

South African Institute of Race Relations NPC (IRR)
Submission to the
Select Committee on Land and Mineral Resources
of the
National Council of Provinces
regarding the
Mineral and Petroleum Development Amendment Bill of 2013 [B 15D-2013]
Johannesburg, 22nd March 2017

SYNOPSIS

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1 Introduction

The Select Committee on Land and Mineral Resources of the National Council of Provinces has invited interested people and stakeholders to submit written comments, by 22nd March 2017, on the Mineral and Petroleum Resources Development Amendment Bill of 2013 [B 15D-2013] (the Bill).

This submission on the Bill is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

The Bill was adopted by the National Assembly in November 2016, and has now been referred to the National Council of Provinces (NCOP) for adoption. The Joint Tagging Mechanism of Parliament has identified it as a measure that affects the provinces and needs to be dealt with in terms of Section 76 of the Constitution. The Bill is essentially the same as an earlier version that was referred back to the National Assembly by President Jacob Zuma

in January 2015 because he was concerned about its constitutionality on both substantive and procedural grounds. However, the president's concerns on these substantive issues have effectively been ignored, while various procedural shortcomings look set to be repeated by the NCOP and the various provincial legislatures.

2 Public participation in the legislative process

The Constitution obliges Parliament and the provincial legislatures to 'facilitate public involvement in the legislative process'. The Constitutional Court has reinforced this obligation by striking down legislation, including the Restitution of Land Rights Amendment Act of 2014, because of failures to fulfil this obligation. The Constitutional Court has also made it clear that a provincial legislature must act 'reasonably' in facilitating public participation, and 'provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them'. [*Doctors for Life*, Media summary, p2]

2.1 A fatally flawed public participation process in Gauteng and other provinces

The Gauteng provincial legislature, for one, has failed to act reasonably in this regard. In Gauteng, the public was given too little notice of the public hearing on the Bill that was held on 2nd March 2017. The relevant portfolio committee also failed to give the public sufficient information about the Bill, for its description of the Bill in the notice it published was truncated and often unintelligible. This notice also failed to alert the public to the unconstitutionality of the Bill. Nor did it give the public any insight into the damaging economic consequences of the Bill. It also failed to provide people with copies of the full socio-economic impact assessment of the Bill that now needs to be conducted before the measure can be adopted. In addition, it set aside too little time for the public hearing: a scant four hours, which in the event was further reduced to roughly two-and-a-half hours. This suggests that the portfolio committee was simply going through the motions on public consultation rather than giving people a meaningful opportunity to engage with it on the Bill.

Many of the people attending the hearing complained that public participation had been inadequate. In summing up at the end of the public hearing, the chairman of the Gauteng Legislature's Economic Development, Environment, Agriculture and Rural Development Portfolio Committee, Errol Magerman, apologised for the various ways in which public consultation had been deficient. Mr Magerman acknowledged that 'there was a problem with public participation'. He also recognised that the notice period had been too short, that copies of the Bill were not timeously supplied, that the centralised venue excluded many people from attending, and that the community members who were supposed to have been bussed in had never arrived. The chairman blamed this on the minister and the short timetable set by him for the NCOP process.

If Gauteng found that the timetable for the NCOP process impeded adequate public facilitation, then other provincial legislatures are likely to have experienced the same problem. Hence, the public participation process is likely to have been similarly flawed in all (or almost all) of them. However, as the Constitutional Court took pains to stress in the *Doctors for Life* case, legislative timetables cannot be allowed to trump constitutional rights.

In the words of the Constitutional Court: ‘The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.’ [*Doctors for Life*, para 194]

2.2 Public participation on the Bill in the NCOP also fatally flawed

On 3rd March 2017 the NCOP published a notice on the Parliamentary Monitoring Group (PMG) website calling on the public to make written submissions on the Bill by 22nd March 2107. The period given for public comment is thus less than three weeks. This is far too short a period to facilitate meaningful public involvement in the NCOP’s legislative process, as required by Section 72(1) of the Constitution.

In addition, the notice published on 3rd March 2017 is again too short to give the public any real insight into what the Bill proposes. Like the advertisements published in Gauteng, it is misleading on various points, for the Bill does not ‘remove ambiguities’ or ‘improve the regulatory system’. Much of what the notice says about the Bill is so badly phrased that it is difficult to understand, even for legal experts with a detailed knowledge of the measure.

In addition, if the people of South Africa are to have an opportunity for meaningful participation in the NCOP’s legislative process, they need to be made aware of the likely negative ramifications of the Bill. They need to know that the president himself (along with many legal experts) has concerns about the constitutionality of various provisions in the Bill. They need to be aware that many other provisions of the Bill are also unconstitutional. In addition, they need to know that the Bill is likely to have many adverse economic consequences for the mining industry – and that its damaging ramifications will be particularly severely felt in four provinces where mining and related economic activities contribute significantly to provincial output. They also need access to the comprehensive socio-economic impact assessment of the Bill which must now be conducted before the Bill can be adopted. However, the brief notice published by the NCOP meets none of these needs.

Moreover, the NCOP’s notice makes no reference to a ‘table’ of some 60 additional amendments, which the Department of Mineral Resources (DMR) drew up in November 2016 and now proposes to include in the Bill (the Table). Many of the people and organisations commenting on the Bill within the truncated period allowed by the NCOP may thus be unaware of the Table and unable to comment on its content. This too is a fatal procedural weakness. At the same time, the rules of Parliament prohibit the NCOP from adopting these additional amendments, all of which fall outside President Zuma’s referral mandate. Should the NCOP nevertheless purport to adopt these additional amendments, this will be a further major breach of the relevant rules.

3 The president’s concerns about unconstitutionality

None of the president’s substantive concerns about constitutionality has been addressed. First, the Bill still incorporates the mining charter (and other transformation policies) into the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. Yet these documents were not drawn up as legislation and cannot now be elevated to this status. In addition,

despite making the charter (and these other policies) a part of the MPRDA, the Bill still gives the power to amend them to the mining minister. This is inconsistent with the doctrine of the separation of powers, which gives the law-making power to Parliament and not the executive.

Second, the Bill obliges the mining minister to impose export quotas on ‘designated’ minerals (and probably on those identified as ‘strategic’ as well). However, the Bill’s export restrictions are in breach of South Africa’s binding obligations under the General Agreement on Tariffs and Trade (GATT) of the World Trade Organisation (WTO). These provisions in the Bill contradict Section 25(1) of the Constitution, which prohibits ‘arbitrary’ deprivations of property. They are also inconsistent with Section 33(1) of the Constitution, which requires that all administrative action must be ‘lawful’ and ‘reasonable’. Prima facie, they also contradict the doctrine of the separation of powers, which bars Parliament from straying into areas (such as the conclusion, termination, or amendment of international agreements) which fall within the executive’s domain.

4 Other provisions are also unconstitutional

Many provisions in the Bill are too vague to comply with the rule of law. This requires certainty in legislation, so that rules are not open to arbitrary interpretation and uneven application by bureaucrats and ministers. The supremacy of the rule of law is one of the founding values of the Constitution, which means that its requirements cannot simply be ignored. [Section 1(c), Constitution of the Republic of South Africa, 1996]

Some provisions in the Bill are themselves impermissibly vague. Others provide insufficient criteria to guide and constrain the exercise of administrative discretion. Examples include the Bill’s amendments to:

- Section 11, which introduce ambiguous restrictions on share transfers;
- Section 26, which give the minister an unfettered discretion to impose export and other controls on ‘designated’ minerals;
- Section 1, which allow the minister an unfettered discretion to declare minerals as ‘strategic’, ‘as and when the need arises’, and make no attempt to explain the further consequences which may flow from such a declaration;
- Section 26, which will result in the expropriation of some of the income of producers without providing for the payment of just and equitable compensation;
- Section 9, which put an end to the ‘first-in, first-assessed’ principle for the awarding of mining rights and increase the scope for arbitrary ministerial decision-making in this sphere;
- Section 43, which introduce permanent liability for environmental damage and render it impossible for mining companies to assess how much financial provision they must make for a liability that could extend 20, 50, or 100 years into the future;
- Section 86, which allow the State a 20% free carried interest and a further ‘participation interest’ of an unspecified proportion; and

- Sections 98 and 99, which subject mining companies and their executives to draconian fines and prison terms for impermissibly vague offences such as failing to ‘promote optimal economic growth’.

5 Impermissible provisions which cannot lawfully be included in the Bill

The rules of Parliament provide that no further amendments can be made to a bill when it is returned to Parliament by the president because he has concerns about its constitutional validity. Parliament must then make such amendments as are needed to address the president’s constitutional concerns regarding the content of the bill.

It must also ensure that the president’s reservations about compliance with the Constitution’s procedural requirements are met. Any past inadequate public consultation on the content of the bill must be cured. In addition, the public must be adequately involved in any amendments that are made to the bill to address the president’s substantive constitutional concerns. Parliament may not, however, consider or adopt additional substantive amendments which fall outside the mandate of the president’s referral.

The DMR has ignored these rules in proposing close on 60 additional amendments to the Bill. These additional amendments are set out in a Table of Proposed Amendments to the Mineral and Petroleum Resources Development Bill, 2013 [BD-2013], drawn up by the DMR on 26th November 2016 (the Table). All of these additional changes fall outside the mandate given to Parliament by President Jacob Zuma when he referred the Bill back to the National Assembly in January 2015. Neither the select committee nor the NCOP may thus lawfully adopt the additional changes set out in the Table. Some of these additional provisions are also so damaging that they should not be adopted, as set out in the IRR’s full submission.

6 The Bill’s mistaken emphasis on state-controlled beneficiation

Many of the minerals extracted in South Africa are already extensively milled, refined, or smelted inside the country. Some are already used in manufacturing processes that include the production of steel and the making of other alloys. South Africa not only pioneered the production of oil from coal, but currently produces roughly a third of the petrol needed in the country in this way. In addition, the Petroleum, Oil and Gas Corporation of South Africa Ltd (PetroSA), a state-owned enterprise mainly involved in extracting natural gas from offshore fields near Mossel Bay (Western Cape), also produces synthetic fuels via a gas-to-liquids process. [Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, p275]

In recent years, however, local beneficiation has diminished. Smelters have closed down or reduced operations for lack of a reliable and affordable supply of electricity. The production of ferrochromium within the country has been eroded by China’s capacity to produce ferrochromium more cheaply than can be done here. South Africa’s small diamond cutting and polishing industry, which cannot compete with low-cost countries such as India, has been decimated by government controls that were supposedly aimed at boosting the local industry. Steel production is under threat from cheap Chinese imports. In addition, the manufacturing sector, much of which has links to the mining sector, has been struggling to maintain its

profitability in the face of high input costs, load-shedding, labour instability, currency volatility, and growing international competition.

Where increased local beneficiation makes economic sense, South African corporations already have a demonstrable capacity to embark on this and make a success of it. Where it does not make economic sense, government's insistence on local beneficiation is likely to do far more harm than good.

The Bill, with its strong emphasis on local beneficiation 'for national development', ignores these economic realities. It also overlooks warnings from the National Planning Commission, the Industrial Development Corporation, and many others that South Africa lacks the electricity, the skills, and the international competitiveness required for successful local beneficiation.

Far from boosting the economy, the Bill's damaging export and other controls are likely to choke off the supply of key minerals, as is already happening with coal. New coalfields need to be developed, at a cost of some R100bn, to ensure adequate future supplies to Eskom and its coal-fired power stations. But few mining companies are willing to risk this enormous outlay when the mining minister can decide to whom, and at what price, coal is to be sold. A supply gap is thus developing, not because of any shortage of coal in the ground, but rather because few companies can risk mining it in these circumstances.

Instead of increasing local beneficiation, the Bill could in time help to cripple Eskom's generating capacity and plunge the country into load-shedding once again. All manufacturing and other businesses will then find it much harder to survive, let alone to engage in more beneficiation or compete internationally. The Bill could also help to choke off exploration for other minerals and deter fresh investment in other new mines. In 2015 mining exploration was already standing at a quarter of its level in 2007. Unless this situation is reversed – and the Bill will make it harder to achieve this – South Africa might not have a mining industry some 20 years from now.

7 The need for a proper socio-economic assessment

Now that the Bill has been referred back to Parliament for re-adoption, it falls within the ambit of the socio-economic impact assessment system (SEIAS) introduced by the government in 2015. Hence, the NCOP cannot lawfully adopt the Bill without first ensuring that a proper socio-economic impact assessment has been conducted. The outcomes of this assessment must also be made available to all stakeholders and the wider public to 'facilitate the public involvement...in the legislative process' that the Constitution requires. [Section 72, Constitution]

Any SEIAS assessment must examine all the risks in state-controlled beneficiation, as described in *Section 6* of this submission. It must also include an evaluation of the economic importance of the mining industry. This industry is, of course, the bedrock on which modern South Africa has been built. Mining also remains vital to the country's economy, for it still

provides employment (directly and indirectly) to some 1.5 million people. It also helps to bring in foreign investment, generate tax revenues, and bolster the country's export earnings.

Mining is particularly important to the output of four provinces: Limpopo, Mpumalanga, the Northern Cape, and North West. It is also vital to the prosperity of at least six mining towns. It largely sustains two key ports (Richards Bay and Saldanha Bay) and helps to support a host of other areas involved in the transporting and exporting of minerals. It is no less vital to the Eastern Cape, which has no mining activity of its own, but relies heavily on the remittances sent back to families by migrants working at mines in the North West and elsewhere.

Mining also sustains a vast array of other businesses through the goods and services it buys. In 2016 its current procurement spending totalled R156bn, which was not much less than the R188bn the central government had budgeted for current expenditure in 2015/16. In 2016 its capital expenditure amounted to R89bn. Again, this is a tidy sum compared to the R290bn or so that the government and all its parastatals may budget to spend in a given year.

The mining industry could also be much larger than it is if poor mining policies had not already harmed it so much. As the National Development Plan (NDP) points out, South Africa's mining industry shrank by 1% a year during the global commodities boom from 2001 to 2008, whereas the mining sectors in other countries expanded by 5% a year on average over this same period.

The NDP identifies South Africa's poor performance as 'an opportunity lost'. It also puts much of the blame for it on the vague and uncertain terms of the MPRDA. It thus urges that the MPRDA be amended to 'ensure a predictable, competitive and stable regulatory framework'. However, far from complying with the NDP's recommendation, the Bill makes the regulatory framework even more unpredictable, uncompetitive, and unstable.

Much of the problem lies in the unfettered discretion given to the mining minister in various important spheres, as outlined in *Sections 3 and 4* of this submission. Instead of helping the mining industry to grow, the Bill will make it even more difficult for it to attract much-needed investment. The Bill will thus make it harder still for mining companies to maintain, let alone expand, their operations. Even more jobs are likely to be lost, while mining's contributions to revenue, export earnings, and GDP could well decline.

All these factors need to be taken into account as part of the necessary SEIAS assessment. In addition, before it decides to adopt the Bill, the NCOP should reflect on how much wealthier the country would be if the mining industry – instead of shrinking by 1% a year – had grown by 5% a year during the global commodities boom, as other major mining countries were able to achieve. If this had happened, South Africa would have reaped substantial benefits in many spheres.

Instead of so many mining jobs being lost, hundreds of thousands of jobs in mining could have been created. Many more jobs would also have been generated in other sectors, for a

host of businesses would have sprung up or expanded to supply the mining industry with all the additional goods and services it would have needed. There would be less poverty in both mining communities and rural sending areas. The government would have collected far more in taxes, making it easier to afford both infrastructure expenditure and current spending on education, health, housing, social grants, and other needs. Public debt would not have gone up so sharply and the interest payable on that debt would be much reduced. The country would have earned more in foreign exchange, which would have helped to strengthen the value of the rand. More foreign investment would have flowed in, helping to expand the economy still further. Pension funds and unit trusts invested in the mining industry would have been richer. So too would all the ordinary people, both black and white, whose savings are so often invested in those funds.

The National Assembly, in adopting the Bill in November 2016, seems to have lacked an understanding of just how important the mining industry is to South Africa's economy – and just how widely its linkages into other sectors extend. The NCOP can now help to rectify this situation.

8 The obligations resting on the NCOP

The NCOP has a duty to uphold the Constitution and the rules of Parliament. The NCOP is thus obliged to delete all the unconstitutional provisions contained in the Bill, as described above. These include not only the provisions flagged by the president in his referral mandate (see *Section 3* of this submission), but also all the further unconstitutional provisions highlighted in *Section 4* of this submission. In addition, since the rules of Parliament bar it from adopting any amendments on issues falling outside the president's referral mandate, the NCOP must reject all the 60 or amendments set out in the Table.

The constitutional obligation resting on the NCOP to facilitate public involvement in its legislative processes must also be fulfilled, and cannot be downplayed or brushed aside. Yet no socio-economic impact assessment of the Bill has seemingly been conducted, while the outcomes of such an assessment have certainly not been made available to the public to help facilitate their involvement in the adoption of the measure.

Moreover, the NCOP has allowed less than three weeks for the sending in of written submissions, which is not nearly long enough for such a lengthy and complex Bill. In addition, the NCOP has failed to give the public adequate notice of what the Bill provides, which in turn has denied people a necessary opportunity for 'meaningful' participation in the law-making process. The NCOP has also failed to give the public any information about the DMR's additional 60 or amendments, which it cannot adopt for this reason either.

The public participation process in Gauteng has also been flawed, as the chairman of the relevant portfolio committee has publicly acknowledged. According to the chairman, Errol Magerman, the timetable set by the minister made it difficult for the relevant portfolio committee of the Gauteng provincial legislature to give people more notice of the public hearing held on 2nd March 2017, to arrange hearings in different parts of the province, or to

ensure that people were given copies of the Bill and the Table in advance. In addition, no attempt at all was made to give them copies of the MPRDA, even though the Bill and the Table are simply unintelligible unless the Act is also to hand.

If Gauteng found that the timetable for the NCOP process impeded adequate public facilitation, then other provincial legislatures are likely to have experienced the same problem. Hence, the public participation process is likely to have been similarly flawed in all (or almost all) of them. Yet, as the Constitutional Court has stressed, guaranteed rights to public participation cannot be trumped by a timetable; rather it is the timetable that must yield to the constitutional imperative to ensure adequate public involvement in the legislative process.

In summary, the NCOP cannot lawfully adopt new provisions which fall outside the president's referral mandate and on which no adequate public participation has taken place. It also cannot adopt the Bill until a comprehensive socio-economic assessment has been drawn up and made public, and stakeholders have been given an adequate opportunity to engage on the contents of this assessment.

Most importantly of all, the NCOP has an obligation to delete all provisions of the Bill which are inconsistent with the Constitution. These include not only the provisions flagged by the president, but also all the other unconstitutional provisions earlier described. The NCOP's first and most compelling duty is to bring the Bill into line with the Constitution by deleting all these clauses, as set out in *Sections 3 and 4* of this submission. Only what remains in the Bill itself (and not in the Table) can then be adopted. However, this can be done only after a full socio-economic impact assessment has been carried out and made public – and only after the people of every province have indeed been given a 'meaningful' opportunity to participate in the legislative processes of both their provincial legislatures and the NCOP itself.