

130918 PC MIN

MP13/048

Trade Union Solidarity.

Comments on the
Mineral and
Petroleum
Resources
Development Act
Amendment Bill

Solidarity Research Institute



Solidariteit
Navorsingsinstituut

ABOUT SOLIDARITY

Solidarity is one of the oldest trade unions in South Africa. Its origins date back to 1902 and the Witwatersrand mines. Since its inception, Solidarity – formerly the Mine Workers Union (MWU) – has been closely linked to the course of South African history. In the 1990s a number of other trade unions, including the South African Workers Union, joined the MWU and the trade union's name was changed, first to MWU-Solidarity and subsequently to Solidarity.

Solidarity has members in virtually every industry in South Africa. It also has members in a great number of companies. The main industries in which Solidarity is organised are metal and engineering, mining, electrical, telecommunications, chemical, agriculture and general industries, including tertiary institutions, aviation and other specialised areas.

Solidarity is a trade union in the Christian democratic trade union tradition. It promotes the interests of its members in labour relations and community life, believing that a system of government and labour relations can be judged by the extent to which it recognises the rights of minorities. Solidarity also promotes a system of free enterprise, confident that the employment relationship can be one of mutual gain.

Solidarity does not support any political party. Solidarity seeks to create democratic spaces for its members in which to live and function independently. The trade union believes in mobilising capital to assist its members and their communities in coming up with their own institutions to solve challenges, instead of depending on

INTRODUCTION

During December the draft Mineral and Petroleum Resources Development Amendment (MPRDA) Bill, 2012 ("the Bill")¹ was put forward for comment. The Department of Mineral Resources (DMR) has invited interested parties to make written submissions.

It is regrettable that the DMR chose this time of the year to put the Bill forward for input from stakeholders. For obvious reasons the months of December and January see a number of stakeholders not being as active as during other times of the year. This raises the question whether enough time has been afforded for concerns regarding the Bill to be properly ventilated.

GENERAL COMMENTS

A number of stakeholders and commentators have raised a number of concerns about the Bill, which resonate with the concerns that Solidarity has. We trust that the DMR will take these concerns to heart and rework the Bill before embarking on the parliamentary process.

Our aim with making a number of general comments is to add Solidarity's voice to those that are concerned with the harmful impact, be intended or unintended, that the Bill will have if accepted in its current format.

¹ Government Gazette, No. 36037 published on 27 December 2012.

Key points of concern are:

1. Although aimed at diminishing ambiguity in the Act, the introduction of a number of proposed amendments will rather contribute to regulatory uncertainty than meaningfully contributing to the making the Act less ambiguous. It introduces further regulatory obstacles, the effects of which have not properly been discounted.
2. The Bill aims to ensure bigger state intervention and control. Specifically, too much unwarranted control is given to the Minister and a Regional Manager in certain matters. That there is no way to determine the limits to an interventionist project except through expressions of arbitrary preferences by those in the power to do so. This absence of guiding principles is a recipe for conflict.
3. Certain proposed provisions amounts to legislated nationalisation and not custodianship of natural resources.
4. The Bill introduces stricter punitive measures aimed at synthetically enhancing compliance with BBBEE, which is essentially voluntary in nature.
5. The Bill seeks to introduce a number of regulations that will further harm investor confidence in South Africa. The Bill in its current format will serve as a deterrent to investors who will rather take their money elsewhere in order to avoid excessive and unnecessary regulation.

PROBLEMATIC PROPOSED AMENDMENTS

DEFINITIONS

“Beneficiation”

The proposed amendment to the definition of “*beneficiation*” is indicative of both the unnecessary intervention by the state and the unwarranted control that the Bill seeks to introduce. This should be revisited. A coherent regulatory framework to create certainty for all stakeholders should be developed before this proposed amendment is taken any further.

“Historically disadvantaged person”

This definition is wholly inadequate and has no sound legal basis. Specifically the use of the phrase “*demographics of South Africa*” in context of what a historically disadvantaged person is purported to mean is unlawful.

“Strategic minerals”

This definition should be reworked and refined in order to curb the power of the state. In its current format the state has *carte blanche* to abuse this.

SECTION 2

The proposed deletion of “women” from the definition of historically disadvantaged is to say least, worrisome. This should be revisited.

SECTION 9

Given the problems the DMR has experienced with potentially fraudulent manipulation of this system, those portions of section 9 of the MPRDA dealing with the “*first come first served*” principle in processing applications are to be removed.

SECTION 11

Solidarity is concerned about the amendments to Section 11 of Act 28 of 2002, as amended by section 8 of Act 49 of 2008 (not implemented to date) which deals with asset and share transactions. Currently section 11 of the MPRDA provides that “*a prospecting right, mining right or part thereof or an interest in any such right, or any interest in an unlisted company, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the prior written consent of the Minister, and subject to such conditions as the Minister may determine.*”²

Problem with this section is that when a company listed on the JSE, free trade in its shares should take place and this article will be inconsistent with the rules of the JSE. A disturbing issue is that Minister can control the terms and conditions applicable to the consent, which means that the Minister has extensive range of discretion.

SECTION 23

Amendments to Section 23 of Act 28 of 2002, section 23(2) *The Minister may (a) having regard to the nature of the mineral in question, apply the provision of section 26; (b) after taking into considerations the socio-economic challenges or needs of a particular area or community, direct the holder of a mining right to address those challenges or needs.*³ The word ‘community’ is not well defined; there is no guidance in light of previous xenophobic attacks

SECTION 26

The amendment of section 26 of Act 28 of 2002 is problematic. Presently section 26(3) states that “*Any person who intends to export ant designed minerals mined or from of petroleum extracted in the Republic may only do so with the minister’s written consent to such conditions as the minister determine*”⁴

This section is problematical and unclear and should be revisited.

SECTION 43

Section 43 (1) states that “*notwithstanding the issue of a closure certificate, by the Minister in terms of this Act to the holder or owner concerned*” Section (6) *when the Minister issues a certificate he or she may retain any portion of such financial provision for latent and residual safety, health or environmental impact which mat become known in the future for a period of 20 years after issuing a closed certificate.*” The point of a closure certificate has now been obliterated.

² Section 11(1) of the MPRDA.

³ Section 23(2) of the MPRDA.

⁴ Section 26(3) of the MPRDA.