] Coal of Africa also has the Enterprise Development Programme[643] which identifies, incubates and interconnects entrepreneurs with business and procurement opportunities created by the Makhado Project.

As for skills development, ABET, artisanal and core business trainings will be provided by the company. Internships and learnerships will be provided for young graduates, in addition to internal and external bursaries. The skills development programme will be directly linked to the community investment plan which will include operator and computer trainings. Some of the trainings will be catered for by the Learning Centre of Excellence which the company has assigned R36 million for its establishment.[644]

Coal of Africa has developed its own Broad Based Black Economic Empowerment strategy based on what the company terms "sustainable socio-economic transformation".[645] The strategy encourages community participation through equity sharing and ownership. Because of this strategy, the community, through the King's Forum, the Chief's Forum and the Makhado Colliery Community Consultative Forum acquired a 20% stake in the Makhado Project in 2014.[646] In 2015, Yoright, an empowerment company, acquired a 6% stake in the project.[647]

Through the Makhado Project, Coal of Africa has also embarked on a comprehensive corporate social investment strategy which is directly linked to its social and labour plan. The strategy focuses on education and skills development; enterprise development; and infrastructure development. The establishment of Makhado Centre of Learning, which was

[641] Ibid.
[642] Ibid.
[643] Ibid.
[644] Coal of Africa 'Makhado Mail' Issue 2 December 2015.
[645] Coal of Africa 'Makhado Profile' 21 November 2016.
[646] Ibid.
[647] Ibid.

launched on 3 September 2016,[648] is meant to bridge the gap between the company's requirements and the community's skills levels. This was following up to the launching of the Makhado Bursary Fund in August 2016.[649]

For members of the community to be employable at the mine they need to possess certain relevant skills. At the moment, the skills levels within the community are very low, with less than 5% of community members having post-grade 12 qualifications.[650] In January 2016, 11 students from the affected communities were granted full bursaries to study at tertiary institutions focussing on disciplines which would equip them with relevant skills to enable them to be employable at the company's mines. [651]

Impressive as the above processes may be, one is somehow sceptical. The zeal on the part of the company to offer such generous incentives to the community leaders and other influential stakeholders such as business, may be a way of soliciting consent from the community. There are several examples throughout the country where the elite in the community have benefited tremendously in the form of royalties and business opportunities whereas the rest of the community gets very little, if any benefits. However, one should not be over-critical. Like I pointed out above, the real test will be at the implementation stage.

Following below is the consultative process that was followed by Coal of Africa in the Makhado Project.

(c) Consultative Process Followed

Coal of Africa's consultative process is said to be based on its Engagement Model, which recognises 'both the traditional leadership and the voice of the community and are empowered with information, and included in the decision-making process.'[652]

Coal of Africa claims that it has expended considerable resources and time on its stakeholder activities to *'earn and maintain its social licence to operate*.'[653] The company further purports that it would achieve this social licence to operate through its community centred

[648] Makhado Mail issue 2 December 2015.
[649] Ibid.
[650] Ibid.
[651] Ibid.
[652] Coal of Africa 'Makhado Profile' 21 November 2016 at 11.
[653] ibid at 6.

and integrated approach to stakeholder engagement. Coal of Africa defines its stakeholders as 'those interested in and potentially affected by the company's operations and projects.'[654] Together with communities, Coal of Africa established various stakeholder forums to assist in its engagement with the communities. These included the following: The King's Forum, comprising of representatives of King Mphephu Ramabulana of the Vhavenda people; the Chiefs Forum, chaired by Chief Musekwa and including chiefs of all affected communities; Makhado Colliery Consultative Forum comprising of elected community representatives; as well as all affected communities in general.[655]

Social licence to operate presupposes obtaining a buy-in from affected stakeholders before a project commences with its activities. When one considers the list of stakeholders that were approached and engaged with by Coal of Africa before it commenced with its operations it is evident that the company is trying to involve interested and affected communities in the processes leading to the actual operations of the mine at all levels. There are other interested parties such as land owners or farmers, national department and municipalities that the company engages with as part of interested stakeholders.

There are several things that Coal of Africa is doing right in its stakeholder management. Inclusion of traditional leadership in its consultative process is one of them. This is critical in the rural setting where the company operates, as traditional leaders are indigenous leaders of the people and exert great influence amongst their communities. They also command a great deal of respect from their subjects, and therefore their support for the project is needed if such project is to receive acceptance in the community.

The company has also invested considerably in communicating with the broader communities in the form of mass meetings. Its open day activities are one of these events. On 18 July 2015, the company hosted a Mandela Day celebration at Dzanani, in Makhado Municipality where the King's royal palace is situated.[656] The event was attended by more than 1000 community members.[657] Coal of Africa used the event to inform ordinary members of the community about the latest status of the Makhado project. It also used the event to introduce new initiatives such the Sustainable Value Model which was designed to train and develop

[654] ibid at 10.
[655] Ibid.
[656] Coal of Africa *Makhado Mail Launch* Issue 1 September 2016.
[657] Ibid.

1000 community members in anticipation of the envisaged 2400 jobs during the construction phase of the mine.[658]

However, it is critical to note that Coal of Africa's stakeholder management and consultative processes were not without serious challenges. To start with, not all traditional leaders were in good terms with the company. Chief Nekuvule of the Kuvule community whose area of jurisdiction is part of the land affected by the Makhado project, launched a court case against Coal of Africa interdicting the company from expanding its preferential procurement process to include any other participant than the Kuvule community.[659] Coal of Africa in turn lodged an interlocutory application challenging Chief Nekuvule's authority to represent the Kuvule community. Although the company succeeded in its challenge, the public relations damage was already done, blemishing the near-perfect image in stakeholder management that Coal of Africa had always portrayed.

Other than the Kuvule scenario, Coal of Africa had another bruising encounter with Akkerland Boerdery[660] – one of the farm owners on whose property the company had obtained a mining right. Akkerland Boerdery refused Coal of Africa access to the farms Lukin 643 MS, and Salaita 188 MT. The reasons for refusal were that the mining right was not validly issued and that Coal of Africa failed to consult properly on the issue of access to the property. The court rejected both the reasons by Akkerland Boerdery and afforded Coal of Africa the right to access the properties. Although Coal of Africa manged to succeed in this case as well, the damage was already done.

The issue of denying access to a company holding a mining or prospecting right on the basis of lack of consultation is not peculiar to the Akkerland Boerdery case. In the case of Meepo ya Sechaba and Kotzer[661] the court indicated that 'post the granting of a prospecting right and before the commencement of prospecting activities on any land which is the subject of such prospecting right, proper notice of the intention to enter the land for the purposes of prospecting should be given to the land owner, followed by a consultative process.'[662]

[658] Ibid.
[659] Coal of Africa Limited v Nekuvule, in re: Nekuvule and Another v Coal of Africa Limited and Others (64389/2014) [2018] ZAGPPHC 5 (12 February 2018) Unreported
[660] Coal of Africa limited and Another v Akkerland Boerdery (Pty) Ltd (38528/2012) [2014] ZAGPPHC 195 (5 March 2014) Unreported.
[661] Meepo ya Sechaba v Koetzer and Others 2008 (1) SA 104 NC
[662] Ibid at para 16.

The need for a proper consultative process was further emphasised in the case of Joubert and Miranda[663] where the court indicated that 'consultation is the means whereby a land owner is appraised of the impact that prospecting or mining activities may have on his land'.[664] In this case even if the consultative process was not complete, the court held that the holder of the mining or prospecting right should not be denied access to the property. This clearly shows that the court will take a more pragmatic approach and will not lightly deprive a right holder access to the property on which such right is held.

The next section will consider legislation that was applicable during the inception of Makhado Project. The focus will be on how these laws advanced the interest of FPIC, if they did at all.

(d) Applicable Legislation

The legislative framework applicable to Makhado Project is similar to that of Vele Colliery. This is because both mines are owned by CoAL; they are situated in the same District (Vhembe) and only 48 kilometres apart; and producing the same product. Furthermore, except for the DFA which was repealed by SPLUMA in 2013, all the relevant laws that were applicable at the inception of Vele Colliery were also applicable at the introduction of Makahdo Project.

The main difference between the two projects relate to the implementation of these laws as far as public participation, consultation and the consent requirement is concerned. Whereas in Vele Colliery CoAL only attempted to implement the public participation and consent requirement at the implementation stage of the project, these processes were followed, albeit to a limited extent, from the onset in the Makhado project.

(i) Land Management Laws

As with Vele Colliery, the Restitution of Land Rights Act, 1994 is the main land management law applicable in this case. This is because the mining project is situated on claimed land, the details of which have been noted above.

[663] Joubert v Miranda Mining Company (296/2008) [2009] ZASCA 68 (29 May 2009).
[664] Ibid at para 12.

I have already indicated when dealing with Vele Colliery the importance of the Restitution of Land Rights Act in the promotion of access to land, and how the Act deals with the FPIC requirements relating to public participation, consultation and consent. The Act does not directly address the question of consultation regarding claimed land. Nevertheless, as we have seen in the preceding section that deals with the consultative process, CoAL has been interacting with all affected and interested parties, including land claimants, in their pre-project engagements.

CoAL has been interacting with the Commission on the Restitution of Land Rights in relation to the farms Lukin and Salaita. These farms are claimed by the Musekwa community and their claims are not yet finalised. CoAL has been actively assisting the Musekwa community to get their claim finalised as they want to enter into lease agreements with the real owners of the land once the farms have been transferred to them.

(ii) Mineral Laws

Makhado Project was conceptualised and initiated after the Mineral and Petroleum Resources Development Act, 2002 was enacted. I have already indicated that although the Act has an elaborative consultative process, it falls short of requiring consent from affected and interested parties before a mining right can be granted. Again, as has been detailed in the preceding section, although CoAL has extensively engaged with all major stakeholders, including claimants, none of these consultations was meant to obtain consent in the FPIC, but rather to obtain a *social licence to operate.*

(iii) Water Management Laws

Recalling the detailed discussions in preceding case studies, the Water Services Act and the National Water Act do not require that consent from affected communities be obtained before the commencement of any developmental project in their areas. Instead these Acts call for affected and interested parties to comment or object to an application within a certain period. This type of consultation has nothing to do with the FPIC principle.

Again, CoAL of Africa seems to have tried its best to go beyond the legal requirements regarding its Makhado Project. The company went to an extent of entering into agreement with affected farmers and formed a water users' forum in the affected areas. Of course, the company did not do this to obtain consent, but to get a *social license to operate*.

(iv) Environmental Management Laws

The main legal framework for environment management in South Africa is the National Environment Management Act, 1998 (NEMA). Recalling the discussions in the preceding case studies, the NEMA regime requires that certain procedures, such as placing notices that must be responded to within a certain period; the applicant should *seek and obtain consent* from the affected communities before the application can be granted. This approach is in line with the FPIC requirements.

CoAL never sought to obtain consent in the FPIC sense before and during the implementation of the Makhado project. The company did comply with the procedural requirements of the legislation; and did not find itself in conflict with the authorities like in the case of Vele Colliery. Their endeavours to come up with sustainable ways to conserve water is commendable; however, it has nothing to with trying to seek and obtain consent from the affected communities before carrying out the mining project.

(e) Application of FPIC to the Makhado Project

Although Coal of Africa, through its CEO David Brown, seems not to accept the concept of FPIC in its "uncompromising interpretation", there is enough evidence pointing to the company's leaning towards the spirit of FPIC. This is more evident when it comes to the company's stakeholder management and engagement processes. From the beginning, the company has sought to consult extensively with communities at all levels - from the king, the chiefs, community organizations and ordinary community members on the ground. This was done through the creation of various consultative forums including the King's Forum, the Chiefs Forum, Makhado Colliery Consultative Forum and general community meetings.

Although not seeking consent to operate its mine from the affected communities, the company's "social licence to operate" strategy seeks to get buy-in from such communities. This is a good conflict management strategy as it allows the company to identify potential risks before they arise and find ways of managing them. Most importantly, although at somewhat superfluous level, this strategy attempts to involve all the affected communities in the decision-making processes.

Furthermore, affording affected communities opportunities to acquire stakes or shares in the company was another way of making them part and parcel of the project. This further justifies the company's social licence to operate. In addition, although Makhado Colliery is still just a project, the affected communities have already benefited in the form of jobs, education and skills development.

All the above is in line with the spirit of FPIC, which advocates that affected communities need to be genuinely consulted, engaged and involved in the development projects taking place in their territories from the beginning to the end. As already stated above, Coal of Africa is not, and does not claim to be implementing the FPIC principle. However, its endeavours, especially in relation to Makhado Colliery Project lean towards the fulfilment of FPIC or its spirit.

(f) Conclusion

As with the three preceding case studies, I would like to conclude by reflecting on the key elements of the FPIC. These elements are "free", "prior", "informed" and "consent". The purpose of this reflection is to establish the applicability of the FPIC principle to the Makhado project; and the extent to which Coal of Africa, who are the owners of Makhado Project, attempted to accommodate the spirit, if not the principle, of FPIC.

(i) 'Free' Consent

As indicated in chapter 2, free consent involves an element of voluntariness, in that communities are not manipulated or unduly influenced by developers or developing agencies to agree to developmental projects taking place in their territories. Manipulation can come up in several guises. Interested and affected parties may be offered benefits in the form of cash, economic and infrastructure development, as well as jobs. In most cases, such undertakings do not materialise, leading to conflicts between affected communities and the developers.

In Makhado Project huge benefits packages were offered to the traditional leaders, business, and community structures such as youth formations. In fact, there is nothing wrong with projects improving the livelihood of communities within which they operate. However, when promises of such improvements are made before full consent from affected communities is

secured, there will always be suspicions of developers unduly influencing the decisions of such communities.

(ii) "Prior" Consent

For consent to be meaningful, it must be the result of a consultative and negotiated process based on good faith and participation by all members of the affected communities. Such consultative and participatory processes should take place before the approval or authorisation of the project activities.

When it comes to the Makhado project, CoAL has been very proactive regarding community consultation and public participation. However, it is important to note that most of these efforts came about after the mining right was granted by the state, hence falling short of the requirements of the FPIC principle. In fact, these engagements were not meant to seek consent from affected communities, but to inform them about the benefits that would accrue after the mining right was granted. As quoted in the analysis above, CoAL CEO conceded that his company did not adhere to the "uncompromising interpretation" of the FPIC principle in both projects.

(iii) "Informed" Consent

In chapter 2 I indicated that an informed community is a community whose members have been empowered to make decisions. Such a community is able to say agree or disagree to any development proposal in their lands without undue influence. Such influence would come from developers or their agencies or the elite in the communities who stand to gain if the projects go ahead.

In the Makhado Project, despite massive efforts to engage affected communities in consultative and public participation processes, there is not a single workshop prior or after the granting of the mining right where members of the affected communities were empowered to take their own decision on whether the project should commence or proceed and on what terms. Most of the workshops or meetings have been on the benefits that would accrue to the affected communities once the mine is operational, as well as informing them about the benefits that have already accrued to communities from the company.

There is no doubt that Makhado project does not fully meet the requirements of the key elements of the FPIC principle, especially when it comes to the consultative and public participation processes that were followed. However, from the analysis above, it can be argued that Makhado project seems to lend itself favourably to the spirit of the FPIC principle, even though the motive may be slightly suspect as alluded to above. The company has consulted extensively before the commencement of the project, going to the extent of forming community participatory forums such as the King's Forum, the Makhado Colliery Consultative Forum and the Chiefs Forum. The company has also organised mass meetings to communicate directly with ordinary members of the community. Several community engagement strategies were initiated, including the Social Licence to Operate concept, Engagement Model, Social Economic Survey Programme and the Sustainable Value Model.[665]

All the above programmes are designed to maximise community engagement and participation in the spirit of FPIC. It is therefore safe to say that although one cannot attest to the fact that Coal of Africa explicitly or expressly adheres to the FPIC principles, its community engagement programmes and strategies at Makhado Project points heavily to that direction. The company seems to have learnt well from the shortcomings at Vele Colliery as far as participatory democracy is concerned.

(iv) Consent

From the preceding subsections, it is apparent that the Makhado Project has taken great strides towards the fulfilment engaging with stakeholder. This is more evident in CoAL's consultative and participatory processes where all stakeholders were engaged, and crucial information disseminated. However, as we I have indicated in the main discussion, these engagements, although they were termed a "licence to operate", were not meant to seek consent from affected communities to mine their area. They were actually meant to justify and legitimise the project which was conceived by the company and approved by government without the communities' involvement.

[665] Coal of Africa Limited 'Makhado Project' 21 November 2016 at 10-11.

5.3 Conclusion

This chapter focussed on four case studies involving development projects, namely Anglo Platinum's Gapila relocation project, Nandoni Dam, Vele Colliery and Makhado Project. The case studies are a culmination of the theoretical analysis of the FPIC principle, which started from chapter 2 to chapter 4 of this thesis. Therefore, the main objective of introducing and analysing the case studies was to try and apply the outcome of the theoretical research to practical cases. This was done to establish the extent to which the FPIC principle or at least its spirit, is being applied, if at all it is, in development projects in South Africa.

Following below, are the overall concluding remarks on each of the four case studies, that is, the extent to which each project complied with the requirements of the FPIC, mainly when it comes to the consultative and public participation processes that were followed, as well the reduction of poverty and inequality. To this extent, and unavoidably so, the discussion will also compare the applicability of the FPIC principle in all the case studies.

(a) Ga-Pila Relocation Project (Anglo Platinum)

It must be pointed out from the start that the task of analysing the extent to which the Ga-Pila project complied with FPIC or its spirit was made very difficult due to lack of information from Anglo Platinum or even the holding company, which is Anglo American. Based on the information at my disposal, an analysis of the case study was made in line with the major themes of this research, namely economic growth, sustainable development, quality of life, participation as well as poverty alleviation and reduction of inequality. These themes were condensed into two major focus areas, namely poverty alleviation and reduction of inequality; as well as the actual consultative process that was followed in the project.

Below I will succinctly discuss some conclusions that I established pertaining to this project in relation to poverty alleviation and reduction of inequality, as well as the consultative process followed.

(i) Poverty Alleviation and Reduction of Inequality

According to Anglo Platinum, the mining operations at Mogalakwena would bring about several development opportunities and real benefits in the form of job opportunities and infrastructure development such as roads, electricity, tap water, schools and health facilities.

However, facts on the ground proved otherwise. The community complained that there was no sufficient land in the new area; the water in the new area was said to be polluted; graves were not relocated in accordance with customs and culture; and issues relating to traditional governance were allegedly ignored.

Another major complaint was that there were no schools in the new area, and children were forced to commute to another village for schooling purposes. Furthermore, Action Aid found that Anglo Platinum violated several constitutional rights such as the right to food, housing, healthy environment and responsibility to sustainable development when relocating people of Ga-Pila village. In addition, there were also allegations that water supply was cut off for the families that resisted to relocate. Regarding housing, there were complaints about the size and quality of the new houses, and the houses of the families that refused to relocate were adversely affected by the mine blasting which caused them to crack. The families were also affected by huge amount of dust from the open cast mining operations. There was also a complaint that the water in both the old and new settlement areas was contaminated due to mining activities.

The South African Human Rights Commission (SAHRC) also found that Anglo Platinum had failed to provide adequate farming land to the communities; to ensure adequate access to water to communities; to provide full monetary compensation for loss of land; as well as ensuring that post-relocation communities would receive adequate services. Anglo Platinum was also found to have cut off electricity supply to the remaining families.

Following the above analysis, it can be argued that Anglo Platinum did not do much to alleviate poverty and reduce inequality in the relocated Ga-Pila community. The situation of the remaining households was significantly worse off than before the relocation project was started. Lack of adequate service delivery because of the relocation process led to great dissatisfaction in the community, and this led to several violent protests which are still a common occurrence to date.

(ii) Consultative Process

When coming to the consultative process, one of the major steps that Anglo Platinum did was to facilitate the formation of a Section 21 company which was supposed to comprise of community, government and company representatives with the main aim of advancing

community interests and to act as a communication vehicle between the community and the mining company. The main problem was the composition of the company as it ended up being comprised solely of directors appointed by the corporation without consulting the community, although some of them were from the community. These directors did not report to or consult with the community. This led to a complete communication breakdown between the community and Anglo Platinum as the company insisted on communicating with the community through the section 21 company only.

Action Aid found that Anglo Platinum failed to consult adequately with the affected communities. Hence the organization recommended that local communities should have the right to be fully consulted and give their informed consent before mining rights are awarded, and that the affected communities should be empowered to enable them to engage meaningfully when they negotiate agreements and compensation with development agencies. The SAHRC also expressed concern that the communities were not granted the opportunity to make inputs at the planning phase of the relocation process. The human rights organization recommended that Anglo Platinum should move away from a "compliance-based approach" to resettlements, and engage meaningfully with affected communities in the spirit of the FPIC principle.

Considering the above assessment, there are no indications whatsoever that Anglo Platinum took community involvement and engagement seriously. The mine was satisfied that it met all the legal requirements to expand the operations of the mine. Unfortunately, this approach has backfired in many ways, and the community has, to a large extent, refused to accept the project.

(b) Nandoni Dam

The second case study was Nandoni dam in the Vhembe District of Limpopo Province. The uniqueness of this case, as opposed to the other three, is that it is a state-sponsored development project. As South Africa is a developing country, such projects are a common place. Therefore, it was worth examining as to what extent, if any, were the principles of FPIC applied before, during and after the operationalization of the project. Similar to the Ga-Pila project, I will restrict my concluding remarks to the issues relating to poverty alleviation and reduction of inequality as well as the consultative processes that were followed.

(i) Poverty Alleviation and Reduction of Poverty

As we will recall, the basic principles pertaining to the Nandoni project were the mitigation of negative social impacts, developmental approach, fair compensation and empowerment. Although the overarching principle of the Nandoni project was that members of the affected communities should not be worse off than before the project, the project seems to have done very little to alleviate poverty and to reduce inequality. Even though new modern houses were built for the relocated families, there were complaints to the Public Protector about the quality of such houses. There were a host of other complaints, including amongst others, inadequate financial compensation. Furthermore, there is almost no evidence of community empowerment by the development agency in the Nandoni dam project.

(ii) Consultative Process

On the consultative process, the analysis of the project revealed that the consultative structure of the project, although elaborate, did not include sufficient community representatives, especially in the upper echelons such as the PSC, the PCC and the CPC. The CAC, which was the most representative structure was disbanded by DWAF. This led to a breakdown in communication between the communities and DWAF, which in turn led community protests which at times turned violent.

It can therefore be concluded that despite a promising start and well-articulated strategy and policies, the Nandoni project failed to live up to the affected communities' expectations. The main contributing factors seem to be insufficient representation of affected communities in the governance structures of the project. Another critical factor was the breakdown in communication caused by the dissolution of the CAC. In the end, it can be argued that both the principle and the spirit of FPIC were compromised in the Nandoni project.

(c) Vele Colliery (Mapungubwe)

In this third case study, I will also conclude by considering issues relating to poverty alleviation and reduction of inequality, as well as the consultative process that was embarked upon during the project.

(i) Poverty Alleviation and Reduction of Poverty

Vele Colliery had a mixed result as far as alleviation of poverty and reduction of inequality was concerned. As detailed in the case study, the project's initial plan was very impressive: Vele Colliery would employ 2600 workers during the construction phase, that is between 2009 and 2011; 826 permanent workers would be employed during the operational phase; 32908 indirect opportunities would be created during the operational phase; and the mine closure operation was expected to provide employment for between 250 and 826 people over a five-year period. In addition, Vele Colliery would contribute R1.8 billion to the South African Gross Domestic Product (GDP) during the three-year construction phase; R7.6 billion per annum to the South African GDP during the operational phase; and R4.9 billion to the GDP of Limpopo Province. On the Broad-Based Black Economic Empowerment side, Eyesizwe Coal (Pty) Ltd held 20% shares, Shangoni Management Services 6% and Coal of Africa held the remaining 74%. On the procurement front, CoAL had committed itself to purchasing goods and services from suppliers that are black-owned and managed.

However, the above targets were never achieved, as the mine suspended its operations within 18 months after commencement of mining. Vele Colliery retained only 7 maintenance employees and 31 contractors, out of the 358 staff complement it had before operations ceased.

To its credit, Vele Colliery did manage to record some achievements under very difficult circumstances. As indicated in the case study, the company managed to produce 35 graduates in the fields of finance, environmental science, geology and engineering within the first five years of its social labour plan; invested R1 million in the Musina Agricultural Youth Project; adopted Renaissance Secondary School in Musina; invested R6.5 million for the school's renovations and upgrading; and invested R4 million in the Musina Municipality's project. The sidewalk project employed 35 Musina residents.

(ii) Consultative Process Followed

From the discussions of this case study, it did not seem like Vele Colliery had a structured way of consulting with affected communities and other interested parties, particularly prior to the commencement of the mining operations. According to the CoAL's public participation report, some consultative activities did take place before and during the operational phase of

the project. Some of the activities were as follows: the compilation of a register of interested and affected parties during 2008 and early 2009; the compilation of a background information document in 2009; placement of advertisements and notices on the project in newspapers and public places from August 2008 to February 2009; and meetings with interested and affected parties between 31 July 2008 and 20 November 2008.

A participatory process was also followed in relation to the scoping report. After the report was completed it was availed to all registered interested and affected parties through post, e-mails and hand delivery. Interested and affected parties were given 60 days to comment on the report. The participatory process that was followed in relation to the scoping report was also employed when the environmental impact assessment and management programme report was finalised and distributed.

Despite the above consultative process followed by the mining company, some major stakeholders were not satisfied that adequate engagement had been carried out by the company before the commencement of mining the area. This culminated in a court case to interdict the company from proceeding with the mining activities in the area. One of the major grounds of the interdict was the lack of or insufficient consultation with relevant stakeholders.

It can be concluded therefore, that beside the above seemingly elaborative consultative process at Vele Colliery, these activities fell short of the FPIC principle or the fostering of its spirit. The above processes were never intended to obtain consent of community to mine the area. These were just information dissemination sessions mainly to comply with the regulatory requirements.

(d) Makhado Project

The fourth and final case study is Makhado Project. Like the preceding sections, the concluding remarks on this case study will hinge on the two critical issues relating to FPIC, namely poverty alleviation and reduction of inequality as well as the consultative processes that were followed in the project.

(i) Poverty Alleviation and Reduction of Inequality

The project has very comprehensive programmes to deal with poverty alleviation and reduction of inequality. These programmes are based on its socio-economic model which focuses on job creation, preferential procurement system, skills development, community investment, social and labour planning, as well as equity and ownership. The model was developed after a social economic survey that identified the needs of affected communities. Some of these benefits, such as the bursary schemes, have started to show.

Recalling from the discussion in the case study, some of the details in the plan are provided below:

The project aimed to create 2500 jobs plus 100 contractors in its first 24 months; at least 60% of these jobs will be ring-fenced for members of the affected communities; and 1100 permanent jobs envisaged for the operations phase. Members of the communities would be provided with entrepreneurs training and skills; given preference when it comes to procurement; and be provided with basic literacy skill through the ABET programme, as well as bursaries for tertiary education. Through the company's Broad Based Black Economic Empowerment the community would have a 20% stake, and Yoright would acquire a 6% stake in the project. The company also has a corporate social investment strategy focusing on education and skills development; enterprise development; and infrastructure development.

It is still early days however, and the full proof of the promised benefits will manifest at the operational phase of the project.

(ii) Consultative Processes

Coal of Africa seemed to have learnt well from the Vele Colliery experience. The company has a well-crafted consultative strategy with all affected and interested parties. Through its Engagement Model, the company has developed a comprehensive and inclusive consultative strategy which all stakeholders and affected and interested parties such as communities, traditional leadership, and farmers. Most impressive however, is the company's community engagement strategy which is very inclusive, starting from the King of Vhavenda down to ordinary members of the affected communities. Community consultative structures were put

in place. The structures are the Kings Forum, the Chiefs Forum and the Makhado Colliery Community Consultative Forum.

CoAL's communication strategy is also very effective. The company interacts directly with communities through mass meetings, media and open day events. This type of meetings allows the company to show off itself and gauge the community mood on its license to operate campaign.

However, the fact that the project has been delayed to start with its operations due to opposition from some stakeholders is a cause for concern. This turn of events may indicate that CoAL's consultative strategy may not as water tight as it is purported to be. In 2014 and 2015 groups such the Vhembe Mineral Resources Stakeholders Forum, Makhado Action Group and the Mudimeli community appealed against the granting of water users licence and the environmental authorisation to CoAL by government. These groups even went to court to interdict CoAL from continuing with activities in the project pending the review of the said licences.

CHAPTER 6

OBSERVATIONS AND FINDINGS

6.1 Introduction

In this penultimate chapter, I will reflect on the entire work of this research project, starting with the objectives of the study which were presented in chapter 1; the analysis of the FPIC concept, its origin and application as elucidated in chapter 2; the contextual application of the FPIC principle within the South African political, legal, social and economic landscape as dealt with in chapters 3 and 4; and the use of practical case studies in chapter 5 of the thesis. The aim of this reflection is to make key observations on the main features of the research, and to come up with findings or conclusions based on the outcomes of such observations.

To achieve the above objective, I will focus my analysis to the following areas:

(a) The linkage between FPIC and development
(b) The evolution of FPIC in policy and law in South Africa since the early 1990s;
(c) Evolution in the implementation of FPIC within the South African context; and
(d) Roles of various stakeholders in advancing FPIC.

Furthermore, the above analysis will assist in answering the research questions raised in chapter 1, which are as follows:

(i) Given the existing constitutional, legislative and practical frame for development in South Africa, what are the implications for the adoption of the FPIC principle in country?
(ii) How does the principle of FPIC square with development ideologies in general, and the approaches to development adopted in South Africa?
(iii) Regarding the four case studies selected, is there a nascent adoption of FPIC? What is the impact on communities and development agents of the failure to follow FPIC?
(iv) What measures should be put in place to foster the FPIC principles in development in South Africa?

In answering the above questions, I will try to reconcile theoretical claims as set out in literature and empirical evidence as presented by practical case studies. The main focus will be on the South African context, but drawing from international experiences as supported by literature and empirical examples where there are any.

6.2 The Linkage between FPIC and Development: An Overview

Before embarking on a detailed discussion on the observations and findings of the study relating to specific issues, it may be beneficial to provide a brief overview on the linkage between FPIC and development both internationally and within the South African context. This will assist in providing some basis and insight in the discussion that will ensue throughout this concluding chapter.

There has always been a nexus between the requirements of FPIC and development. To start with, one needs to revisit the definition of FPIC as defined in chapter 2 of this thesis. In that chapter, FPIC was said to be 'the principle that a community has the right to give or withhold consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use.'[666] In chapter 3, development was defined as consisting of 'a plethora of dimensions and aspects as they relate to health, education, nutrition, shelter, access to information, participation, nature of regime (degree of democracy and liberty) and many more.'[667]

The above quotations clearly illustrate the linkage between FPIC and development. The definition on FPIC relates to "proposed projects" that affect the lands owned by the communities. The proposed projects referred to are developmental projects, and FPIC requires that affected communities should have the right to give or withhold consent to such projects taking place in their lands. The definition on development refers to *access to information* and *participation*. These are some of the crucial elements of FPIC. Access to information is the basis of *informed* consent; whereas participation in decision-making processes on issues that affect people's daily lives is central to FPIC.

[666] Forest Peoples Programme 'Free, Prior and Informed Consent' http://www.forestpeople.org/guidingprinciples/ (last accessed 09 February 2013).
[667] Erik Thorbecke 'The Evolution of the Development Doctrine 1950 – 2005' in Mavrotas & Shorrocks (eds.) *Advancing Development: Key Themes in Global Economics* (2007) 29.

The relationship between FPIC and development is also fostered through specific rights-based entitlements such as human rights, the right to development, sustainable development and participatory democracy. These rights were fortified by several international tools or instruments, such as agreements, committee recommendations, resolutions, programmes, forums and institutions. Most importantly, these concepts have over a period of time permeated the international development arena and the dominant feature in all of them is the participation element.

Coming to the South African context, the relationship between FPIC and development has been one of slow but steady growth over the decades. Since South Africa has not formally adopted FPIC both in policy and law, the linkage between this principle and development can only be deduced from the country's legislative and policy frameworks as well as empirical evidence. In chapter 3 it was established that important policies such as the RDP and NDP do embody the spirit of FPIC, even if the principle is not explicitly mentioned in these documents. The same goes for chapter 4 that deals with South Africa's legal framework, where it was established that both the South African Constitution and the legislative framework in relation to development were mainly in support of the FPIC principle, although not explicitly so as well.

Still within the South African context, empirical evidence in the form of identified case studies has been used to try and establish the linkage between FPIC and development. We have seen the negative impact of not observing the FPIC elements in the Ga-Pila project, some improvements in Nandoni dam, and a considerable development in the Makhado Project. The outcome of this exercise was to demonstrate the effectiveness of the elements of FPIC even when the principle is not directly referred to within policy and law in South Africa.

6.3 The Evolution of FPIC in Policy and Law in South Africa since the Early 1990s

6.3.1 Introduction

Chapter 3 of this thesis traced the South African development path since 1910. It is clear from the discussion in that chapter that FPIC as a concept or principle, or even the spirit of FPIC, never featured at all in the South African development discourse until after 1994.

Aware of a myriad of development challenges left behind by the apartheid legacy, the new South African government, which came into power in 1994, embarked on a series of developmental programmes or polices. These programmes included the RDP, GEAR, ASGISA, NGP and NDP. On the legislative front, several laws were promulgated to assist in the implementation of these developmental policies. The legislative framework included, amongst others, laws relating to land, water, environment and mining. The introduction of the above-mentioned policies and laws ushered in the potential for FPIC into the South African development spectrum. The implementation of the policies and laws that brought in the evolution of FPIC, simultaneously led to the evolution in the implementation of the principle.

6.3.2 The Evolution of FPIC in the South African Development Policy

The main development policies or strategies that were introduced into the development space since 1994 are the RDP, GEAR, ASGISA, NGP and the NP. As will be shown below, not all of these policies contributed positively in the evolution of FPIC in South Africa.

The RDP is one of programmes that can be said to have contributed positively towards the evolution of FPIC in this country. The RDP has been described as the foundation of post-apartheid development framework,[668] and a benchmark for all the government's economic and social policies through which the state committed itself to creating employment opportunities, alleviating poverty and reducing extreme inequalities amongst South Africans.[669] In order to achieve these objectives, the country needed to develop democratic institutions based on representativeness and participation, and to embark on an environmental friendly and sustainable development.[670]

The above sentiments are critical to the FPIC principle, especially the need for representativeness and participation. Furthermore, although the principle is not directly referred to in the policy, the fact that the RDP has been described as 'an integrated, people-centred development approach... characterised by integration between decision-makers from the public, private and voluntary sectors and the intended beneficiaries of development (i.e. the people)'[671] adds credence to the claim that the policy embodied the spirit of the principle. Another critical factor, as indicated in chapter 3 of this thesis, is that the process of

[668] Okereke & Agupusi opcit at 109.
[669] South African Human Development Report 2000 at iii.
[670] RDP White Paper, para 1.2.
[671] Davids *et al* opcit at 18.

developing the RDP policy itself was a consultative and inclusive one, actively involving people and their organizations in articulating their needs and aspirations.[672]

On the other hand, GEAR can be described as one of those policies that did not contribute positively to the evolution of FPIC in South Africa. Instead of advancing the interest of the RDP, the programme was seen as 'an attempt to reassure international investors by providing a vision of growth consistent with fiscal discipline, openness to international trade, privatization and macroeconomic stability.'[673] In fact GEAR was widely hailed in the corporate world as offering more certainty and predictability, therefore creating a secured basis for investment.[674]

Considering the analysis above, it is difficult to imagine GEAR as an embodiment of the spirit of FPIC or having contributed positively towards its evolution. To compound matters, the process of developing the GEAR policy itself was not based on public participation and inclusivity. Instead, when formulating GEAR, government relied mostly on technical experts, government departments and the business community, and isolating important stakeholders like COSATU which represent the poor in the process.[675]

As for ASGISA, the policy focussed mainly on big infrastructure and skills development as a way of alleviating poverty and the reducing unemployment, and mentioned very little if anything, about public participation in its activities and decision-making processes. However, even though the policy does not say much regarding public participation and therefore seems to fall short in advancing this critical element of FPIC, the development of ASGISA itself is said to have been an inclusive consultative process, with government engaging with a wide range of stakeholders including government departments, organised labour and business, religious leaders, youths and women groupings; as well as domestic and international experts. The government even went further and established the Task Force whose function was to consult nationally with all relevant stakeholders before the policy document on ASGISA was developed.[676]

[672] See preface to 'The Reconstruction and Development Programme (RDP): A Policy Framework, 1994
[673] Seekings & Nattrass opcit at 91.
[674] Parsons opcit at 53.
[675] See detailed discussion on this point in chapter 3 of this thesis.
[676] This point was also fully canvassed in chapter 3 of this thesis.

ASGISA was replaced by the NGP in 2010. This programme's main thrust was job creation, as it aimed to create over 5 million jobs and reduce unemployment rate to 15% by 2020.[677] The main challenge was that the NGP, as a development programme, did not entertain the issue of people-centred development. As a result, the policy lacked a clear public participation and consultative strategy. This does not auger well with the spirit of the FPIC. COSATU lamented this lack of people involvement in the NGP, and typically threatened to mobilize the civil society to ensure that the policy-making process in the NGP was mass-driven.[678] The NGP lifespan, which was scheduled to run until 2020, was cut short when the National Development Plan was introduced in 2013.

The NDP's main goal is to eliminate poverty; alleviate unemployment and to reduce inequality by 2030.[679] To achieve this, the NDP lists six priorities or pillars, the most important of which, for the purposes of this thesis, is the development of an active citizenry which holds its leaders accountable.[680] According to this policy, 'active citizenry and social activism is necessary for democracy and development to flourish. The state cannot merely act on behalf of the people – it has to act with the people, working together with other institutions to provide opportunities for the advancement of all communities.'[681] Indeed, no development programme can succeed if people, particularly the poor and marginalised, are not central to such a programme – and this is what the FPIC principle ascribes to.

It is important to note that, save for GEAR, all development policies in South Africa since 1994 had one thing in common – the participatory element. Participation alone does not equate to FPIC, however this element is an important ingredient of the principle.

6.3.3 The Evolution of FPIC in the South African Legislative Framework

To assist with the implementation of the development programmes or policies that have been discussed above, government introduced laws that deal with different forms of development. These laws related to land development, environmental management, water management and mining. I will briefly discuss these laws below to establish if they embodied the elements and

[677] Economic Development Department *The New Growth Path: Framework* at 3.
[678] ibid at 3.
[679] ibid at 14.
[680] Ibid at 25.
[681] National Development Plan Executive Summary opcit at 30.

spirit of FPIC, and how they contributed to the development of the principle within the South African development landscape.

Regarding land management legislation, the most relevant Acts for this discussion are the Development Facilitation Act, 1995,[682] the Municipal Structures Act, 1998, the Local Government Municipal Systems Act, 2000 and SPLUMA. All these Acts emphasise the requirement for communities to be consulted and to participate in the decision-making processes in all development matters that affect them. This is the essence of participatory democracy which may be described as an arrangement 'to enable people's direct involvement in political, administrative and other processes which affect them.'[683] Public participation and consultation, which are part of participatory democracy, are some of the essential elements of FPIC.

NEMA is the overarching legislation relating to environmental management in South Africa. There are several Acts of Parliament relating to different kinds of environmental management which fall under the auspices of NEMA, including Acts dealing with management of biodiversity, waste, air quality, costal environment, and conservation.

NEMA and the supporting Acts are some of the few laws in South Africa that make public participation and consent compulsory. NEMA's preamble is to the effect that procedures and institutions should be established to promote and facilitate public participation in environmental management and governance.[684] In addition, and most importantly, the consent procedure in the 2014 Environmental Impact Assessment Regulations[685] relates almost directly to FPIC. Regulation 39 (1) requires that before a proponent who is not an owner of the land or someone who controls that land applies for an environmental authorisation to perform certain activities on that land, such person must first obtain a *written consent* from the owner of the land or the person who controls that land.

[682] Although the DFA was amended by SPLUMA, the Act was applicable when the Ga-Pila and Nandoni projects took place.
[683] Croft & Beresford "The Politics of Participation" in D. Taylor (ed.) *Critical Social Policy: A Reader* (1996) 181.
[684] Section 2(h) of NEMA.
[685] National Environmental Management Act, 1998 (act No. 107 of 1998): Environmental Impact Assessment Regulations 2014.

The law that stands out as far as the requirement of *consent* is concerned and refers directly to FPIC is the National Environmental Management: Biodiversity Act.[686] Section 82 of the Act is of the effect that an authority may only issue a bio prospecting permit if the applicants can show that they obtained a prior consent from the affected indigenous community after disclosing all material facts about the prospecting project. The importance of this section as far as FPIC is concerned cannot be overemphasized. This is probably the only Act in South Africa that specifically refers to the FPIC principle and the indigenous communities.

The leading pieces of legislation dealing with water management in South Africa are the Water Services Act, 1997 and the National Water Act, 1998 and their Regulations. The National Water Act states that to achieve its objectives, it seeks to establish suitable institutions and that such institutions have appropriate *community, racial and gender representation* (my emphasis)."[687] But it looks like that is where reference to public participation by this Act begins and ends. The Water Services Act does not make such reference. In fact, the two Acts do not require that consent be obtained from affected communities before a project such Nandoni Dam is undertaken. Instead they advocate for a form of a consultative process in which interested parties are notified about the impending project and they are called upon to comment or object within a set period.[688] In addition, the Water Services Act requires this type of a consultative process only in relation to its water services development plan.[689]

The consultative requirements of both the National Water Act and the Water Services Act do not satisfy the requirements of FPIC. FPIC requires that meaningful engagement with affected communities be aimed at soliciting their free prior and informed consent. The main aim of such consultations should be to enable affected communities to agree or disagree to development projects taking place in their areas.

When coming to mining, the question that needs to be addressed is how mining legislation has or has not advanced the requirements of public participation and consent in mining projects taking place in areas occupied by local communities. The main Act that can assist with the answering of this question is the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) and its Regulations. The Act clearly does not require that

[686] Act No. 10, 2004.
[687] ibid.
[688] Section 5 (5) of the National Water Act, 1998 and Section 14 (1) of the Water Services Act, 1997.
[689] Section 15 (1) and (2) of the National Water Act, 1997.

consent be obtained from affected communities before a mining right can be granted. All that the Act requires is a consultative process whereby interested and affected parties are called upon to comment within a certain period. Therefore, it is difficult to harshly judge Anglo Platinum in Ga-Pila for not taking issues of public participation and consent seriously when it resettled the residents.

6.3.4 Conclusion

I would like to conclude this section by pointing out that from both the policy and legislative perspective, South Africa has experienced a steady, albeit slow, evolution of the elements of FPIC over the past two decades. Policy-wise, the RDP formed both the foundation and catalyst to this evolutionary process. Although at some point a programme such as GEAR seemed to reverse the gains achieved through the RDP as far as public participation and consent was concerned, the introduction of the ASGISA, NGP and the NDP policies pointed to the move in the right direction.

On the legislative front the country did not fare badly as far as the evolution of FPIC is concerned. Land development and management laws such as the DFA, the Municipal Systems Act and the Municipal Systems Act advocated for public participation, even though they did not expressly address the issue of consent. There was some disappointment though, with both the water and mining laws that seem oblivious to the requirement of consent in projects where local communities were affected.

However, when one considers the positive endeavours in the Nandoni Dam, Vele Colliery and Makhado Project, there seems to be light at the end of the tunnel. The three projects initiated, although sometimes only on paper, consultative processes which are in line with the spirit of FPIC. When it comes to fostering public participation and consent, there is also a clear improvement from the first case study, Ga-Pila which commenced in 1998, to the Makhado Project which commenced in 2013.

6.4 Roles of Various Stakeholders in Advancing FPIC

6.4.1 Introduction

The evolution and implementation of FPIC as discussed in the above sections was developed and shaped through the involvement of various stakeholders such as developers or development agencies (such the State, private entities or corporations); institutions supporting democracy (such the South African Human Rights Commission and the Office of the Public Protector); human rights-based groups (such as Action Aid); as well as interested and affected parties (such as communities, farmers and environmentalists). In this section I will explore the role played by these stakeholders in advancing FPIC in South Africa in general, with particular reference to selected case studies. My point of reference will be the researched literature; stakeholder activities and the case studies.

6.4.2 The Role Played by Development Agencies in Advancing FPIC

The main role players in this category were the South African government and the two mining houses, namely Anglo American's Anglo Platinum and Coal of Africa Limited (CoAL). The government, through the Department of Water Affairs (now called the Department of Water and Sanitation), was responsible for the construction of Nandoni Dam; Anglo Platinum, through PPL mine (now Mogalakwena Mine) was responsible for the Ga-Pila relocation project; and CoAL owns both Vele Colliery and Makhado Project.

There is no evidence of the role that Anglo Platinum played which can be regarded as advancing FPIC during the Ga-Pila relocation project. It was confirmed that the company did not even have a relocation action plan for the project.[690] It is difficult to imagine how the mine envisaged consulting and involving affected communities without a basic planning document such as the relocation plan. A relocation action plan is very important as it contains all the policies and procedures relating to the relocation, including the consultative processes.

We have also seen from the case study that the mine preferred to communicate with the affected community through a section 21 company that it created. This company was rejected

[690] University of Stellenbosch Business School 'A clash of Cultures (and lawyers): A Case Study of Anglo Platinum and its Mogalakwena Mine in Limpopo, South Africa' 2009 Corporate Governance in Africa Case Study Series: No. 1. www.usb.ac.za>Documents>pdfs (accessed 11/02/2018).

by the Ga-Pila community as not representing their interests. The company's failure to consult and communicate with the affected communities led to social tensions that resulted in violent protests. Such actions cannot be said to advance the interests of FPIC in any form.

The government fared better in its Nandoni Dam project. BKS, the government's implementing agent, managed to develop a relocation action plan. The process of developing the plan was a consultative and an inclusive one. The local communities, traditional leadership, the local and district municipalities, as well as the provincial government, were all included in the consultative structures. The plan contained all relocation policies and the communication plan. The policies were also a product of an elaborative consultative process with the above-mentioned stakeholders.

The downside, however, was the failure by the Department to implement the plan. The situation got so bad that the CAC, which was the only structure that directly represented affected communities, was disbanded when it did not get along with BKS. This cast a doubt as to the commitment by government to genuine consultative processes and community engagement.

Vele Colliery never had a structured way of consulting with affected communities and other interested parties, particularly prior to the commencement of the mining operations. However, some vital public participation activities as required by the law did take place such as the compilation of a register of interested and affected parties, the compilation of a background information document, placement of advertisements and notices on the project in newspapers and public places, meetings with interested and affected parties, and the distribution of the scoping and the EIA reports to interested and affected parties.

The main problem with the Vele Colliery consultative process was the selective way in which they chose the stakeholders to engage with. Land claimants where only invited during open day sessions, and no effort was made to consult with them at the pre-project stage in order to solicit their views regarding the project. Open day sessions were just information dissemination events where CoAL wanted to promote itself to the stakeholders. Furthermore, CoAL failed to adequately consult with some key stakeholders such as the environmentalists. As pointed out above, these stakeholders, led by the Mapungubwe Action Group, even went to court to challenge the mining right of the company. Therefore, it can be argued that

CoAL's public participation and consultative activities were never intended to obtain the consent of communities to mine the area, but were meant to comply with the regulatory requirements. This cannot be said to be in line with FPIC or its spirit.

CoAL fared much better in their Makhado Project when it came to community consultation. From the onset, the company established its *Engagement Model,* a consultative strategy that aimed to ensure that 'both the traditional leadership and the voice of the community are empowered with information, and included in the decision-making process.'[691] CoAL claims that this consultative strategy earned it a "social licence to operate,"[692] meaning that its presence in the area was accepted and approved by the local communities. Therefore, although during my analysis of this case study I have cast some doubts on CoAL's understanding and commitment to include ordinary residents in the decision-making process, the company at least had a consultative strategy from the initiation stage of the project.

Furthermore, CoAL established various stakeholder forums such the King's Forum, the Chiefs Forum and Makhado Colliery Forum,[693] to assist in its engagement with the communities. Another important factor in CoAL's consultative process is its mass communication strategy. The company uses events such as its own "open" days, mass meetings and special days such as Nelson Mandela Day. It is in these events where CoAL conducts information dissemination sessions, updates communities about progress in the project and introduces new initiatives if there are any.

However, one should be careful in heaping all the praises to the Makhado project. Some stakeholders such as the Vhembe Mining Resources Stakeholders Forum, Makhado Action Group and Mudimeli community were not in support of CoAL's Makhado Project. These groups managed to have the Makhado Project water use licence suspended, and the EA reviewed. At one stage the group went to court to interdict CoAL from continuing with project activities at Makhado pending the review of the EA granted by the government.

[691] Coal of Africa: 'Makhado Profile' 21 November 2016 at 11.
[692] Ibid at 6.
[693] Ibid.

6.4.3 The Role Played by Institutions Supporting Democracy in South Africa in Advancing FPIC

Institutions supporting democracy in South Africa are those listed under chapter 9 of the Constitution. These institutions include the Public Protector and the South African Human Rights Commission. I am singling out these two institutions as they featured in my case studies, and will be used as examples in this discussion.

In 2008, the SAHRC investigated the Ga-Pila relocation project and found that the mining company failed to adequately consult with the affected community before the decision to relocate it was taken, and during the implementation of that decision. After these findings, the SAHRC came up with medium to long-term recommendations. The medium recommendations were as follows: that the company should always endeavour to obtain *free prior and informed consent* of affected communities before commencing with resettlements; that the Department of Minerals and Energy should determine the criteria for meeting the required standard of "consultation" by the applicant mining company with the affected community; and that the Department of Land affairs should engage affected communities on the nature of land rights at the outset of any resettlement negotiation process.[694]

The long-term recommendations are more relevant to this discussion as they refer directly to FPIC and public participation. One of the recommendations in this regard was to assist Anglo Platinum and any other company involved in relocation processes to move beyond compliance based approaches in relation to consultation; achievement of free, prior and informed consent; and grievance redress processes.[695] Indeed, the SAHRC report is one the very few sources in this country to refer to the FPIC principle and indicated its importance in projects where communities are negatively affected.

Regarding Nandoni Dam, communities affected by that project approached the Public Protector for relief when they were not happy with the relocation process, especially when it came to compensation, implementation of agreed terms of the relocation and the consultative process. In addressing the complaints from the affected communities, the Public Protector conducted a public hearing to allow the communities to present their views. In return, DWAF

[694] Ibid.
[695] Ibid. at iv.

and BKS could cross-examine members of the communities who presented evidence on behalf of the affected communities. The public hearing itself was an example of a public participation process.

After the public hearing and other detailed investigations on the project, the Public Protector issued a report as required by law. In his findings, the Public Protector found that the project did relatively well in its public participation processes. This included the involvement of the affected communities and other stakeholders such as chiefs, local authorities and the provincial government in policy development. The project also had clear communication and community participation structures and plans. All these plans were set out in the relocation action plan. The relocation action plan itself was a product of an inclusive process.

However, the Public Protector questioned the commitment of DWAF and BKS to public participation when these institutions disbanded the CAC, which was the only structure to represent affected communities at grassroots level, when they could not agree on certain issues. The disbanding of the CAC was the main course for communities to approach the Public Protector as their only avenue to communicate with DWF and BKS was closed. To revive this communication link and promote public participation, in his interim report, the Public Protector created a complaints resolution committee (CRC). This committee comprised of all stakeholders in the project, including affected communities, and assisted with the implementation of the Public Protector's recommendations.

From the above discussion, it is clear that the Office of the Public Protector played an important role in advancing the spirit of FPIC in the Nandoni Dam project. Although its report did not directly refer to FPIC or consent, its findings on public participation, consultation and communication did reflect its concerns on essential elements of FPIC. Its recommendations, especially in the interim report, emphasized the need for an inclusive process in the implementation of the Public Protector findings and complaints resolution process.

6.4.4 The Role of Rights-based Groups in Advancing FPIC

Two of the case studies, namely Ga-Pila and Vele Colliery involved the intervention of rights-based groups. Action Aid, an international organization working for the world free of

poverty and injustice, was involved in the Ga-Pila project.[696] Mapungubwe Action Group, a South African environmentalist organization comprising of the Endangered Wild Life Trust, the Association of Southern African Professional Archaeologists, Peace Parks Foundation, WWF, Bird Life of Southern Africa and the Wilderness Foundation of South Africa were involved in the Vele Colliery project.

In its investigation of Anglo Platinum's Ga-Pila resettlement project, the organization found that the mine violated several constitutional rights such as the right to food, housing and a healthy environment. More importantly, the organization found that Anglo Platinum failed to consult adequately with the affected communities. To this end, Action Aid recommended that local communities should have the right to be fully consulted and to give informed consent before mining rights are awarded, and that affected communities should be empowered to enable them to engage meaningfully when they negotiate agreements and compensation with development agencies.

Because of its findings, Action Aid recommended that the SAHRC should investigate the violation of human rights in the resettlement of the Ga-Pila community. The SAHRC obliged, and produced a report in 2008. The findings of the SAHRC have been discussed above in this section, and may not be repeated here. Suffice to indicate however, that the SAHRC report highlighted the lack of public participation plan and failure to observe FPIC requirements as some of the serious concerns about the Ga-Pila relocation process.

Without the involvement of Action Aid the FPIC-related challenges faced by the project would have not been discovered. Moreover, the in-depth investigation by SAHRC would have not taken place if it were not for Action Aid.

When coming to Vele Colliery, the opposition to the granting of mining right by the Department of Mineral Resources CoAL was led by the Mapungubwe Action Group. Initially, the group appealed against the granting of the mining right by the Department, and when the appeal failed they approached the court for an interdict. One of the key grounds of the Action Group's appeal was that "the decision maker did not have necessary facts before her that would enable her to take a decision on the application due, inter alia, to the absence

[696] Action Aid 'Who We Are' www.actionaid.org/who-we-are (last accessed 17/02/2018).

of proper consultation with interested and affected parties and communities"[697] The group also indicated that indigenous communities who are the custodians of cultural and religious rites of Mapungubwe, and also land claimants in the area, were not consulted to obtain their consent before the mining permit was issued.

Although the Action Group later withdrew from the MOU, the court case and the agreement were important actions in that the company was forced to negotiate with the stakeholders, and agreed to consult and work with them to develop an environmental management plan for Vele Colliery. This was one big step towards the achievement of some elements of FPIC, particularly public participation and consultation, and cemented the role of rights-based groups in the advancement of FPIC in South Africa.

6.4.5 Conclusion

The discussion in this section has shown that various role players and interest groups played a vital role in the advancement of FPIC. Although there was a slow start with the Ga-Pila resettlement project regarding implementation of FPIC or a move towards the spirit of this principle, the situation started to improve in Nandoni dam. Whereas in the Ga-Pila project there was not even a relocation action plan, Nandoni dam's RAP was a product of a participatory process, even though there were some challenges with the actual implementation of some of the policies articulated in that document. The situation improved even further in the Makhado Project where extensive pre-project consultative processes where embarked upon.

Coming to chapter 9 institutions, the role that they played in advancing FPIC in South Africa cannot be over-emphasised. The SAHRC was one of the first institutions to explicitly refer to the principle of FPIC in their Anglo Platinum/Ga-Pila report. The organization showed how this principle was ignored at the project's peril. In addition, the OPP tackled the issues of public participation and consultation head-on in his Nandoni dam report. The footprints of these two institutions in advancing at least the spirit of FPIC in the country need to be acknowledged.

[697] Centre for Applied Legal Studies 'Changing Corporate Behaviour: the Mapungubwe Case Study' February 2014 at 21-22. https://www.wits.ac.za>cals>documents (last accessed 15/03/2018).

Rights-based organization such as Action Aid and Mapungubwe Action Group also played a role in the advancement of FPIC or its spirit. It was upon the recommendation by Action Aid that the SAHRC commenced its investigation of the Ga-Pila resettlement project. Even before the SAHRC pronounced on FPIC, Action Aid had already pointed out that this principle was not observed by Anglo Platinum in the Ga-Pila project. On the environment side, the Action Group's appeal and court action compelled CoAL to negotiate and commit to work with stakeholders in the development and management of the environmental plan.

6.5 Conclusion

Chapter 6, being the analysis chapter, aimed to deal with observations and findings throughout this thesis. In this chapter I analysed both the theoretical and practical (through case studies) aspects of the thesis and focussed on the following themes: the linkage between FPIC and development; the evolution of FPIC in policy and law in South Africa since the early 1990s; evolution in the implementation of FPIC within the South African context; and roles of various stakeholders in advancing FPIC. In making my observations and findings through these themes, I have attempted to link each of these themes to the case studies discussed in chapter 5.

Firstly, I considered the linkage between FPIC and development. The evolution of FPIC in the international development arena, supported by the above-mentioned international instruments, created a clear and fundamental linkage between the two concepts. Vehicles for FPIC or institutional arrangement of the principle seemed to be grounded in international instruments. These instruments include international conventions or agreements, resolutions, recommendations and court decisions. Although most of these institutional arrangements are not binding to South Africa, they do have a binding effect to businesses and development agencies involved in development projects in the country.

On the national front, policy development, legislation and some case studies led to the conclusion that although South Africa has not formally adopted the FPIC principle, its policy and legislative frameworks have created a link between FPIC and development. This trend has shown in some major development projects such as Nandoni Dam and the Makhado Project.

On the evolution of FPIC in policy and law since the early 1990s, as well as the implementation of the principle, it was concluded that South Africa has over the years developed a policy and legislative framework that is in line with the spirit of FPIC. Policy-wise, government has since 1994 introduced development policies and programmes such as the RDP, GEAR, ASGISA, NGP and NDP. On the legal side, the country has promulgated development-related laws in the fields of mining, water services, local government and environment. The analyses of all these policies and legislation proved a slow, but steady evolution of FPIC, or at least its spirit, within the South African policy and legislative frameworks.

The role played by various institutions in the advancement of FPIC was found to be of great significance. Institutions such as Action Aid and the SAHRC were the first to insist on the introduction of FPIC in development projects within South Africa. This they did when intervening in the Ga-Pila relocation project.

CHAPTER 7

RECOMMENDATIONS

7.1 Introduction

Consequent to the observations and findings in chapter 6 above, I would like to make the following key recommendations:

(i) that South Africa considers formally adopting the FPIC principle as a policy, and if possible, legislate it;
(ii) that corporate organisations or institutes such as the Minerals Council of South Africa, for example, adopt the FPIC principle and make its implementation by their members compulsory; and
(iii) that Government ensures that every Act of Parliament that deals with development, land, mining and environmental management incorporates public participation and consent requirements.

I will briefly deal with each of the above recommendations below.

7.2 Consideration by South Africa to formally Adopt the FPIC Principle

From the first to the penultimate chapter, this thesis has emphasised the benefits of the FPIC principle in development. When I dealt with the relationship between FPIC and development in chapter 2, I indicated that development entails economic growth, improved quality of life as well as social transformation.[698] The social transformation part includes access to information, public participation and freedom. These elements are the essence of FPIC. Therefore, as a start, FPIC forms an integral part of development in general. On basis of this fact alone, it would make sense for a developing country such as South Africa to consider adopting the principle in all development projects.

In chapter 3, which considered development dynamics within the South African context, I dealt with the concept of participatory democracy in detail. The importance of participatory democracy as far as this thesis is concerned is that it is the root of public participation, which

[698] Emmanuel Nnandozie 'Definition and Measurement of Growth and Development' in Emmanuel Nnandozie (ed.) *African Economic Development* (2003) at 30.

in turn forms an essential part of FPIC. I pointed out that participatory democracy in development has its foundation in the South African constitution which states that local government must encourage the involvement of communities and community organizations in matters of local government. I also pointed out in that chapter how the country has, since the dawn of democracy, formulated developmental policies as well as legislative frameworks that advanced the spirit of FPIC even though the principle was not formally recognised.

In chapter 4 I analysed in detail South Africa's development policy framework. I traced the evolution of these policies from the RDP, right up to the NDP. In the process, it was evident that programmes such as the RDP, ASGISA, NGP and the NDP contain strong elements of FPIC, although the principle is hardly directly referred to. All that was left was to formally adopt the principle so that it can be enforceable in all developmental projects.

I considered South Africa's development legislation evolution in chapter 4. I discovered that stemming from the Constitution, development-related laws concerning planning, mining, water use and environmental management were promulgated since 1994. These included the Development Facilitation Act, Municipal Structures Act, Municipal Systems Act, Minerals and Petroleum Resources Development Act, National Environmental Management Act (NEMA), Water Services Act, National Water act and the Spatial Planning and Land Use Management Act. All these laws, to different degrees, had some elements of FPIC, particularly when it comes to consultation. NEMA actually refers directly to FPIC as a requirement in projects affecting environmental issues. Therefore, like in the policy front, what is required in the legal sphere is to legislate FPIC as a requirement in all developmental projects. As already discussed, this has been done in the Philippines and some South American countries.

7.3 Adoption of FPIC by Corporate Institutions or Organizations

The sole effort by government to adopt FPIC, if it were to, through policy development and legislation would not suffice for the effective implementation of FPIC in all developmental projects. As it is well known, governments are good at developing policies and legislation but not their implementation. Other institutions, which are role players in an industry, become effective enforcers of certain norms and standards in their sphere of operations. Sometimes they do this independent of government as some industries have self-regulatory bodies.

The best examples internationally are the International Finance Corporation (IFC) and the International Council on Mining and Metals (ICMM). The IFC has formally adopted FPIC and has made it a requirement for its members to seek and obtain free, prior and informed consent of indigenous peoples when conducting development projects in their lands. The ICMM has also formally adopted the FPIC and called upon its members to obtain *consent* of indigenous peoples, respect their rights and interests, and to consult with them in the decision-making processes.

Locally, an institution such as the Minerals Council of South Africa, for example, can emulate the ICMM and make it a requirement for its members to adopt and implement FPIC when embarking on mining projects. Financing institutions such as the Industrial Development Corporation, Land Bank and the Development Bank can follow suit and require their clients to implement FPIC in their operations. The joint effort between government and these role players would certainly make FPIC a reality in South Africa.

7.4 Incorporation of Public Participation and Consent Requirements in Acts of Parliament

As already pointed out, South Africa has a host of development-related laws dealing with planning, mining, water use and services, as well as environmental management. Most of these laws have some elements of FPIC, especially the requirement to inform the public when an application has been lodged to carry out a project. Affected and interested parties are often given a period, usually 30 days, within which to comment or object to a proposed project. Amongst others, the Minerals and Petroleum Resources Development Act, National Water Act and the Water Services Act follow the above-mentioned procedure as a consultative process. As repeatedly indicated, the above process falls short of the FPIC requirements. It does not even come close to a simple information dissemination process that is usually equated to consultation since majority of citizens cannot access notices.

NEMA is the only development-related law in South Africa that refers directly to FPIC as a requirement when dealing with environment-related projects. All laws falling under the auspices of NEMA, such as those dealing with, amongst others, biodiversity, conservation, waste management and pollution, set out clear consultative processes which provide for public participation and seeking of consent from affected communities.

I therefore submit that South Africa can borrow from the NEMA regime, and incorporate FPIC requirements when promulgating development-related laws. I further recommend that all existing development-related laws which do not incorporate FPIC be amended accordingly. The process of amending these laws should not be difficult as almost all the Acts do have a public notice provision as mentioned above. For example, the MPRDA can be amended to make it a condition that free prior and informed consent be obtained from affected communities before an application for a mining right can be approved; and the National Water Act can make it a requirement that proof pre-project consultation and a written consent from affected communities be submitted to authorities before permission to construct national dams can be granted. If these types of recommendations can be effected, development in South Africa can be propelled to new heights, as affected communities will join hands with developers for the common good of the country.

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Thesis

1. Ramoganyane, IP *Local Government and Local Economic Development in South Africa: A Case Study of Pietersburg/Polokwane* Dissertation submitted to the Department of Town and Regional Planning in the Faculty of Built Environment

at the University of the Witwatersrand, in partial fulfilment of the requirements of the degree of Masters of Science in Development Planning 2000

2. Nkadimeng MG *From Miracle to Mirage: The ANC's Economic Policy Shift from MERG to GEAR* Thesis submitted to the Faculty of Arts, University of the Witwatersrand, 1999.
3. Ogunfiditimi O *Assessment of Structural Quality of Houses Delivered through the People's Housing Process in South Africa* Dissertation submitted to the Faculty of Engineering and Built Environment, Department of Construction Management and Quantity Surveying, University of Johannesburg, 2008.
4. Sibane NV *The Implementation of the Bill of Rights for Sustainable Development by the Department of Mineral Resources (DMR): A Case Study of Xolobeni Mining Project in the Mbizana Local Municipality, Eastern Cape, South Africa* Thesis submitted in fulfilment of the degree of Doctor of Administration: Public Administration in the Faculty of Management and Commerce at the University of Fort Hare, Bisho, 2016.

Memoranda

Memorandum of Understanding between Coal of Africa Limited and its subsidiary Limpopo Coal Company Pty Ltd and Save Mapungubwe Coalition, consisting of the Endangered Wildlife Trust, Bird Life South Africa, Wilderness Foundation South Africa, World Wide Fund for Nature South Africa, Mapungubwe Action Group and the Association of Southern African Professional Archaeologists, 24 November 2011.