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Mr Asgar A Bawa
Select Committee on Land and Mineral Resources
Per email: Asgar Bawa abawa@parliament.gov.za
09 March 2017

Dear Mr Bawa

Re: Mineral and Petroleum Resources Amendment Bill [B15D of 2013]

ActionAid South Africa (AASA) has been working in South Africa since 2006 and we work closely with mining affected communities, particularly with a network of affected communities, MACUA (Mining Affected Communities United in Action) , who represent over 150 communities across South Africa.

During 2015 and 2016, MACUA and AASA travelled the length and breadth of South Africa to collect inputs related to the MPRDA, from over 150 communities and over 15 civil society organisations, and compiled these into a **Peoples Mining Charter** (copy attached) which communities intended to present to Parliament or the Provincial Hearings, depending on which avenue would be made available to them.

We have however noted with some concern that a "TABLE OF PROPOSED AMENDMENTS TO THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013 (B15D-2013), FOR CONSIDERATION BY THE NCOP AND PROVINCIAL LEGISLATURES. LAST UPDATED: 24 NOVEMBER 2016" has been sent to the Provincial legislatures for approval and consideration.

We are concerned that as an interested party who has made submissions to Parliament on the proposed amendments to the Bill in 2013 that the proposed amendments are patently unlawful as:

1. The rules of Parliament provide that no amendments can be made when a Bill is returned to Parliament by the President.
2. The NCOP and the Provincial Legislatures therefore cannot cure the flawed NCOP and PL process of March 2014 by now holding fresh hearings because these belated hearings cannot make amendments which render the hearings meaningless.
3. The NCOP cannot consider amendments which fall outside the referral mandate of the President.
4. Bill 15D and the 57 further amendments do not address the concerns of communities. They actually dilute the little community participation currently provided for in the MPRDA.

We request that should the PL decide to continue with the hearings in disregard of the blatant flaws of the process, that our submissions be meaningfully considered by the committee and the Legislature.

Notwithstanding the procedural flaws of the process we are also concerned that some of the provincial hearings have already happened or are currently in the process of being held.

This lack of adequate notice has prevented us (AASA and MACUA), and the communities we work with from effectively participating in these hearings and thus would submit that the hearings will not have allowed nor ensured that it meets its "*obligation to facilitate public involvement in the law-making process*".

We call on the committee to immediately scrap the current flawed process and to demand that a completely new process be undertaken which would allow for adequate community and public involvement in line with the constitutional requirements.

MPRDA and MPRD Amendment Bill No 15 of 2013 proposals

The purpose of the proposals below is to incorporate the principles of

a) Community consent for mining on communal land;
b) Community participation in decision making concerning matters affecting them;
c) Compensation and reparation for communities who lost their land and land rights as a result of mining.

The proposals are drawn from the submissions made in 2013 to the portfolio committee [and largely ignored] by ActionAid, NUMSA, LRC, MEJCON, the MACUA and WAMUA People's Mining Charter and the IANRA Model Mining Law for Africa.

1 Preamble

Communities and members of communities owning or possessing land in terms of any custom or practice shall have a right to property and the protection thereof, including the use and disposal of both surface and subsurface rights.

The Preamble must be augmented with foundational principles:

Communities should determine land use and provided the space to solicit ideas and input, from relevant sources, about possibilities for how to use their land, the impacts on the community and environment, and potential positive outcomes of that land use vs. costs.

FPIC is seen as a collective right held by all in a community and this assumes participation by the whole community and consent from as an absolute minimum the majority of the community. The exercise of FPIC must be participatory in nature. This means decisions can't be made by leaders on behalf of a group, nor by men for women. The group itself must decide and here democratic principles are important. As such it is an inclusive right and enjoyed by women and men equally.

The Act documents the aspirations of communities to defining their own development paths with due regard to their land and culture through enshrining the first principles of consent, respect, dignity and self determination

The Act serves as a basis to guide elements of land and minerals regulation to result in a developing rural economy where various development alternatives are explored in the interests of people and future generations.

2 Definitions

insert new definition: "customary law" means the rules and principles that communities use to govern themselves and their access, governance, development, allocation, conservation and disposal of shared resources. The customary law as practiced by communities today shall prevail over

any written account of a community's customary law, particularly any account written by colonial administrators or their functionaries.

insert new definition:

'directly affected community' means a community or part of a community directly affected by mining on communal land occupied or used by members of such community or part of the community,

and where a directly affected community was dispossessed of its rights in land as a result of mining on its communal land, the community shall have the meaning corresponding to the meaning ascribed in the Restitution of Land Rights Act 1994.

insert new definition:

'communal land' means land in respect of which a community holds rights including informal rights as defined in Interim Protection of Informal Land Rights Act 1998.

Community shall be defined as a group of persons who have chosen or choose to adhere to and enforce shared rules of access to their land, minerals and other resources, owned by them through long occupation and or grant or other means regardless of whether title is formally held by the State or another person, provided that the community shall:

- practice a system of customary land tenure; or,
- be indigenous people or descendant; or,
- live on trust land under statute law.

Such a community may affirm its recognition and social boundaries with reference to its neighbours, and neighbouring communities may recognise a community for purposes of decision-making under this law. In the context of proposed mining activities, decision making power shall vest at the lowest level of organisation of customary rights holders, including at the village, ward or clan level or any other structure defined by that community's customary law.

IPILRA is currently the only statute that addresses tenure security under section 25(6) of the bill of rights. It is renewed annually. The new State Land Lease and Disposal Policy of the department of rural development and land reform profers state assistance with the community identification and consultation and consent process. Community self identification and ownership of the customary law decision making processes are important ingredients for successful negotiations and sustainable outcomes.

The 1913 land act legacy requires of our society to invest in supporting communities to shape and pace their own development paths.

3 Section 2: principles

Subsection 2 paragraph (d)

Retain “women and communities”

(d) substantially and meaningfully expand opportunities for historically disadvantaged [persons, including women and communities] South Africans, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

There is no motivation, legally or constitutionally for removing women and children as a designated group identified for mining development.

by the insertion of the following paragraph after paragraph (i):

(j) ensure that applicants for and holders of prospecting and mining rights are required to obtain community consent prior to and during the development or implementation of projects;

(k) provide for a contribution to the reparation for the dislocation of affected communities on communal land that were dispossessed of their rights in land due to mining or otherwise directly affected;

(l) communities and members of communities owning or possessing land in terms of any custom or practice shall have a right to property and the protection thereof, including the use and disposal of both surface and subsurface rights.

The additional principles are warranted in the light of the questionable record of the MPRDA and its implementor the DMR. The wording of paragraph (j) is borrowed from the industry/labour/government amended BBSEE charter of 2010, and states the value underlying the consent standard.

Paragraph (k) includes impacts of mining on restitution communities and other communities.

Unless the consent and reparation standards are adopted in practice and as the foundational principles to address the 1913 land law legacy, history will be repeated.

Section 5A: prohibited activities

by the insertion after paragraph (c) of the following paragraph:

(d) on communal land, without the prior written consent of the directly affected community in terms of customary law as applicable and the Interim Protection of Informal Land Rights Act 1996: Provided that if a prospecting right, mining right or mining permit had been granted after 16 January 2015 in respect of communal land and such consent is not given within 6 months of any grant, such right will lapse.

The motivation for the consent requirement as the foundation principle for mining on communal land is rooted in our history and our constitution. Section 5A should be

amended to make it illegal to start mining without community consent under customary law and complying with IPILRA.

Under section 10, any applicant and the department must invite a community on communal land to negotiate with a view to find agreement. An applicant for a mining right without community consent or pending consent, can proceed with an application at his own risk but cannot start mining until consent is given and the department's grant will lapse after six months if community consent is not given.

Under section 100, communities that are considering giving consent to new mining on their land in terms of section 5A will at least get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.

4 Section 10: consultation

by the insertion in subsection (1) after paragraph (b) of the following paragraph:

"Provided that if the application relates to communal land,

i. The directly affected community must be invited to negotiate and seek agreement on the application;
ii. Prior to seeking consent, the applicant must approach the community to have an independent expert appointed;
iii. The independent expert shall first facilitate a process in which the community decides whether to consent to the access required for the completion of impact assessments;
iv. Once a decision concerning access and impact assessment has been made, the independent expert shall facilitate a process in which the community shall make an informed decision regarding whether to consent to the granting of the mining right. This process shall be transparent, democratic and participatory, and shall at minimum include the following steps:
    a. A widely publicised public meeting where the independent investigator summarises the likely effects of the proposed mining activities, including the results of any impact assessment conducted, in a manner that is accessible to the community and at a convenient venue and time. The independent investigator must also summarise the proposed terms under which the applicant proposes to compensate the community and its members for the proposed mining activities, and advise the community regarding the extent of the applicant's compliance with the statutory requirements.
    b. At such a meeting, community members shall be entitled to comment freely and to seek further information.
    c. At or after such a meeting, the community may appoint community representatives to represent the community in engagements with the independent investigator and the applicant in terms of that community's customary law, provided that such representatives shall not be empowered to give binding undertakings on behalf of the community.
    d. After such a meeting, the independent investigator shall furnish all information sought by community members in an accessible form.
v. While the applicant and the independent expert may engage with the community throughout the application process, the decision regarding community consent shall only be taken after the integrated assessment report is finalised."

5 Section 10B: RMDEC

by the insertion after paragraph (b) of the following paragraph:

(c) consider reports on negotiations in respect of communal land, and report thereon to the minister.

6 Section 10C: composition of RMDEC and expertise of members

by inserting at the end of section 10C(1) the following words:

"the development needs of communities"

by inserting a paragraph after paragraph (c) in subsection (2)

"the regional land claims commissioner"

7 Proceedings of RMDEC meetings

10H Proceedings of the RMDEC

The meetings of the committee shall be open to the public.

The reports and recommendations of the committee, minutes of meetings and comments, objections and agreements considered by the committee shall be available for public inspection.

Whether or not the right to attend meetings and the right so access to information are implied in the PAJA or PAIA is neither here nor there. The fact is that in the extractives industry extraordinary efforts must be made in the statutory instruments to address the perception that the department and regional managers do not promote transparency and accountability in a manner that fosters trust between stakeholders. The right to attend meetings and get access to information in particular in relation to RMDEC should be stated in terms in the act itself.

8 Section 27 small scale mining and mining permits

by the insertion after subsection (9) of the following subsections:

(10) the minister shall, after consulting the Council, develop a Charter

a) to protect and promote customary and artisanal small scale miners,

b) that will set the framework for effecting the participation of members of communities in the exploitation of the resources of their communal land.

(11) the Minister may, with reference to the Charter envisaged in subsection (10)exempt

persons who are members of communities or categories of such persons from certain of the provisions of this section.

Regarding the legitimate activities of small scale customary and artisanal miners on communal land who cannot comply with the onerous provisions relating to small scale mining in section 27 which are too cumbersome on the one hand or too restrictive on the other hand, the above provisions will allow for a flexible small scale policy, without sacrificing certainty and security.

9 Section 45A Minister's power to recover costs in event of urgent measures to prevent safety and security risks at abandoned and closed mines

Minister's power to recover costs in event of urgent measures to prevent safety and security risks at abandoned and closed mines

45A. (1) If, in the Minister's opinion, any closed or abandoned mine or any cessation of operations as a result of relinquishment, abandonment or cancellation of a right or permit poses a risk to the security, health and safety of the public, or is used for illegal mining activities, and requires urgent remedial safety and security measures to be taken, the Minister may direct the holder or previous holder of the relevant right, permit or permission or the previous holder of an old order right to---

(a) investigate, evaluate, assess and report on the impact of any safety or security risk;

(b) take such measures as may be specified in such directive; and

(c) complete such measures before a date specified in the directive.

(2) (a) If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the public or secure the abandoned or closed from illegal activities.

(b) Before the Minister implements any measure, he or she must afford the holder an opportunity to make representations to him or her.

(c) In order to implement the measures contemplated in paragraph (a), the Minister may by way of an ex parte application apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.

(d) In addition to the application in terms of paragraph (c), the Minister may use funds appropriated for that purpose by Parliament to fully implement such measures.

(e) The Minister may recover an amount equal to the funds necessary to fully implement the measures from the holder concerned.

(3) If the Minister directs that measures contemplated in this section must be taken to protect or secure but establishes that the holder of the relevant right or permit or old order right, or his or her successor in title, is deceased or cannot be traced or, in the case of a juristic person, has ceased to exist, has been liquidated or cannot be traced,

the Minister may instruct the Regional Manager concerned to take the necessary measures to make the area safe and secure.

(4) The measures contemplated in subsection (3) must be funded from the financial provision made by the holder of the relevant right or permit or if there is no such provision or if it is inadequate, from money appropriated by Parliament for that purpose.

10 Section 47: cancellation of mining right

''(c) is contravening any condition in the environmental authorisation, approved social and labour plan or undertaking by a holder or condition imposed in respect of the housing and living conditions standard for the minerals industry, codes of good practice for the minerals industry and the broad-based socio-economic empowerment charter envisaged in section 100.

The enforceability of SLPs and mining charter undertakings and targets are undermined in that there is no real sanction for non compliance. A fine as provided for in section 99 has little if any deterrent value. Non compliance with the detailed provisions of SLPs and BEE undertakings should in terms be punishable with cancellation of the right, as in the case of environmental authorisations.

Retain paragraph (d) dealing with misrepresentations by mining companies

The memorandum and the departments give no explanation why after the act has been in operation for 11 years, why the offence and remedy must be now be repealed.

11 Section 56C: The composition of the Council

Include the following categories

One representative from non governmental organisations

Two persons from community based organisations

The Chief Land Claims Commissioner

The memorandum and the department give no explanation why civil society and communities should lose the representation that they had on the Board which is now being replaced by the Council.

12 Section 100: empowerment and reparation

Section 100 of the principal Act is hereby amended by the substitution in subsection (2)

for paragraph (a) of the following paragraph:

''(a) To ensure the attainment of the Government's objectives of redressing

historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting

a) reparation and redress to directly affected communities on communal land who have not benefitted from mining on their land;

b) the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources:

Provided that the target set in respect of mining on communal land shall be exclusively for the benefit of the directly affected community, and any equity associated with such target shall be held by an entity in which the community holds a controlling interest."

The proposal above means that

a) Communities that historically and currently lost their land rights in homelands and and on communal land as a result of mining will get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.

   This does not mean that communities with land claims under the Restitution Act will be limited to this grant in their restitution packages, but it could make a significant contribution to the integration of the reparation aims of the land reform programme and the redistribution aims of the MPRDA.

b) Communities that are considering giving consent to new mining on their land in terms of section 5A will at least get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.

by the amendment of section 100(2)(b):

the Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f), (i), (j) and (k) can be achieved.

Yours Sincerely

C.J.Rutledge
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