A Comparative Analysis of Extractive Industry Law in South Africa and Namibia

Balancing Resource Sovereignty, Environmental Protection, and Community Rights

A comparison of the legal frameworks, jurisprudence and policy instruments that govern mining in South Africa and Namibia, with recommendations for aligning extractive governance with sustainable development and human rights norms



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Abstract



This article compares the legal frameworks, jurisprudence and policy instruments that govern mining (and, to a limited extent, petroleum) in South Africa and Namibia. It assesses how each jurisdiction balances resource sovereignty (state custodianship and fiscal capture of rents), environmental protection (prevention, mitigation and rehabilitation obligations), and community rights (participation, information access and consent). Drawing on statutes, leading case law and academic commentary, the article highlights convergences and divergences, evaluates leading judicial decisions (notably Alexkor, Agri SA and the Xolobeni-related Baleni judgment), and concludes with targeted recommendations for aligning extractive governance with sustainable development and human-rights norms.

South Africa and Namibia at a Glance

Feature	South Africa	Namibia
Principal mining statute	Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), in operation since 1 May 2004	Minerals (Prospecting and Mining) Act 33 of 1992
Resource ownership	Custodianship vested in the State for all the people	Mineral rights vested in the State, consistent with Article 100 of the Constitution
Environmental law	National Environmental Management Act 107 of 1998 (NEMA) and EIA Regulations	Environmental Management Act 7 of 2007 (EMA), with the ECC regime
Community consent	Baleni (2018) requires full and informed consent on communal land, through IPILRA	Public participation under the EMA EIA process; no express FPIC in the minerals law
Reform	Upstream Petroleum Resources Development Act 23 of 2024; draft Mineral Resources Development Bill (2025)	Minerals Bill under consideration, not yet enacted
EITI Standard	Not implemented	Not implemented



01. Introduction

Extractive industries present a classic governance trade-off: they can generate significant revenue and create jobs, but impose long-term ecological costs and social disruption if poorly regulated. South Africa and Namibia are both mineral-rich southern African states with comparable colonial legacies, relatively centralized resource law frameworks, and strong environmental statutes. Yet the two countries adopt different institutional arrangements and legislative vintage: South Africa's Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) represents a post-apartheid reconception of mineral custodianship, while Namibia today still operates largely under the Minerals (Prospecting and Mining) Act 33 of 1992 supplemented by the Environmental Management Act 7 of 2007 (EMA). This divergence affects how resource sovereignty, environmental safeguards and community rights are operationalized. Both regimes are also in transition. In South Africa, the Upstream Petroleum Resources Development Act 23 of 2024 is designed to separate petroleum regulation from the MPRDA, and a draft Mineral Resources Development Bill was published for comment in 2025.[1] In Namibia, a Minerals Bill intended to replace the 1992 Act has been under consideration but, on the publicly available information, has not yet been enacted.[2] This article focuses on mining; Namibian upstream petroleum, which is governed by separate legislation, is outside its scope.[3]

1. Upstream Petroleum Resources Development Act 23 of 2024 (assented to on 25 October 2024; s 111(1) provides for commencement on a date fixed by the President by proclamation); Draft Mineral Resources Development Bill, published for public comment by the Minister of Mineral and Petroleum Resources on 20 May 2025.

2. Cliffe Dekker Hofmeyr, 'Developments in Namibia's Mining Law Underway' (Mining and Minerals Alert, 2 September 2025).

3. Petroleum (Exploration and Production) Act 2 of 1991 (Namibia).

02. Statutory frameworks: custodianship, licensing and environmental law

2.1 South Africa: Custodianship and the MPRDA

South Africa's MPRDA (in operation since 1 May 2004) declares that mineral and petroleum resources are the common heritage of all the people of South Africa and vests custodianship in the State, thereby shifting private mineral rights into a statutory licensing regime aimed at equitable access and beneficiation.[4] The MPRDA creates a system of prospecting and mining rights issued subject to conditions and environmental obligations, with socio-economic objectives pursued through social and labour plans and the Mining Charter. The Mining Charter, however, has been held by the High Court to be an instrument of policy rather than binding subordinate legislation, which limits the extent to which its targets can be enforced as law.[5] Environmental regulation of mining now sits under the National Environmental Management Act 107 of 1998 (NEMA) and its EIA Regulations, with the Minister responsible for mineral resources acting as competent authority for mining-related authorisations.[6]



4. Mineral and Petroleum Resources Development Act 28 of 2002, s 3(1).

5. Minerals Council South Africa v Minister of Mineral Resources and Energy and Others (20341/19) [2021] ZAGPPHC 623 (21 September 2021); Mineral and Petroleum Resources Development Regulations, GN R527 of 2004.

6. National Environmental Management Act 107 of 1998, ss 24 and 24C(2A); Environmental Impact Assessment Regulations, 2014 (GN R982 of 4 December 2014).



2.2 Namibia: the 1992 Minerals Act and the EMA

Namibia's principal mining statute, the Minerals (Prospecting and Mining) Act 33 of 1992, vests the rights to prospect for, mine and dispose of minerals in the State, consistent with Article 100 of the Constitution, and establishes licensing, the Minerals Board (an advisory body) and the State's control over minerals; however, it predates many modern environmental and indigenous-rights standards.[7] Namibia's Environmental Management Act 7 of 2007, which came into operation in 2012 (implemented with regulations and listed activities), provides the EIA/Environmental Clearance Certificate (ECC) regime that interfaces with mining licensing.[8] The EMA establishes the Environmental Commissioner and introduces procedural safeguards, but the legal architecture leaves gaps in explicit community-consent mechanisms and modern benefit-sharing provisions found in newer frameworks.

03. Constitutional and human-rights context

Both countries recognize land and environmental rights within constitutional or statutory frameworks, which shape judicial oversight of resource governance.

South Africa: Constitutional protections for property, environmental rights (s. 24), and equality intersect with the MPRDA.[9] The Constitutional Court and other courts have clarified that the state's custodianship under the MPRDA does not amount automatically to expropriation requiring compensation, but that private holders may be "deprived" of rights when the statutory scheme takes effect. The Agri South Africa v Minister for Minerals and Energy decision (Constitutional Court, 2013) is authoritative on deprivation vs acquisition and on the relationship between previous private mineral rights and the custodianship model.[10]

7. Minerals (Prospecting and Mining) Act 33 of 1992, ss 2, 9 and 10; Constitution of the Republic of Namibia, 1990, art 100.
8. Environmental Management Act 7 of 2007; Environmental Impact Assessment Regulations (GN 30 of 2012).
9. Constitution of the Republic of South Africa, 1996, ss 9, 24 and 25.
10. Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC).

Namibia: The Namibian Constitution protects property (Article 16, subject to expropriation in the public interest on payment of just compensation) and provides that natural resources belong to the State if they are not otherwise lawfully owned (Article 100). Its social and environmental commitments appear largely as principles of state policy (Article 95), which guide government but are not directly enforceable by the courts (Article 101).[11] The jurisprudence on resource custodianship and indigenous/community rights is less expansive than South Africa's recent jurisprudence. The EMA and EIA procedures anchor environmental rights in administrative processes, leaving courts to interpret community participation and compensation in disputes.

04. Key case law and their practical impact

4.1 Alexkor Ltd v Richtersveld Community (Constitutional Court, 2003)[12]

Alexkor concerned the Richtersveld Community's claim, under the Restitution of Land Rights Act 22 of 1994, to land together with its minerals and precious stones. The Constitutional Court held that the Community held communal ownership of the land, including its minerals and precious stones, under indigenous law, and that it had been dispossessed after 19 June 1913 as a result of racially discriminatory laws and practices, entitling it to restitution. The judgment recognises indigenous law as a source of rights alongside the common law and confirms that restitution can extend to mineral rights. Although it predates the commencement of the MPRDA, it remains a central reference point for how restitution and customary rights interact with State control over minerals in South Africa.



11. Constitution of the Republic of Namibia, 1990, arts 16, 95, 100 and 101.
12. Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).



4.2 Agri South Africa v Minister for Minerals and Energy (Constitutional Court, 2013)

In Agri SA, the Constitutional Court analysed whether the MPRDA's vesting of mineral resources in the State and the lapse of unused old order rights constituted expropriation. The Court held that the MPRDA effected a deprivation of private mineral rights but not an acquisition by the State in the sense required for expropriation claims, so that no compensation was payable under section 25(2) of the Constitution.[13] The decision clarifies the constitutional validity of the State's custodianship model but does not preclude a challenge to a deprivation as arbitrary under section 25(1). This case remains central to debates about compensation, property rights and the State's redistributive powers in mining law.

4.3 Baleni and Others v Minister of Mineral Resources (Xolobeni) (High Court, Pretoria, 2018): consent and community rights[14]

The Pretoria High Court's decision in Baleni and Others v Minister of Mineral Resources (commonly referenced as the Xolobeni decision) has been pivotal for community rights. The Court held that, in the communal-land context, the Minister could not grant mining rights without obtaining the affected community's full and informed consent, a requirement it derived from the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), read with customary law and the Constitution.[15] The MPRDA itself requires consultation rather than consent, so the judgment locates the consent requirement in IPILRA. The judgment advanced the operational significance of free, prior and informed consent (FPIC)-style protections within South Africa's legal context and has influenced debate and administrative approaches to mining approvals and disclosures. As a High Court decision, it does not carry the authority of the Constitutional Court decisions discussed above.

13. Agri SA (n 10).

14. Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018).

15. Interim Protection of Informal Land Rights Act 31 of 1996, s 2(1).



05. Environmental protection: regulatory tools and enforcement

5.1 Environmental impact assessment and environmental management

Both countries require environmental assessment processes as prerequisites to mining operations, but they differ in maturity and procedural clarity.

South Africa: NEMA's EIA regulations, applied to mining through the competent authority, provide an established EIA regime with public participation requirements, environmental management programmes, and closure planning.[16] However, implementation challenges (resourcing, monitoring, and what civil-society assessments describe as institutional inaction) have reduced the efficacy of enforcement in practice.[17]

Namibia: The EMA (2007) and associated EIA regulations set out ECCs and listed activities requiring assessment.[18] The EMA instituted the Environmental Commissioner and a procedural framework for impacts and monitoring. Yet scholarly assessments identify limited monitoring and enforcement capacity,[19] and criticisms persist about the interaction between mining licenses issued under the 1992 Minerals Act and the EMA's EIA processes.

16. NEMA (n 6).
17. Centre for Environmental Rights, Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga (CER 2016).
18. EMA (n 8).
19. Nakwaya-Jacobus DN, Hipondoka M, Angombe S and others, 'Evaluating the performance and procedural effectiveness of Namibia's Environmental Impact Assessment system' (2022) Environmental Impact Assessment Review, article 106670.



5.2 Financial assurances and closure

In South Africa, NEMA and the Financial Provisioning Regulations require holders of mining rights to make financial provision for rehabilitation and closure.[20] Civil-society research, however, reports heavy reliance on bank and insurance guarantees rather than ring-fenced funds, which leaves the State exposed to rehabilitation costs.[21] A recurring weakness in this area is the adequacy and enforcement of financial assurances (environmental bonds) to guarantee rehabilitation and long-run liability coverage. International best practice recommends risk-based, indexed bonds housed in ring-fenced trusts accessible to regulators, transparent reporting and periodic recalculation, reforms that would address the weaknesses identified above.

06. Community rights, participation and FPIC

6.1 Consultation vs consent

A central legal and policy fault-line is whether statutory regimes require consultation (discrete process) or consent (a more decisive community right) before mining proceeds on communal land.

South African judicial decisions (notably the Baleni, or Xolobeni, judgment)[22] incline towards requiring consent-like outcomes where communal and customary rights are implicated, especially where the livelihood and cultural resources of communities are at stake. Scholars have argued for clearer statutory adoption of FPIC to align administrative practice with human-rights norms.[23]

20. National Environmental Management Act 107 of 1998, s 24P; Financial Provisioning Regulations, 2015 (GN R1147 of 20 November 2015, GG 39425).
21. Centre for Environmental Rights, No More Ghost Towns: Lessons from Mpumalanga's Mine Closure Crisis (CER 2026).
22. Baleni (n 14).
23. Mathiba, G, 'The Incorporation of the FPIC Principle in South African Policy on Mining-Induced Displacements: Bottlenecks and Opportunities' (2023) 30(4) International Journal on Minority and Group Rights 1.

Namibia's law provides for public participation under the EMA EIA process, but does not yet expressly enshrine FPIC in the minerals law; this gap risks marginalizing customary community decision-making in practice.

6.2 Benefit-sharing, local content and community trusts

South Africa's Mining Charter (and related policies) foregrounds transformation, local procurement and beneficiation, although the 2018 Charter now operates as policy rather than binding law, while Namibia has adopted some local-content and community-development mechanisms in practice. However, across both countries, community benefit mechanisms (trusts, CBAs) face governance, transparency and elite-capture concerns that limit their developmental impact without stronger legal design and oversight.[24]

07. Comparative assessment: gaps and institutional design

7.1 Gaps and challenges

FPIC and community consent: South Africa's jurisprudence has moved toward community consent in practice, but statutory language remains ambiguous and administrative practice inconsistent.[25] Namibia lacks explicit FPIC-style safeguards in its minerals law, relying on EIA participation processes that may not achieve meaningful community empowerment.

Financial assurances and monitoring: South Africa has documented under-priced or poorly enforced environmental bonds and weak inspection/monitoring capacity, and Namibia's EIA system shows comparable monitoring and enforcement gaps,[26] problems that leave communities and the fiscus exposed to orphaned liabilities.



24. Matebesi, S, Social Licensing and Mining in South Africa (Routledge 2020).
25. Mathiba (n 23).
26. CER, No More Ghost Towns (n 21); Nakwaya-Jacobus and others (n 19).



Benefit capture and transparency: While South Africa has transformation-oriented instruments (Mining Charter) and Namibia has mechanisms to channel benefits locally, both jurisdictions need better transparency (publication of licenses, beneficial ownership, payments) and improved sovereign/stabilization instruments to manage volatility.

Institutional separation and capacity: Concentration of policy, licensing and enforcement roles within single departments risks conflicts of interest and weak enforcement. Both countries would benefit from clearer separation of licensing, monitoring and policy functions and stronger sub-national capacity for oversight.

08. Recommendations (legal and policy actions grounded in law and practice)

8.1 Enshrine community-consent protections and procedural clarity

South Africa: Amend regulations under the MPRDA (and issue guidance under NEMA/EIA rules) to clarify when FPIC-like consent is required, especially for communal land, land subject to restitution claims and where projects threaten livelihoods. Build on the Baleni (Xolobeni) judgment and IPILRA to provide administrative checklists for meaningful consent (representation, information disclosure, reasonable timelines).

Namibia: Amend the Minerals Act (or introduce regulations) to require documented community consent processes where customary and communal rights are affected, backed up by enforceable conditions in licenses and the EMA's public-participation rules.

8.2 Strengthen financial assurance and closure liability regimes

Require risk-based, inflation-indexed environmental bonds sufficient to fund full closure and worst-case remediation, deposited in ring-fenced rehabilitation trusts accessible to regulators. Embed independent actuarial methodologies into regulations. This responds to the documented enforcement and liability gaps discussed in sections 5.2 and 7.1.

8.3 Improve transparency and fiscal governance

Join and fully implement the EITI Standard (neither country currently does so)[27], enact open contracting for mining licenses and publish registers showing licenses, beneficial ownership, production and payments in machine-readable formats. Design transparent local-transfer formulas so communities can track revenues paid and projects funded.

8.4 Institutional redesign and capacity building

Separate licensing functions from compliance monitoring and environmental enforcement (institutional firewalls). Establish or resource independent environmental monitoring units with authority to inspect, sample and recommend sanctions. Fund these units through modest levies on mining operations.

8.5 Codify community benefit agreements (CBAs) and local procurement roadmaps

Require CBAs as license conditions where applicable, made public and containing clear, enforceable commitments on jobs, procurement, local investments and grievance mechanisms. Support CBAs with legal-aid and capacity building to prevent elite capture and to ensure stewardship of community equity shares.



27. Extractive Industries Transparency Initiative, 'Countries' (eiti.org/countries, accessed 3 November 2026).



8.6 Legislative modernization (Namibia) and targeted regulatory reform (South Africa)

Namibia: Modernise the Minerals Act to align with EMA, FPIC norms and modern transparency and benefit-sharing practices. The Minerals Bill now under consideration is the natural vehicle for this reform.

South Africa: Use the MPRDA's regulatory architecture and Mining Charter guidance, and the pending reform of the MPRDA, to codify environmental conditioning, stronger closure finance rules, and clear thresholds for consent in communal contexts.

09. Conclusion

South Africa and Namibia share the same fundamental policy challenge: how to convert finite mineral wealth into sustained public benefit while safeguarding ecosystems and community rights. South Africa's MPRDA and active judicial scrutiny (Alexkor and Agri SA in the Constitutional Court, and Baleni in the High Court) provide a dynamic legal environment in which community rights and environmental protections have advanced through both statute and court decisions. Namibia benefits from a coherent licensing statute and an EMA that modernises environmental procedure, but needs legislative and regulatory updating to fully internalise FPIC principles, modern financial assurances, and transparency norms.

Reforming extractive governance in both jurisdictions requires (i) legal clarity (statute/regulation), (ii) capacity and institutional redesign (independent monitoring and separation of functions), and (iii) procedural innovations (transparent CBAs, risk-based bonds and public registries). These are reforms that are legally feasible and consistent with constitutional rights and international norms. The jurisprudence developed in South Africa offers instructive precedents that should inform Namibia's reforms, while best practices on bonds, disclosure and benefit sharing should be adopted in both states to ensure extractive industries contribute to a fairer, greener development trajectory.

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