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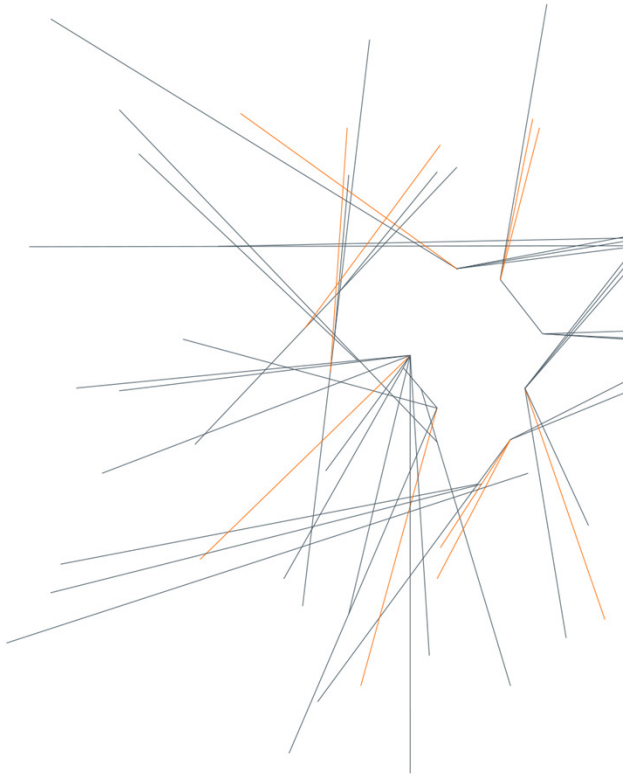

THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013

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Presentation to the Portfolio Committee on Mineral Resources (the "Committee")

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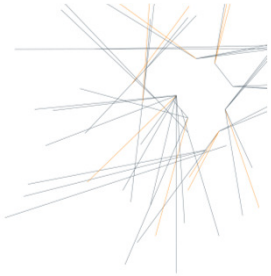
INTRODUCTION

- Webber Wentzel has provided detailed comments on the amendments to the Mineral and Petroleum Resources Development Act, 2002 (the "**MPRDA**") proposed under the Mineral and Petroleum Resources Development Amendment Bill, 2013 (the "**Bill**") in its written submission of 6 September 2013.
- According to its preamble, the Bill's objectives include improving the MPRDA by removing ambiguities, streamlining administrative processes and enhancing the regulatory system.
- The Bill does not achieve these laudable objectives and in fact exacerbates the MPRDA.
- Certain policy changes proposed in the Bill are not well conceived and various provisions are drafted in a vague and ambiguous manner which creates further regulatory uncertainty.
- The Fraser Institute's annual survey of mining companies for 2012/2013 notes that regulatory uncertainty resulting from the MPRDA has been a deterrent to investment in the South African mining industry.
- South Africa is currently ranked 64th out of 96 mining jurisdictions surveyed.

RULE BY REGULATION AND BROAD ADMINISTRATIVE DISCRETION



- ***Unguided administrative discretion contravenes the rule of law principle***
  - The Minister of Mineral Resources (the "**Minister**") and the Department of Mineral Resources' regional managers are given broad administrative discretion under the Bill.
  - The Bill, however, does not provide *any objective criteria* under which such discretion should be exercised. For example:
    - clause 8 of the Bill amends section 11 of the MPRDA to grant the Minister *broad discretion* to impose conditions of the transfer of prospecting and mining rights;
    - clause 21 of the Bill amends section 26 of the MPRDA to allow the Minister in her *sole discretion* to prescribe a broad array of beneficiation requirements; and
    - the Bill also inexplicably eliminates all time periods previously provided for in the MPRDA and grants the Minister the discretion to prescribe these time periods in regulations (clauses 8 – 12, 14, 16 - 18, 20, 22 - 23, 27, 40 – 41, 48 – 51, 53 – 54, 56, 58 – 59, 63 and 66 of the Bill).
  - Such unfettered discretion may contravene the rule of law principle enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996 (the "**Constitution**").
  - The rule of law principle requires, among other things, laws to be reasonably certain and administered in a predictable manner.

    See *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)
  - The unrestricted and unpredictable exercise of powers and discretion is potentially unconstitutional.

RULE BY REGULATION AND BROAD ADMINISTRATIVE DISCRETION

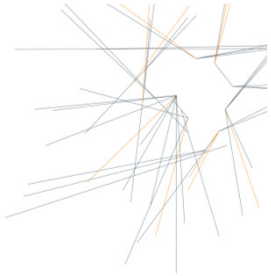
- The Constitutional Court has held that:
  - "…*if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision*"; and

    Dawood and Another v Minister of Home Affairs; Shalabi and another v Minister of Home Affairs and Others 2000 (8) BCLR 837 (CC), para 47
  - *"[t]he law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly"*

    Affordable Medicines Trust v Minister of Health of the Republic of South Africa 2005 6 BCLR 529 (CC), para 108
- The Bill seems to contradict the preamble to the Framework Agreement for a Sustainable Mining Industry, 2013, which provides that the "*the rule of law and stability is a fundamental pillar of our democracy and a necessity to ensure economic and social development*".
- We understand that the Minister plans to publish comprehensive regulations which would limit this discretion. However:
  - such regulations will be subject to change without the usual public participation processes; and
  - an excessive delegation of legislative power to the executive has been identified by the Constitutional Court as unconstitutional, as it is contrary to the principle of the separation of powers.

    See *Executive Council of the Western Cape Legislature v President of the RSA* 1995 10 BCLR 1289 (CC), para 61

RULE BY REGULATION AND BROAD ADMINISTRATIVE DISCRETION



- **Overboard ministerial discretion in mineral beneficiation and restrictions on exports – clause 21 of the Bill**
  - Clause 21(a) of the Bill amends section 26(1) of the MPRDA to *oblige* the Minister to initiate the beneficiation of minerals, mineral products and petroleum in South Africa.
  - The Minister now also has broad discretionary powers to set the:
    - *levels* required for beneficiation;
    - *percentage per commodity* required to be beneficiated;
    - *developmental pricing conditions* required for beneficiation; and
    - *percentage of raw mineral* or mineral products to be offered to local beneficiators.
  - The Bill does not, however, provide *any criteria* under which this discretion is to be exercised. Thus the discretion afforded to the Minister is overbroad and contrary to the rule of law.
  - It is unclear whether or not clause 21 will be applied retrospectively.
  - Clause 21(d) of the Bill amends section 26(3) of the MPRDA and requires any person who intends to export "*designated minerals*", to obtain the Minister's consent.
  - The Bill vaguely defines "*designated minerals*" as "*such minerals as the Minister may designate for beneficiation purposes as and when the need arises in the Gazette*".
  - Section 26(2), currently provides that the Minister may promote beneficiation of a mineral subject to such terms and conditions as she may determine. Clause 21(b) deletes the word "*economically*" from subsection 26(2) of the Minister. This suggests that the Minister is *no longer* required to consider whether beneficiation is *economically feasible*.

MINERAL BENEFICIATION AND RESTRICTIONS ON EXPORTS - CLAUSE 21 OF THE BILL

- **The Bill introduces a potentially unlawful export licensing system**
  - Clause 21(d) of the Bill introduces an export licensing system.
  - This proposed amendment potentially contravenes:
    - article XI, read with article XX, of the General Agreement on Tariffs and Trade, 1994 ("**GATT**"); and
    - article 19, read with article 27, of the European Union - South Africa Trade, Development and Cooperation Agreement, 1999 ("**TDCA**"),

    which both prohibit the imposition of measures which limit the amount of goods that may be exported between countries.
  - If South Africa is found to be in breach of the GATT, the Dispute Settlement Body of the World Trade Organisation ("**WTO**"), may make recommendations to South Africa which, if not met, may result in the suspension of concessions or other obligations owed to South Africa by affected member states under the GATT or another WTO treaty.

    See articles 2 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to the Marrakesh Agreement Establishing the WTO , 1994
  - The Co-operation Council established by the TDCA, or an international arbitration panel constituted under it, may issue a binding decision requiring South Africa to implement corrective measures.

    See article 104 of the TDCA

MINERAL BENEFICIATION AND RESTRICTIONS ON EXPORTS – CLAUSE 21 OF THE BILL

- **The Bill potentially violates South Africa's bilateral investment treaties ("BITs")**
  - The Bill may also violate South Africa's obligations under its BITs.
  - South Africa has signed 23 BITs currently in force.
  - In particular, this amendment may contravene the BIT between South Africa and the United Kingdom, which requires, among other things, that South Africa and the United Kingdom ("**UK**") afford investors and their investments "*fair and equitable treatment*" .
  - This principle imposes obligations on South African public authorities to *act transparently, reasonably and without ambiguity.*
  - South Africa will be in breach of a BIT where it has failed to protect investors' legitimate expectations to rely on the host State's earlier commitments, in that it has not provided a predictable regulatory framework for investments.

    Emilio Agustin Maffezini v The Kingdom of Spain, ICSID Case No. ARB /97/7, Decision on Jurisdiction (25 January 2000), 5 *ICSID Reports* 296 (2002)
    CME Czech Republic B.V. (The Netherlands) v The Czech Republic, Partial Award (13 September 2001) at para 611
  - The amendments proposed by the Bill do not adequately protect foreign investors' legitimate expectations by creating a regulatory environment which is significantly different from the one which existed at the time their investment was first made.

MINERAL BENEFICIATION AND RESTRICTIONS ON EXPORTS – CLAUSE 21 OF THE BILL

- **Parliament cannot enact legislation which conflicts with South Africa's international law obligations**
  - The enactment of clause 21 of the Bill is potentially unconstitutional insofar as it violates South Africa's international law obligations.
  - Section 231(2) of the Constitution provides that "*an international agreement binds the Republic… after it has been approved by resolution*" in Parliament.
    - *"… the main force of s 231(2) is in the international sphere. An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved 'binds the Republic'".*

      Glenister v President of the Republic of South Africa and Others 2011 (3) SA 247 (CC) para 182 ("***Glenister***")
  - Section 231(2) of the Constitution and the rule of law principle enshrined in section 1(c) of the Constitution requires the legislature to take into account international law when enacting legislation.
  - The Constitutional Court has found that a law enacted contrary to South Africa's international law obligations is unreasonable, and creates an unjustifiable limitation of constitutional rights.

    Glenister para 194

MINERAL BENEFICIATION AND RESTRICTIONS ON EXPORTS – CLAUSE 21 OF THE BILL

- **The Bill may violate the section 25(1) constitutional right not to be arbitrarily deprived of property**
  - The amendments proposed under clause 21 of the Bill empower the Minister to set the levels and developmental pricing conditions for beneficiation of minerals as well as to consent to and set conditions for the export of "*designated minerals*".
  - This could constitute a deprivation of property as envisaged in section 25(1) of the Constitution.
  - Section 25(1) provides that "*no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*".
  - The Constitutional Court has held that, *"any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned*".

    See First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC) at para 57
  - A deprivation is unconstitutional where it is arbitrary or procedurally (section 25 of the Constitution) unfair in that:
    - without clear rules, the deprivation cannot be procedurally fair; and
    - without adequate criteria, the deprivation is arbitrary.

    See *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC)
  - The proposed amendments permit interference with mining companies' right to use, enjoyment and exploitation of the minerals they have extracted, and thus constitute a deprivation
  - As there is no legal constraint on the Minister's discretion or clear rules of procedure in this regard, the deprivation is arbitrary and potentially unconstitutional.

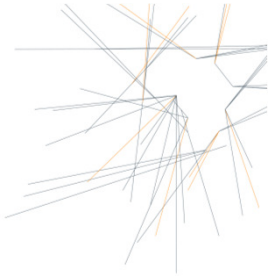
ORDER OF PROCESSING APPLICATIONS – CLAUSE 5 OF THE BILL

- **The Bill inexplicably deviates from international best practice in changing the licensing process**
  - The Bill inexplicably deletes section 9 of the MPRDA, which deals with the order of processing of applications for rights, including the "*first in, first assessed*" system ("**FIFA system**").
  - Under the Bill, the Minister reserves the right to:
    - periodically invite applications by way of notice;
    - prescribe the period within which any application may be lodged; and
    - set the terms and conditions subject to which such rights may be granted.
  - The Bill thus appears to jettison the FIFA system without providing for a competitive or tender process. The Bill thus creates substantial uncertainty.
  - International best practice in the mining industry requires that mineral rights are allocated either of two ways:
    - a *competitive or tender process*, where the government identifies the relevant area and provides information about potential resources. This system is rare for non-fuel minerals and is more feasible where the State has greater information about the area's mineralisation (Mongolia, Kazakhstan and Liberia); or
    - the FIFA system (or "*free entry*" process), where the party who first applies for the rights in an area is entitled to these provided that it meets basic administrative requirements. This is the normal approach for non-fuel minerals and follows the international best practice approach to mineral rights allocation.

CONCENTRATION OF RIGHTS – CLAUSE 12 OF THE BILL

- **The regulation of the concentration of rights is better left to the Competition Commission**
  - Section 17, as amended by clause 12, now grants the Minister the ability to refuse or grant any additional prospecting or mining rights to an applicant where this would lead to the "*concentration of rights in question under the control of the applicant and its associated companies*".
  - This power of refusal is broader than that under the MPRDA, where the Minister only has this power in relation to the grant of prospecting rights or retention permits.
  - The Bill uses the term "*concentration of rights*" rather than "*concentration of mineral resources*" which is used in the MPRDA.
  - It is unclear what is intended by this change – it may indicate moving away from imposing a restriction on a particular commodity towards one on the *number of rights* a company can hold.
  - The amendments in relation to "*concentration of rights*" will create an overlap between the regulatory oversight under MPRDA and that under the Competition Act, 1998 (the "**Competition Act**").
  - The Competition Act was itself enacted to promote and maintain competition in South Africa in order to foster, among other things, (i) efficiency, adaptability and development of the economy; and (ii) employment and advance the social and economic welfare of South Africans.
  - The DMR does not have the requisite institutional knowledge or capacity to adjudicate on an issue of competition law issues which should be dealt with by the Competition Commission.

PENALTIES – CLAUSE 70 OF THE BILL



- **Penalties under section 99, amended by Clause 70, are unreasonable**
  - Clause 70, which amends section 99 of the MPRDA, seeks to increase significantly the penalties that may be imposed on mining companies for non-compliance with the MPRDA .
  - In addition, an appeal against a penalty will *not* suspend the immediate obligation to pay the penalty unless it is suspended by the Minister.
  - Clause 99 imposes penalties with reference to a percentage of annual turnover in South Africa, and exports from South Africa in the preceding year, and in some instances imposes hefty penalties per day whilst the contravention persists.
  - The imposition of such penalties have, presumably, been inspired by the provisions of section 59 of the Competition Act (which was greatly influenced by, among others, the EU Treaty).
  - The Competition Appeal Court has held that *"… a penalty … should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular…. [and] the imposition of an administrative penalty should not only promote the important objective of deterrence but that sight should not be lost of fairness to the offending party*".

    Southern Pipeline Contractors and Another v Competition Commission (2011) ZACAC 6 (1 August 2011) at 9.
  - It is unclear whether there is a rational basis for imposing turnover based penalties in the mining industry, particularly in view of mining companies' low profit margins.
  - For instance, the failure to submit an annual progress report of a prospecting right under section 19(2)(h) has been made an offence by the Bill and is thus punishable with a fine of up to 10 per cent of the company's annual turnover.

HISTORIC TAILINGS – CLAUSE 29 OF THE BILL

- **Regulation of historic tailings may amount to an unconstitutional expropriation**
  - Currently only tailings stockpiled by the holder of a mining right granted under the MPRDA (and not under previous laws governing mineral resources, such as the Minerals Act, 1991), are residue stockpiles and residue deposits as contemplated by the MPRDA.
    - This interpretation of the MPRDA was confirmed in *De Beers Consolidated Mines Limited v Ataqua Mining (Proprietary) Limited and Others* [2007] ZAFSHC 74 (13 December 2007).
  - Clause 29 of the Bill inserts section 42A, which will bring ownership of tailings created prior to the commencement of the MPRDA on 1 May 2004 ("**historic tailings**") under the ambit of the MPRDA for the first time.
  - Section 42A of the MPRDA regulates the application for reclamation permits, and the management of residue stockpiles and residue deposits.
  - Owners of historic tailings would need to apply for a for reclamation permit in order to process these residue stockpiles and residue deposits.
  - This amendment may constitute an unconstitutional expropriation of historic tailings, as it would be difficult for the State to link such expropriation to a public purpose.
  - Further, the provision may amount to an expropriation under South Africa's BITs. For example, section 42A would contravene Article 5 of SA-UK BIT in that the expropriation is not linked to a "*public purpose*" and fails to provide for "*prompt, adequate and effective compensation*".

CONCLUSION

- The National Development Plan 2030 (the "**NDP**"), adopted by cabinet in September 2012, observes that "*over the past decade, domestic mining has failed to match the global growth trend in mineral exports due to poor infrastructure, alongside regulatory and policy frameworks that hinder investment*".
- The Bill, while attempting to rectify some of the problems experienced in the mining sector and pointed out in the NDP, unfortunately does little to remedy the situation. In fact the Bill may amplify the uncertainty under the existing mineral regulatory regime.
- This uncertainty will exacerbate rather than improve the difficulties that exist within the current mineral regulatory regime and may further damage investor confidence in the mining industry.
- Before the Bill is enacted by Parliament a full Regulatory Impact Assessment (RIA) should be conducted to assess the likely consequences of the Bill on the South African mining sector.
- The amendments to the MPRDA should be seen in light of the effects of the Marikana tragedy which led to more than R12 billion in lost exports, in addition to R15.3 billion in lost mine production. This reduced South Africa's GDP from 3 per cent to 2.5 per cent in 2012. This, in turn, led to three sovereign ratings downgrades which will ultimately increase South Africa's borrowing costs.
- The Bill will inevitably reduce mineral exports, discourage investment and thus affect the balance of payments on the current account which is already at an unsustainable 6.5 per cent deficit.
- It is crucial that the Bill is amended to remedy these shortcomings.

"Measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."

US-Iran claims tribunal in
Starrett Housing Corp. v. Islamic Republic of Iran, Iran-U.S.C.T.R. 4 (1983 III), S. 122 (154)

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