



## **FREE STATE LEGISLATURE**

### **PORTFOLIO COMMITTEE ON ECONOMIC DEVELOPMENT NEGOTIATING MANDATE**

**TO:** Chairperson of the Select Committee on Land and Mineral Resources

**NAME OF BILL:** Minerals and Petroleum Resources Development Amendment Bill

**NUMBER OF BILL:** [B 15D-2013]

**DATE OF DELIBERATION:** 14 June 2017

#### **VOTE OF THE LEGISLATURE:**

The Portfolio Committee on Economic Development as designated by the Free State Legislature:

#### **a) MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL [B15B-2015]**

##### **1. WAMUA (Women affected by Mining United in Action)**

MPRDA and MPRD Amendment Bill No. 15 of 2013 proposals

##### **Definitions**

Insert new definition:

"Customary law" means the rules and principles that communities used 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.

**Purpose and objective**

Community shall be defined as a group of persons who have chosen or chose 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.

**Subsection 2(d)**

Retain "women and communities"

**Purpose and objective**

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

By 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 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.

**Purpose and objective**

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: Prohibition relating to illegal act.**

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 in 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.

**Purpose and objective**

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, i.e. 26%, of ownership and control targets BBSEE Charter.

**Section 10: consultation with interested and affected parties**

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 assessment;
- (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:
  - (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 regarding the extent of the applicant's compliance with statutory requirements.

- (b) At such 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 the 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."

#### **6. 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.

#### **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 (c) in subsection (2)

"the regional land commissioner"

#### **Proceedings of RMDEC meetings**

Proceedings of the RMDEC

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

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

#### **Purpose and objective**

Whether or not the right to attend meetings and the right to 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 of the Act itself.

#### **Section 27 clause 22 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 affecting 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.

#### **Purpose and objective**

Regarding the legitimate activities of small scale onerous 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.

#### **Section 45A Minister's power to recover costs in the 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 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 mine 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 his or her 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 older 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 is there is no such provision or if it is inadequate, from money appropriated by Parliament for that purpose.

**Section 47(1)(c) Minister's power to suspend or cancel rights, permits or permissions**

"(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 minerals industry, codes of good practice for the minerals industry and the broad-based socio-economic empowerment charter envisaged in section 100.

#### **Purpose and objective**

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.

#### **Purpose and objective**

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 now be repealed.

**Section 56C: Establishment of Ministerial Advisory Council (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

#### **Purpose and objective**

The memorandum and the departments 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.

**Section 100 Transformation of minerals industry (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 benefited 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."

#### **Purpose and objective**

The proposal above means that

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

#### **Guidelines for community consent processes**

The following conditions for community consent processes shall be incorporated into the regulations and participation codes.

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

##### **Community governance**

1. Communities shall have the choice to practice customary forms of governance in matters internal to the community and involving relations external to the community.
2. Such practice shall be recognised as a living and changing form of governance.
3. Such practice shall not be defined or bound by colonial constructions of customary ownership, decision-making and governance.
4. Customary decision-making processes shall be as defined by the communities' living practice, subject to the realisation of equality and democracy enshrined in the African Charter on Human Rights and People's Rights, especially the promotion of the rights of women to participate in and lead such processes.

#### **Community Rights**

The continued existence of a community shall be considered inviolable

1. The rights of a community include, amongst others, the right to:
  - 2.2. Pursue their own development path;
  - 2.3. The natural resources on and below the surface of their land; and
  - 2.4. Collectively benefit from the use of the natural resources on and below the surface of their land.
- 10.3 no community may be arbitrarily deprived of these rights through mining or associated activities.
- 10.4 the State must facilitate and support the chosen development path of such a community, including supporting the community in considering all viable forms of development.

#### **Community consent required**

1. Should a proposed mining activity require access to a portion of land owned, occupied or used by a community in terms of that community's custom or practice, or if an existing



mining activity should require a significant change in the scope or nature of operations, the affected community's consent shall be required.

2. The affected community shall have the right to grant consent unconditionally or subject to conditions that the community considers necessary to protect their socio-economic rights or interests, or their natural or cultural heritage.
3. The affected community shall have the right to refuse to grant such consent.
4. Should the affected community's consent not be granted, the State shall not permit the proposed mining activity to proceed until such consent is granted.
5. Should mining commence or a mining right without the consent of their community, the community shall have the choice to:
  - 5.1. Have the right set aside and to be paid compensation for their full damages suffered by the community including the value of any minerals extracted and the value of rehabilitating the land to the condition it was prior to any mineral exploitation; or
  - 5.2. Consent to the mining retrospectively through the process set out in this Chapter, including the negotiation of compensation, and to recover all compensation that would have been owed to it had the community's consent been received from the outset.
6. Communities shall have the right to revoke their consent should mining activities be conducted in a manner contrary to this law, with communities then entitled to compensation for the full damages suffered by all mining activities.
7. If more than one community is affected by a proposed mining activity, each community shall have the right to independently decide whether to grant or refuse its consent.

#### **Free, Prior and Informed consent**

1. Community consent may only be granted on the terms set out in this Chapter, and must be:
  - 1.1 free from any form of manipulation, coercion, or pressure;
  - 1.2 prior to the commencement of the activity; and
  - 1.3 with full, detailed and accurate information on the nature and scope of the proposed mining activity, on the reasonably possible impact on the community's economic, social and environmental wellbeing, including the impact on women informed by the precautionary principle that the burden of proof falls on the application to establish that an activity is not harmful, and on development alternatives.

#### **Customary decision-making**

1. When a community's consent is required, a community shall decide whether to grant its consent in terms of that community's customary law and practice, provided that such processes shall:
  - 1.1. be transparent, democratic, and participatory;
  - 1.2. ensure the participation of all persons directly affected by the proposed mining activities; and
  - 1.3. Protect and promote the right of women to participate, lead, and make decisions.
2. Where the proposed mining activity requires the relocation of specific community member's homes, the majority of the specific persons affected by the relocation must consent to the mining activity.
3. A decision to provide consent must include an agreement regarding compensation payable to the community and its members compliant with the standards set out in CHAPTER 6.
4. Notwithstanding any timeframes provided for in terms of any statute law, communities have the right to sufficient time to give effect to decision making processes required by their customary law.

#### **Outcome**

1. Where consent is granted for a mining activity, it is mandatory that the applicant and the community conclude a written agreement setting out the terms of exactly what has been consented to in plain language, including the terms of compensation payable to the community and its members, provided that the community may nominate representatives to sign such agreement in terms of its customary law and practice after the final draft has been made available to the public.
2. This agreement may be amended with the consent of all parties where it is necessary to change the project plan for the proposed mining activity which is likely to affect or change the impact of such activity.

3. Where consent is granted or refused, the independent investigator shall produce a report documenting the decision-making process, with a particular emphasis on the following:
  - 3.1 the steps taken to notify the members of the community about the meetings convened by the independent investigator;
  - 3.2 the quality of the information provided by the applicant and the extent of its cooperation;
  - 3.3 indications of manipulation, coercion or pressure from outside actors during the decision-making process.
  - 3.4 The extent of community participation, including the extent of participation by vulnerable members of the community and minority groups;
  - 3.5 Where consensus was not reached, the reasons why consensus was not reached, the views of those opposed to the mining activity including and especially minority and vulnerable households, and full details on the meeting at which the decision was taken.
  - 3.6 The extent of the participation of and leadership by women in the process;
  - 3.7 Where the relocation of members of the community had been proposed by the applicant, the steps that were taken to solicit the view of the persons affected by the relocation; and
  - 3.8 Any other information that may be relevant to explaining the extent and quality of the public participation process and the decision of the community.

## 2. CHAMBER OF MINES OF SOUTH AFRICA

### PART A: CONSTITUTIONAL ISSUES

1.1. In terms of s79 (1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the President of the Republic of South Africa referred back the Bill to Parliament on two substantive grounds of unconstitutionality, namely:

"a. The definition of "*This Act*" is likely unconstitutional in that the amended definition elevates the Codes of Good Practice for the South African Minerals Industry, the Housing and Living Conditions Standards for the Minerals Industry and the Amended Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry to the status of national legislation. In addition, in terms of section 74 of the Amended Act, the Minister is given the power to amend or repeal these instruments as and when the need arises effectively by-passing the constitutionally mandated procedures for the amendment of legislation;

b. As amended, sections 26(2B) and 26(3) appear to be inconsistent with South Africa's obligations under the General Agreement on Trade and Tariffs (GATT) and the Trade, Development and Cooperation agreement (TDCA) insofar as they appear to impose quantitative restrictions on exports in contravention of GATT and TDCA and in doing so render the state vulnerable to challenges in international fora;"

1.2 The National Assembly has however dismissed the abovementioned Presidential reservations.

1.3 The Chamber submits that the above Presidential reservations were correct, for the reasons which follow and has obtained opinions from Adv. CDA Loxton SC and Adv D Unterhalter SC on such reservations agreeing with the views of the President. If the Bill remains unchanged in these respects the President should in terms of s79(4)(b) of the Constitution refer the Bill to the Constitutional Court for a decision on the Bill's constitutionality. The need for this would be avoided if the Bill were amended in the manner suggested by the Chamber below.

Clauses 1(zD), 20(e), apparently newly proposed 35(b), and 74 of the Bill: "This Act" and related issues, be deleted from the Bill.

Clauses 1(g) and 21(c) and (d) of the Bill: proposed definition of "mine gate price" and ss26 (2B) and (3) on beneficiation.

In regard to the above clauses the Chamber submits the following.

- (1) The inclusion of the Codes, the Standards and the Charter into the definition of "this Act" in s1 of the MPRDA 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.

- (2) The same applies to the proposed new ss25 (2)(f) and 100(3) in the MPRDA and the apparently newly proposed s47(1)(f), the effect of which would be to elevate what are only guidelines into a form of subordinate legislation.
- (3) The above issues are, as the President pointed out, exacerbated by the proposed s100(4) which would, read with the proposed new definition of "this Act", empower the Minister to amend or repeal the Parliamentary legislation now by definition constituted by the Codes, the Standards and the Charter.
- (4) In terms of ss44, 55 and 239 of the Constitution, national legislative authority is vested in Parliament, including to amend legislation, and the definition of national legislation includes subordinate legislation made in terms of Parliamentary legislation, and Parliament may delegate its power to make delegated legislation to the executive. However, Parliament may not delegate its function to make nation legislation.

Clauses 1(g) and 21(c) and (d) of the Bill: proposed definition of "mine gate price" and ss26 (2B) and (3) on beneficiation

3.1. 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 benefactors. The Chamber submits that the exercise of the Minister's powers in terms of these provisions will constitute an expropriation of property within the meaning of ss25 (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.

- (1) In terms of s5 (1) of the MPRDA, a registered mining right is a limited real right in respect of the mineral and the land. Such mining right, including income derived from the exercise of such mining right, constitutes property.
- (2) The Constitutional Court has held that a one-size-fits-all determination of what acquisition for purposes of expropriation, is inappropriate and that a case-by-case determination is necessary by reference inter alia to the source, nature and content of the affected rights. The above provisions deal with the enforced diversion of income from the holder of the mining right to another (being the local benefactor) in promotion of the State's industrial and economic policies. It follows when the Minister prescribed by regulation the aspects dealt with in the above provisions, an expropriation will result, and for which, in terms of item 12 in Schedule II to the MPRDA read with ss25 (2) and (3) of the Constitution, the State will have to pay compensation to the holder of the mining right for the loss suffered by such holder in being forced to sell at a price lower than export parity price. In other words, the State will in any event ultimately pay for the subsidisation of local beneficiaries.
- (3) In addition, investors who enjoy the benefit of Bilateral Investment Treaties (BITs) will still have claims for compensation in terms of now non-renewed or terminated BITs to which South Africa was a party. BITs tend to contain a broad definition of "investment" and "expropriation". Notwithstanding such non-renewal and withdrawal by South Africa, BITs normally contain a provision that in respect of investments made while the BIT was in force its provisions continue in effect with respect to such investment for a period such as 20 years after termination.
- (4) All the above of course also constitutes a considerable deterrent to investment in the mining industry in South Africa.

3.2 The Chamber further submits that the proposed ss26(2B) and (3) would indeed, in accordance with the President's reservations in that regard, be unconstitutional as being inconsistent with South Africa's international trade obligations.

(1) Subsection 26 (2B) and (3) would cause some producers to have to breach their long-term export contracts.

(2) The proposed ss26 (2B) and (3) would violate South Africa's above-mentioned international trade agreements.

(3) In conclusion therefore:

- (a) the proposed amendments entail quantitative restrictions on exports;
- (b) such export restrictions breach South Africa's international law obligations;
- (c) South Africa's international law obligations are of Constitutional relevance in that :



- (i) they must be considered for the purpose of interpreting legislation;
- (ii) international law obligations discipline the exercise of powers granted under primary legislation to make subordinate legislation; and
- (iii) where an empowering statute compels the exercise of powers in a manner that breaches international law, the challenge lies against the statute itself whereby a challenge to a statute under the Bill of Rights in the Constitution recognises the importance of international law because in terms of s7(2) of the Constitution the State is under an obligation to respect its binding commitments under international law.

3.3 In the Chamber's submissions on the Bill it had at all times submitted that the proposed ss26(2B) and (3) are unconstitutional. During the consultative process undertaken by the Department of Mineral Resources the Chamber reserved its position on unconstitutionality while discussing the wording of ss26(2B) and (3). Although therefore the wording was discussed, this was subject to the Chamber's reservation of its position on unconstitutionality as outlined above and which has now again come to the fore to the President's reservations as outlined above and which now again come to the fore due to the President's reservations on constitutionality of these provisions as mentioned in paragraph 1.3 above.

3.4 The Chamber therefore respectfully requests the Provincial Legislature to recommend that the above clauses be deleted from the Bill.

#### **PART B: OTHER KEY ISSUES**

The Chamber recommends the retention of the following clauses:

##### **Clause 5: invitations for applications (substituted s9)**

The current "first come, first served" order of processing of applications will be replaced with a system of Ministerial invitations.

An essential element of the new system is that the Minister, when processing applications, would be obliged to give preference to an application lodged by a person who had applied by invitation. The reason for such preference was to give security to persons who 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 unlikely that such persons would risk undertaking the operations. The Chamber therefore submits that a new s9(5) referring to such preference should be retained.

##### **Clause 8: Ministerial approval for changes in shareholding of companies (s11)**

##### **Clause 75(b): Extension of areas (s102)**

##### **Clauses 28, 29 and 30: Environmental legislation (ss37, 38B and 43)**

##### **Clause 30: Historic residue stockpiles and residue deposits**

#### **PART C: TABLE OF OTHER PROPOSED AMENDMENTS PUT FORWARD BY THE DEPARTMENT OF MINERAL RESOURCES**

##### **Clause 1(i): Amended definition of "effective date" in section 1 of the MPRDA**

- (1) In the *Mawetse* judgement the Supreme Court of Appeal held that the duration of a right granted in terms of the MPRDA commences when the applicant receives notice from the Department of Mineral Resources of the grant of the applicant's application for such right, and not on the effective date as defined.

The Chamber submits that the commencement date of the right should be on the effective date as currently defined, and that accordingly the definition of "effective date" 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."

##### **Clause 5: Proposed deletion of s9 (5) in the MPRDA: invitations for applications**

The Chamber requests the retention rather than the deletion of the proposed s9(5) as in s9 above.

##### **Clause 12(e): deletion of s17 (2)(b): concentration**

The Chamber respectively agrees with this clause but submits that a new sub clause needs to be inserted into clause 26 of the Bill to the effect that s33(c) of the MPRDA, which also refers to concentration, also be deleted.

However, the Portfolio Committee noted that section 17(2)(b) is not the subject of proposed amendment in the Bill. Furthermore, clause 26 proposes to omit "Board" and to substitute "Regional Manager". It does not deal with "concentration" as contemplated in section 17(2)(b).

Clause 20(c), Proposed s25(2)(fA) and further proposed amendment thereto: codes, standards and Charter.

For the reasons given on Constitutional issues, the Chamber submits that the proposed s25 (2)(fA) should be deleted and hence also that the above further proposed amendment thereto not proceed.

Clause 22: proposed s27 (1)(c): Mining permits

An unintended consequence could be that if there is no Black owned or controlled company which is interested in applying for or a qualifying applicant for the relevant mining permit, the mining opportunity will go to waste, which would not accord with the object in s2(e) of the MPRDA of promoting mineral resource development in South Africa.

The Chamber therefore does not agree that such permits should be reserved for black owned and controlled companies.

**However, the Portfolio Committee noted that section 27 does not have subsection (1)(c).**

Clause 35: Proposed new s47 (1) (f): contravention of Codes, Standards or Charter

For the reasons given on Constitutional issues, the Chamber respectively requests that this proposed amendment not be adopted.

Clause 57: proposed new s80 (2A): Exploration rights

The Chamber respectively agrees with the proposed s80 (2A) but submits that in clause 57(b) the reference in s80 (2) to the Mining Charter needs to be replaced with a reference to the Petroleum Charter which is proposed in the new s100 (5) in clause 74.

**However, the Portfolio Committee noted that clause 57 does not propose a new section 80(2A) and section 100 referred to by the Chamber of Mines does not have a new section 100(5).**

### **3. SOUTH AFRICAN OIL AND GAS ALLIANCE(SAOGA)**

**MPRDA Amendment Bill proposals**

The Shale Gas Industry very much supports the MDR amendment proposal with the following few key additional requirements:

Incorporation of a "Shale Gas" definition to allow for addressing a few Shale Gas specific challenges and provisions.

Section 86A(9) and (10)- Incorporate 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.

**However, section 86A does not have new subsections (9) and (10).**

Section 81(4)-Time sensitive activities for an onshore shale gas programme include compliance with technical regulations, extensive public participation, EIA and permitting. Process to amend the exploration timelines for an initial 5 years with an additional 2\* 3 years (total of 11 years) rather than an additional 3\* 2 years (also a total of 11 years). The overall timelines remains unchanged.

BEE participation in the Petroleum Industry and especially Shale Gas Industry need to reflect the required State Carried Participation Interest(not applicable for Mining) and be commensurate with the level of commercial risk and scale of continuous and long term investment requirements (far greater chance of failure and investment levels compared to Mining)

**However, the Portfolio Committee noted that section 81(4) is not the subject of amendments in the Bill.**

#### **MPRDA Amendment-Negotiation scope for an Early Downward Adjustment**

Insert a new subsection (10) in Section 86A-State participation in exploration and production rights:

(10) The Minister may make the downward adjustment referenced above in subsection (9) prior to the notarial execution of an exploration right granted in terms of section 80 or a renewal thereof in terms of section 81 for a Shale gas project, in respect of a corresponding production right, after consultation with the applicant and the Minister of Finance, where such earlier adjustment is shown to be necessary by the applicant with specific reference to the following factors:

**However, the Portfolio Committee noted that section 86A in the Bill only has subsections 1-5. The submission by SAOGA proposes subsection (10) when the Bill does not have sub-clause (9).**

The nature and scope of the project;  
Financial and economic profile of the project;  
The degree of risk assumed by the holder throughout the projects; and  
National interests.

#### **4. OFFSHORE PETROLEUM ASSOCIATION OF SOUTH AFRICA (OPASA)**

Clause 1, page 3 before line 28, to insert before the definition of "community" the following definition:

**"carried interest"** means the interest allocated to the State in an exploration or production right, which interest shall inure exclusively to the benefit of the State and the costs of which shall be borne by the non-state holder and shall be recoverable by such holder in accordance with the terms and conditions determined in accordance with section 86A".

**Purpose and objective**

The purpose and objective of the proposal is to give effect to the outcomes of operation oceans Phakisa, the negotiations between DMR and the petroleum industry and provide for State carried interest in the exploration in exploration or production rights. This is a change from the notion of "free carried interest" currently proposed in the Bill.

Clause 1, page 4, before line 1, to insert after the definition of "controlling interest" the following definition:

**"corresponding production right"** in relation to an exploration right means the production right for which a holder of an exploration right shall apply covering the area relating to such exploration right".

**Purpose and objective**

The purpose and object of the proposal is to reinforce the notion of certainty of project terms by linking exploration and production rights and to give effect to the outcomes of Operation Oceans Phakisa.

Clause 1 page 4 before line 14, to insert before the definition of "exploration work programme" the following definition:

**"existing exploration right"** means an exploration right granted in terms of section 80 prior to the commencement of Act".

**Purpose and objective**

The purpose and objective of the proposal is to address the applicability of the concept of State participation in respect of existing exploration rights.

Clause 1 page 4 from line 16 to 18, to delete the definition of "free carried interest" ["free carried interest" means interest allocated to the State in exploration or production operations without any financial obligation on the State;]

**Purpose and objective**

The purpose and objective of the proposals is to delete the definition of "free carried interest" since this concept has been replaced with "carried interest".

However, the Portfolio Committee noted that the definition of "free carried interests" has not been replaced by "carried interests" in the Bill.

Clause 1 page 5 after line 56 to insert the definition of "pending application" after the definition of "organ of State":

**"pending application"** means an application in terms of section 79 of the Act that was submitted-

- (a) Before the commencement of Act; or
- (b) After the commencement of the Act, provided the applicant is the holder of a valid technical co-operation permit in respect of the proposed exploration area prior to commencement of the Act."

**Purpose and objective**

The purpose and objective of the proposal is to provide for applicability of State participation in respect of applications that are on the pipeline as from the date of the Bill is finalised and proclaimed into law.

Clause 1 page 6 after line 31, to insert after the definition of "residue stockpile" the following definition:

"right of pre-emption" means the right of the State in the event of a sale of participating interest, to purchase the participating interest to be disposed of by the holder on terms and conditions equal to those offered by the purchaser selected by the holder, which right shall expire unless accepted by the designated State entity within a period of 90 days following delivery of a notice setting out the final terms and conditions of the proposed transaction".

#### **Purpose and objective**

The purpose and objective for the proposal is to provide for a right of pre-emption in favour of the State in the event that a right holder decides to sell its participating interest. The State will have a right of first refusal which must be exercised within the prescribed timeframe.

Clause 1 page 6 from line 37 to 43, to substitute the definition of "State participation" means the right of the State to participate in petroleum exploration and production operations, including through:

- (a) Participating interest in exploration and production rights and may include production sharing agreements and
- (b) Representation at the joint operating committee of the exploration or production operation commensurate with the State's proportionate participating interest.

#### **Purpose and objective**

The purpose and objective of the proposal is to change the definition of State participation to remove reference to "free carried interest" and replace same with carried interest.

Clause 57 page 33 after line 14, to insert the following subsection (2A) as follows:

"(2A). The Minister shall when granting a production right under this section give effect to the terms and conditions agreed to in a corresponding production right in terms of section 84 and shall record those terms and conditions of the exploration right."

#### **Purpose and objective**

The purpose and object of the proposal is to reinforce the notion of certainty of project terms by linking exploration and production rights and to give effect to the outcomes of operation oceans Phakisa.

Clause 62 page 35 after line 52, to insert the following subsection (1A) as follows:

"(1A) The Minister shall when granting a production right under this section give effect to the terms and conditions agreed to in a corresponding exploration right that relates to the production right; and".

#### **Purpose and objective**

The purpose and object of the proposal is to reinforce the notion of certainty of project terms by linking exploration and production rights.

Clause 63 page 36 line 24, to insert the following paragraph after subsection (3) paragraph (d) of the following paragraph:

"(e) the applicant and the Minister have concluded the negotiating process referred to in subsection (3A)."

"(3A) Notwithstanding the provisions of section 84(1A) and section 80 (2A), any application for renewal of a production right, shall initiate a negotiating process between the Minister and the applicant relating to technical, financial and commercial terms and conditions of the production project".

#### **Purpose and objective**

The purpose and objective of this proposal is to provide for renegotiation of project terms when an application for renewal of a production right is made.

Clause 65 page 36 and 37 from line 49 to 55, and from line 1 to 9, to substitute section 86A for the following section:

"86A. (1) The State has, through the designated organ of State, a right to a 20 percent carried interest in exploration and production rights, from effective date of such rights.



(2) In existing exploration rights and exploration rights granted in respect of pending applications, The State is in addition to the State carried interest referred to in subsection (1) and in accordance with terms and conditions agreed upon and recorded in the exploration right, entitled to a right of pre-emption in the event of a sale of a participating interest by the holder of an exploration or corresponding production right, entitling it to purchase the participating interest on terms and conditions equal to those offered by the purchaser selected by the holder.

(3) The right of pre-emption shall within a period of 90 days from the date of delivery of a notice setting out the final terms and conditions of the proposed transaction expire, entitling the holder a right to offer such participation interest to a third party.

(4) Where an existing exploration right application not contemplated in sub-section (2) is received after commencement of Act, the State is, in the prescribed manner, entitled to an additional participation interests of up to 30 percent taking into account the size of the discovery and rate of production, in the form of-

- (a) carried interest;
- (b) acquisition at an agreed price; or
- (c) production sharing agreements.

(5) The holder of a production right shall recover developments costs of the State carried interest referred to in subsection (1) or (4) where applicable, from the proceeds generated from the production right, as may be prescribed in the terms and conditions of such right.

(6) The State shall upon acquiring interest in terms of subsections (1) and or (4) enter into a joint operating agreement with the right holder or become a party to an existing operating agreement if one is in place in respect of such right.

(7) The Minister must, acting on behalf of the State, appoint two representatives to the joint operating committee of the exploration or production operation to represent the interest of the State."

(8) The State is entitled to exercise its rights held in the joint operating agreements through-

- (a) representation as a non-voting participant in the joint operating committee in accordance with the joint operating agreement during exploration; and
- (b) corresponding percentage of voting rights to the interests held in the joint operating agreements during production.

(9) Notwithstanding subsection (1), the Minister must before granting a production right in terms of section 84 and after consultation with the applicant and the Minister of Finance, determine whether the percentage or terms and conditions of the State carried interest referred to in subsection (1) may be adjusted downwards, taking into account-

- (a) the nature and scope of the project;
- (b) financial and economic profile of the project;
- (c) the degree of risk assumed by the holder throughout the projects; and
- (c) National interests.

(10) the State carried interest shall not be adjusted below 10 percent.

(11) The holder of an existing exploration right in respect of which terms and conditions for a production right have not been agreed to and attached in such exploration right, shall within a period of three years of the coming into effect of the Act, apply to the Minister for a determination of the terms and conditions which will be applicable to a corresponding production right, including State participation in the manner contemplated in subsection (9).

(12) Notwithstanding anything to the contrary in the Act, the terms and conditions of an existing exploration right granted before the commencement of the Act in respect of which terms and conditions for a production right have been agreed to and attached in such exploration right shall, remain unchanged in as far as it relates to State participation and participation by historically disadvantaged South Africans and shall where necessary be amended to comply with section 81 and 82 of the Act.

(13) Upon making the determination in terms of sub-section (11), the Minister shall record the terms and conditions of the corresponding production right determined in terms of subsection (11) in the exploration right;".

#### **Purpose and objective**

The purpose and objective for the proposal is to provide for State carried interest in exploration and production right with a cost recovery mechanism. The State has a right of pre-emption in the event that a holder disposes of its interest. There is also provision for downward adjustment of the interest to not below 10% after consultation with the Minister of Finance. The State has a right to representation at joint operating committee of the exploration or production operation. Provision is also made for transitional arrangements for existing rights and pending applications.



**CRATIC ALLIANCE MALUTI CONSTITUENCY FREE STATE PRESENTATION ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL TO THE FREE STATE LEGISLATURE PORTFOLIO COMMITTEE FOR ECONOMIC DEVELOPMENT: 23 MARCH 2017**

Allow us the opportunity to draw attention to the major areas of objection that we have to the Bill. In summary, the major problems with the Bill are as follows:

- In too many places the Bill replaces laid-down timelines and instead inserts "the prescribed period". This is vague and subject to change.
- The Bill introduces the concept of strategic minerals, which amount to the forcing of cheap mineral sales to benefit local industry. In effect this implies that mining will subsidize manufacturing. This may violate our international trade obligations and be unconstitutional.
- The Bill changes the process of obtaining mining rights from first-come first served to one where government can allocate rights to people with ulterior motives.
- The Bill requires the Minister to approve the transfer of any interest in an unlisted company, as well as a controlling interest in a listed company that own a mining or prospecting right.
- The Mining Charter is given the force of law. This allows the Minister to change law without going through Parliament. This may be unconstitutional.
- The Bill imposes an unrealistic burden on oil and gas companies. If the wording is not rephrased, there will never be a viable oil and gas industry.

The following concrete proposals are made:

**Section 1 DEFINITIONS**

(b) beneficiation: The "baselines are to be determined by the Minister" We are wary of the amount of regulatory vs legislated power to the Minister. This cumulatively amounts to a reduction in certainty.

**(h) designated minerals**

We oppose the whole concept of designated minerals. It gives the Minister far too much discretion to arbitrarily add mineral to the list on which mineral exports will be interrupted, banned or made less economic.

**(j) free carried interest**

We have two objections to this:

This description may amount to the free carried interest falling under the definition of a tax. The Bill imposing taxes are section 79 Bills and can only be introduced by the Minister of Finance. If that is found to be the case, it will mean this Bill has been wrongly tagged and processed and is thus unconstitutional.

The concept of the State not having to carry its share of exploration costs is alien to most oil and gas dispensations worldwide. In other words, this is prejudicial to oil and gas companies in an unprecedented degree. The procedure for these changes may be unconstitutional.

**(q) mine gate price**

This definition should be changed to be quite clear and not subject to legal challenge.

(zA) refers again to the term "free carried interest" which is problematic. Any change to this concept that may appear later in the revised Bill will probably have to be changed here.

**(zB) "strategic minerals"**

The entire designation of strategic minerals is problematic. We believe it is part of a plan to limit exports which is probably unconstitutional and will definitely be economically harmful.

**(zD) (b)**

The "Codes of Good Practice" means the mining Charter. We do not believe the Charter should be part of this Bill.

**AMENDMENT OF SECTION 9 OF THE PRINCIPAL ACT**

This deals with the new system for issuing mining licenses. It says a person intending to obtain a mining right must request the Minister to invite applications for permission to mine. There is no guarantee that the applicant will be the person granted the right. In our opinion this removes the incentive to discover new deposits and allows the Minister to direct all new mineral finds into the hands of people whom the Minister finds acceptable.

**AMENDMENT OF SECTION 10**

This removes the legislated time by which the DMR must respond to an application by making it regulated rather than legislated time. In practice this means a lack of certainty which will make it less attractive to mine. The removal of set down times and their substitution by the phrase (the "prescribed period" is a key weakness that appears in any places in the Bill.

#### **AMENDMENT OF SECTION 11**

This amendment seeks to make anybody trying to sell, even part of a mining right, to get written permission to do so from the Minister. This will delay and make mining transactions more difficult.

Exactly how this will affect the trading of mining shares is not clear. It may make this almost impossible.

#### **AMENDMENT OF SECTION 13 AND 14**

More uses of the phrase "the prescribed period" which will open door to poor administrative processes keeping applicants waiting indefinitely or alternatively for this period to be changed at the Minister's whim.

#### **AMENDMENT OF SECTION 19**

This change implies that somebody requesting a renewal of a right will not automatically have it granted, even though they may have invested heavily in mining they stand to lose that investment. This will reduce security of tenure and act as a deterrent to investment.

#### **AMENDMENT SECTION 23 (d)**

The old Act gave the Minister the option of requiring community participation in a mining license. We would like this to stay because we would prefer community participation in mining in their community to be mandatory.

#### **AMENDMENT OF SECTION 25**

We oppose the amendments that remove the security of tenure of rights holders by removing the guarantee of the renewal rights.

#### **AMENDMENT OF SECTION 26 – BENEFICIATION**

This is another subject of major concern in this Bill. The Bill will in effect force beneficiation by limiting exports of mined minerals and by forcing miners to sell what they mine at cut prices to local industry. Ultimately this means mining will be less profitable because it will be expected to subsidize industry.

Similar government attempts to interfere in the economy in other countries have always ended in failure.

In this section we object to:

- The phrase "national development imperatives" we don't know what these are and there is no definition so it could mean anything on any particular day.
- The whole concept of the Minister "designating" any mineral in preparation for limiting its export. We believe this will impact on mines profitability and will likely contravene South Africa's obligations under international trade law. This was one of the reasons why the President sent the Bill back but his reservation has been ignored in the Bill, leaving this unchanged.

#### **AMENDMENT OF SECTION 43(1) – ENVIRONMENTAL LIABILITY**

Thus makes the holder of a mining right liable for future environmental damage even after the issuing of a closure certificate. Currently the right holder is indemnified from liability that may occur or become apparent years in the future. If the issuing closure certificate was done properly, this would not be necessary. This would negate the closure certificate. It would also introduce confusion about who was liable if there have been more than one holder of a mineral right.

The effective imposition of endless liability will obviously have a dampening effect on investment.

Section 43 (6) proposes allowing the retention of rehabilitation funds for latent impacts which may only become apparent later. This should be sufficient to cover any subsequent damage.

#### **AMENDMENT OF SECTION 70, 80, 84 etc.**

This effectively does away with the Petroleum Agency of South Africa, a body which successfully promoted and regulated the issuing of drilling license on and offshore. The powers are given to regional managers who are not knowledgeable enough to exercise them. PASA was sufficiently independent to have the confidence of the industry. It will not have similar confidence in the Regional Managers of the DMR.

#### **AMENDMENT OF SECTION 86**

This deals with the insertion of 86A which imposes an impossible burden on oil and gas companies.

#### **AMENDMENT OF SECTION 100**

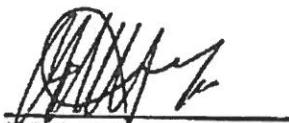
This section includes the Mining Charter as part of the MPRDA. What this implies is that it gives force of law to a charter that can be changed by the Minister at his whim.

He has unlimited powers to change these transformation policies, in the words of the Bill, "as and when the needs arises".

We believe this is unconstitutional. The Constitutional Court has consistently upheld legal challenges against legislation that gives the executive the power to make law. If the new version of the mining

Charter is the version that is incorporated, then the mining sector will shrink as investors withdraw their capital and jobs are lost.

The Portfolio Committee votes in favour of the Bill.



**HON. T.P. MEEKO**

**CHAIRPERSON OF PORTFOLIO COMMITTEE ON ECONOMIC DEVELOPMENT  
FREE STATE LEGISLATURE**

**14 June 2017**