

Your Ref:
Our Ref: S/jc/zm/MPRDA

Att: Ntombi Lentheng Mekgwe (MPL)

02 March 2017

The Honourable Speaker
Gauteng Provincial Legislature

By Email: tsokana@gpl.gov.za, lmampe@gpl.gov.za, bdhlomo@gpl.gov.za

Dear Honourable Mekgwe:

**RE: MINERAL AND PETROLEUM RESOURCES DEVELOPMENT
AMENDMENT BILL: NO 15D OF 2013**

The above Amendment Bill (“the Bill”), which has been referred back to Parliament by President Zuma on certain grounds, refers.

1 We are instructed by the Land Access Movement of South Africa (LAMOSA), the Amadiba Crisis Committee (ACC), and Bench Marks Foundation (“our clients”):

1.1 LAMOSA is a non-profit organisation that advocates for land and agrarian rights. LAMOSA first wrote to the President in April 2014 regarding the Bill’s inadequate public participation process in the National Council of Provinces. This resulted in the President referring the Bill back to Parliament.

1.2 The ACC is a community movement that seeks to oppose mining in the Umgungundlovu Community, commonly referred to as Xolobeni, on the Wild Coast in the Eastern Cape. The Umgungundlovu Community has applied to the High Court for a declaratory order that no mining right may be granted, alternatively that no mining may commence, without the Community’s prior and informed consent.

- 1.3 Bench Marks Foundation is an independent, non-governmental organisation established by the South African Council of Churches (SACC), the Ecumenical Service for Socio-Economic Transformation (ESSET), the Industrial Mission of South Africa, the CDT Foundation, and the Justice and Peace Department of the South African Catholic Bishops' Conference. The Bench Marks Foundation seeks to monitor the practices of multinational corporations, including mining companies, to ensure that corporations respect human rights, protect the environment, and generally conduct their business in a manner where profit is not made the expense of the poor and marginalised.
- 2 Our clients have a clear interest in ensuring that MPRDA entrenches the customary law principles of free, prior and informed consent, and that such amendments are lawfully enacted.
- 3 Bill 15D and the 57 further amendments proposed by the Department of Mineral Resources must be rejected because:
 - 3.1 The rules of Parliament provide that no amendments can be made when a Bill is returned to Parliament by the President.
 - 3.2 The NCOP and the Provincial Legislatures therefore cannot cure the flawed NCOP and PL process of March 2014 by now holding fresh hearings because these belated hearings cannot make amendments which render the hearings meaningless.
 - 3.3 The NCOP cannot consider amendments which fall outside the referral mandate of the President
 - 3.4 Bill 15D and the 57 further amendments do not address the concerns of communities. They actually dilute the little community participation currently provided for in the MPRDA. For example, Bill 15D and the 57 further amendments delete the MPRDA's current

requirement that when a prospecting or mining right is granted and the application relates to the land occupied by a community, the Minister may impose “conditions requiring the participation of the community.”

- 4 We are therefore instructed that the Bill be rejected and a new draft bill submitted that provides for community consent.
- 5 If the committee and the legislature decide to proceed with the public hearings despite this, our clients demand that their concerns about the Bill and proposals for its amendment are meaningfully considered by the committee and the legislature. The principal demand of our clients is that the Interim Protection of Informal Land Rights Act (IPILRA) be explicitly incorporated into the MPRDA and that no mining on communal land be allowed without community consent. Our clients' proposed amendments are attached hereto marked **A**.
- 6 We record that when the President referred the Bill back to Parliament two years ago on 16 January 2016, he recorded one of the referral grounds as related to “the consent principle in customary law.” The National Assembly and the NCOP ignored the exhortation of the President. The eight editorial amendments of the NA and the 57 amendments proposed by the DMR fail to address customary law and other property rights of communities on customary land. Instead Bill 15D and the proposed further amendments of the DMR further undermine community property rights and the participatory rights of communities.
- 7 We await to hear from you regarding the demand that Bill 15D be rejected outright.

Yours faithfully

LEGAL RESOURCES CENTRE
Per:

RICHARD SPOOR INC, ATTORNEYS
Per:



WILMIËN WICOMB &
HENK SMITH

RICHARD SPOOR

MPRDA and MPRD Amendment Bill No 15 of 2013 proposals

The purpose of the proposals below is to incorporate the principles of

- a) Community consent for mining on communal land;
- b) Community participation in decision making concerning matters affecting them;
- c) Compensation and reparation for communities who lost their land and land rights as a result of mining.

1 Preamble

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.

The Preamble must be augmented with foundational principles:

Communities should determine land use and provided the space to solicit ideas and input, from relevant sources, about possibilities for how to use their land, the impacts on the community and environment, and potential positive outcomes of that land use vs. costs.

FPIC is seen as a collective right held by all in a community and this assumes participation by the whole community and consent from as an absolute minimum the majority of the community. The exercise of FPIC must be participatory in nature. This means decisions can't be made by leaders on behalf of a group, nor by men for women. The group itself must decide and here democratic principles are important. As such it is an inclusive right and enjoyed by women and men equally.

The Act documents the aspirations of communities to defining their own development paths with due regard to their land and culture through enshrining the first principles of consent, respect, dignity and self determination

The Act serves as a basis to guide elements of land and minerals regulation to result in a developing rural economy where various development alternatives are explored in the interests of people and future generations.

2 Definitions

insert new definition:

"customary law" means the rules and principles that communities use to govern themselves and their access, governance, development, allocation, conservation and disposal of shared resources. The customary law as practiced by communities today shall prevail over any written account of a community's customary law, particularly any account written by colonial administrators or their functionaries.

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.

Community shall be defined as a group of persons who have chosen or choose to adhere to and enforce shared rules of access to their land, minerals and other resources, owned by them through long occupation and or grant or other means regardless of whether title is formally held by the State or another person, provided that the community shall:

- practice a system of customary land tenure; or,
- be indigenous people or descendant; or,
- live on trust land under statute law.

Such a community may affirm its recognition and social boundaries with reference to its neighbours, and neighbouring communities may recognise a community for purposes of decision-making under this law. In the context of proposed mining activities, decision making power shall vest at the lowest level of organisation of customary rights holders, including at the village, ward or clan level or any other structure defined by that community's customary law.

IPILRA is currently the only statute that addresses tenure security under section 25(6) of the bill of rights. It is renewed annually. The new State Land Lease and Disposal Policy of the department of rural development and land reform prefers state assistance with the community identification and consultation and consent process. Community self identification and ownership of the customary law decision making processes are important ingredients for successful negotiations and sustainable outcomes.

The 1913 land act legacy requires of our society to invest in supporting communities to shape and pace their own development paths.

3 Section 2: principles

Subsection 2 paragraph (d)

Retain "women and communities"

(d) substantially and meaningfully expand opportunities for historically disadvantaged **[persons, including women and communities]** South Africans, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

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

by the 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 a contribution to the reparation for the dislocation of affected communities on communal land that were dispossessed of their rights in land due to mining or otherwise directly affected;

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

The additional principles are warranted in the light of the questionable record of the MPRDA and its implementor the DMR. The wording of paragraph (j) is borrowed from the industry/labour/government amended BBSEE charter of 2010, and states the value underlying the consent standard.

Paragraph (k) includes impacts of mining on restitution communities and other communities.

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: prohibited activities

by the insertion after paragraph (c) of the following paragraph:

(d) on communal land, without the prior written consent of the directly affected community in terms of customary law as applicable and the Interim Protection of Informal Land Rights Act 1996: Provided that if a prospecting right, mining right or mining permit had been granted after 16 January 2015 in respect of communal land and such consent is not given within 6 months of any grant, such right will lapse.

The motivation for the consent requirement as the foundation principle for mining on communal land is rooted in our history and our constitution. Section 5A should be amended to make it illegal to start mining without community consent under customary law and complying with IPILRA.

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, ie 26%, of ownership and control targets in the BBSEE Charter.

4 Section 10: consultation

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 assessments;
- 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 steps:
 - 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 for the proposed mining activities, and advise the community regarding the extent of the applicant’s compliance with the statutory requirements.
 - b. At such a 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 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.”

5 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.

6 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 paragraph (c) in subsection (2)

“the regional land claims commissioner”

7 Proceedings of RMDEC meetings

10H Proceedings of the RMDEC

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

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

Whether or not the right to attend meetings and the right so 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 in the act itself.

8 Section 27 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 effecting the participation of members of communities in the exploitation of the resources of their communal land.

(11) the Minister may, with reference to the Charter envisaged in subsection (10) exempt persons who are members of communities or categories of such persons from certain of the provisions of this section.

Regarding the legitimate activities of small scale 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.

9 Section 45A Minister's power to recover costs in event of urgent measures to prevent safety and security risks at abandoned and closed mines

Minister's power to recover costs in event of urgent measures to prevent safety and security risks at abandoned and closed mines

45A. (1) If, in the Minister's opinion, any closed or abandoned mine or any cessation of operations as a result of relinquishment, abandonment or cancellation of a right or permit poses a risk to the security, health and safety of the public, or is used for illegal mining activities, and requires urgent remedial safety and security measures to be taken, the Minister may direct the holder or previous holder of the relevant right, permit or permission or the previous holder of an old order right to---

(a) investigate, evaluate, assess and report on the impact of any safety or security risk;

(b) take such measures as may be specified in such directive; and

(c) complete such measures before a date specified in the directive.

(2) (a) If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the public or secure the abandoned or closed from illegal activities.

(b) Before the Minister implements any measure, he or she must afford the holder an opportunity to make representations to him or her.

(c) In order to implement the measures contemplated in paragraph (a), the Minister may by way of an ex parte application apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.

(d) In addition to the application in terms of paragraph (c), the Minister may use funds appropriated for that purpose by Parliament to fully implement such measures.

(e) The Minister may recover an amount equal to the funds necessary to fully implement the measures from the holder concerned.

(3) If the Minister directs that measures contemplated in this section must be taken to protect or secure but establishes that the holder of the relevant right or permit or old order right, or his or her successor in title, is deceased or cannot be traced or, in the case of a juristic person, has ceased to exist, has been liquidated or cannot be traced, the Minister may instruct the Regional Manager concerned to take the necessary measures to make the area safe and secure.

(4) The measures contemplated in subsection (3) must be funded from the financial provision made by the holder of the relevant right or permit or if there is no such provision or if it is inadequate, from money appropriated by Parliament for that purpose.

10 Section 47: cancellation of mining right

“(c) is contravening any condition in the environmental authorisation, approved social and labour plan or undertaking by a holder or condition imposed in respect of the housing and living conditions standard for the minerals industry, codes of good practice for the minerals industry and the broad-based socio-economic empowerment charter envisaged in section 100.

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

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 be now be repealed.

11 Section 56C: 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

The memorandum and the department give no explanation why civil society and communities should lose the representation that they had on the Board which is now being replaced by the Council.

12 Section 100: 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 benefitted from mining on their land;

b) the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources:

Provided that the target set in respect of mining on communal land shall be exclusively for the benefit of the directly affected community, and any equity associated with such target shall be held by an entity in which the community holds a controlling interest."

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, ie 26%, of ownership and control targets in the BBSEE 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, ie 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 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.

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 and Peoples' Rights, especially the promotion of the rights of women to participate in and lead such processes.

Community Rights

.1 The continued existence of a community shall be considered inviolable.

.2 The rights of a community include, amongst others, the right to:

.2.1 pursue their own development path;

.2.2 the natural resources on and below the surface of their land; and

.2.3 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 be granted without the consent of the community, the community shall have the choice to:

5.1 have the right set aside and to be paid compensation for the 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 in 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 impacts 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 practices, 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 members' homes, the majority of the specific persons affected by the relocation must consent to the mining activity. This is a necessary requirement, without which the community as a whole cannot consent to such 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 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 written 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 factors:

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 views 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.