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Submission by
Webber Wentzel Bowens
to the Portfolio Committee on Minerals and Energy
on the Mineral and Petroleum Resources Amendment Bill, 2007

Regulatory Law Issues

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1. Introduction

As legal advisors in the South African mining and petroleum industries, Webber Wentzel Bowens is grateful for the opportunity to make a written submission to the Portfolio Committee on Minerals and Energy (**"the PC"**) on the Mineral and Petroleum Resources Amendment Bill, 2007 (**"the Bill"**). Our submission is made in the spirit of transparency and with a desire to engage constructively in the legislative process. These submissions by the Regulatory Law Unit of the firm relate to matters of regulatory policy and international best practice.

In view of the fact that we first became aware of the opportunity to make this submission on 13 May 2007, when an advertisement was published in the *Sunday Times*, we reserve our right to supplement our submission in due course. In addition, we offer to furnish the PC with formal drafting notes on the Bill, should the opportunity to do so arise.

We respectfully request the PC to afford us the opportunity to participate in the hearings to be held on the Bill on 29 and 30 May 2007.

2. Approach

In this submission, we:

- draw the PC's attention to:
  - statements made by the Honourable Minister Buyelwa Sonjica, Minister of Minerals and Energy (**"the Minister"**), in her speech at the Mining Indaba on 6 February 2007 in Cape Town, which are apposite to the Bill; and
  - certain objects of the Bill, extracted from the explanatory memorandum to it, which do not appear to have been addressed in the Bill;
- examine the extent to which the Bill brings South Africa's mining code in line with international best practice in the mining industry, emphasising the requirements for investment in a high cost, high risk, capital intensive industry. In this regard, we use the Minister's stated desire to remove obstacles to mining investment and examples from other African jurisdictions as our starting point;
- point out that the Bill fails to afford sufficient security of tenure to holders of OP26 prospecting sub-leases in the oil and gas exploration and production industry; and
- discuss certain technical failings of the Bill.

3. The Minister's speech at the Mining Indaba and the objects of the Bill

3.1 The Minister's speech

In her speech at the Mining Indaba in Cape Town on 6 February 2007, the Minister pointed out that there had been a decline in real fixed investment in mining in South Africa. Later in her speech, the Honourable Minister said:

"During 2007, the MPRDA will be amended to remove all identified obstacles to mining investment."

The Minister's speech led us to understand that the Bill would address obstacles to investment occasioned by the Mineral and Petroleum Resources Development Act, 2002 (**"the MPRDA"**). We submit, however, that the Bill does little, if anything, to remove such obstacles.

In our view, one of the main reasons for the obstacles to investment referred to by the Minister, is the failure of the MPRDA to provide sufficient guidelines to the Minister and her delegates in the exercise of their discretion to grant or refuse rights under the MPRDA. The grant, transfer and retention of rights under the MPRDA is dependant on compliance with certain of the MPRDA's socio-economic objects. While we make no argument against these laudable and important socio-economic objects, the failure of the MPRDA to establish objective criteria, upon which compliance with such objects may be measured, has led to a lack of certainty on the part of potential investors in the mining and oil and gas industries, who have shown themselves to be wary of investing in the absence of such certainty.

In any event, it is apparent that, despite the Minister's statements, the Bill has been drafted without reference to the objective of removing obstacles to mining investment. This is evident from the fact that the objects to the Bill, as set out in the explanatory memorandum to it, do not refer to this objective. We submit that without regulatory certainty, to be achieved by provision in the MPRDA of clear and objective criteria upon which an applicant's compliance with the socio-economic objects of the MPRDA can be guided, the obstacles to investment identified by the Minister will continue to affect South Africa's mining industry negatively.

3.2 **The objects of the Bill**

Some of the objects of the Bill, as set out in the explanatory memorandum to it, have not been adequately addressed in the Bill. For example, it is stated in the explanatory memorandum that:

> **"the Bill seeks to amend the principal Act to facilitate the smooth implementation of the new minerals and mining dispensation by aligning it with sound administrative practices and the objects of the Promotion of Administrative Justice Act, 2000. [("PAJA")]**

We have not found anything in the Bill which may be construed as aligning the MPRDA with sound administrative practices or with PAJA. As stated above, the lack of objective criteria to guide the Minister's decision-making powers in relation to the grant or refusal of rights under the MPRDA, has not been addressed in the Bill. The provision of adequate guidelines by parliament to an administrator charged with taking a decision is fundamental to the Constitutionally enshrined principle of the rule of law and is relevant to the principle enshrined in section 33 of the Constitution, as well as in PAJA, that administrative action be *lawful* (in the sense that the law should be such that those subject to it will be able to be guided by it), in addition to being reasonable and procedurally fair. We address the rule of law principle further in paragraph 6.1 of this submission.

Moreover, we note that the Bill removes all references to "written reasons" accompanying decisions to refuse rights under the MPRDA (see, for example, clauses 12 and 18 of the Bill). While we appreciate that section 6(2) of the MPRDA provides that every administrative decision made under the MPRDA must be accompanied by written reasons, we are concerned that the removal of explicit reference to the requirement of written reasons, particularly in those sections of the MPRDA which deal with the grant and refusal of rights, might lead to the failure of administrators to furnish reasons with their decisions to refuse rights. This criticism must be read in the context of our experience that refusals of rights under the MPRDA are accompanied by reasons which are insufficiently clear, consisting of the citation of statutory or regulatory provisions without providing any particularity as to the manner in which an applicant has failed to comply with such statutory or regulatory provision.

Another instance in which the Bill fails adequately to address fundamental administrative law concerns, and thereby fails to accord with the stated object of **"the smooth implementation"** of the MPRDA, is the Bill's failure to set exact time limits for the taking of decisions under the MPRDA. This omission is also relevant to the issue of certainty and investment incentives discussed elsewhere in this submission. The substantial delays in the processing of applications for rights under the MPRDA is a matter of record. Despite the provision contained in section 6(1) of the MPRDA, that decisions under the MPRDA must be taken **"within a reasonable time"**, we submit that the Bill should provide that important decisions, including, without limitation, those to grant or refuse applications for rights under the MPRDA, must be taken within a specific period (for example, 180 days from acceptance of an application), failing which such application shall be deemed to be accepted.

4. **International best practice: examples from other African jurisdictions**

The Minister has indicated that removing obstacles to investment must be a driving force behind the Bill. The Minister clearly recognises that, in a global environment of fierce competition for mining investment, and in the context of a capital intensive, high risk industry, companies are more likely to invest in a country which incorporates international best practice into its regulatory framework. Key requirements of international best practice in the mining industry are:

- certainty;
- stability; and
- guarantees in favour of holders of rights.

Several mineral rich countries in Africa, recognising the need for investment, have established investment incentive measures to lure investors. The *Union Economique et Monétaire Ouest Africaine* (**"the UEMOA"**), consisting of eight member countries (Benin, Burkina Faso, Ivory Coast, Bissau Guinea, Mali, Niger, Senegal and Togo), enacted a regional mining code (**"the RMC"**) on 23 December 2003. The RMC lays the foundation for each member country's national mining code.

In respect of investors in member countries' mining industries, the RMC provides:

- the freedom to select suppliers, subcontractors and partners;

- o various guarantees relating to foreign exchange control (for example, free transfer of foreign currencies and free transfer of dividends)

- o various guarantees in term of management and organization (for example, free circulation of goods, free circulation of samples);

- o guaranteed stabilization of the tax and custom regimes during all the period of validity of the rights, together with the possibility to opt for a future regime if it is more favorable to the right holder.

The mining code of Senegal, adopted on 24 November 2003, further extends the incentive measures of the RMC by, *inter alia*:

- o simplifying procedures for the granting of mining rights and establishing certainty in those procedures;

- o guaranteeing non-discrimination by the State;

- o providing substantial tax relief, such as total exemption from all taxes and duties during the prospecting phase and caps on taxes during the exploitation phase; and

We submit that, if the legislature is serious in its intention to attract investors to South Africa's mining industry, valuable lessons may be learned from the approach of other African jurisdictions such as those outlined above.

5. **Security of tenure in relation to the OP26 prospecting sub-leases for natural oil**

Under the regulatory regime which preceded the MPRDA, holders of OP26 prospecting sub-leases for natural oil were afforded substantial protection in that, *inter alia*:

- o terms and conditions of the prospecting sub-leases were guaranteed for their duration;

- o legislative and fiscal stability were guaranteed by the State. These guarantees took the form of a guarantee in favour of the sub-lessee in the event of a detrimental change in the governing legislation; and

- o the form of mining lease in the event of a discovery was included in the form of the prospecting sub-lease.

In addition to the object in section 2(g) of the MPRDA relating to security of tenure generally, item 2 of Schedule II to the MPRDA states that one of the objects of the transitional arrangements, applicable to, *inter alia*, the OP26 prospecting sub-leases, is to "**ensure that security of tenure is protected in respect of...exploration and production operations**". Despite this object, the MPRDA in its present form fails to grandfather the rights held by a sub-lessee of a prospecting sub-lease, despite guarantees made by the State to do so, which guarantees are contained in the texts of the OP 26 prospecting sub-leases themselves.

In the course of our oil and gas regulatory practice, we have had the opportunity to peruse and comment on the draft exploration and production rights ("**the draft rights**") intended to apply to exploration and production operations in South Africa.

We have noted that, despite the various guarantees in favour of OP26 prospecting sub-lessees, no distinction whatsoever has been drawn between the rights which the holder of a converted OP26 sub-lease will have compared with the rights the holder of an exploration right, applied for under section 79 of the MPRDA, will have.

This *lacuna* is in urgent need of rectification and we submit that the Bill presents the legislature with the ideal opportunity to do so. As indicated above, we would be happy to provide drafting suggestions to resolve this issue.

A separate issue relating to the draft rights, is that they do not currently reflect the various amendments to be effected by the Bill. Consideration should be given by the designated agency to whether the rights should reflect the language of the Bill.

6. Selected comments on the Bill

We set out below our preliminary observations on certain of the amendments to the MPRDA contained in the Bill. As stated above, time constraints in the preparation of this submission lead us to reserve our right to supplement these submissions in due course.

6.1 Amendment of the definition of "exclusionary act" (clause 1 of the Bill)

We submit that this amendment broadens an already unconstitutionally overbroad definition. Under section 17(2)(b)(i) of the MPRDA, the Minister must refuse to grant a prospecting right if the granting of such right will result in an **"exclusionary act"**. On a literal interpretation, the grant of any prospecting right to any person in respect of any property would result in an **"exclusionary act"**, as defined. The meaning and scope of an **"exclusionary act"**, as defined, is accordingly unclear, vague, imprecise and, as such, it falls foul of the foundational requirement of the rule of law, enshrined in section 1(c) of the Constitution, that the law should be sufficiently clear such that those subject to it will be able to be guided by it.

The significance of the rule of law was set out in a separate and concurring judgment in *President of the Republic of South Africa v Hugo*,[1] where Mokgoro J observed that:

> **"[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to conform his or her conduct to the law."**

This position was confirmed in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd And Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,[2] where the court held:

> **"the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them."**

[1] 1997 (4) SA 1 (CC) at paragraph 102.

[2] 2001 (1) SA 545 (CC) at paragraph 24.

Moreover, where legislation confers a discretion upon a functionary, such as the discretion to decide whether the grant of a prospecting right will result in an **"exclusionary act"**, the ambit of the discretion must be described with sufficient clarity to allow those subject to it to know what the extent of the functionary's powers are so that they may order their affairs accordingly. The legislation must also provide guidelines as to how the discretion should be exercised, both so that the official vested with the discretion does not exercise the discretion in an arbitrary fashion and so that those affected know what is relevant to the exercise of the discretion. Without the requisite guidelines in the MPRDA as to how the discretion to decide whether the grant of a prospecting right will result in an **"exclusionary act"** should be exercised, an applicant whose application is refused on this ground will consequently not be in a position to challenge the decision. This is also contrary to the rule of law requirements in section 1(c) of the Constitution.

The principle of the rule of law in relation to discretionary power was discussed by the Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others,*[3] where the court held:

> **"If broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision"**

Finally, we note that **"exclusionary act"** and **"prevent fair competition"** are terms of art in competition law. The inclusion of these terms in the MPRDA as well those provisions which enjoin the Minister to refuse an application for a right if the grant of the right will **"result in the concentration of the mineral resource in question under the control of the applicant"** represent an unwarranted intrusion into the territory of competition law. The competition authorities in South Africa are the appropriate organisations which have the requisite knowledge to decide whether any particular practice constitutes an **"exclusionary act"**, **"prevents fair competition"** or **"result[s] in the concentration of the mineral resource in question under the control of the applicant.**" The inclusion of these terms in the MPRDA is accordingly inappropriate and we submit that the definition of **"exclusionary act"** as well as section 17(2)(b) of the MPRDA should be deleted by the Bill.

6.2 **Amendment of the definition of "day" in the MPRDA (clause 1 of the Bill)**

We welcome this amendment, but suggest that the Bill should adjust certain of the periods in the MPRDA to minimise delays in the processing of applications.

6.3 **Amendment of section 9 of the MPRDA (Clause 5 of the Bill)**

This clause provides that any **"subsequent applications" must be processed at least 40 days after the applications contemplated in subsection (1) has been rejected or refused"**.

[3] Cited as *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at paragraph 47.

The meaning of this amendment is imprecise in that it is unclear whether **"subsequent applications"** refers to those lodged by the entity whose application has been refused or to applications lodged subsequently to such application by other entities. The meaning of this provision needs to be clarified.

Secondly, the word **"processed"** should be replaced with the word **"decided"**, as the word **"processed"** implies that it is only after 40 days that subsequent applications should be *considered*, as opposed to *decided*. If the latter is, in fact, the intended meaning of the Bill, then we see no reason to delay the deciding of such applications by 40 days. This would not seem to not comply with the stated object of the Bill to facilitate the "**smooth implementation**" of the MPRDA.

6.4 **Amendment of section 11 of the MPRDA (Clause 7 of the Bill)**

On a literal interpretation of section 11(1), an interest in *any* close corporation or company, regardless of whether it holds an interest in a prospecting or mining right, may not be disposed of without the consent of the Minister. We suggest the phrase " **company or close corporation**" must be qualified by specifying that the company or close corporation *must hold a controlling interest in a prospecting or mining right.*

The deletion of the words **"a controlling"**, before "**interest**" does not accord with the stated object of the Bill to allow **"the smooth implementation [of the MPRDA]"**. The amendment results in the Minister's consent being required for the disposal by a company which holds a one percent interest in a mining right or prospecting right of one percent of its share capital, this will cause unnecessary delays.

Moreover, a listed company is not defined in either the MPRDA or the Bill. This requires clarification.

6.5 **Amendment of section 16 of the MPRDA (clause 11 of the amendment bill)**

The proposed section 16(2) to the MPRDA provides that the Regional Manager must accept an application for a prospecting right if **"no other person holds a prospecting right, mining right, mining permit or retention permit for <u>any</u> mineral and on the same land"**.

Section 16(3) of the MPRDA provides that if the application does not comply with the requirements of section 16(1) (including the absence of any right for any mineral having been granted on the same land) the Regional Manager must reject the application.

First, it should be noted that the amendment applied here by the Bill has been applied to all sections of the MPRDA dealing with the conditions of acceptance of any application for any right or permit.

Secondly, the Bill effectively prevents the possibility of conducting different activities (i.e. reconnaissance, prospecting, mining, exploration and production) on the same land for different minerals.

Practical consequences of this are very important as this may prevent, for example, a gold company from prospecting on an area where it is known that substantive gold reserves exist, as long as another entity already holds a mining right for coal on the same area for a 30 years period.

These amendments will result in the sterilising of South Africa's mineral resources and are inconsistent with the Minister's stated wish to promote investment in mining.

6.6 **Amendment of section 17 of the MPRDA (clause 12 of the amendment bill)**

The Bill amends section 17(5) of the MPRDA as follows:

"The granting of a prospecting right in terms of subsection (1) becomes effective on the date on which

(a) the environmental authorization is issued; and

(b) the right is executed."

This amendment is applied in a similar way in relation to the effective date of mining, exploration and production rights.

The amendment presupposes that an environmental authorization will always be issued on the same date as the right in question is executed. In our experience, an Environmental Management Programme (the equivalent of the environmental authorisation) is not always approved on the same date as a right is executed. This requires clarification.

6.7 **Registration of renewals of rights**

Provision should be made in the Bill for the registration of renewals of rights.