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NEGOTIATING MANDATE

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

Hon. O Sefako

NAME OF BILL: MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL

NUMBER OF BILL : [B 15D—2013]

DATE OF DELIBERATION: 4 May 2017

VOTE OF THE LEGISLATURE:

The Gauteng Provincial Legislature supports the principle and the detail of the bill with the proposed amendments.

- Mineral and Petroleum Resources Development Amendment Bill

HON. E Magerman

Chairperson of Economic Development, Environment, Agriculture and Rural Development Portfolio Committee

GAUTENG PROVINCIAL LEGISLATURE

Date: 5 May 2017

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ECONOMIC DEVELOPMENT, ENVIRONMENT, AGRICULTURE AND RURAL DEVELOPMENT PORTFOLIO COMMITTEE

COMMITTEE REPORT ON THE NEGOTIATING MANDATE

ON THE:

MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL [B 15D—2013]

4th May 2017

1. INTRODUCTION

The Chairperson of the Economic Development, Environment, Agriculture and Rural Development Portfolio Committee, Mr. Errol Magerman, tabled the Committee's report on the Negotiating Mandate on the Mineral and Petroleum Resources Development Amendment Bill [B15D-2013]. .

2. PROCESS FOLLOWED

The Speaker, on 3rd November 2016, formally referred the Mineral and Petroleum Resources Development Amendment Bill [B15D-2013] Section 76, to the Portfolio Committee on Economic Development, Environment, Agriculture and Rural Development referred to as the Committee, for consideration in terms of Rule 248 (1)(a) read with 250 (1) and 251.

On the 31st January 2017, the Permanent Delegate from the National Council of Provinces (NCOP), Honourable E. Mlambo gave a briefing to the Committee on the Bill. This was followed by a presentation by the National Department of Mineral Resources on the detail of the Mineral and Petroleum Resources Development Amendment Bill [B15D-2013]. Subsequent to that, the Gauteng Department of Agriculture and Rural Development (GDARD) made a presentation on the views of the Executive on matters related to the Minerals and Petroleum Resources Development Amendment Bill [B15D-2013].

In the same meeting, a research analysis focusing on the socio economic impact of the Bill was presented respectively by the Research Unit from the Gauteng Provincial Legislature.

In fulfilling its constitutional mandate the Committee published adverts in the following newspapers: The Star and the Sowetan on the 22nd February 2017. Other adverts were placed on the Business Day on the 23rd February 2017 and on the City Press on the 26th February 2017. Furthermore live reads related to the Bill were run on Kaya FM from the 27th February 2017 to the 1st March 2017. This was to enable the Committee to request members of the public and stakeholders to attend the public hearing on the bill and further make comments on the Bill. Following that, the Committee convened one public hearing in the City of Johannesburg at the Johannesburg City on the 2nd March 2017.

The Portfolio Committee deliberated and adopted the draft report on the Negotiating Mandate of the Mineral and Petroleum Resources Development Amendment Bill [B15D-2013] in a meeting that convened on Thursday, 4th May 2017.

3. PRINCIPLES AND DETAILS OF THE BILL

To amend the Mineral and Petroleum Resources Development Act, 2002, as amended by the Mineral and Petroleum Resources Development Act, 2008 (Act No.49 of 2008); so as to remove ambiguities that exist within the Act; to provide for the regulation of associated minerals, increasing the socio-economic impact through mining, partitioning of rights and enhance provisions relating to the regulation of the mining industry through beneficiation of minerals or mineral products; to promote national energy security; to streamline administrative processes; to align the Mineral and Petroleum Resources Development Act with the Geoscience Act, 1993 (Act No. 100 of 1993), as amended by the Geoscience Amendment Act, 2010 (Act No. 16 of 2010); to provide for enhanced sanctions; to improve the regulatory system; and to provide for matters connected therewith.

4. OBJECTIVES OF THE BILL

The objects of the Mineral and Petroleum Resources Amendment Bill are to strengthen the current construct of the legislation, fortify the penalty provisions, to streamline the administrative process and to provide for a single regulatory system.

5. OVERVIEW OF THE PUBLIC HEARING

The Public hearing were attended by stakeholders and members of the public who engaged on all matters related to the Bill. Various sentiments were echoed by all who attended and a summary of all inputs are highlighted below.

6. SUMMARY OF STAKEHOLDERS SUBMISSIONS MADE DURING THE PUBLIC HEARING

As part of its functions and obligation in line with the Constitution, the Committee held a public hearing where written and oral submissions were made for possible consideration. The Committee received the following submissions from:

Anglo American, Chamber of Mines of South Africa, South African Institute for Race Relations, South African Oil and Gas Alliance Mining Affected Communities United in Action, Legal Resources Centre, South African Mining and Beneficiation Co-ops, Offshore Petroleum Association of South Africa, Thabo Lietsiso Tours and Projects (PTY) LTD, Ekurhuleni Environmental Organization, Reedville Environmental Task Team, Blysoor Community Forum and Merafong Black Business Chamber

Written submissions by stakeholders have been attached to the negotiating mandate for ease of reference.

7. POSITION BY THE GAUTENG DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

In line with the GPL Standing Rule 248 (1) (b) the Committee sought the views of the relevant Member of the Executive on the Bill. The Gauteng Department of Agriculture and Rural Development supports the Mineral and Petroleum Resources Amendment Bill [B15D-2013] Section 76 based on the following reasons:.

- Strengthen the architecture of the mining and minerals regulatory framework and direct a shift towards local mineral value addition;
- Contribute towards national developmental imperatives;
- Streamline licensing processes;
- Provide for state participation in the petroleum sector; and
- Significantly boost the energy security programme through extractive industries that span mining, minerals and upstream petroleum industry.

8. SOCIO-ECONOMIC FINANCIAL IMPLICATIONS

The benefits of the Mineral and Petroleum Resources Development Amendment Bill have been severely contested, with its critics indicating that it could result in South Africa losing billions in investment for the nascent oil and gas sector. However the proponents of the Bill maintain that it has huge benefits for South Africa's masses. It is argued that the Bill will encourage investment as it has the ability to speed up the process of securing water, environmental and mining licenses.

The Committee noted that the mostly contested issues on the Bill is the insertion of section 86A which indicates that the state has the right to a 20 per cent free carried interest in all new exploration and production. This is largely seen as being too high, and having the potential to create anxiety in the economy as it will ensure that projects become uneconomical. The huge risk that is taken by exploration companies can be compounded by the 20 per cent that need to be given to the state without it having contributed to the risk capital. This may create uncertainty which may be seen as a major deterrent to oil and gas investors.

The Committee noted that amongst others the objectives of the Bill are to augment and substantially increase socio-economic development impact through mining and the provision for the implementation of beneficiation. These objectives are clearly without doubt of good intent, as beneficiation become dominant in the country's public discourse, it has received more criticism relating to its cost and technicality. It has also been acknowledged by the South Africa government through the National Development Plan (NDP) that beneficiation is not a fix-all solution for the country's growth and employment creation. On the other hand, beneficiation may be crucial for the benefit of the people as it aims to create employment and local skills for the economy. The Bill entails that specific categories of minerals will be designated for domestic beneficiation, and this is also being bolstered through the insertion of the new definition for beneficiation. In addition, although mentioned in the argument, the 20 per cent state intervention in special mineral resources incites fears; it has also benefits aimed at increasing the socio-economic impact of mining in the country.

The Committee noted that the with regard to financial implications that there are no explicit financial implications for the province outside the normal budgetary allocations through the Treasury.

9. COMMITTEE'S RECOMMENDATIONS

The Portfolio Committee recommends that –

- the definition of "the Act" be amended to delete the following part of the definition; "the Codes of Good Practice for the South African Minerals 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 Minerals Industry".
- Section 26(2B) and (3) be deleted
- Timelines that were prescribed in the 2002 and 2008 Acts have been substituted with "the prescribed period". This leaves the administration of processes such as approvals open to interpretation, and subject to change without notice.

- The bill gives the Minister too much power including deciding and declaring any minerals as "strategic", interfering with free market principles by forcing local beneficiation, being empowered to allocate mining rights arbitrarily, and the duty to approve any and all transfers of interest in listed and unlisted companies locally and abroad.
- The Mining Charter is given the force of law. This is probably unconstitutional because it gives the Executive the power to make laws, instead of the Legislature. In existing case law, the Constitutional Court has upheld the separation of powers. The Attorneys Malan Scholes will be challenging this aspect in court to have the mining charter set aside
- The Department of Mineral Resources, in the interests of streamlining processes is now being made responsible for the effective implementation of environmental plans according to NEMA, as well as the Water Services Act.
- There was no consultation with rural communities on the 54 amendments now proposed. Even traditional leaders prefer that the rights currently conferred to the Minister must rather vest in an independent body. To this end the Centre for Environmental Rights resolved at the Alternative Mining Indaba held in February 2017 to challenge the Bill in Court.
- The DMR is notoriously bad at monitoring compliance with the provisions of the existing legislation and have recently lost two court cases in this regard against AngloGold (section 54 safety stoppage was irrational) and Aquila Steel (DMR highly incompetent).
- There is no clarification on the obligations of Liquidators to ensure that environmental and socio-economic commitments are fulfilled prior to being granted provisional liquidation status by the Court in terms of the Insolvency Act. At some point, a liquidator must seek approval from the DMR to access financial provisions to initiate redress to mining communities.
- Several of the proposed amendments is inconsistent with the NDP, which explicitly warns against increased state intervention
- The relationship between government and the Mining sector is hostile at the moment. This is illustrated by comments made by the Minister at the Mining Indaba held in February 2017 where he lamented that mining companies must stop taking the DMR to court whenever they cannot have it their way.

Furthermore the Committee highlighted sections on the Bill that are deemed problematic and the reasons thereof and the sections are follows:

Analysis of Problematic Clauses

Section 1:Definitions	
(b)beneficiation	The definition is collapsed to mean transformation, value addition or downstream beneficiation over baselines to be determined by the Minister
(h) designated minerals	New definition giving the Minister total discretion over inclusion of exclusion of minerals in line with "national development imperatives" that is vague and ever changing. We oppose this entire concept
(j) free carried interest	This means interest allocated to the State without any financial obligations on the State. "We have two objections to this: This description may amount to the free carried interest falling under the definition of a tax. 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 to an unprecedented degree. It is likely that the DMR will try to change this definition in line with its agreements with the industry. The procedure for these changes may be unconstitutional."
(q) mine gate price	Behind-the-scenes discussions with the Chamber of mines appears to have resulted in agreement that this means more or less the cost of production. This definition does not appear to be clear on that. It should be changed to be quite clear and not subject to legal challenge".
(z) residue stockpile	After a prescribed period ownership automatically vests in the State, with no provision for the transfer of old order rights-this could be interpreted as expropriation

Z(A) Security of supply and State Participation	refers again to the term free carried interest, with which we have a problem. Any change to this concept that may appear later in the revised bill will probably also have to be changed here".
(zB) strategic minerals	The Minister is given the responsibility to declare which minerals are strategic. Although the actual bill is silent on which minerals are included, the clues are hidden in an ANC document entitled "State Intervention in the Minerals Sector" released in Feb 2012. It was mentioned at the 2013 Mining Indaba that should coal for instance be declared "strategic" a company such as Anglo which relies heavily on coal exports for profits would no longer be interested to mine coal in South Africa and would have to move their operations. We have a problem with the entire designation of strategic minerals. We believe it is part of a plan to limit exports which is probably unconstitutional and will definitely be economically harmful. We should object to the inclusion of the words in the bill".
zD (b)	"The "Codes of Good Practice" means the mining Charter. We do not believe the Charter should be part of this bill" This would give the Executive the right to make laws, which is inconsistent with the Constitution.
Section 9	This section is changed from the principle of "first in, first assessed" to a system where the Minister invites applications. In essence it means that even if a company incurs all the costs of exploration to find new deposits, they are not guaranteed a right to mine their find, which makes it risky to explore in the first place –IC "This deals with the new system for issuing mining licences. It says a person wanting to get a mining right must ask 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 cronies of the minister or of the ruling party".
Section 10	This removes the legislated time by which the DMR must respond to an application by making it a 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 many places in this bill.
Section 11	This amendment seeks to make anybody trying to sell even part of a mining right, 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.
Section 13, 14	More uses of the phrase "the prescribed period" which will open the door to poor administrative processes keeping applicants waiting indefinitely or alternatively for this period to be changed at the Minister's whim.
Section 19	This change implies that somebody asking for a renewal of a right will not automatically have it granted, even th9ough they may have invested heavily in mining they stand to lose that investment. This will reduce security of tenure and act to deter investment.
Section 23(d)	The old Act gave the minister the option of requiring community participation in a mining licence. We would like this to stay because we would like community participation in mining in their community to be mandatory.
Section 25	We oppose the amendments that remove the security of tenure of rights holders by removing the guarantee of the renewal of rights.

Section 26- beneficiation	The concept of beneficiation occurring economically is fundamentally changed to place the onus on the Minister to force beneficiation, and to further determine the percentage per mineral commodity and the price of the mineral as well. This is done in the absence of any business case for the local beneficiation of any mineral in the first instance – IC (Anthea Jeffery, IRR 2013) Furthermore any person wishing to export a mineral must get the permission of the Minister. The NDP warns against the unintended consequences of restrictions on exports, but this is ignored-IC This is another subject of major concern in this bill. The ANC is trying to 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 subsidise industry. Similar government attempts to interfere in the economy in other countries have always ended in failure. In this section we should particularly 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 Zuma sent the bill back but his reservation has been ignored by the Portfolio Committee, which has left this unchanged. We believe all amendments to this section should be opposed".
Section 43(1)- Environmental Liability	This 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 of closure certificates 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.
Section 70-81	Effectively does away with the petroleum Agency of South Africa, a body which successfully promoted and regulated the issuing of drilling licences on and offshore. There is discussion that this will be reversed. If there are amendments that restore PASA's position, we would welcome them. 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.
Section 86	This deals with the insertion of 86A which imposes an impossible burden on oil and gas companies. We rejected the concept of free carried interest . We believe the DMR wants to change this section in the NCOP process to a form that it has agreed on in talks with the oil and gas industry.
Section 100	This section includes the Mining Charter as part of the MPRDA. What this means 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 need 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.

10. NEGOTIATING POSITION ADOPTED BY THE COMMITTEE

The Portfolio Committee on Economic Development, Environment, Agriculture and Rural Development supports the principle and details of the Mineral and Petroleum Resources Development Amendment Bill [B15D-2013] Section 76 with the proposed amendments.