



## **EASTERN CAPE PROVINCIAL LEGISLATURE**

OFFICE OF THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON  
ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM

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02 May 2017

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### **NEGOTIATING MANDATE**

**To:** The Chairperson:  
Select Committee on Land and Mineral Resources

**Name of Bill:** Mineral and Petroleum Resources Development Amendment  
Bill

**Number of Bill:** [B15D-2013]

**Date of Deliberation** 02 May 2017

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#### **1. Vote of the Legislature**

The province votes in favour of the Bill and mandates the Eastern Cape delegate to the NCOP to negotiate in favour of the Bill within the following parameters:

##### **1. Preamble to the Bill**

(a) 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.
- Free prior and informed consent (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. Clause 1 of the Bill – Definitions**

(a) It is proposed that the following new definitions be inserted:

- '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;
- '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;
- '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.

- (b) There is a concern that the inclusion of the Codes, the Standards and the Charter into the definition of "*this Act*" in section 1 of the Bill would transform these instruments as developed by the Minister into Parliamentary legislation thus offending against the constitutionally enshrined separation of powers between the legislature and the executive, and cannot elevate them to even subordinate legislation let alone parliamentary legislation.
- (c) It is submitted that the definition of "*mine gate price*" arguably does not allow for export parity pricing, so that the producer will suffer a loss by being compelled to subsidise local beneficiaries. It is submitted that the exercise of the Minister's powers in terms of these provisions will constitute an expropriation of property within the meaning of section 25(2) and (3) of the Constitution and hence oblige the state to pay compensation to the holder in respect of the resultant loss of income.
- (d) It is proposed that the commencement date of the right should be on the effective date as currently defined, and that accordingly the definition of "effective date" should read:
- " 'effective date' means the date on which the relevant permit is issued or the relevant right is executed, and on which date, notwithstanding the date of grant of the application for such permit or right or the date of notification to the applicant of such grant, the duration of the relevant permit or right shall commence and which issue or execution shall occur within a prescribed period after such notification".
- (e) It is suggested that a definition of "shale gas" should be included in the Bill to address a few shale gas specific challenges and provisions.

### 3. Clause 2

- (a) It is submitted that "women and communities" be retained as there is no motivation, legally or constitutionally for removing women and children as a designated group identified for mining development.
- (b) It is proposed that the following paragraphs after paragraph (i) be inserted as follows:
  - "(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."

#### **4. Clause 5**

- (a) It is submitted that an essential element of the first come first served basis in applications was to give security to persons who had incurred the costs of identifying such land and mineral or petroleum so that such persons would be first in line for a right. Without such a provision it is very unlikely that such persons would risk undertaking the operations. It is therefore submitted that the new section 9(5) referring to such preference should be retained.

#### **5. Clause 5A**

- (a) It is proposed that Clause 5A should be amended to make it illegal to start mining without community consent under customary law and complying with Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996).
- (b) It is therefore further proposed that the clause be amended 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."

6. **Clause 7**

**10B**

(a) It is submitted that the clause be amended 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."

**10C**

(a) It is proposed that the clause be amended by inserting at the end of section 10C (1) the following words:

"and the development needs of communities"

(b) It is further proposed that the clause be amended by inserting a paragraph after paragraph (c) in subsection (2)

"the regional land claims commissioner"

**10H**

(a) It is submitted that a new section be inserted as follows:

Meetings of the Regional Mining Development and Environmental Committee

10H The meetings of the RMDEC shall be open to the public and that 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.

7. **Clause 8(1)**

- (a) More detail in regard to precisely when such Ministerial consent would be required and a period for the furnishing of such consent will be set out in regulations is required.

**8. Section 10 of the Act**

- (a) It is proposed that the section be amended by the insertion in subsection (1) after paragraph (b) of the following paragraph:

"Provided that if the application relates to communal land,

The directly affected community must be invited to negotiate and seek agreement on the application;

Prior to seeking consent, the applicant must approach the community to have an independent expert appointed;

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;

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 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.

At such a meeting, community members shall be entitled to comment freely and to seek further information.

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.

After such a meeting, the independent investigator shall furnish all information sought by community members in an accessible form.

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."

- (b) A further proposal is that whenever the Minister receives an application for a mining permit in area falling under traditional leadership, the first person to be consulted should be the traditional leader (King/Queen/any member of the royal family) of the area. It is also suggested that the Minister should, when approaching an affected community regarding any proposed mining do so together with the applicant so that the community is in a position to clarify whatever issues it may have in the presence of the Minister and the applicant.

#### **9. Clause 21**

- (a) It is submitted that the proposed sections 26(2B) and (3) appear to be unconstitutional as being inconsistent with South Africa's international trade obligations. There is a concern that the effect of these provisions is that a quantity of designated minerals would have to be made available for local beneficiation, the result being that there is a quantitative limit which is placed on the designated minerals which are available for export.

#### **10. Clause 22**

- (a) It is submitted that some mining companies are not all Black owned or controlled. Some of them, including the members of ASPASA (the Aggregate and Sand Producers Association of South Africa) for quarrying purposes and the members of the South African Diamond Producers Association (SADPO) for alluvial diamond digging purposes, sometimes do need to apply for mining permits since the minerals in question can be mined optimally within three years and the relevant mining areas do not exceed five hectares, within the meaning of section 27(1) of the MPRDA.

An unintended consequence could be that if there is no Black owned or controlled company which is interested in applying for or is a qualifying applicant for the relevant mining permit, the mining opportunity will go to waste, which would not accord with the object in section 2(e) of the MPRDA of promoting mineral resource development in South Africa.

Furthermore the Mining Charter's empowerment ownership target is 26% and which target is and should remain applicable to mining permits.

The proposal to reserve for 51% black owned South African companies the competence to acquire mining permits is unconstitutional in that it contravenes the right to equality in section 9 of the Constitution, the right to freedom of trade, occupation and profession in section 22 of the Constitution, and the parliamentary procedure in section 76 of the Constitution.

In essence, it is submitted that permits should be reserved for black owned and controlled companies.

#### **11. Clause 27**

- (a) It is submitted that the clause should be amended 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."

#### **12. Clause 31 of the Bill**

- (a) There is a concern that clause 31 of the Bill in its current form, which will prohibit collection of prescribed debt, was not put to public comment.

#### **45A**



(a) The following section is proposed for inclusion in the Bill:

"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."

**13. Clause 35**

- (a) It is submitted that section 47(1)(c) be amended by the insertion of the following paragraph:  
"(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."
- (b) It is also proposed that paragraph (d) dealing with misrepresentations by mining companies be retained.

**14. Clause 44 (56C)**

- (a) There is a concern that the memorandum to the Bill 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. It is therefore proposed that the clause be amended to include the following categories:

"One representative from non-governmental organisations;  
Two persons from community based organisations;  
The Chief Land Claims Commissioner"

**15. Clause 58**

- (a) It is submitted that time sensitive activities for onshore shale gas programme include compliance with technical regulations, extensive public participation, EIAs etc. An amendment is therefore proposed to section 81(4) that the exploration timelines be for an initial 5 years with an additional 2 to 3 years with a total of 11 years.

**16. Clause 65 (86A)**

- (a) It is proposed that there should be incorporation of the necessary flexibility for downward adjustment of the State carried interest during the exploration phase to support shale gas exploration investments and ultimately a more competitive gas production cost and consequential market price.

**17. Clause 74**

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**17. Clause 74**

- (a) It is submitted that this clause be amended so that communities that historically and currently lost their land rights in homelands and on communal land as a result of mining get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter and communities that are considering giving consent to new mining on their land in terms of section 5A to at least get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.
- (b) It is therefore proposed that Section 100 of the principal Act be 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.”
- (c) It is further proposed that section 100(2)(b) be amended as follows:  
“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”

## 18. General

- (a) It is submitted that Bill 15D and the 57 further amendments proposed by the Department of Mineral Resources must be rejected because the joint rules of Parliament provide that no amendments can be made when a Bill is returned to Parliament by the President on the procedural ground of lack of participation.
- (b) The Bill inserts the words “where necessary” in 16 places in the Bill. This gives an applicant mining company and the regional manager of the Department of Mineral Resources the discretion to decide whether there must be a

simultaneous application for a water use licence under the National Water Act. The authority of the Department of Water Affairs is undermined. It is proposed that the offending words [where necessary] be removed from the Bill.

- (c) It is submitted that there should be financial provision for the communities that have interest in mining.
- (d) There was a proposal that the Bill should await the finalisation of the land claims processes.
- (e) A concern was raised about the benefits of the Eastern Cape Province as it has the highest percentage of mine workers, which makes it a labour sending area.
- (f) It was also submitted that suitable housing should be provided for the people working in the mines.
- (g) A concern was raised that the Bill the local beneficiation in its current format is vague and does not seem to advance the radical economic transformation that the Bill seeks to achieve. A further proposal with respect to beneficiation is a 5% to the directly affected community as a means of compensation for loss of grazing land and the resultant pollution to the environment.
- (h) A proposal was raised that the social and labour plans should be strictly a product of deliberations between the directly affected community, the mining company and other relevant stakeholders.
- (i) A concern was also raised about the proposed 20% free carried interest to the State while the company will be paying the tax to the State.
- (j) Emphasis was made on the importance of community involvement in the consultation processes.
- (k) A suggestion was also raised with respect to the fact that the Department should take responsibility and assist the communities when there is proposed mining to guard against incorrect submissions being made by mining companies regarding consent having been given by affected communities when that is not the case.
- (l) A further suggestion was made that environmental impact assessment reports should be presented directly to affected communities in the presence of the Department and the proposed RMDEC.
- (m) A concern was also raised about the short and/or late notice about the public hearing to some stakeholders.
- (n) Of all the communities visited, the Xolobeni community advised that it was vehemently opposed to mining.

- (o) There were a number of other general comments raised and these are outlined in the attached report of the Portfolio Committee on Economic Development, Environmental Affairs and Tourism for consideration by the Select Committee.



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**CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON ECONOMIC  
DEVELOPMENT, ENVIRONMENTAL AFFAIRS & TOURISM**

*02 May 2017*  
**DATE**