

NATIONAL UNIVERSITY OF LESOTHO



**AN ENQUIRY INTO THE MINING INDUSTRY IN LESOTHO: A NEED
FOR A MORE EFFECTIVE REGULATORY BODY**

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‘All the gods, all the heavens, and all the hells are within you’

Ecclesiastes 9:11 KJV ‘Returned and so under the sun that the race is not the swift nor the battle to the strong, whether yet pray to the wise nor yet riches to the man of understanding nor yet favoured to men of skill; but the time and chance happeneth to them all.

ABSTRACT

An inquiry into the Mining Industry in Lesotho: A Need for a More Effective Regulatory Body

The aim of this study was to discuss the challenges posed by the Legislative provisions under the Mines and Minerals Act No. 4 of 2005 which seems to cast to wide discretionary powers on the Minister responsible for Mining. Also, to highlight the weaknesses of the mineral regulatory functions under the Office of Commissioner of Mines. The study recommends the establishment of a regulatory body to do away with potential abuse of discretionary powers, conflict of interest of the Minister, direct political appointments and also assume regulatory function bestowed on the Commissioner of Mines under the current Act. In essence, the study advocates for repeal of the current Minerals Act and proposes the enactment of a new Mining Act that would establish amongst others, a regulatory body / Mining Authority to assume all the regulatory functions in the mining sector.

Keywords: Mining, Mineral Resources, Mining Regulations, Discretionary Powers, Minister responsible for mining, The Office of the Commissioner of Mining, Mining Authority.

ACRONYMS/LIST OF ABBREVIATIONS

| | |
|--------------|--|
| ABC | All Basotho Convention |
| AD | Alliance for Democracy |
| AMV | Africa Mining Vision |
| ASM | Artisanal Small Scale Mining |
| AU | African Union |
| BCP | Basotho Congress Party |
| BNP | Basotho National Party |
| DC | Democratic Congress |
| EITI | Extractive Industries Transparency Initiative |
| FDI | Foreign Direct Investment |
| GDP | Gross Domestic Product |
| ICA | International Compliance Association |
| KPCS | Kimberley Process Certification Scheme |
| LCD | Lesotho Congress for Democracy |
| LPC | Lesotho People's Congress |
| MFP | Marematlou Freedom Party |
| NIP | National Independent Party |
| UNDP | United Nations Development Programme |
| UNECA | United Nations Economic Commission for Africa |

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Chapter 1: Introduction

1.1 Introduction

Like many other mining legal and regulatory frameworks, Lesotho's framework is an endeavour to regulate the industry in a manner that would ensure socio economic development and economic growth. Regulation of the mining sector is a day-to-day task encompassing various factors as offering of justice by administrative authorities, public conduct monitoring and facilitation of social economic needs.

1.2 Background

Lesotho's mining industry legal and regulatory framework is currently made up of two principal Acts¹ that are supplemented by the Mines Safety Act of 1981² and the Kimberly Process Certification Scheme 2003³ as the international regulatory instrument. There are other regulatory Acts which are not specifically designed for mining but form part of the legal regulatory framework. These are the Environmental Act,⁴ Income Tax Act,⁵ and the Explosives Act.⁶ The regulatory framework is thus fragmented as the pieces of legislation governing the sector establish regulatory institutions that are administered under different administrative authorities which are otherwise exclusively mining in nature.⁷ In 2012, the government of Lesotho adopted a mineral policy that was designed to attract more foreign investment into the mining sector, ensure economic development and, *inter alia*, reform the legal and regulatory framework for institutional changes and changes in governance practices in order to better uphold the rule of law principles.⁸ Generally, the definitions of the rule of law principle vary between different nations. The particular definition adopted for purposes of this

¹ Mines and Minerals Act 2005 and Precious Stones Act 1970.

² Act No.4 of 1981.

³ KPCS of 2003.

⁴ Environmental Act 2008.

⁵ Act No. 9 of 1993.

⁶ No. 41 of 1958.

⁷ Different government Ministries. The Ministry of Tourism Sports and Environment is generally responsible for the issuance of environmental clearances, environmental impact assessments and environmental management pursuant to provisions the Environmental Act and thus responsible for regulating and monitoring environmental issues in the mining industry. Taxation in the Mining industry is also regulated by the Revenue Authority Lesotho as a unit under the Ministry of Finance pursuant to the Income tax Act 1993. Licensing, monitoring and management of explosives used in the mining industry is vested in the Ministry of Police and regulated under the provisions of the explosives Act. Provide more detail as to the place of each of those departments in the government system. Precision is the name of the game. In doing so, do show that they are entirely unrelated to each other in order to bolster your point of fragmentation.

⁸ The Minerals and Mining Policy 2015.

study is the one based on public administration performance coined around six principles of the rule of law which are; legality, accessibility, the right to be heard and participate, transparency, the right to appeal, and accountability of decision making.⁹ This study shall focus on the two outstanding principles: legality, which according to the Stanford Encyclopaedia of Philosophy, denotes that people in positions of authority should exercise their powers within the constraints of a legal framework of well-established laws rather than in an arbitrary, ad hoc, or discretionary manner¹⁰ and also transparency or fairness which denotes impartiality of government agencies or officers in discharging of regulatory functions in the mining sector as provided by the governing laws.

The study will also reflect on challenges brought about by wide discretionary powers casted on the Minister responsible for mining which their misuse seem to undermine the economic rights of the public or constrain economic development through the mining sector. The study, thus, reflect on good Governance of the mining sector that should be grounded on the principles of the rule of law which are critical in managing inherent risks in the sector and ensuring mining that can contribute sustainably towards development.

According to Markus Derblon *et al*,¹¹ the rule of law in the mining sector is ensured by public institutions that can formulate and implement clear, accessible and just laws that provide for equitable and accountable outcomes. Therefore, the study shall also reflect on the mining policy that seeks to revise and review the sector for sustainable economic benefits to the country .The Ministry of Mining has since attempted to implement the policy by formulating Bills that sought to revamp the sector and address the recurring shortfalls in the mining legal and regulatory framework.¹²

⁹ Marcus Derblon *et al*, ‘Assessing the Rule of Law in Public Administration: The Mining Industry’ (UNDP publications, 28 June 2019) <<http://www.undp.org/publications/assessing-rule-law-public-administration-mining-h>> accessed on 24 November 2022.

¹⁰ Waldron, Jeremy, ‘The Rule of Law’, The Stanford Encyclopaedia of Philosophy (summer end, 2020) <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/> accessed on 24 November 2022. The principle of legality in *Lesotho Brewing Company v Lesotho Labour Court President* [1999] LSHC 83 was explained to demand that a persons should not be charged on non-existent or unclear rules. Also the case of *Lemphane Diamond Mine (Pty) Ltd v Minister of Mining and 5 others* [2022] LSHC 36, similarly upheld the principle of legality and held that the Minister of Mining ousting administrative powers to terminate mining agreements, cannot arbitrarily do so without adhering to the dispute resolution mechanisms provided in the lease agreement despite discretionary powers pursuant to section 36 (5) of the Mines and Minerals Act of 2005.

¹¹ Marcus Derblon *et al*, *Assessing the Rule of Law in Public Administration: The Mining Industry* (UNDP publications 2019) 3.

¹² The first Bill was presented before Cabinet in January 2017 (Mines and Minerals Draft Bill of 2017) and other drafts followed in successive years. There was the 2018 January draft that was presented at the stakeholder’s

However, due to the fairly high turnover rate of governments and consequent frequent changes¹³ in policy, policy implementation and direction is derailed and diverted.¹⁴ The current Bill, towards implementation of the policy, has not addressed the key challenges faced by the sector nor limited the scope of state participation as recommended by the policy.¹⁵ This study, therefore, seeks to assess the current position of the diamond mining legal and regulatory framework and make recommendations for establishment of a semi-autonomous regulatory body that would assume some of the responsibilities and functions of the Minister responsible for mining and the office of the Commissioner of Mines in order to circumvent the seeming regulatory challenges in the regulation of the mining sector under the current legal and regulatory framework as highlighted under the Minerals and Mining Policy.

The study also interrogates the extent of state participation in the mining sector¹⁶ that can attract investment and enhance economic development. In particular, the study seeks to interrogate the current regulatory framework which revolves around a Minister and the Office of the Commissioner of Mines and Geology in terms of powers granted by the principal Mining Act.¹⁷ The study supports and affirms the idea of limited state participation by establishment

validation meeting followed by the latest Bill of September 2019 which has vastly changed from the former and has amongst other things done away with the mining authority.

¹² There has been three transitions in government and four different Ministers heading the Ministry of Mining since the first Bill was presented to multi stakeholders and cabinet in January 2017.

¹⁴ The first Bill was presented to the coalition government's cabinet comprising the Democratic Congress, Lesotho Congress for Democracy, Basotho Congress party, Lesotho People's Congress, Marematlou Freedom Party and National Independent Party in November 2016. The Bill encompassed all institutional arrangements or structures reflected in the Policy which were primarily aimed at attaining equitable and transparent governance, in particular the mining authority. However, June 2017 saw the emergence of a new coalition government made up of All Basotho Congress, Alliance for Democracy, Basotho National Party and Reformed Congress of Lesotho which advocated for the removal of the initial institutional arrangements in the former Bill as were held to be duplicating administrative functions of the respective government ministries and establishment of the mining authority in a separate Act of Parliament (Bill). This was in the Bill presented on the stakeholder's validation meeting in July 2018. Due to infightings within the leading party (ABC) in the coalition of 2018, in 2020, a new coalition government consisting of All Basotho Convention, Democratic Congress and Basotho national Party emerged. The latter government changed policy direction also by advocating for the total removal or exclusion of the Mining Authority and other institutional arrangements on the notion that government does not have the financial capacity to sustain any semi-autonomous institution or the mining authority. .

¹⁵ Sofonea Shale, 'The implications of party Conflicts for Coalition Governments' Coalition Governments in Lesotho (Africa Sun Media, 2021) 177-197.

¹⁶ The study seeks to justify limiting of Minister's discretionary powers granted by the Mines and Minerals Act 2005. State participation in the mining industry should be limited to administrative and regulatory duties discharged by the Minister through the government Ministries such as formulation and implementation of policy, establishment of compliance and monitory laws

¹⁷ No. 4 of 2005.

of a regulatory body that will assume the much more focussed regulatory role. It is also an attempt to curb the Minister's seeming conflict of interests and weak regulation by the Office of the Commissioner of Mines and Geology. This researcher agrees with Alstine *et al* in the contention that regulation of natural resources requires a competent legal and regulatory framework that upholds principles of the rule of law.¹⁸

1.3 Statement of the problem

The Mines and Mineral Act grants the Minister responsible for mining powers to administer the mining sector and cast too wide discretionary powers on the Minister that are prone to abuse and hinder investment opportunities for economic development.¹⁹

There is also a seeming conflict of interest in light of the Minister's roles in the sector. Section 34 of Mines and Minerals Act also places the Minister within the corporate structure of the mining companies as a shareholder on behalf of the Government. He has to mediate where disputes arise between the mining companies and public.²⁰ Decision making is as thus challenged for lack of impartiality.

The Office of the Commissioner of Mines and Geology as regulator and supervisor of the sector lacks technical and financial capacity to effectively regulate this ever evolving sector.²¹ For

¹⁸ Alstine, James, Jacob Manyindo, Laura Smith, Jami Dixon, and Ivan Amaniga Ruhanga. 2014. 'Resource Governance Dynamics: The Challenge of New Oil in Uganda.' *Resources Policy* 40: 48–58.

¹⁹ See sections 3, 12 and 61 of the Mines and Minerals Act of 2005.

²⁰ Practical examples of the latter can be drawn from interventions on the Kao, Kolo and Letseng Mines riots between the host communities and mining companies (investors). Sometime in February 2018, heavy rains eroded kimberlite mud to four household in a small village called Tiping, laying beneath the Kao Mine tailings site or mining pit. This disastrous event fuelled anger amongst nearby mine host communities who angrily protested by riotous acts. They protested by blocking public roads and vandalising some of the mine's property. Police were immediately called to the scene to control the angry villagers. Unfortunately, in an effort by the police to control the riotous villagers, one life was lost and two villagers severely injured. The brawl was fuelled more as intervention by the Minister of Mining was called. The Minister approached the villagers to hear their complaints about the mine and instantly issued directives on the mine to remedy all complaints that were lodged by the villagers within two months and failing which he would order closure of the mine. Amongst the complaints laid out by the villagers was the relocation of the village (Tiping) or villagers which had been hit by the disaster. It would therefore seem that the Minister sought to suspend operations of the mines without giving the mine a fair hearing and notwithstanding the fact that, as an administrator of the mining industry, he had to be impartial before holding the mine accountable. Also, it would seem that as a shareholder and regulator, he was equally liable or accountable for not ensuring that the mine upheld environmental standards or prevented hazards to the community yet acted as judge on his own cause. The office of the Minister directly interfered into the operational affairs of the mine and did not utilise agencies that can be seen to curtail this seeming conflict of interest due to external forces that may be seen to be political motivated.

²¹ This was revealed by research conducted on multi- stakeholder consultations through aid from UNDP and UNECA upon formulation of the Mining Policy.

Lesotho and other African countries, civil servants in public service experience different challenges depending on the level of resource allocation and regulatory environment, technical support, training, qualifications and complexity of service to be offered.²² Macroeconomic management financing²³ is always a challenge for public regulators as they do not get the necessary funding to capacitate them when needed.²⁴ Also, with very low government budget for the Ministry²⁵ and public servant's salaries, experts and technocrats in mining cannot be afforded as are consumed by the operative mines within the sector. The mining regulatory framework is fragmented as different government institutions or authorities have independent roles to play in the sector, and as thus lack of coordination becomes a repercussion to smooth and good governance of the sector.

1.4 Significance of research problem

Research and stakeholder's consultations were conducted in formulation of the current mining policy which has highlighted pitfalls in the legal and regulatory framework and recommended, *inter alia*, for establishment of an independent regulatory body or the Mining Authority. However, the policy is perceived to have been politically driven by the government of the day and too hypothetical and impractical in light of the many units or institutions sought to be integrated in the body.²⁶ It has been contended that reluctance to implement the policy has not only been due to political rifts in government but also due to the fact that some recommendations are far-fetched for Lesotho in light of its weak economic muscle, compared to other countries whose legal frameworks and mining governance models were referenced in formulation of the policy and are not based on practical challenges evidenced in the sector.²⁷ The research question for this study is whether the existing legal and regulatory framework upholds good mineral sector governance standards in light of the powers granted to the Minister responsible for mining under the current mining legislation and regulation of the sector under

²² The International Study Group Report on Africa's Mineral Regime' 'Minerals and Africa Development' (UNECA, November 2011) http://archive/unece.org/sites/default/files/DefaultFiles/mineral_africa_development_report_eng.pdf assessed on 24 November 2022.

²³ Funding of state participation that is seen to draw resources from other urgent budget priorities.

²⁴ The International Study Group Report on Africa's Mineral Regime' 'Minerals and Africa Development' (UNECA, November 2011) 129 -138.

²⁵ Ibid 129-138.

²⁶ Paki Bereng, 'Lesotho: Mining Bill Falls Short-Lawyer' *Lesotho Times* (Maseru, 12 January, 2018)1. There were also some of the comments by the Chamber of Mines on multi-stake holders' consultations on policy formulation.

²⁷ Ibid.

the office of the Commissioner of Mines. This study will also, significantly, critically explore the wisdom or otherwise of establishing an independent regulatory body or Mining Authority.

1.5 Scope and purpose of the study

This study seeks to assess, analyse and highlight the practical recurring challenges in support of the need to establish a mining authority that would be seen to be more feasible and efficient to address aspirations of the policy which are to establish an investment attractive environment that would yield economic benefit for the country. The focal point of the study is to critically analyse the legal and regulatory framework of the sector in light of the state participation in the sector through powers vested in the Minister against the government's attempt to creating a conducive environment for economic development by limiting state participation through establishment of the Mining Authority. It is also to depict practical challenges faced by the Office of the Commissioner to regulate the sector and how those challenges can be managed through introduction of a mining authority. Lesotho's challenges are peculiar in light of its small economy, infancy and history of its mining sector and legal system as compared to other diamond mining countries better endowed and whose legal and regulatory frameworks shall be comparatively analysed.²⁸ Therefore, the study is not a full-blown comparative study.

1.6 Literature review

Analytical research have been conducted on the legal and regulatory framework of the mining industry of Lesotho most of which emphasised the need for a transparent governance of the sector that would see mine host communities participate in the sector. In his dissertation, M.T Mats'ela²⁹ emphasises on the need for transparency within the sector and advocates for incorporation of the monitoring international standards that would compel upholding of rule of law principle within the industry.³⁰ In formulation of the Mining Policy, stakeholders' participation and research was conducted to assess the challenges inherent in the current legal and regulatory framework as reforms or review of the current framework was recommended upon implementation of the policy. As an attempt to implement the policy, a Bill³¹ was

²⁸ Selloane Khoabane, 'Diamonds Are Not Forever: Implications for Lesotho' (Analytical Note issue 2, 2020) <<http://www.centralbank.org.ls>> accessed on 4th January 2022.

²⁹ T M Mats'ela 'Transparency Regulation in the Diamond Mining Industry: Lessons Learned from South Africa a dissertation submitted in 2019 in partial fulfilment of a Master's Degree in Environmental Law at the University of Northwest, South Africa.

³⁰ Ibid.

³¹ Mine and Mineral Draft Bill 2016.

formulated through support from the UNECA and UNDP legal experts but has since undergone scrutiny and changes vastly from its original form.

Diamond mining is viewed globally as a significant economic activity for economic growth.³² It is perceived that to attain economic growth, mining activities have to be regulated in the most effective manner by competent bodies.³³ Regulation that has been controversially identified as key to attainment of economic growth for most South African Development Community (SADC) is one that vouches for diamond beneficiation processes. According to Nzenzema *et al*,³⁴ most developed countries have managed to profit out of their natural resources through beneficiation processes or export of mineral as semi-finished or finished products. For African countries like Lesotho, there has been numerous interventions by the Africa Mining Vision (AMV), mining dialogues and seminars (Mining Indaba) that supported beneficiation policies intervention.

However, Lesotho like other African countries as Zimbabwe seem not to be utilising beneficiation processes to expand their economies as still attain less returns over their mineral resources that are exported or traded in their raw state. Many African authors such as Sheloke *et al*³⁵ have identified that most African Countries like Lesotho continue to face the problem of not realising due economic benefits from their natural resources due to lack of appropriate skills, technology and infrastructure to embark on beneficiation processes.

For Lesotho, diamond mining has proved to be the major contributor of GDP despite meagre gains from sales of raw diamonds. Regulation of the diamond mining sector in Lesotho has since not adapted to the ever evolving technological changes that demand industrialisation of minerals or beneficiation for attainment of high gains out of value addition and beneficiation processes. Thus, the need for a more effective regulatory body that will be equipped with appropriate skills and infrastructure to adhere to beneficiation processes that would enhance economic growth and maximum gains from mineral resources.

³² Nzenzema N, An Investigation into the Efficiency of Diamond Beneficiation as a Fiscal resource Mobilisation Strategy: The Case of Zimbabwe. [2015] 5 American Journal of Contemporary Research.

³³ Ibid.

³⁴ Ibid 5.

³⁵ Sheloke *et al*, 'Regional Beneficiation Policy Intervention in SADC: Industry perspective' [2020] American Journal of Contemporary Research.

In this study, reference shall be made to the legal and regulatory frameworks of other diamond mining countries as Tanzania and Botswana that have prioritised beneficiation processes in regulating their diamond mining sectors. A comparative analysis with the diamond mining legal frameworks of Tanzania and Botswana shall be conducted to determine a framework against which to benchmark good governance in the diamond mining sector in Lesotho. The study shall therefore, assess practical mining governance models best suited for Lesotho in light of lessons that can be drawn from the two selected countries' legal and regulatory frameworks in the governance of diamond mining. These will include, *inter alia*, a review of the above-mentioned policies and regulatory frameworks of the two countries that regulate their mining sectors through independent bodies with the aim of limiting state participation or regulation by public bodies or government ministries that normally lack sufficient capacity to regulate the sector in the most efficient or beneficial that adheres to socio economic needs of the state due to undue political influences.

1.7 Research Questions

The research questions that will guide this study are as follows:

- What are the current challenges facing Lesotho's mining sector?
- Whether the mineral legal and regulatory framework sufficiently meets minimum governance standards that go a long way to guaranteeing success in regulation of the sector.
- Whether an independent mining regulatory body would not be a better policy choice as compared to the current situation?

1.8 Hypothesis

For any extracting country, the mining legal and regulatory framework is assumed to be a pillar for orderly exploitation of natural resources and economic development.³⁶ Whilst this might be true, at least theoretically, some empirical studies have suggested otherwise.³⁷ Lesotho is not

³⁶ Sovacool K et al 'Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)' [2016] *World Development* 179–192.

³⁷ Study by Human Rights Watch 'Out of Control: Mining Failure and Human Rights India' (June 2012) <https://www.hrw.org/sites/default/files/reports/india0612ForUpload_0pd> assessed on the 23rd March 2023.

an exception to the latter, hence the current study which aims to contribute to an ongoing debate towards implementation of the mining policy by critically assessing and analysing the current mining legal and regulatory framework through empirical research.

In African Countries inclusive of Lesotho, mining capital is scarce as is sourced from foreign sources by way of foreign direct investment (FDI). Foreign investment is perceived to be a risky task for investors where the mining legal and regulatory measures are weak and do not adhere to rules of natural justice as entailed in the EITA.³⁸

This study assumes that whilst the mining legal and regulatory framework of Lesotho is perceived to be fragmented and outdated, reforms envisaged by the mining policy remain debatable due to lack of justifications based on practical challenges or empirical evidence. It is therefore, the aim of this study to contribute to the ongoing debate by assessing the practical challenges and justifying the need for establishment of the mining authority.

It is therefore hypothesised that limitation of the minister's powers (discretionary) and strengthening of the regulatory functions of the state by establishment of a semi-autonomous (mining authority) body that would assume the regulatory functions on behalf of the government may be key to Lesotho's attainment of its vision for the sector.³⁹

1.9 Methodology

A qualitative research approach and analytical comparative analysis shall be used to conduct the study. A qualitative research approach is defined by Pritha Bhandari as collection of non-numerical data to understand concepts, opinions and experiences.⁴⁰ This approach is suitable

reveal that India's state government regulators admit that they fail to determine whether mining companies comply with the mining regulatory laws and cannot even control recurring illegal mining activities. The Human Rights Watch also interviewed one company executive who attested to chaos, corruption and total lack of governance in state's mining sector. The same can be evidenced in Lesotho, South Africa and other resource rich countries as the universal problem has been labelled the 'resource curse' by many authors on mining issues.

³⁸Sovacool K et al 'Energy Governance, 'Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)' 2016 *World Development* 179–192 and EITI 2018 History of the EITI < <https://eiti.org/> > accessed on the 23rd November 2022.

³⁹Mahlo 2017 Lesotho's Mining Legal Reforms are in Progress Press Release on 30 November, Ministry of Mining available at <http://www.lesothotradeportal.org.ls> accessed on the 24th November 2022.

⁴⁰ Bhandari, P. (2022, October 10). What Is Qualitative Research? | Methods & Examples. Scribbr. <https://www.scribbr.co.uk/research-methods/introduction-to-qualitative-research> accessed 11 January, 2023.

for this study as it allows for the assessment of published material by legislators and relevant stakeholders and open up the possibility for a comparative analysis with other jurisdictions.

According to Vellah Kedogo Kigwiru,⁴¹ a comparative research method is a subset of the qualitative research approach and the learned author defines as the method as the study of two or more macro level units with the aim of explaining the differences and similarities between the units of analysis. The comparative research method will be employed to assess Lesotho's frameworks against those of its counterparts in Botswana and Tanzania as they are established and have working frameworks. A critical Analysis will be conducted to evaluate the strengths and weaknesses of Lesotho's legal and regulatory framework against those of its neighbours, Botswana and Tanzania. This will give a clearer picture as to the need of regulatory body to oversee the mining industry.

A critical analysis and assessment of the Mines and Mineral Act, in particular sections 3, 12 and 61 shall be conducted. The above-mentioned sections shall be assessed on how interpreted to determine their effect on application. A Comparative research approach will be employed to assess the strengths and weaknesses of Lesotho's legislative and regulatory framework against the mining legal and regulatory frameworks of other jurisdictions such as Tanzania and Botswana.⁴² Cardinal to the study will be justification of the need for a regulatory body to regulate the mining sector and determination of the best mining governance model that would be ideal for Lesotho in light of international trade theories.

Practical examples and cases reflecting on challenges faced by the current regulatory and seeming conflict of interest poised by the roles played by the minister in discharge of his functions shall be assed in this study. Primary, secondary and internet sources shall be used to conduct the study.

1.10 Chapter breakdown

Chapter 1: Introduction. In this chapter, the researcher introduces the study and outlines the historical background of the mining sector in Lesotho.

⁴¹ Vellah Kedogo Kigwiru, 'Comparative Legal research: A Brief Overview'(Afrinomics Law January 2020) <https://www.afrinomicslaw.org/2020/01/24/comparative-legal-research-a-brief-overview> accessed on 11 January 2023.

⁴²Ibid.

Chapter 2: Background on the Notion of Good Mineral Governance Good governance of mineral resources is discussed as well as principles of the rule of law for good governance.

Chapter 3: The Pitfalls of the Legal and Regulatory Framework in the Mining Sector in Lesotho. The following chapter highlights the pitfalls of the current mining legal and regulatory framework by critically analysing the powers granted to the Minister under the mining legislation and regulation of the mining sector under the Office of the Commissioner of Mines

Chapter 4: Analysis of Mineral Governance and the Role of Government in the Diamond Mining Sector. Mineral governance under the legal and regulatory frameworks of Botswana and Tanzania and application of good mineral standards is discussed for comparative analysis with that of Lesotho. This chapter also discusses the role of government in the diamond mining sector and further introduce and discuss the need for establishment of a new semi-autonomous regulatory body, the Mining Authority.

Chapter 5: Conclusion. The last chapter concludes the study and offers recommendations for regulation of the diamond mining sector in Lesotho

Chapter 2: Background on the Notion of Good Governance of Mineral Resources

2.1 Introduction

This chapter discusses the concept of good governance in relation to the mining industry with the view of reflecting or highlighting the effect of undermining such principles under the current legal and regulatory framework in Lesotho which seem so cast unduly wide discretionary powers on the Minister responsible for mining. It introduces the need for good governance of the mining industry and the rationale thereof. It will further outline the principles of good governance and the rule of law on how adherence thereof can enhance development and economic growth. Conflict of interests and effectiveness in governance of the mining industry shall exclusively be outlined.

2.2 Good governance of the mining industry

The definition of governance is marked by the field in which is implemented.⁴³ Goldsmith⁴⁴ contents that the term originates from the general meaning defining public management. For the purpose of this study, this section will focus on the concept of governance as applied in the mining field.

For the mining industry, the concept of governance is underpinned by social, political and economic meanings. An initial general survey by Goldsmith⁴⁵ suggests that governance carries an ethical connotation of goodness (good governance) encompassing principles of the rule of law in public management. It has also been observed that the ethical dimension is losing ground on more neutralised concept of governance that is premised on the principle of efficiency and or effective regulation which only extends the economic dimension.⁴⁶ Therefore, the focal point of the study is centred on the principles of the rule of law and principle of efficiency underlying good governance in the mining industry.

⁴³ J Andres Dominguez-Gomez and Teresa Gonzalez-Gomez, 'Governance in Mining: Management, Ethics, Sustainability and Efficiency' (2021)3(8)*The Extractive Industries and Society* <<https://www.sciencedirect.com/science/article/pii/S2214790X21000551>> accessed on 22 January 2023.

⁴⁴ A Goldsmith, 'Is Governance Reform a Catalyst for Development?' [2007] *Governance: An International Journal of Policy, Administration, and Institutions* 165-186.

⁴⁵ *ibid.*

⁴⁶ cf J Andres Dominguez-Gomez et al (n1) 1-11.

2.3 The need for good governance in Africa

Like many other African countries endowed with extracted mineral resources (diamonds), Lesotho is also faced with the challenge of a ‘resource curse’. The term has widely been used to define those resource rich countries (mostly African countries) who do not seem to be benefiting from their resources, but rather the resources themselves being the source of poverty and instability. Many authors like McFerson⁴⁷ and Kolstad and Wig⁴⁸ have observed that bad governance leads to corruption that hinders economic growth in resource rich countries. Mo Ibrahim⁴⁹ also contends that even though Africa is so rich with resources, Africans remain poor as a result of governance of the resources.

Ibrahim⁵⁰ further contends that without good governance, country’s resources cannot be administered for socio economic needs like education and health care services. Laws (mineral laws) cannot be justly applied and security upheld. The lack of adherence to the principles of the rule of law and security have seen Africa facing a huge risk of internal security instability and resource abuse. Ibrahim sees the lack of good governance as a barrier to democracy as people cannot be fairly represented nor allowed to contribute to economic development. Also, the private sector is barred by the lack of good governance to generate employment, prosperity and tax revenues. This also holds true for international investors who are deterred by these alarming conditions in Africa. The UNDP Users Guide⁵¹ observes that good governance is fundamental for improving Africa’s global standings and shaping of its economic growth linked to stability and development.

The former UN Secretary-General Kofi Annan, in one of his famous speeches, once said “Good governance is the single most important factor in eradicating poverty and promoting

⁴⁷ H McFerson, ‘Extractive Industries and African Democracy: Can the ‘Resource Curse be Exorcised?’ [2010] 11 *International Studies* 335.

⁴⁸ I Kolstad and A Wiig, ‘Is Transparency the Key to Reduction Corruption in Resource -Rich Countries?’ [2009] *World Development* 521-53. If *World Development* is a journal please italicise it.

⁴⁹ Mo Ibrahim, ‘The Secretary-General’s Agenda: Sustainable Development in Africa Requires Good Governance’ <<https://www.un.org/en/chronicle/article/secretary-general-agenda-sustainable-development-africa-requires-good-governance>> accessed on 27th January 2023.

⁵⁰ *ibid.*

⁵¹ UNDP Users Guide, *Assessing the Rule of Law: The Mining Sector* (June 2019) <<https://www.undp.org/publications/assessing-rule-law-public-administration-mining-sector>> accessed on 27 January 2023.

development.”⁵² The World Bank President, Paul Wolfowitz⁵³ also alluded to the fact that people need a state that functions effectively for development and economic growth.

In determining good governance of the mining industry, we shall focus on the following critical cornerstones for good governance as viewed by Ndulo⁵⁴ These are: (a) the countries legal frameworks; (b) the process of licencing mineral rights; (c) governance of the mining industry; and (d) regulatory bodies.

2.3.1 Countries legal frameworks

As has been acknowledged,⁵⁵ the abundance of resources does not necessarily determine the country’s wealth or economic growth. The underlying causes of ‘resource curse’ are seen as complex and in many instances hindered sustainable growth and development in resource-rich countries. Therefore, to avoid this absurd repeated African history, regulatory frameworks governing extractive industries in developing countries are required to promote principles of sustainable development and good governance.⁵⁶

2.3.2 Licensing of mineral rights

It should be borne in mind that the mineral licencing laws or regulatory systems are not merely legal procedures, but expression of country’s policy towards exploration and exploitation of the country’s wealth.⁵⁷ Therefore, licencing laws or mineral and mining legal frameworks exists to both the host governments and investor actions in relation to mineral development. They set out boundaries of acceptable conduct in relation to exploration (prospecting) and exploitation (mining) hence the need to be premised on good governance principles. The Granting of mineral rights note⁵⁸ provides for equality before the law principle which denotes equal treatment of all applicants and non-bias on the part of granters of rights.⁵⁹ Below are some of

⁵²<https://www.kofiannanfoundation.org/speeches/governance-and-values/>.

⁵³ UNECA, ‘Minerals and Africa Development: The International Study Group on Africa’s Regimes (2011) < <https://repository.uneca.org/bitstream/handle/10855/21569/Bid-69220.pdf?sequence=> > accessed on the 23rd March 2023.

⁵⁴ Muna Ndulo, ‘Legal and Regulatory Frameworks for Resource Exploration and Extraction-Global Experience’ (ADB, February 2013) 1.

⁵⁵ Jonathan Di John, ‘The Resource Curse: Theory and Evidence’ (ARI, December 2010) 1 < <http://www.realinstitutoelcano.org/en/analyses/the-resource-curse-theory-and-evidence-ari> >.

⁵⁶ Minerals and Africa Development: The International Study Group on Africa’s regime (2011).

⁵⁷ Good Practice Note Granting of Mineral Rights <https://www.un.org/en/chronicle/article/secretary-generals-agenda-sustainable-development-africa-requires-good-governance> accessed on 27 January 2023.

⁵⁸ Ibid 7.

⁵⁹ UNDP Users Guide, Assessing the Rule of Law: The Mining Sector (June 2019) 16.

the principles of equality that should guide or govern the allocation of mineral rights for attainment of good governance.⁶⁰ These principles are normally undermined by discretionary powers granted to the Minister responsible for mining under the current legal framework where he or she has to exercise his or her discretionary powers upon a recommendation being presented to him by the Mining Board for allocation of mining rights.

2.3.2.1 First-come-first-served

Under this principle, applications should be considered on the basis of their lodgement succession. Further, applicants are required to lodge complete application so as to avoid a situation where an incomplete application is merely lodge to preserve a position in the queue. It applies to applicant who lodged first.⁶¹

2.3.2.2 Predefined application criteria and compliance requirements

This principle requires simplified and clear outlining of application requirements, and the terms conditions title holders must comply with.⁶²

2.3.2.3 Public disclosure of application

All applicants should be required by law to approach and consult with landowners or host community authorities before applying for any mining area or upon application.⁶³

2.3.2.4 Written notification

All decisions, directives, instructions by the regulators must be written and backed by rationale reasoning. This circumvents arbitrary decision making by the regulators or grantors of rights.⁶⁴

2.3.2.5 Suspension or Cancellation of Mineral Rights

Adherence to administrative justice principles is emphasised by this principle as there has to be specific reference to conditions under which mineral rights may be termination or

⁶⁰Ibid.

⁶¹ Good Practice Note Granting of Mineral Rights <https://www.un.org/en/chronicle/article/secretary-generals-agenda-sustainable-development-africa-requires-good-governance> accessed on 27 January 2023.

⁶² Ibid 4

⁶³ Good Practice Note Granting of Mineral Rights (n 57) 5

⁶⁴ Ibid 5

suspension. Procedural fairness and recourse against decisions should be allowed by regulatory authority.⁶⁵

2.3.2.6 Timeframe for Action

There has to be precision on execution of actions by regulatory authorities and consequences for failure to meet the target times for action.⁶⁶

2.3.2.7 Transparent Fiscal and Royalty Regime

A fiscal regime that is not open to negotiations improves transparency and good governance as all fiscal terms are to be proscribed under relevant mining legislation.⁶⁷

2.3.3 Governance of Mining Industry

For most African countries governance of the mineral resources is inferred from the constitutions⁶⁸, other laws governing the industry, specific mining legislations, model mineral developments agreements and ad hoc agreements.⁶⁹ Mineral resources are either owned by the state or held in trust by the respective Government on behalf of the citizens in all instances.⁷⁰ Principles of good governance underpinning governance of the mining industry remain key even for Lesotho as provided under section 3(2) of Mines and Mineral Act as being efficiency and social and economic benefit and effective regulation (timely manner).⁷¹

2.3.4 Regulation

Over the years, mining regulations in developing countries have focused on either state control of resource revenues or private sector independence.⁷² Also, corruption and rent seeking behaviour remain major concern and obstacle to good governance in Africa.⁷³ Whilst section

⁶⁵ Good Practice Note Granting of Mineral Rights (n 57) 5.

⁶⁶ Ibid 5.

⁶⁷ Good Practice Note Granting of Mineral Rights (n 57) 5.

⁶⁸ For Lesotho, section 107 of the constitution of Lesotho 1993 infers rights for exploration and exploitation of minerals.

⁶⁹ J M Otto, (2002) 'Mineral Policy Legislation and Regulation'.

⁷⁰ In Lesotho all minerals are vested in Basotho pursuant to section 107 of the Lesotho constitution of 1993 and section 3(2) of the Mines and Minerals Act of 2005 convers the Minister of Mining with powers to govern exploitation and exploration of the mineral in the most beneficial, efficient and timely manner.

⁷¹ B. G Peters 'Is Governance for Everybody' (policy soc, 2004) 301-306.

⁷² Nhi Ba Nguyen, 'The Regulatory Framework and Mineral development in Vietnam: An Assessment of Challenges and Reform (2019) 11(18) JS. Is this JS supposed to be Journal of Sustainability? Or is the journal just *Sustainability*? Please also show the website where you got this and the date thereof.

⁷³ Ibid.

3(2) of the Mines and Minerals Act of Lesotho emphasises on the Minister's responsibility to ensure effectiveness in exploration and exploitation of minerals in Lesotho, it has been observed that corruption is directly linked to the effectiveness of government institutions and destroys public trust on government regulatory institutions.⁷⁴ It is another observation that government institutions regulating the mineral industries in developing countries lack the necessary capacity to regulate the industry effectively and timely.⁷⁵ Various factors including rare utilities to examine the daily operations of mines like cars and unskilled public officers are challenges facing the mining industry in developing African countries.

Therefore, in order to attain good governance of the mining industry, African states would have to focus on the implementation of principle of good governance which for the purpose of this study, focus shall be on the rule of law principles.

2.4 Principles of the Rule of Law

It has been noted that the concept of the rule of law is crucial for effective and efficient governance of the mining industry.⁷⁶ The rule of law in the mining industry is ensured by the public institutions that can formulate and implement accessible, clear and just laws that provide fair, equitable and accountable development outcomes and services to the all.⁷⁷ It is on this basis that the rule of law has to be seen to apply to both the regulator (government) and investor (mining companies). The six principles of the rule of law that underpin good governance of the mining industry to be discussed are, legality, accessibility, right to be heard or participate, transparency, right to appeal and accountability.⁷⁸

2.4.1 Legality

Underlying the principle of legality is the need to respect and comply with the regulating laws by all stakeholders in the industry. Both Government and investors must give effect and comply with the regulatory framework of the host nation. It would, therefore, seem that not only

⁷⁴ UNODC, 'Preventing and Managing Conflict of Interest in the Public Sector: Good practice Guide' (July 2020) <<https://www.unodc.org/documents/corruption/Publications/2020/Preventing-and-Managing-Conflicts-of-Interest-in-the-Public-Sector-Good-Practices-Guide>> accessed on 27 January, 2022.

⁷⁵ UNECA, 'Minerals and Africa Development: The International Study Group on Africa's Regimes (2011) <<https://repository.uneca.org/handle/10855/21569>> accessed on 27 January 2022.

⁷⁶ UNDP Users Guide, Assessing the Rule of Law: The Mining Sector (June 2019) 17.

⁷⁷ Ibid 17-18.

⁷⁸ Ibid.

titleholders and applicants are to give effect to statutory and contractual obligations, but also the public administrators or regulator are obliged to abide by the law as their decisions and content have to have a basis in law. This can best be summarised as equality before the law.⁷⁹

2.4.2 Accessibility

The principle denotes that every person should have access to information from the regulator or public authority. The regulator should be able to provide information to the public regarding the minerals, guidelines and applicable laws governing the industry. As will be discussed in the following chapters, under resourced agencies or incapacitation of the regulatory body often hinders this principle.⁸⁰ This also denotes clarity of administrative procedures that have to be clear and unambiguous in order to be easily accessible. Public must as such be made aware of the administrative procedures in the language they understand. Thus, the right to information should not be absolute, but rather be restricted by the legal limitations necessary for the public interest and or national security.

2.4.3 Right to be heard /to participate

This principle underpins administrative fairness and procedural fairness upon decision making. For applicants of mineral right, this would mean a right to address any shortcomings in their application prior to the decision being taken. Where a decision to cancel or terminate mineral rights is to be made, titleholders must be afforded an opportunity to defend their standpoint. Regulators or government are supposed to apply the ‘let the other party be heard rule’ before making terminal decisions as that may amount to expropriation.⁸¹

2.4.4 Transparency

Transparency denotes openness in governance through disclosure in order to promote good governance and democracy. Lack of transparency has often been seen to be a floodgate of corruption leading to bad governance and secrecy.⁸² Matsela contends that transparent

⁷⁹ The Africa Mining Vision 2020 and the Mineral and Mines Policy recognize the involvement of women in mining as the latter meaning includes equal treatment of men and women in the mining industry.

⁸⁰ The Minerals and Mining Bill 2017 provides for the need to have a geological survey agency that will provide mineral information about the country’s mineral resource endowments and conduct explorations.

⁸¹ Section 68(2) Mines and Mineral Act of 2005 provides that before the Minister exercises her right to cancel the lease, he must first call on the defaulting party to remedy the breach.

⁸² M T Matsela, ‘Transparency Regulation in the Diamond Mining Industry: Lessons Learned from South Africa’ 6-14.

governance should be that allows consultations with host communities upon grant of mineral rights and disclosure of all information relating to the industry.⁸³ There should also be honest recordings of revenues availed to the public. The EITI⁸⁴ reiterates on the importance of open dialogues with all stakeholders in the mining industry. The KPCS⁸⁵ on the other hand promote transparency by providing guidelines on how member state can avoid trading on blood diamond. The most critical aspect of transparency in governance of the mining industry which is also the focal point of this study, is the concept of ‘guided discretionary powers’.⁸⁶ this concept is underpinned by the concept of ‘no subjectivity in decision making’ regulators must ensure that in exercise of statutory powers, are limited to the confines of law and not personal interest that tend to create a situation of conflicting interest. Cardinal to this study, conflict of interest shall be analysed in the case of Lesotho’s legal framework in the following chapters.

2.4.5 Right to appeal

This principle means that there should be guarantee to administrative and judicial review against decisions taken by the regulatory authority. It is also referred to as the right to ‘access to courts’.⁸⁷ Mining companies and investors must be confident about the dispute resolution mechanisms of the host nation and in exercise of such right, courts should be able to confine their decision to the contractual agreements and concessions.⁸⁸

2.4.6 Accountability

This principle ensures that decision makers or regulators are held accountable for their wrongful actions or wrongful doings undermining laws and procedures for their personal gains. Throughout the mining life cycle, public official or agencies can be held liable for their actions. In order to guarantee the upholding of the principle, mechanism such as internal reviews, disciplinary measures, internal audits, ethics boards and independent supervisions are often involved to reduce possibilities of negotiations behind closed doors.⁸⁹ The principle also

⁸³ Ibid.

⁸⁴ Extractive Industries Transparency Initiative 2018 <<https://eiti.org/history>> accessed on the 27 January 2023.

⁸⁵ Kimberley Process Certification Scheme.

⁸⁶ Good Practice Note Granting of Mineral Rights <https://www.un.org/en/chronicle/article/secretary-generals-agenda-sustainable-development-africa-requires-good-governance> accessed on 27 January 2023.

⁸⁷ Ibid.

⁸⁸ In the recently celebrated case of *Lemphane Diamonds (Pty) Ltd v Minister of Mining and 5 Others* CCA /0016/2022LSHC COM, Judge Mathaba emphasised that parties are bound by resolution mechanisms freely chosen except if they freely agree to abandon same.

⁸⁹ Good Practice Note Granting of Mineral Rights 16.

ensures that the government or regulators of the industry report information and activities in compliance with the regulatory framework as required by the law. It is on this basis that the EITI, of which Lesotho has not ratified, advances open dialogues between government and public the public is able to access information held by government and hold officials accountable based on such information.

Considering the above discussed principles, it can be observed that the principles of the rule of law serve as the basis and guide towards attainment of good governance that can drive the goals of the industry and ensure sustainable development and socio-economic benefit for the public. Governance of the mining industry coined around these principles can promote economic growth and ensure a mining legal and regulatory framework that can yield economic growth.

2.5 Discourse on good governance

Some authors like Gyek Tanoh⁹⁰ contend that good governance of mineral resources in Africa is a masquerade to harbour plunder of resources of Africa by the Western Countries from the colonial regimes to date. This they contend that it is manifested under different political systems and political governance patterns labelled ‘good governance’ and or ‘international standards by international organisations such as the MIF and the World Bank amongst many others.

Tanoh also holds a view that the historical background of mineral exploitation in Africa has seen Western countries or former colonisers dictating how resources should be managed and traded by African countries who at the time had no control and power on how the resources were managed.⁹¹ The mineral regulatory and legal frameworks post-colonial regimes still depict western monopoly over resources where foreign mining companies are given power to control trade of resources and self-regulate the markets. Whilst this may be good for efficiency of markets and free trade, exploitation and trading of raw resources from Africa becomes clear evidence of resource plunder in Africa. It is on this basis that mining is seen to benefit mining companies at the expense of poor resource rich African countries. Tanoh⁹² looks beyond corruption as he postulates that there is power imbalance between the mining companies and

⁹⁰ Gyek Tanoh, ‘Good Governance and Resource Plunder in Africa’ The Tricontinental: Institute for Social Research (June 2019).

⁹¹ Ibid.

⁹² cf Tanoh (n86) 1-32.

resource rich countries as the international organisations and mining companies dictate mineral policies to African states.

2.6 Chapter Conclusion

The purpose of this chapter was to highlight the importance, rationale and criticism for good governance and reflect on legal and regulatory framework that would work best in Lesotho considering some underlying factors evolving from good governance. Good governance of resources stems from legal and regulatory frameworks that underpin principles of the rule of law and leave no room for political monopoly as shall be discussed in the next chapters.

Chapter 3: The Pitfalls of the Legal and Regulatory Framework in the Mining Sector in Lesotho.

3.1 Introduction

This chapter reflects on the pitfalls of the mining legal and regulatory framework of Lesotho. Particular focus shall be on specific provisions of the Principal Mining Act⁹³ that seem to cast too wide discretionary powers on the Minister responsible for mining and as thus rendering the legal and regulatory framework non-compliant with the principles of good governance as discussed in the previous chapter. The chapter further discusses the shortfalls of the regulatory framework, in view of the regulatory function of the office of the Commissioner of Mines.

First, the chapter shall reflect on the global overview of the mining regulatory framework. It will further outline and critically discuss particular sections of the Mining Act⁹⁴ that seem to render too wide discretionary powers on the Minister responsible for mining. The Chapter will discuss challenges and incapacitation of the office of the Commissioner of Mines on regulating and monitoring operations of the mines as wholly public funded office under the government. The principal aim of any country's mining legislation is to attain a conducive environment for investment, innovation and country's economic benefit through orderly exploitation and development of mineral resources.⁹⁵

Like many other Southern African Countries and resource rich countries in the world, Lesotho's rich endowment with diamonds can be a major asset to ensure economic growth and sustainable development yet contribute so little and at worst does substantial social and environment harm like in other endowed countries.⁹⁶ Alence and Mattes contend that to avoid such pitfalls emerging, there is an international consensus that good governance framed on adoption and implementation of regulatory framework that promotes deeper linkages between the mining sector and broader economy and protects socio-economic rights.⁹⁷

⁹³ Mines and mineral Act No. 4 of 2005.

⁹⁴ *ibid.*

⁹⁵ Muna Ndalo, 'Legal and Regulatory Framework for Resource Exploration and Extraction: Global Experience' Africa Development Bank High Level Seminar, 27 February, 2013).

⁹⁶ Rod Alence and Robert Mattes, 'Mineral Governance Barometer: Southern Africa' (OSISA, December 2016)1.

⁹⁷ *ibid* 1-5.

There is also a requirement that states be able to monitor whether Mining Companies comply with regulations imposed by mining legislations and restrictions or able to punish upon breach. Therefore, the most intriguing question to answer in the study is to whether the regulations and legal framework given provisions of the Mines and Minerals Act⁹⁸ achieve the latter purposes. Also, if the provisions of the Act are geared towards the latter, do the regulators achieve the legislative purpose of the Act in discharge of their function.

In view of some provisions of the Act and day to day performance or monitoring of the sector by the office of Commissioner of Mines, the pitfalls of the diamond mining legal regulatory framework of Lesotho become apparent.

Whilst it cannot be ignored that without accountability or at least governance through laws that foster state officials to pursue socially desirable mineral governance policies, accountability mechanisms including legislative, judicial and independent institutions that restrain on the use of executive authority, a legal framework cannot be seen to be transparent and effective

It is argued by Alence⁹⁹ that without accountability or rather restraining of executive authority through legislation, judicial decision or independent institutions, mineral governance can easily be degenerated into selective, rent seeking activities where politicians or ministers in the case of Lesotho, relax rules or impose regulations that favour extracting companies for bribe¹⁰⁰.

Therefore, this study seeks to highlight and discuss those sections in the Principal Law¹⁰¹ that seem to pose a threat of abuse due to wide discretionary powers vested on the Minister responsible for Mining, seeming conflict of interest (duties) and also weak regulation of the sector by the office of the Commissioner of Mines for reform.

According to Maope,¹⁰² the lack of controls and legal precision which leaves too wide discretionary powers on administrative agencies are held as two major pitfalls in the mining legislation of Lesotho and as such require reform.

⁹⁸ No.4 of 2005.

⁹⁹ Alence, 'Mineral Governance Barometer', (n 84) 1-5.

¹⁰⁰ Ibid 3-5.

¹⁰¹ Mines and Minerals Act, 2005.

¹⁰² Kelebhone Maope, 'Aspects of mining law in Lesotho', (1988) 4 LLJ 107.

3.2 Powers of the Minister under the Act

Section 107¹⁰³ of the Lesotho's Constitution vest all minerals in the Basotho Nation. This denotes that for one to acquire mining rights in Lesotho, they must have a mining mineral agreement with the government. The main body responsible for regulating the mining sector is the Ministry of Mining through the Minister responsible for mining.¹⁰⁴

The Ministers responsible for Mining in Lesotho are political appointees who are vested with the responsibilities of ensuring that minerals are prospected and mined in the most efficient and beneficial way in the public interest.¹⁰⁵

Section 4(3) provides that notwithstanding provisions of this Act, the Minister 'may', in public interest and subject to such conditions as 'he' may determine, authorize any person cited to a research institute as accredited university to undertake non-commercial investigation into the geological or mineral resources of Lesotho.¹⁰⁶

This provision casts too wide discretion in the Minister to authorize institutes or universities to undertake studies on the land vested in Basotho and such undertaking normally precludes other researchers or potential investors to acquire the land being investigated for mineral prospecting or exploration as permissions to study normally guarantees researchers a pre-emptive right in the event they discover potential wealth in the land being studied. Ministers are at liberty to permit even institutes that may deliberately oust malicious agenda to investment and such powers attract bribes or rent seeking practices as ministers are at liberty to decide without any other statutory conditions but conditions he 'may determine'. Also, the sovereignty and ownership of mineral resources is put at risk on such arrangement as ministers is solely responsible to determine conditions he 'may' deem to be in the best public interest without any threshold or guidelines.

¹⁰³ Constitution of Lesotho 1993.

¹⁰⁴ Mines and Minerals Act of 2005, ss3 (2).

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*, ss4 (3).

Section 12 (2) (e) also casts discretion on the minister to directly make appointments of two members to the board with technical expertise.¹⁰⁷ This criterion of appointment also poses a threat of abuse of power and a conflict of interest that may be pressured by political influence. This type of appointment is normally referred to as unregulated or direct appointment¹⁰⁸. Gill¹⁰⁹ argues that public appointments those who administer appointments are often pressured politically and as such there is need to regulate appointments and those administrators then get additional protection from patronage. Candidates need to be appointed on merit and wider pools of professions and disciplines in order to attain the best and independent professionals.¹¹⁰

3.3 State Participation

Section 34 stipulates that the government through the Ministry of Mining may require not less than 20% shareholding in a purposed mine.¹¹¹ This denotes government's participation in the mining sector. Government's participation in the sector can take various forms.¹¹² The most common are the free equity participation, carried equity participation and free equity participation. The latter model is practiced in Lesotho pursuant to Section 34 where the state is allotted shares by the private company without any consideration and also pays dividends to the government for the proportion of shares allotted as equity.

The model also poses ministerial powers challenge or generally governance challenge as is normally held as a very poor governance model.¹¹³ Commercial efficiency is normally a challenge due to minister's involvement as a shareholder on behalf of the government. Microeconomic management financing is also a problem as the state normally draws away funds from mining priorities to other budget priorities of the government. The other challenge is of conflict of interest, which is focal point of this study in light of minister's role as a

¹⁰⁷ *ibid*, para 12(2) (e).

¹⁰⁸ Mathews Gill, 'Reforming Public Appointments' (Instituted for Government UK, 18 August 2022) < <http://www.institutionforgovernment.org.uk/publication/reformoming-publicapointment>> assessed 21 April, 2023.

¹⁰⁹ *ibid*, 5-19.

¹¹⁰ *ibid* 5.

¹¹¹ Mines and Mineral Act of 2005, s 34.

¹¹² ANC Policy Discussion Document, 'Maximising the Developmental Impact of the People's Mineral Assets: State Intervention in the Mineral Sector (SIMS, March 2012). < <http://www.anc1912.org.za> > accessed on 21 May, 2023.

¹¹³ *ibid*, 11- 16.

representative of state where the state is a partner (shareholder) with the private companies and also a regulator of the mining sector of the same private company.¹¹⁴

As highlighted before,¹¹⁵ the minister had been in a dilemma of having to take a decision to cancel a lease or resolve a dispute involving a decision taken by the private company on issues the minister, as the shareholder on behalf of the government, was accountable for the same decision that was being challenged before him.

In 2014 the Mines and Minerals Act was amended¹¹⁶ to extend the powers of the minister to suspend and cancel a mineral concession when (a) mining operations are not commenced within a year following issuance of the lease (b) mining operations have ceased for two years or (c) or prospecting operations are not commenced within 6 months of issuance of license.

In *Lemphane Diamond Mine v Minister of Mining*,¹¹⁷ Applicants Lemphane Mine brought an application before court challenging the Minister's decision to terminate the mining lease due to Applicant's failure to operate or commence commercial production within a year since issuance of the mining lease. In defence, the mine alleged that it was due to the government's or minister's failure to discharge its obligations made under the lease which were *inter alia* facilitating for registration of the lease with the Deeds Registrar providing coordinates for the leased are, approval of mining plan, acquisition of stones in the Applicant private company.

The court had to deal with issues of interdict and or specific performance. The court granted Applicant's prayers for temporary relief interdicting the termination letter and matter to be referred to arbitration pursuant to clause 37 of the lease. The latter case demonstrated a very complex situation where the government itself had to defend a matter where it had, through the office of the Minister responsible for mining allegedly failed to discharge its obligations under the lease despite the minister having to cancel or terminate as a partner and regulator who has allegedly failed his obligations.

¹¹⁴ *ibid.*

¹¹⁵ In Chapter 1, page 4.

¹¹⁶ Mines and Minerals Act (Amendment) 2014 (Legal Notice No. 7 of 2014).

¹¹⁷ *Lemphane Diamond mine v Minister of Mining and 5 others* CCA/0016/2022.

In *RESKOL Diamonds (Pty) Ltd v The Minister of Mining and four others*,¹¹⁸ a review application was brought against the Minister's decision of exercising his discretionary powers under section 36 (5) to deny applicants renewal of their mining lease. The applicant's case was that the Minister's exercise of power was irrational and did not invoke section 44 to allow parties negotiations before refusal of renewal. The court took a view that applicants had not substantiated their allegation or rather there was no substantiating evidence pointing towards arbitrariness or bad faith in the minister's exercise of power as the application was dismissed. The court overlooked all reasons advanced by the applicants pointing towards the minister's actions that contributed to the applicants delay in commencing operations and burdened applicants with the obligation to prove arbitrariness of the decision yet the Act does not itself set clear standards or factors to be considered to hold the minister's decision mala fide as the provision casts wide discretionary powers.

The most interesting sections that demonstrates wide discretionary powers of the Minister in sections 60 and 61.¹¹⁹ Section 60 (1) provides that the Minister 'may' remit royalties for a period he may determine, (2) may exempt a mineral requirement for purposes of analysis or other examination. Section 61 on the other hand gives the Minister powers to defer payment of royalties subject to conditions and period he 'may' determine.

The two provisions may be seen to cast two wide discretionary powers on the Minister on very technical and economical aspect of the sector and as such prone to abuse due for personal gains or rent seeking practices. Stason¹²⁰ contents that too wide discretionary power results *pro tanto* in the creation of what he refers to as 'a government by men'¹²¹ rather than rule of law. Stason¹²² also argues that wide discretionary powers also compromise the principles of the rule of law.

Whilst it can be argued that the rationale for discretionary powers is to allow practicability and convenience. The classical jurisprudence Professor Dicey emphasised on the rule of law and

¹¹⁸ *RESKOL Diamonds (Pty) Ltd v Minister of Mining and 4 others* CCA/0047/2021.

¹¹⁹ Mines and Minerals Act No. 37 of 2005.

¹²⁰ E. B. Stason, 'The Role of Discretion in Administration and its Relationship to the Rule of Law (paper No. 14) < <http://dergipark.org.discretionary-powers/> accessed on 21 April 2023.

¹²¹ This refers to governance according to the will of government officials vested with discretionary powers as opposed according to the dictates of statutes or the rule of law.

¹²² E. B. Stason, (n 108) 1.

principle of separation of powers in order to curb the abuse that also had to distort the predictability and certainty of law.¹²³ One of the challenges of the current mining legal framework in Lesotho is that socio economic development goals are not catered for in light of the fact that it does not incorporate the modern governance standards.¹²⁴ The EITA¹²⁵ have not yet been adopted as some of the standards that would be utilised to curb the seeming discretion powers that may not attract investment due to unpredictability or uncertainty of the law posed by sections 60 and 61.

For private companies, sections 60 and 61 is two folded in the sense that it could be used against them or in their favour based on the goal that it serves to achieve depending on the person exercising the power. Verma¹²⁶ alludes to the fact that no modern government can function without discretionary powers, however, he also stresses that the courts have emphasised on the use that is ambiguous, arbitrary and or fictitious. He¹²⁷ also stresses that the person exercising such power must be reasonable.

For the diamond mining sector, it cannot be ignored that the industry itself is a high risk for economic crimes and political power, manipulation malice and dishonesty due to the bribery or rent seeking practices. The Directorate on Corruption and Economic Offences (DCEO) in 2013 revealed that both a sitting minister and a former minister were allegedly involved in corruption cases or bribery.¹²⁸ This illustrates that mining sector cannot be an exception to abuse of discretionary power as Harris et al¹²⁹ contents that there is a growing number of maladministration cases in several regions of the world in the mining Sector.

¹²³ Demise Meyerson, 'The rule of law and separation of powers' (2004) 4 Macquarie Law Journal 1.

¹²⁴ Minerals and Mining Policy (2015) 12

¹²⁵ Extractive Industries Transparency Initiatives (June 2003)

¹²⁶ Himanshu Verma, 'Exercise of Discretionary Powers' (2021) Balack and White Journal.com.

<<http://bnwjournal.com/2021/09/12/exercise-of-discretionary-powers/>> accessed on 21 April 2023

¹²⁷ *ibid*

¹²⁸ Sefako Seema, 'Lesotho, Corruption' (Privacy shield Framework). < <http://www.privacyshield.gov>>

¹²⁹ K. Harris, Rizal Muchtasar and Sahbudin, 'Preventing Maladministration on Issuing Mining Licences: A Case Study in Southeast Sulawesi, Indonesia' (2018) 54 ICoL 4

3.4 Incapacitation of the Office of Commissioner of Mines as the Regulator

The regulatory function for the mining sector in Lesotho is vested in the office of the Commissioner of Mines established under Section 6 of the Act.¹³⁰ Section 7 of the Act provides for the functions of the Commissioner.¹³¹

However, as highlighted in Chapter 1¹³², the Commissioner's Office is highly challenged in its discharge of functions due to financial constraints and technical incapacitations. There have been massive allegations of diamond erosion in Lesotho.¹³³ The most recent show that Lesotho exports more diamonds than it produces and also that mining companies smuggle diamonds out of the country of which Lesotho gets no value of them.¹³⁴ The allegations in the papers revealed that Lesotho is failing to protect and monitor its resource wealth in diamonds that could see economic declines and circumventing of international compliance standards with the KPCS.¹³⁵ The allegations show that Lesotho exported 264,355 carats of rough diamonds valued at \$51,959,190 (M761 million) more than it produced. These diamonds may have been smuggled, stolen, lost or hinting at blood diamonds.¹³⁶

The allegations pointed out that the rife discrepancies were due to inadequate technical representation in the mines.¹³⁷ Despite the Commissioner's denial of the allegation, what remains factual is the technical inadequacy of the office of the Commissioner to efficiently supervise and monitor the industry due to the low budget challenges in Lesotho.¹³⁸ The lack of facilities for public officers in the Commissioner's office and technical expertise for supervision and monitoring is a major setback for the mining sector regulation for Lesotho.

The Mining Policy¹³⁹ recognises the deficits in the supervision and monitoring by the Commissioner's Office as a regulator and seeks to address the same by realising the need to capacitate the office through appropriately qualified human resources and a competent

¹³⁰ Mines and Minerals Act No. 4 of 2005.

¹³¹ *ibid*, s 7.

¹³² Chapter 1, p 5.

¹³³ Moorosi Tsiane, 'Commissioner of Mines in Hot soup over Diamonds' Lesotho Times (Maseru, 29 January 2019).

¹³⁴ Staff Reporter, 'Lesotho Exports More Diamonds than it officially Produces' Lesotho Tribune (Maseru, 16 April 2023) 1.

¹³⁵ *ibid*.

¹³⁶ Staff Reporter, (n 122).

¹³⁷ *ibid* 1.

¹³⁸ Minerals and Mines Policy of 2014.

¹³⁹ *ibid*.

institution that can effectively discharge its functions. This can be achievable through mineral sector governance that would see regulation by a semi-autonomous institution as shall be seen in the following chapters.

3.5 Chapter Conclusion

In view of the sections highlighted in this chapter, it is recommended for reform of the same, reiteration being on the need to limit too wide discretion imposed on the Minister and capacitation of the regulatory body that will discharge functions of the office of the Commissioner more effectively, hence capacitated.

CHAPTER 4: Comparative Analysis

4.1 Introduction

The aim of the previous chapter was to highlight threats of weak governance in the mineral sector and regulatory and weakness of the Commissioner's Office. The next chapter seeks to provide a comparative analysis of the regulatory framework of other jurisdictions with that of Lesotho. The key points to be highlighted shall be to observe how other jurisdictions have addressed the paradigm of limitation of discretionary powers and enhancement of capacity of the regulatory bodies in the mining sector. This chapter seeks to provide a comparative analysis of Botswana and Tanzania's legal regulatory frameworks with that of Lesotho, particularly in the diamond mining sector and their level of competence to regulate and supervise the diamond mining sector more efficiently as compared to Lesotho.

The final part of the analysis shall highlight the strengths and lessons that could be learned from the two jurisdictions' regulatory frameworks in order to propose recommendation for Lesotho. The chapter will first discuss the legal regulatory framework of Tanzania and provide a comparative analysis on powers granted on the minister responsible for mining and regulatory model and capacity of the office or agencies that are vested with the powers to supervise and monitor the mining operational aspect of the sector. It will be followed by a comparative study of the framework of Botswana.

4.2 Comparison of Tanzania and Lesotho Mining Regulation

The Tanzanian mining legal framework is founded on a mining policy which amongst other things, which seeks to formulate a legal regulatory framework that ensures transparency, predictability and minimum discretion.¹⁴⁰ Similar objectives hold for Lesotho's mining policy.¹⁴¹ However, different from Lesotho, Tanzania have implemented their policy and incorporated the latter objectives in the mining legislative framework. Lesotho is in the process of formulating a new mining law that would incorporate the latter objectives and the necessary regulatory reforms.¹⁴² The main legislation in Tanzania governing the Mining sector is the

¹⁴⁰ The Mineral Policy of 2009

¹⁴¹ The Mineral and Mines of 2014

¹⁴² The Draft Mineral and Mines Bill of 2021 is yet to be validated at the stakeholder's meeting before it can be send to the national assembly

Mining Act as amended.¹⁴³ The main Act is supported by other pieces of Legislation that regulate the mining sector.¹⁴⁴ The Act is reviewed timeously as its latest review is the Mining Act Review of 2019 [CAP.123R.E.2019], which is a review of the 2017 amendment or review. The latter laws brought changes into the Tanzanian Mining sector.¹⁴⁵ It took Tanzanian about 12 years to craft the laws from being Bills in 2005 to being promulgated 2017. These laws together formed what is currently the 2017 Mining laws together with their many regulations including the 2018, Local Content Regulations and the Diamond Industry Protection regulations as amended in 2019.¹⁴⁶ The Most recent is the 2022 regulation introducing the reversionary mineral rights.¹⁴⁷

4.2.1 Ownerships of Rights

Section 5(a) vests minerals into the hands of the President who holds the same in trust for the Tanzanian people.¹⁴⁸ This according to Amne Suedi¹⁴⁹, gives a lieu to the government over the mineral as she views it to be more precise than the previous in the repealed Act, where such were held to be vested in the ‘United Republic of Tanzania’ on what she views a ‘loose term’.

The principal aim of any country’s mining legislation is to attain a conducive environment for investment, innovation and country’s economic benefit through orderly exploitation and development of mineral resources.¹⁵⁰

Like many other Southern African Countries and resource rich countries in the world, Lesotho’s rich endowment with diamonds can be a major asset to ensure economic growth and sustainable development yet contribute so little and at worst does substantial social and environment harm like in other endowed countries.¹⁵¹ Alence and Mattes contend that to avoid

¹⁴³ Mining Act No.14 of 2010 (Miscellaneous Amendment No. 7 of 2017).

¹⁴⁴ The Permanent Sovereign Act No. 5 of 2017, Review and Renegotiation of Unconscionable Term Act No. 6 of 2017, Environmental Management Act of 2004, Land Act CAP 113 and the Village land Act CAP 114.

¹⁴⁵ Burure Ngoch and Sadock Magai, ‘Mining in Tanzania: Effects of the Mining Legal Framework Overhaul’ (DLA Piper, August 2020) < <http://www.dlapiper.com> > accessed on 22 May 2023.

¹⁴⁶ *ibid.*

¹⁴⁷ Mining (State Participation) Regulations No. 574 of 2022, regulation 4.

¹⁴⁸ Mining Act No.14 of 2010 (Miscellaneous Amendment No. 7 of 2017).

¹⁴⁹ Amne Suedi, ‘Who is Who in the Mining Sector in Tanzania: The Institutional Framework and How it Works (Mondag, Sep 2018) < <http://www.mondag.com/mining/735054/who-in-the-mining-sector-tanzania-the-institutional-framework-and-how-it-work> > accessed on the 22 May 2023.

¹⁵⁰ Muna Ndalo, (2013) Legal and Regulators Framework for Resource Exploration and Extraction (n 50) exploration and extraction Global experience.

¹⁵¹ Alence and Mattes, Mineral Governance Barometer (n 135) 1-3.

such pitfalls emerging, there is an international consensus that good governance framed on adoption and implementation of regulatory framework that promotes deeper linkages between the mining sector and broader economy and protects socio-economic rights.¹⁵²

There is also a requirement that states must be able to monitor whether mining companies comply with regulations imposed by mining legislations and restrictions or able to punish upon breach.¹⁵³ Therefore, the most intriguing question to answer for this study is to whether the regulations and legal framework, given provisions of the Mines and Minerals Act,¹⁵⁴ achieve the latter purposes. Also, whether the provisions are geared towards the latter, also, whether the regulators achieve the legislative purpose of the Act in discharge of their function.

In view of some provisions of the Act as highlighted above, and operational functions or monitoring of the sector by the office of Commissioner of Mines, one may well observe that the pitfalls of the regulatory framework become apparent.

It is argued by Alence¹⁵⁵ that without accountability or rather restraining of discretionary authority through legislation, judicial decision or independent institutions, mineral governance can easily be degenerated into selective, rent seeking activities where politicians or ministers in the case of Lesotho, relax rules or impose regulations that favour extracting companies for bribe.¹⁵⁶

4.2.2 Powers of the Minister under the Act

The Minister is responsible for formulating many policies, strategies and many legal frameworks for the exploration, exploitation, supervision, monitoring and implementation of the same. In discharge of his functions, the Minister has to report to Cabinet and is responsible to promote investment through research and exploitation of minerals¹⁵⁷.

Notably, the Minister's powers to grant special mining licenses and Mining Development Agreements (MDAs) was removed.¹⁵⁸ The granting of such rights is now vested in the

¹⁵² Ibid 1 -5.

¹⁵³ Alence, Mineral Governance Barometer (n 135) 1-5

¹⁵⁴ No.37 of 2005

¹⁵⁵ Alence and Mattes, Mineral Governance Barometer (n 135) 3.

¹⁵⁶ *ibid*.

¹⁵⁷ Pursuant to the Tanzania Extractive Industries (Transparent and Accountability) Act 2015 (TEIA).

¹⁵⁸ Mining Act No.14 of 2010 s 10 repealed and replaced by s19 under the Amendment [C.A.P 123 R. E 2019].

commission of mines established under the Act.¹⁵⁹ Applications for mineral rights brought through the commission shall be evaluated and issued to the Minister who shall forward the same to Cabinet for approval.¹⁶⁰ Once Cabinet has approved, applications are then taken to the Commissioner for issuance of rights to applicants.¹⁶¹ Therefore, one observes that the Commission is responsible for the issuing, suspending, cancelling of exploration licences together with mining licenses and not the Minister as in the case of Lesotho.

Sections 15 and 16 of the Act gives power to the Minister to publish public notice for mineral rights tender, whilst Section 17 goes further to show that: The Minister after consulting with the commission, where he determines that it would be in the interest of orderly development, may make such gazette publication for areas that may be demarcated for primary mining licenses.¹⁶² Comparing the latter with provisions of Lesotho, one may see that the Minister's role is to point out areas of mining interest and upon such consult the Commission, whilst in Lesotho section 57¹⁶³ makes it compulsory acquisition.

4.2.3 State participation in the Mining Sector

Whilst Section 34 of the Lesotho Mining Act¹⁶⁴ provides for not less than 20% free carry shareholding for the government of Lesotho through the Ministry of Natural Resources, Section 10 of the Tanzanian Act¹⁶⁵ holds that in any mining licence issued to rights holders, the government shall acquire not less than 16% free carried shares. Also, the government is entitled to acquire “in total, up to 50% of shares of the mining company commensurate with the total tax expenditures incurred by the Government in favour of the mining company”.¹⁶⁶

The state participation shares are acquired by the Government through a state-owned company under the Mining (State Participation) Regulations.¹⁶⁷ The state mining company (STAMICO), has the mandate to oversee the government's interest, also, worth noting that regulation 6(1) of the 2022 Regulations, has expanded the activities of the STAMICO to hold equity interests

¹⁵⁹ *ibid* s21.

¹⁶⁰ *ibid* s32.

¹⁶¹ *ibid*.

¹⁶² Mining Act No.14 of 2010 s 10 repealed and replaced by s19 under the Amendment [C.A.P 123 R. E 2019].

¹⁶³ Mines and Mineral Act No. 4 of 2005 s 34.

¹⁶⁴ *ibid*.

¹⁶⁵ Mining Act No. 14 2010 as Amended [C.A.P 123 R. E 2019] s10.

¹⁶⁶ *ibid*.

¹⁶⁷ Mining (State Participation) Regulations No. 574 of 2022.

and mineral beneficiation in any mining operations.¹⁶⁸ Holders of mining rights are expected to negotiate and allot the government its participation interest or shares within 90 days of issue.¹⁶⁹ One is most likely to conclude that the controversy or seeming conflict of interest in the case of Tanzania is farfetched, in light of their participation or acquisition of shares through a state-owned entity as opposed to Lesotho as shown in chapter 1¹⁷⁰ where the Ministry of Mining Lesotho through the Minister acquires shares of the government and becomes conflicted as a representative shareholder when dispute arises against the mining company and the Ministry.

4.2.4 Regulation of the Mining Sector

Section 21 of the Tanzanian Mining Act¹⁷¹ establishes a mining commission of which Section 22 confers regulatory and supervisory duties to the Commission. The Commission has powers to issue, suspend and revoke renewal exploration licenses and permits.

The Commission is a body corporate with perpetual succession or a legal persona that can amongst others sue and be sued, hold property and contract.¹⁷² Its day-to-day administration is headed by the executive secretary. The Commission comprises of four departments broken down into twelve sections of which four are the main sections: Mines Inspectorate and Environmental Department,¹⁷³ Mineral Licensing and Information System Department,¹⁷⁴ Mineral Audit and Trade department¹⁷⁵ and Corporate Service Department.¹⁷⁶

Important to note is the composition of the Commission, Section 21(7)(h) provides for two eminent persons who possess proven knowledge and experience in the mining sector of which one has to be a woman.¹⁷⁷ Section 25 also gives power to the Commission to appoint

¹⁶⁸ Kelvin Mosha and Willbert Kapinga, 'Tanzania: Mining (State Participation) Regulations' (Bowmans, October 2022) < <http://bowmanslaw.com/insights/corporate.service/tanzania-state-participation-regulaion> > accessed on 21 April 2023.

¹⁶⁹ Mining (State Participation) Regulations No. 574 of 2022 s6.

¹⁷⁰ Page 4.

¹⁷¹ Mining Act No. 14 2010 as Amended [C.A.P 123 R. E 2019] s21.

¹⁷² *ibid* s 22.

¹⁷³ Its general obligations are to ensure infrastructural compliance and monitoring of health and safety standards in the mining operations.

¹⁷⁴ Its main obligations are to issue, suspend and revoke mineral licenses and permits.

¹⁷⁵ Its function is to audit the mining sector and corporate social responsibility.

¹⁷⁶ It conducts general audit of the Commission.

¹⁷⁷ Mining Act No. 14 2010 as Amended [C.A.P 123 R. E 2019] para22(7)(h)

officers under terms and conditions of the public service for the proper discharge of its functions.¹⁷⁸

Section 25 (2) goes further to show that the Minister also may make appointments Chief Inspector of Mines, Resident Mines Officers, Mines Resident Officers and public officer in consultation with the Commission for the purpose of better performance and function of the Commission.¹⁷⁹

In respect to royalties, Section 87 (3) provides for an engagement with an expert by the Minister in a situation where there may be a dispute after payment of said royalty.¹⁸⁰

4.3 Lessons learned from Tanzania

Notably, one is most likely to conclude that the Tanzanian Legal Framework is more precise and predictable when it comes to the powers of the minister despite also the limited powers to exercise his discretion on any functions under the Act¹⁸¹.

The other important lesson that one can extract from Tanzania's mining legal and regulatory framework is the harmonisation of all laws related to mining and timely amendments or reviews to further enhance proper functioning of the mining sector. The amendments or reviews of the laws and regulations imposed can be seen by one as geared towards maximising the local's benefit in the sector, whilst also observing transparency and accountability in the governance of the sector by limiting political player's participation in decision making in the mining sector. One may also conclude that the establishment of independent intermediaries to regulate and hold shares on behalf of the government curtails the likelihood of ministerial intervention and is reflective of principles of the rule of law regarding potential bias and avoidance of pressured decision -making. It is for this reasons that the DLA Piper Report¹⁸² continues to show that Tanzanian Mining sector is effective and still the major contributor of GDP.

¹⁷⁸ Ibid s 25

¹⁷⁹ Ibid ss25(2)

¹⁸⁰ Mining Act No. 14 2010 as Amended[C.A.P 123 R. E 2019] ss87(3)

¹⁸¹ *ibid*

¹⁸² DLA Piper report, (n 133)

Another remarkable lesson that one can learn from the Tanzanian’s legal and regulatory framework, is the structural regulation of the mining sector through independent body corporates that are able to function with the best technical staff under clear personnel selection standards or appointments through merit rather than the threat of seeming political nepotism as shown in the case of Lesotho.¹⁸³

The observer is most likely to conclude that the regulatory function and supervisory role of the Commission in the Tanzanian mining sector is outstanding based on the regional and global mineral performance indicators.¹⁸⁴ One may perceive it as one of the best models of regulation and supervision of the mining sector. The regulators’ general approach in regulating the mining sector in Tanzania is said to be guided by the Mineral Policy.¹⁸⁵ The Policy requires the regulator to be an overseer and not directly engaged in the daily operations of the mines different from Lesotho. In Lesotho, an observer is likely to see that the same Ministry and/or the Minister has to regulate, overseeing compliance, grant rights and revoke mineral titles, handle disputes and hold shares on behalf of the government.

Another important observation on the composition of the Commission, is its standard of competence in light of its human resource and its ability to generate self-sustaining revenue and budget to effectively discharge its mandate in the mining sector.

4.4 Comparison of Botswana’s Legal and Regulatory framework with that of Lesotho

4.4.1 Ownership of Mineral Rights

Ownership of minerals in the Republic of Botswana vests in the state and the Minister has to ensure that such minerals are invested in and exploited in the most efficient and timely manner.¹⁸⁶

4.4.2 Powers of the Minister

The Minister of Minerals and Energy – Botswana is responsible for the general administration of the Ministry of Mineral Resources, Green Technology and Energy Security (MMGE) and

¹⁸³ Mining Act No. 14 2010 as Amended[C.A.P 123 R. E 2019] s25

¹⁸⁴ DLA Piper report, (n 133) and Alence, ‘Mineral Governance Barometer’, (n 84) 1-5

¹⁸⁵ Mineral Policy of Tanzania 2009

¹⁸⁶ Mines and Minerals Act No. 17 of 1999 s3.

the mining sector. The Minister is vested with the powers to grant mineral rights, refuse, suspend, revoke, direct inspections on any mineral title in accordance with the provisions of the Act.¹⁸⁷

Sections 5(4) of the Botswana Mines and Minerals Act¹⁸⁸ resembles that of Lesotho¹⁸⁹. The section grants the Minister wide discretionary powers with the same wording of ‘as he may determine’. Notably, it would seem that even on sectors that deal with royalties,¹⁹⁰ appointments¹⁹¹ and Minister’s powers to suspend mineral concessions are identical.¹⁹² The wording in the above-mentioned provisions are identical and can be viewed to consist of the same objective or rather that the Lesotho’s Mining Act is a replica of Botswana’s Mining Act being the pioneer of such a policy.

4.4.3 Regulation of the Mining Sector

Similarly, the Ministry of Mineral Resources, Green Technology and Energy Security (MMGE) is responsible for the regulation of the sector under the supervision and administration of the Minister as is in the case of Lesotho.

However, whilst one can observe that Lesotho has only one administrative body¹⁹³ that serves as advisory to the minister on grant of mineral rights and administrative decisions, Botswana and Tanzania have several departments and subsectors that govern their mining sectors. The MMGE has six departments: Department of Corporate Services (offers administrative support to the ministry) ; Department of Energy Affairs (deals with Energy Policy), Mineral Affairs Division (policy making authority on all mining matters and mineral sector development); Diamond Hub (benefaction of industry); Projects and Energy Development Unit (deals with energy matters).¹⁹⁴

¹⁸⁷ *ibid* s 3.

¹⁸⁸ Mines and Minerals Act No. 17 of 1999 sections: 5,6,7,8 and 76.

¹⁸⁹ *ibid* ss 5(4).

¹⁹⁰ Mines and Minerals Act No. 4 of 2005 ss 4(3).

¹⁹¹ Mines and Minerals Act No. 17 of 1999 s68.

¹⁹² *ibid* ss 7(3).

¹⁹³ Mines and Minerals Act No. 4 of 2005 s 12

¹⁹⁴ The Ministry of Mineral Resources, Green Technology, and Energy Security.

<<http://www.gov.bw/ministries/ministry-minerals-green-technology-energy-security-mmge>> accessed 22 May 2023.

One can also observe parastatals such as the Okavango Diamond Company, a state-owned diamond company that holds government shares in the mines. The Mineral Development Company Botswana (MDCB) which is also an investment company that holds and manages mineral assets for the Government of Botswana.¹⁹⁵

There are various divisions within the Department of Mines whose functions are to licence, inspect and monitor the sector. Their main task as regulators of the sector is to monitor compliance within the regulatory framework for mining operations.¹⁹⁶

4.4.4 State Participation

In terms of Section 40 of the Act¹⁹⁷, the state is entitled to 15% stake in mining projects as a partner on the basis of a working interest participation by representation in the boards of the operating mines¹⁹⁸. The World Bank Mining Governance Review in 2016¹⁹⁹ has complemented Botswana's participation in the sector through its joint venture which saw two-thirds returns on diamond revenues through general tax, royalties and dividends.

The government's shareholding is paid upon though assessment of profitability and feasibility of investment. Of the eight large scale operating mines in Botswana, the government has shares in only four mines of which one of the namely Debswana, where it has partnered with De Beers, it operated a 50-50 joint venture with De Beers from 2011 to 2021.²⁰⁰ However, it is also important for one to note that the level of government's ownership has no bearing on the profit-sharing margin in light of the fact that the government's share is an amalgamation of royalties, taxes and dividends.

It is important to note also, is that Botswana's shares are held under a state-owned company CBL Limited²⁰¹

¹⁹⁵ *ibid*

¹⁹⁶ The Ministry of Mineral Resources, Green Technology, and Energy Security, (n178)

¹⁹⁷ Mines and Minerals Act No. 17 of 1999 s40

¹⁹⁸ KPMG, 'Botswana' (Global Mining Institute, April 2014) 7 < <http://assets.kpmg.com>> accessed on 22 May 2023.

¹⁹⁹ World Bank Group, (2016) 'The Mining Investment and Governance Review (MinGov)' 17 < <http://hdi.handle.net/10986/25225>> accessed 22 May, 2023.

²⁰⁰ *ibid*.

²⁰¹ J. Van Wyk, 'Double diamonds, Real Diamonds: Botswana's national Competitiveness' (2010) 14 Academy of Marketing studies Journal 55-76.

4.5 Lessons Learned from Botswana

Undoubtedly, one is mostly likely to observe that Botswana's mineral policy and legal regulatory frameworks are sound²⁰². The World Bank MinGov Review also attests to the fact that Botswana's economy experiences growth due to its strong legislative framework and institutional mineral governance that is made upon a highly qualified and trained staff.²⁰³ It also highlights Botswana's economic development.²⁰⁴

One is likely to observe that the legislative provisions in the main mineral Acts of both Lesotho and Botswana have similar provisions or wording in light of the provision relating to the ministerial powers and functions, yet Botswana's regulator and mining sector seems ideal and is regarded as the best in Africa.²⁰⁵ Therefore, the question one needs to ask is, why is Lesotho's mineral governance weak?

To address this issue, first, one must note Botswana's efforts in addressing transparency and accountability issues in allocating mineral licences is different as most developing countries have sought to separate the licencing function from the Ministry regulating the sector. This separation is perceived to curb political interference in the licensing process that may lead to the potential of irregular transactions.²⁰⁶ However, it has been argued that in countries with very low chances of perceived corruption as Botswana, such may not be necessary.²⁰⁷

Secondly, one may observe the most iconic feature that enables efficiency and development of Botswana's mineral sector to be its institutional arrangement consisting of different divisions with well trained staff equipped with relevant skills to effectively monitor and support the sector. Unlike Lesotho, there are no conflicting legislative requirements across government institutions as government institutions are coordinated for purposes of licensing and management of the sector.²⁰⁸

²⁰² *ibid.*

²⁰³ World Bank Group, (n 183) 12 -20.

²⁰⁴ *ibid.*

²⁰⁵ World Bank Group, (n 183) 12 -29.

²⁰⁶ J. Van Wyk, 'Double diamonds, Real Diamonds: Botswana's national Competitiveness (n 185) 55.

²⁰⁷ *ibid.*

²⁰⁸ Alexander Nehrbass, 'Africa's Miracle? Assessing Political Stability in Botswana:' (The African Review, April 2020) 202-222.

Not only is the Minister of minerals a mining engineer,²⁰⁹ but it may well be seen that there are also inter-ministerial committees and negotiations task teams for purposes of negotiating state participation that comprise of highly qualified officials.²¹⁰ In Lesotho, the negotiating team is made up of a Board of which two members are direct appointees and government representatives made up of low to medium ranked government officials.²¹¹

One may also observe that institutional capacity of the regulatory bodies in Botswana is well equipped with qualified candidates procured from a wide pool of candidates²¹²

Due to the high turnover in the mining sector from the revenue and royalties and dividends collection, Botswana is able to afford facilitating support to its monitoring and supervising functionaries in its Ministerial Policy Committee.²¹³ One is likely to conclude that Botswana mineral institution's autonomy to administrate their functions enable prioritisation and speciality in their field of service or regulation of the sector unlike in Lesotho where revenues from the mining sector are scatters to some other government projects or regulated under a consolidated government fund. The Botswana Revenue Service also provides a reporting service that allows for transparency and accountability on revenues from minerals.²¹⁴ The Revenue Service publishes information regarding mining production which is also audited by the Office of the Auditor General.²¹⁵

It may also be observed that sometime in 2006, the Government of Botswana implemented expenditure rules prohibiting Government from spending more than 40% of GDP in any year and prioritized acquisition of shares in the mines and funding of mineral regulatory bodies to enhance institutional capacity for the good governance of the sector that would yield economic growth.²¹⁶

²⁰⁹ Hon. Lefoko Fox Moagi (accessed on Linked in Biography).

²¹⁰ It is composed of the Governor of the Bank of Botswana, Permanent Secretaries of the Ministry of Minerals, Green Technology and Energy Security, Ministry of Finance, Ministry of Trade and Investments, Permanent Secretary to the President, Attorney General and National Strategy Officer.

²¹¹ Mines and Minerals Act of 2005 s 12.

²¹² Alexander Nehrbass, 'Africa's Miracle?' (n 192) 200.

²¹³ *ibid.*

²¹⁴ World Bank Group, 'The Mining Investment and Governance Review (n 183) 12-29.

²¹⁵ *ibid.*

²¹⁶ World Bank Group, 'The Mining Investment and Governance Review (n 183) 12-29.

4.6 Chapter Conclusion

The most fundamental lesson one can observe from the two jurisdictions or mineral regulatory frameworks of both Tanzania and Botswana is their prioritisation of mineral sector governance through institutional capacitation. Institutions regulating the mineral sector are staffed with skill personnel and given autonomy to run their administrations and funds without political interference

Also, to avoid conflict of interest in the regulation of the sector, both jurisdictions have their shareholding in the mines through corporate bodies or state companies rather than direct government accounts run directly by the central government as in Lesotho. There is less interference by politicians and more technical staff in the sector's governance.

Therefore, one may well see how effective mineral sector governance can be achievable through institutional arrangement that enjoys autonomy and good administration by skilled personnel in the mining field.

Powers vested upon the Ministers can only be exercised reasonably and effectively where the legal framework is sound and grounded on proper principles of accountability and transparency.²¹⁷

The chapter was aimed at highlighting those strengths and effective regulatory measures imposed by other jurisdictions that have seen much economic growth through the mineral sector. Also, having identified the key strengths of those jurisdictions, one can now draw a conclusion on how Lesotho can best review their Diamond Mining Legal and Regulatory framework for effective governance that would see sustained economic growth. The next chapter shall therefore provide a full summary of key takeaways from the study as such provide recommendations for Lesotho.

²¹⁷ *ibid* 12 -28.

Chapter 5: Conclusion and Recommendations

5.1 Conclusion

The World Bank Mineral Governance review (MinGov),²¹⁸ in assessing the country's performance in the mineral sector reflects on seven themes and the mining value chain. The three value chain themes are: their Policy, Legislation and Regulation; Accountability and inclusiveness; Institutional Capacity and Effectiveness, that are assessed on five stages of the value chain namely contracts, licences and exploration, operators, taxation and state participation, revenue distribution and management, and local impact.²¹⁹

For the purposes of this study, the main focus was on Policy Legislation and regulation which in short refers to the legal and regulatory framework. This in essence refers to the scope of rules and regulations governing the sector against the principles of good governance and the rule of law as highlighted in Chapters 2 and 3 of this study.

The other relevant theme for the study is the institutional capacity effectiveness which assesses the capacity or competence of government institutions on regulating the mining sector and extent of their application of the governing laws.

Therefore, in view of the first theme, one is most like to conclude that Lesotho's Mining Policy is geared towards a legal regulatory framework that would see the institutional changes and good governance practices that *inter alia* speaks to limited or no political interference in the administration of minerals.²²⁰

Some of the key strategies for the Policy to review the legal framework is through modern application of transparency and accountability mining laws or provisions, introducing provisions in the Mining Act that would minimise the Minister's discretionary powers and adherence to the rule of law principles.²²¹

²¹⁸ World Bank Group, 'The Mining Investment and Governance Review (n 183) 12-29.

²¹⁹ *ibid.*

²²⁰ Minerals and Mining Policy 2015.

²²¹ *ibid.*

Another important theme for the study is the institutional capacity and effectiveness. The need for capacitation is two-folded according to the Mineral Policy as it emphasises on human resource capacitation and institutional capacitation for strengthening of the mineral sector governance or regulation.

5.2 Recommendations

Lesotho is home to political turmoil in the form of government instability or frequent change of government that disturbs implementation of policies and the following of guidance within policies as is the case with the implementation of the Mining Policy.²²² The frequent changes in government are also a threat to investment.²²³

Therefore, one is most likely to conclude that casting too wide a net at the discretion of the Minister (a political appointee) to administer and drive the policy becomes a threat to investment. Such instability also weakens the government's budgets to capacitate institutions governing the mineral sector or the mining sector in general.²²⁴

It is on this basis that one may recommend for Lesotho to adopt a governance model that would enshrine minimal governance or regulation reliant on ever changing Ministers or political appointees by opting to regulation driven by autonomous bodies as in the case of Tanzania where licencing and regulations is vested in the Commission.

One may also argue that Botswana's mineral governance still puts their mineral sector at global competitiveness stage with similar provision as in Lesotho. However, such an argument may be rebutted by one's observation of political stability in Botswana and the checks and balances performed by other bodies and transparency initiatives by the revenue authorities and the Central Bank reports over mineral revenues.

Therefore, for Lesotho an observer may well recommend for an independent mining authority and state company that would hold government's shares in the mines would be ideal to curb the seeming abuse of power and as political will. It may also be observed and urged for

²²² Mokete Pherudi, 'Political instability in Lesotho: Causes and Possible Remedies' (2022) 34 BJAS 80 -90.

²²³ *ibid.*

²²⁴ Mokete Pherudi, 'Political instability in Lesotho: Causes and Possible Remedies (n206).

licensing, negotiation and regulatory functions to be vested in a mining authority that will be a semi-autonomous body that is made of highly skilled personnel trained on mineral governance as perceived by the Mineral and Mines Policy.²²⁵

The Mining Act should establish such a body and other supporting bodies such a diamond centre similar to the Diamond hub in Botswana for beneficiation purposes as well as advocated by the Policy.²²⁶

One may conclude that the rationale for regulation through a mining authority would be limiting or doing away with political interference in the mining sector and capacitation of regulatory functions currently handled by the weak regulation of the Office of the Commissioner of Mines.

It may well be seen by one that the conflict of interest where the regulation, shareholding, and dispute resolution or general administration is vested in one Ministry headed by the Minister who is vested with all powers to be the ultimate decision maker. The latter governance model has been held in an old-fashioned way and is against the principles of good governance or following the rule of law.

As stated in Chapter 1 the Mining Authority has been envisaged by the Mining Policy²²⁷ and/or incorporate in the Minerals and Mines Act Bill 2017²²⁸ which was later reviewed in 2020²²⁹ to exclude such on grounds that Lesotho would not be in a position to sustain the authority as there would be no subventions and it would also not be able to generate income for funding its operations.

Notwithstanding, the latter counter argument, to mitigate the risks posed by the current legal framework of Lesotho, this study recommends the development of a more robust regulatory framework by setting up a mining authority to regulate the sector.

²²⁵ The Minerals and Mining Policy of 2015.

²²⁶ *ibid.*

²²⁷ The Minerals and Mining Policy of 2015.

²²⁸ Mineral and Mining Bill of 2017 which was replaced Bill the current 2020 Mineral and Mining Bill.

²²⁹ *ibid.*

The Resource Governance Index postulates that state-owned enterprises and sovereign wealth funds are key institutions towards strong governance and avoidance of inefficiency and corruption hazards resource squandering nations such as Lesotho.²³⁰ The Index²³¹ also identifies that good policies and laws are of no good if the state is challenged by implementation as the case in Lesotho. Therefore, this study seeks to encourage implementation or development of a mining authority that would ensure quality governance of the sector and effectiveness.

Another important recommendation would be to follow Botswana's example and set up a state-owned investment company separate from the Ministry of Mines to handle mineral investments, this would minimise political conflicts of interest and encourage efficient use of capital resources. The Minerals and Mining Policy is the best vehicle towards economic growth through Lesotho's diamond mining, however implementation due to political will seems to be a barricade as no attempts have been made towards implementation or enactment of the new Mineral Act to reform the diamond mining legal and regulatory framework in the mining sector Lesotho.²³²

²³⁰ E. Z Ponde De Leon, (2017) Resource Index 17
<<http://resourcegovernance.org/sites/default/files/documents/2017-resource-governance-index> > accessed on 22 May, 2023.

²³¹ *ibid* 17

²³² Mineral and Mining Policy 2015 page 22.

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