



LEGAL RESOURCES CENTRE

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Your Ref:

Our Ref: HS/nd

30 May 2008

Mr N Ngcobo MP
Chair
Portfolio Committee for Minerals and Energy
engcobo@parliament.gov.za

Mr Peter-Paul Mbele
Secretary
Portfolio Committee for Minerals and Energy
pmbele@parliament.gov.za

Dear Sirs,

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL [B10D-2007]

- 1 We refer to your committee's communiqué sent to us on Wednesday 28 May 2008. Attached to the communiqué was the current version of the bill¹. We forwarded the communiqué to our client in this matter, the Nkuzi Development Association, and we hereby respond on behalf of our client and on its instructions.
- 2 We also refer to our client's letter dated 26 May 2008 and addressed to you. We attach a copy for ease of reference. In that letter our client commented on the version of the bill distributed by the department of minerals and energy to the portfolio committee on 25 March 2008².
- 3 Nkuzi and the LRC have made a number of written representations on the bill, and participated on behalf of and with rural communities at the original public hearings on the bill almost a year ago on 29 and 30 May 2007.
- 4 Our client reiterates its concern about the lack of public participation in the current phase of the process and the removal of community rights. Our client believes that the process is now being rushed without proper consideration of important issues. This is happening at the expense of poor communities who do not see any benefits from mining on their land. Our client states that it is also contrary to the resolution of the majority party in the assembly whose Polokwane resolution of December 2007 called for a strengthening of the

¹ The document attached to the communiqué bears on its front page the appellation "B10D-2007". The electronic file name is "MPRDA B-BILL final draft2". The document was electronically created on 15 May 2008. We shall refer to it as the "28 May version", as that was the date of the communiqué and the date on which, to the best of our knowledge, the version was handed to the portfolio committee. We also attach a copy of the communiqué because we refer to it below.

² The version of the bill handed out to the portfolio committee on 25 March 2008 bears the electronic file name MPRD Amendment Bill 25 March 2008. The document was electronically created on 20 March 2008. We shall refer to it as the "25 March version".

implementation of the MPRDA in a manner that will promote the development of local communities.

Public hearings and public participation in the law making process

- 5 In its letter of 26 May our client asked why your committee would not hold fresh public hearings on the latest version of the bill. Its letter motivates why public hearings are necessary, and refers to the statement of the department on 13 May 2008 that public hearings would be held. You have not replied to our client's request.
- 6 Your communiqué of 28 May is addressed to three civil society organisations (AGRI-SA, Federation for a Sustainable Environment and Habitat Council) and the LRC. It invites "final comments ... from all concerned, especially those who showed interest during the initial stages". Nkuzi and the LRC hereby notifies you that we do not purport to represent all concerned with the bill nor all those rural communities that gave evidence on the bill in May 2007. Nkuzi and the LRC did not and cannot inform them about your communiqué. Nkuzi and the LRC do not have the capacity to do so. In any event the timeframe for final comments set out in your communiqué militates against effective notification of all the rural communities affected by the new provisions of the 28 May version. Your communiqué was sent out in the late afternoon of 28 May and you invited final comments by 12h00 on 30 May. The communiqué warned that no comments would be "accepted" after 12h00.
- 7 We submit that it is vital, in order to retain the integrity of the parliamentary process, that there be an opportunity for the portfolio committee to obtain the benefit of submissions from rural people on the fundamental issue of the removal of the right to be consulted in section 5, and for rural people to place their views before parliament. This can (and we submit should) be achieved by the portfolio committee inviting submissions and holding public hearings on the bill in its current version of 28 May.
- 8 Our client and ourselves therefore hereby request the opportunity to make submissions, and request sufficient notice of the hearings or meetings in order that our client can make arrangements to attend. We believe this will be of assistance to the committee in its task. We naturally do not suggest that this opportunity should be limited to our client or ourselves. In our submission, public hearings are necessary.

Section 5: Repeal of community right to be consulted

- 9 We note that our client's concerns regarding the removal of community participation provisions (set out in its letter of 26 May in paragraphs 12 to 22) have now been addressed in that these community rights were restored in the 28 May version. Our client's concern regarding the amendment of section 5 and the right to be consulted remain. We therefore repeat our client's statement with regard to the amendment of section 5. In fact, the problem is exacerbated because the restored provisions relating to community participation in section 2 and item 7, read with section 17 and 23 cannot operate effectively without prior community consultation which are dealt with in section 5.
- 10 The 2002 act provides that landowners and occupiers including communities in respect of land that they occupy, have a right to be notified and consulted before prospecting or mining happens on their land. The relevant provision in section 5 reads as follows:

"5(4) No person may prospect for or remove, mine, ... or and produce any mineral or petroleum or commence with any work incidental thereto on any area without...

(c) **notifying and consulting** with the land owner or lawful occupier of the land in question."

11 At the public hearings of May 2007 evidence was presented by rural communities that the consultation requirement had not been applied or had been applied in an inconsistent manner. At the hearing it was proposed that committee give consideration to the structuring of the consultation process by way of departmental regulations to ensure that consultation is effective and meaningful. The provision contained in the amendment, bill namely to limit the process to notification of owners or occupiers, did not find favour with any of the respondents at the hearings. None of the written or verbal submissions supported the scrapping of the consultation provision and replacing it with notification.

12 As a result of your committee's deliberations, the department proposed, and on 20 June 2007 your committee agreed on the following amendment:

"(c) **notifying and consulting in a prescribed manner** with the landowner or lawful occupier of the land in question."

This wording appeared in Bill10B published by the government printer in August 2007.

13 The 28 May 2008 version contains the following wording in respect of the amendment to section 5:

Insertion of section 5A of Act 28 of 2002

5. The following section is hereby inserted in the principal Act after section 5:

"Prohibition relating to illegal act

5A. No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without—

(c) **giving** the landowner or lawful occupier of the land in question at least **21 days written notice**".

14 The 25 March version and the 28 May version removed the right to be consulted. The minutes of your committee's meetings (including the meetings of 25 March and 13 May and the recordings thereof) do not show what the department's motivation for the change was or is, and they do not show that this issue was discussed by your committee.

15 The right to be consulted in terms of section 5 is important for a number of reasons, including the following:

- a) The right afforded in terms of section 10 to interested and affected parties to object to any application for new prospecting or mining within 30 days of the notice of acceptance of the application, is a very limited right. Very little information about the proposed activity is known at that time. The information is difficult if not impossible to access. The applicant is entitled to withhold much of the information from interested and affected parties. Communities often do not get notice of the acceptance of the application. Communities often do not get adequate notice and

adequate information about the application and the extent of the activities proposed.

- b) Without the consultation requirement in section 5 communities will not be able to advise the minister and the minister will not be able to get adequate information on appropriate conditions in favour of communities under section 17, section 23 and item 7.
- c) Neither the affected community nor the regional manager will have adequate information to make representations, negotiate or determine appropriate compensation for infringement of surface use under section 54 of the act.
- d) The consultation requirements envisaged under section 16 and section 22 as they are proposed to be amended by the 28 May version are inadequate for community purposes because they relate principally to environmental considerations. Also, these consultations are not at an appropriate stage of decision making processes for purposes of formulating community participation proposals in terms of section 17, section 23 and item 7.

16 Section 5 of the principal act of 2002 gives communities the right to be consulted and this right will be taken away if the 28 May version is adopted by your committee.

17 Our view is that the bill 10B version of the amendment to section 5(4) must be retained, ie:

“(c) **notifying and consulting in a prescribed manner with the landowner or lawful occupier of the land in question.**”

18 The regulations can deal with:

- a) Effective notice to communities to ensure that communities are informed of applications and intended activities;
- b) Support to communities, including legal and commercial advice, under section 12 of the act to ensure that the community consultation process is meaningful and, in the event that an application for prospecting, mining or conversion is to be granted, that meaningful and effective participation proposals can be made for purposes of the minister’s conditions envisaged under section 17, section 23 and item 7;
- c) Time lines to ensure that applications and consultation processes are not delayed;
- d) Consultation about matters and at moments in the application and decision making process that will ensure informed decision making;
- e) Adequate information available to the parties in the consultation processes;
- f) Effective notice and consultation with both the owner and lawful occupiers where a farm is occupied by labour tenants and other farm dwellers whose rights are protected under the Land Reform (Labour Tenants) Act or the Extension of Security of Tenure Act;

- g) Community consultation in phases, one phase being after the environmental authorisation had been issued and before the right is granted. This phase will then focus on the formulation of community participation proposals for the minister's conditions;
 - h) Reports on the consultation processes and their outcomes to the Minister and other decision makers.
- 19 There are a number of other problems with the 28 May version. We mention three. As it stands, section 5(4) of the principal act will not be amended. But section 5(4) of the 2002 principal act will contradict section 5A proposed by the 28 May version. This may be a drafting error. There may be other drafting errors in this rushed process.
- 20 Clause 11 of the 28 May version is a new proposal. It proposes to set conditions to transactions of entities holding rights under the act. Such transactions and/or aspects thereof will be void if the minister's consent had not been obtained. This provision may have unintended consequences and will affect the financial value and commercial viability of community participation stakes.
- 21 From the perspective of communities as land owners and occupiers that are expected to and may wish to comment on applications and environmental authorisations, the timeframes for comment and input are unrealistic and prohibitive. In fact it would be almost impossible for both applicant and the respondent parties to comply with the timeframes, give meaningful input and contribute to the quality of the decision making process.
- 22 Nkuzi and the LRC would appreciate the opportunity to elaborate on our submissions and in particular our view on the appropriate procedure to be adopted. We look forward to hearing from you.

Yours faithfully,

HENK SMITH

-----Original Message-----

From: Peter-Paul Mbele [mailto:pmbele@parliament.gov.za]

Sent: 28 May 2008 15:47

To: Peter-Paul Mbele

Cc: helene@agrisa.co.za; nic@agrisa.co.za; d.zoekop@lando.co.za;

Henk@lrc.org.za; mlroux@mweb.co.za

Subject: MPRDA (B10-2007) : Status and Way Forward

Dear All

Kindly receive this communique regarding the Mineral and Petroleum Resource Development Amendment Bill (B10-2007) currently before the Portfolio Committee on Minerals and Energy at Parliament, for amendment and consideration.

Last year you had all made submissions towards this process. This email comes to you in two-fold then, first to update you on the current status, and to inform you of the way forward as decided on by the Portfolio Committee.

The Committee is hoping to conclude this process soon. However, in the spirit of fairness and transparency, it has been decided that the final draft of the Bill as it stands (B10D-2007) be distributed and final comments invited from all concerned, especially those who showed interest during the initial stages. This, the Committee endeavours, will also ensure that the final product is a good one. Of course, not everyone will be entirely satisfied at the end, but we can at least try to ensure that this is turned into a win-win situation.

Final comments on the Draft Bill are then invited. Please submit these to myself by Friday 30 May 2008. These must reach us no later than 12h00 midday on Friday. Please be strictly advised that no submissions will be accepted after this time.

The latest draft is attached for your convenience. Should you have further queries, please do not hesitate to contact me for clarity.

Many thanks

Peter-Paul B. Mbele

Committee Secretary: Portfolio Committee on Minerals and Energy

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