

NATIONAL UNION OF MINEWORKERS



**SUBMISSION ON THE DRAFT MINERAL AND PETROLEUM RESOURCES
DEVELOPMENT (BILL 2013)**

**SUBMITTED BY NUM PARLIAMENTARY AND TRANSFORMATION OFFICE TO THE PORTFOLIO COMMITTEE
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LIST OF ACRONYMS

1. MPRDA – Mineral and Petroleum Resource Development Act (28 of 2002)
2. MAC- Ministerial Advisory Council
3. CONSTITUTION – Republic of South African Constitution (108 of 1996)
4. HDSA – Historical Disadvantaged South African
5. HDP – Historical Disadvantaged Person
6. ANC – African National Congress
7. NEMA – National Environmental Management Act (107 of 1998)
8. DG – Director General of the Department of Mineral Resources
9. SIMS – State Intervention in the Mineral Sector
10. DMR – Department of Mineral Resources
11. COSATU – Congress of South African Trade Union
12. NPC – National Planning Commission
13. ESOP - Employee Stock Ownership Plan
14. SLP – Social Labour Plan
15. BEE – Black Economic Empowerment

INTRODUCTION

The promulgation of the Mining and Petroleum Resource Development Act (28 of 2002) recognised the state's sovereignty and custodianship over the country's mineral resources, and provides for equitable access, opportunities for historically disadvantaged South Africans (HDSA). NUM supports the broad thrust of the Gazette amendments; we will only emphasize or make new suggestions where we differ with the suggested amendments or if there is insufficient information on the suggested version.

Our hopes for the sustainable redress and the overall of the current structure of the economy is reliant on this draft MPRDA Amendment Bill, whose objectives will enhance and effectively entrench the state as the custodian of the countries mineral wealth; promote equitable access to the nations mineral wealth to all South Africans, substantially and meaningfully expand opportunities for HDSA's, especially women to enter mineral and petroleum industries and to benefit in the exploration of such minerals; and promote employment and advance social and economic welfare of all South African amongst others.

It is our firm conviction that in our country, transformation and advancement of the previously disadvantaged must be seen as a means of not only achieving a sustainable economy but perhaps more importantly as the catalyst for economic growth. It is an undisputed fact that business cannot thrive without the meaningful economic participation of all South Africans, especially its youth and Historically Disadvantaged Persons.

The mining industry has a collective responsibility to ensure that mining companies comply with the Mining Charter, the MPRDA 2002 and subsequent amendments, Skills Development Act, Social and Labour Plans (SLP). The industry's implementations of the targets are very slow; in fact one can even say they are non-compliant with the interim targets progressing towards 2014, hence we applaud the amendments on the offences and penalties (MPRDA Sections 98 and 99 respectively).

2. DEFINITIONS

The draft bill defines Beneficiation as “the transformation, value addition or downstream beneficiation of a mineral and petroleum resource (or a combination of minerals) to a higher value product, over baselines to be determined by the Minister, which can either be consumed locally or exported”. This covered in Section 21 of the draft bill and it will allow greater contributions to the country’s mineral wealth, thus empowering host communities through economic development, employment and ameliorate growth on domestic products. This will enable the mining sector to align their portable skills towards the industries manufacturing beneficiation sector.

We also welcome and support the amended definition of community as described as “*a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law*” by Section 1 (d) of the draft bill. This will ensure greater community participation as a key stakeholder of the mining right holder, reduce community’s ownership in mining operations being relegated to the discretion of mining companies and ensure greater local economic development for the SLP projects.

Historically Disadvantaged Person, the draft bill proposes changes to the current definition of Historically Disadvantaged Persons which defined as any person, category of person or community, disadvantaged by unfair discrimination before the Constitution took effect”. The draft bill defines HDP’s as “any person, category of persons or community who had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa Act No. 110 of 1983 or the Constitution of the Republic of South Africa Act No.200 of 1993, which should be representative of the demographics of the country”. Thus excluding white women as part of the historically disadvantaged, this notion seeks to portray and promote white women whom were used by the industries to circumvent real transformation of the previously disadvantaged South Africans in particular black women.

The NUM also welcomes the Labour Sending Areas inclusion in Section 1 (m) which enforces the mining right holder's responsibility to ensure greater economic development in labour sending areas. This is to ensure that with the current industry's high retrenchment rate, employees go back to undeveloped areas in mostly previous homelands. This can be linked to a good sustainable portable skills programme and with Amended Section 2 (i).

The inclusion of "*mineral processing*" and "*including historic mines and dumps created before the implementation of this Act*" in the definition of Residue Stockpile (Section 1 x) will assist with the regulation of old mine shafts, slam dams (mostly managed by contractors) and ensure responsibility in maintained by the mining right holder. We hope this will ensure that in the future the state is not left with environmental disasters like the current acid mine water and hazardous old mines that promote illegal mining.

Lastly we greatly welcome the inclusion of the Codes of Good practice for the South African Mineral Industry Housing and Living Conditions Standards for the Minerals Industry and the Amended Broad Based Socio Economic Empowerment Charter for the South African Mining and Mineral Industry in Section 1 (za) (b) of this bill. This will assist the regulator in ensuring firm penalties are imposed for non-compliance with the Charter, while closing the gap for pseudo legal trajectory from within the industry in support for non-compliance.

3. MINERAL SECTOR LEGISLATIVE FRAMEWORK

The Minerals Act No. 50 of 1991 was established to set minimum standard in South Africa for mining and environmental aspects to give rise to mining notwithstanding the rehabilitation post mining operation. The Minerals Act No. 50 of 1991 was repealed by the Mineral and Petroleum Resource Development Act (MPRDA) No. 28 of 2002, which included far more rigorous conditions prior to the closure of the mine.

In 2010 the mining sector reaffirmed its status as a listed strategic economic stature and encapsulated environmental provisions of the National Environmental Management Act (NEMA) No. 107 of 1998 now also apply to mine closure certification resulting in mines having to comply with stipulations of this Act too before qualifying for closure¹. The MPRDA continual amendment constitutes a significant step towards redressing the harm caused to communities during the first 142 years of mining in South Africa. The amendments of the MPRDA is aimed amongst others to redress and instill enforceable measures, further seeks to fortify the protections and benefits afforded to communities surrounding mining operations now and future².

4. COMMENTS IDENTIFIED IN THE MPRDA (B15 - 2003) BILL

The MPRDA gives effect to section 25(4)(a) of the Republic of South African Constitution (108 of 1996) by implementing reforming measures that allows equitable access to South Africa's Mineral Resources. This bill gives a clear description to the legislative context of the MPRDA (28 of 2002) among other principles embedded in the bill is equitable access to the mining industry. It is generally accepted that equitable access to mineral and petroleum resources is a desirable objective imperative to enhance socio economic development. However, the difficulty arises when the viability of such a goal is to be measured to determine the level of compliance. We have taken into consideration that, neither the MPRDA nor the Mining Charter respectively

¹ A critical analysis of the mine closure process as followed by the de Beers Oaks Diamond Mine, Limpopo province, South Africa, Botham, Nicole Dawn.

² The Avatar syndrome: mining and communities A. Mitchell; L. Moalusi; M. van der Want; S. Bryson; C. Picas; J. Verwey

defines adequately the term “equitable access” therefore, this causes anomalies going forward. It is therefore imperative, that this bill clarifies these uncertainties in respect of the aforementioned aspects, MPRDA and the Mining Charter respectively.

Section 2 (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, 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;

NUM applauds the Cabinet for implementing and recognizing the role of the Women and people with disabilities in the mining mainstreams. We once again, recommit to extend our unconditional support to ensure the realization of the total emancipation. The inclusion of women and communities reaffirms the 2012 ANC policy conference resolution on socio economic matters to mention but a few, the Minerals belong to the people as a whole through state custodianship, and should be governed by the democratic developmental state in the interests of all South Africans”. Mining should create safe and decent work, and mineral extraction should not compromise local communities or the environment³.

Our view is that, the historically disadvantaged persons includes women and communities, we are not perfectly sure of the reasons cited or a need to explain and specify on “women and communities” should an explanation be provided, we will not object but then we will argue that the bold explanation if needed must include “Youth”, “Workers” and people with” Disabilities” as prescribed by the Gender Equity Bill of 2012.

We support the substitution of Section 9 subsection 1, (a), (b) and 2 with the proposed Section 5 of the draft Bill. The NUM hopes this will ensure that we do not encounter another Kumba ICT case in the industry, thus threatening the stability of both employees and host communities in the process. The limitation on deciding on two applications received at **the same day**, “only to criteria of consideration of previously disadvantage” may in the long run create a problem:

- a. Mining decisions should centrally guarantee both stability of the industry and future of the employment

³ ANC policy conference 2012, Mineral sector: Minerals belong to the people as a whole through state custodianship, and should be governed by the democratic developmental state in the interests of all South Africans

- b. Financial viability irrespective of transformative requirements should be critical (We're of the view that this clause seek to address the Kumba vs. Imperial case but inherently taking side. This clause support entities like Aurora based on historical and transformative grounds, workers compelled to poverty and few individuals because of historical and transformative reasons become super rich and display wealth).
- c. Presumptuously, like any other department or any other institution when clients submitting forms, they follow each other by means of a cue, this then immediately dismiss the idea of the same time unless otherwise DMR give a much clearer definition of "SAME TIME" .
- d. It is rather not clear which criteria will be used in the case where both companies meet the required preference (HDSA), we require more clarity on this decision making processes both from the Minister and the Regional managers.

Section 10 (A-G) of chapter 4 of Act (28 of 2002), Establishment of Regional Mining Development and Environmental Committee.

The NUM welcomes the proposed amendments of Section 10 of the MPRDA with Section 6 of the current bill; this will be dealt with in conjunction with the amended definition in Section 1(d). We believe the industry needs to be accountable to its stakeholders and thus makes this amendment crucial, especially the inclusion of the **"applicant"** and the **"objections"** instead of just comments. We also welcome the process of objection outlined for the Regional Mining Development and Environmental Board as indicated in Section 6 (b) 3. In the composition of the Regional Mining Development and environmental Committee Section 7 C previously 10 C (2), we call on this structure's composition in terms of Section 43 (2);

We once again support the establishment of the Regional Mining Development and Environmental Committee, NUM regards this decision as an effective measure to ensure enforcement of the state mineral resources policies to enhance the workflow and do away with backlogs within the department. The suggestion that the Chairperson of the Ministerial Advisory Council be the Director General, is constraining on Advisory extent of the Council. The DG by appointment and job description is an advisor of the Minister therefore the incumbent becomes

irrelevant for such position. The NUM suggests that the Chairperson of the Ministerial Advisory Council be elected by secret ballot (by all members) on the first meeting of the board and that only members referred at (e) and (f) shall be eligible for nomination and election.

Amendment of Section 11 of Act 28 as amended by section 8 of Act of 49 of 2008, this section has historically caused more harm than good for mine workers in South Africa. We are all familiar with the Aurora liquidation “man-made disaster” the recent unbundling of Goldfields assets into Sibanye Gold Ltd and lastly the acquisition of De Beers mines by Petra Diamonds. The Union can attest to the harsh conditions our members are transferred to in terms of the current section 11, the inclusion of “*...and subject to such conditions as the Minister may determine,*” gives us hope that the Minister will include better conditions for employees and or mine communities.

With the current highly non-compliant mining industry, that is willing to invest millions just to avoid sanctions for non-implementation Social and Labour Plan commitments. The union believes the inclusions of “*complied with the requirements of*” the prescribed social and labour plan “*which shall be reviewed every five years for the duration of the mining right*” in Section 18 (e) will empower the DMR’s enforcement. Section 18 (c) (b) also reiterate the importance of mining right holders developing area and communities they are operating in.

Amendment of Section 19 of MPRDA (28 of 2002) as amended by section 15 of (49 of 2008) states that the rights holder should lodge such right for registration at the Mineral and Petroleum Titles registration office within the 60 day as the prescribed period after the right has been effective, subsection (g) subject to section 20 (and in terms of any relevant law), pay the state royalties in respect of any mineral removed and disposed of during the course of prospecting operations;

NUM supports the notion raised in the ANC Policy conference which suggests that the state must capture an equitable share of mineral resource rents and deploy them in the interests of long-term economic growth, development and transformation. NUM reaffirm COSATU’s position that these provisions do not only represent deviation from the objective, the spirit and the latter of MPRDA but are designed to

provide no meaningful revenue to the State for the compensation of our irreplaceable minerals that shall have been extracted out of the land for the exclusive benefit of monopoly capital⁴.

Section 56A (1) as amended as Section 43 of the Bill, The Minister must within 90 days from the promulgation or commencement of the Mineral and Petroleum Resources Development Amendment Act, 2012 establish a Council to be known as the Ministerial Advisory Council, (2) The Minister must appoint members of the Council

The suggestion that the Chairperson of the Ministerial Advisory Council be anybody with an exception of the Director General, this will have constraints on Advisory capacity of the said incumbent, and that it won't be objective to a certain extent that it will hinder transformational development proposed by other parties. The DG by appointment and job description is an advisor of the Minister.

We suggest that the Chairperson of the Ministerial Advisory Council be elected by secret ballot (by all members) on the first meeting of the board and that only members referred at (e) and (f) shall be eligible for nomination and election.

We therefore propose the establishment of a Mineral Beneficiation Commission that will be funded and managed by the Council for Geosciences.

The function of the *Minerals Commission and Governance*⁵:

- a. The governance of the Commission should include inputs from the Ministries of Trade & Industry, of Energy and of Economic Development and Finance.
- b. The proposed Minerals Commission would also be tasked with the assessment of which minerals should be designated as "strategic minerals" for final classification as such by the Minister and Cabinet.

⁴ COSATU submission to the Mineral and Petroleum Royalty Bill

⁵ State Intervention in the Mineral Sector (SIMS): Policy discussion document, March 2012

- c. This assessment must be in terms of both critical food stock into our economy and minerals where South Africa has a dominant share of global resources that could be leveraged to facilitate the establishment of backward and forward linkages.
- d. The Commission should ensure that “strategic minerals” are exploited in an orderly and optimal manner to satisfy national requirements, demand and pricing.

We welcome the strengthened penalties as Amended in Section 70 of the Bill, the replacement of R 100 000 with 10% of annual turnover and improved term of imprisonment from two year to four years. We hope these will encourage the industry to be transformed instead of merely complying and thus implementation moves without any impediment.

5. PROPOSED INCLUSION TO THE BILL (2013)

The National Union of Mineworkers (NUM) take into consideration the progress that the South African Mining Sector has made in fostering compliance and ensuring legislative intervention in critical areas where there were uncertainties and areas where there has been a lot of ambiguities emanating from the interpretation of the Act (28 of 2002).

The proposed Section 42 (g) which states *“in the event that the holder is liquidated and finally deregistered or sequestered, the right, permit, permission, or license must fall within the insolvent estate and if sold, transferred to the purchaser subject the prior written consent of the Minister in terms of Section 11.”*

We strongly object to the inclusion of the mining right in the insolvent estate and believe it defeat the objectives of this Act, which gives the state the custodianship of the mineral wealth of the country. The NUM proposed that the mineral right falls back to the state and the purchaser be given first preference in applying as per section 9 of the bill, if the purchaser fails to meet the requirements the Minister should Auction the right with the stipulated conditions.

The application for the Water Use License should carry a non-negotiable stipulation that if the mine is situated in an underdeveloped area, that does not have clean running water, The applicant must ensure that they simultaneously develop the relevant water infrastructure for the community

as well as for the mine. This will ensure that pipes no longer pass villages without water and channeled straight to the mine.

Section 34 of the Amended Bill, previously section 47; The NUM welcomes the time frame of 30 days' notice in terms of remedying the contravention, breach or failure. Thus putting a time frame in place for either complying or the withdrawal of the mining right. In light of the suspension of the right, the NUM further proposes a Section 34 (h) be included that will read as follows: The mining right holder will further be liable to pay all employees for the duration of the closure and if after 30 days the mining right holder is still non-compliant the Minister may Auction that right within 60 days.

▪ **State Owned Mining Company (principles)**

In the MPRDA, we suggest that there be an inclusion a section referring to the “State Owned Mining Company”, just on principle and that its nature and operations be captured in a separate Act of Parliament and be establish in the same form of the National Planning Commission.

▪ **Employee Stock Ownership Plan (ESOP)**

NUM proposed that there must be a section dedicated to ESOP's, the SIOC ESOP principles pay out should be adopted and used in the suggested section. ESOP's should be compulsory and mandatory linked to granting of a mining license and failure to implement and comply should jeopardize the status of the mining license. This should be implemented and understood on the basis of the Freedom Charter Clause on, “Wealth of the nation shall be shared amongst those who work it”. The ESOPS should be worth a minimum of 10% value of the company, with decision making powers.

The amendments should also include the following:

- a. Loan free scheme or employer funded ESOP
- b. Importance of the value of the scheme or percentage of ownership in the company
- c. Returns profit sharing or dividends needs to be paid out each time the company declares profit.
- d. The vesting period needs to be maximum 5 years.

- **Outsourcing the operation of the granted Mining license**

Section 101 of the current act should include stipulations clearly determining conditions under which the outsourcing could be allowed and that the procedure should stipulate the approval by the Minister of DMR. Should the outsourcing be approved, the salaries and conditions of the outsourced mining operation be the same with the mining company that the license was granted “equal pay for work of equal value” as prescribed in the Employment Equity Act (55 of 1998) as amended in Clause 2 of the Employment Equity Bill of 2010.

- **State Entity or ownership vs. BEE compliance**

NUM proposes that there must be an inclusion of a section that explains the state ownership or state entity as BEE compliant to avoid what happened to amongst others LIMDEV entity in Limpopo, for the purpose of compliance with the mining license stipulation.

- **Exploration Right Speculators**

We propose that, in order to discourage mineral right speculators, there must be an introduce an exploration (prospecting) right transfer capital gains tax of 45%, payable if the right is on-sold or the company changes hands before the mining commences.

- **Redistribution and Restitution of Mineral Rights**

We further proposed that the inclusion of women should receive a crucial attention, as an area which seeks more transformational interventions, which addresses gender mainstreaming within the industry. South Africa has a worse scenario when it comes to the number of women who owns the mining companies and participates in the industry. We proposed a further inclusion of the women empowerment and gender equity bill (2012) of chapter 3 clause (3) special measures must be implemented, which actively seek (a) to (d)⁶. This proposition should be extended to businesses that are sold on auction where the department must seize the license and await the new bidder to reapply.

⁶ Women’s Empowerment and Gender Equity Bill 2012

CONCLUSION

The Draft MPRDA Amendment Bill will assist the department with financial penalties for non-compliance. Currently the department relies on Section 93 for non-compliance notices; this can be followed by Section 47 (Ministers power to suspend or cancel rights), 98 (Offences) and 99 (Penalties) of the MPRDA 2002. Thus effectively closing down the relevant mine for non-compliance, we have seen this effectiveness with the suspension of the mining licenses of a platinum company in Steelpoort and a gold mine in Soweto. Hence it is imperative for legislations and regulations be enforced and the CEO's of these non-compliant companies face punitive actions.

The industry currently does not provide executive powers to those tasked with SLP Implementation, thus hampering the commitment implantation process. What makes matter worse is lack of inclusion of SLP transformative issues in the organizational policies. Hence the industry still failed to ensure all its employees are functionally literate through Adult Based Education and Training, to mining bosses this would negatively affect their production targets. The Industry needs to ensure they use their Social and Labour Plans as business plan that will ensure it assist employees and communities.