MPRDAB 11 B

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

Submission 2: Technical Mining and Environmental Issues

WEBBER WENTZEL BOWENS
10 Fricker Road
Illovo Boulevard
JOHANNESBURG
2196
South Africa
Ref: M Booysen
Tel: +27 11 530 5224
Fax:+27 11 530 6224
Email: manusb@wwb.co.za

24 May 2007

Webber Wentzel Bowens

1. Introduction

Webber Wentzel Bowens is a leading South African law firm with a significant practice in Natural Resources and Environmental Law. The Natural Resources and Environmental Law Unit of Webber Wentzel Bowens Attorneys is grateful for the opportunity to make a written submission to the Portfolio Committee on Minerals and Energy ("**the PC**") on particular aspects of the Mineral and Petroleum Resources Development Amendment Bill ("**the Bill**") which we believe deserve closer attention. Our submission is our own and is not sponsored by any of our clients.

The Regulatory Law Unit of our firm will make aseparate submission to the PC with regards to international mining industry best practice, security of tenure to holders of OP26 prospecting sub-leases in the oil and gas exploration and production industry and comments which relate to policy and regulatory matters and specific aspects of the Bill. This submission will focus on technical Mining and Environmental Law issues of the Bill.

As these submissions were compiled under strict time constraints, we would like to supplement our submission in due course.

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

An advertisement published on 13 May 2007 in the *Sunday Times* newspaper drew our attention to the opportunity to make this submission.

2. The Process

2.1 The Bill is in our respectful submission, a very important piece of legislation which has the potential to improve and to amend the Mineral and Petroleum Resources Development Act No 28 of 2002 ("**MPRD Act**") in order to facilitate the implementation of the new legal dispensation relating to the natural resources of our country.

The MPRD Act and its implementation is of vital importance to ensure that our nation's natural resources are developed, and that economic growth is promoted, for the benefit of all South Africans in particular the poorest of the

poor. In the light of the aforesaid we cannot over-emphasise the importance of the Bill to achieve the fundamental objectives of the MPRD Act.

2.2 However we must point out that the process that has been followed in respect of the Bill is inadequate. We respectfully submit that the various stakeholders have not had time to consider and make meaningful representations on the Bill and its consequences.

2.3 It is also clear from the memorandum accompanying the Bill that only selected Government Departments had been consulted. No public participation process which involved the Mining Industry, the legal profession, organised labour, financial institutions or Black Empowered entities and various other stakeholders have been followed.

2.4 We further respectfully submit that the amendments proposed by the Bill are not critically urgent, but that it would be in everybody's best interest to deal with amendments to the MPRD Act in a proper manner.

2.5 Adequate time is required by all stakeholders, to consider the proposed amendments properly, to make recommendations and for the PC to apply its mind properly to the proposals and omissions in the Bill.

2.6 We recommend an extension of time for all interested and affected parties to make representations in order to ensure an inclusive process with the best possible results.

3. Our Submission

Through our submission we aim to:

3.1 analyse the environmental law aspects of the Bill; and

3.2 point out certain technical problems arising from the Mineral and Petroleum Resources Development Act, 2002 ("**the MPRDA**") which the Bill fails to address. These issues are stumbling blocks which, in many respects hamper or frustrate achieving the laudable objects of the MPRD Act and growing the South African natural resources industry in a time when this is crucial for the growth and development of our country. We ought not to forego the opportunity to resolve these issues to the benefit of our country, the natural

resources industry and all its people, particularly historically disadvantaged South Africans.

4. Environmental law amendments

4.1 While most of the proposed amendments relating to the environment are acceptable, some of the proposed amendments do, however, require clarification.

4.2 The Bill seeks to harmonise environmental impact assessment requirements with national norms and standards set out in the National Environmental Management Act 1998 ("**NEMA**") which is an express requirement of the MPRD Act. We respectfully submit that this harmonisation process is incomplete.

4.3 The basic assessment process provided by Regulations 22 and 56 of the NEMA Regulations of 2006 require that notification and consultation be done in respect of "*all interested and affected parties.*" In contrast, the proposed amendments of section 16 and section 27 of the MPRDA require notification and consultation with only *"the land owner or lawful occupier"*. It is foreseeable that the restriction of the duty to notify and consult with only *"the land owner or lawful occupier"* does not recognise the rights and interests of other interested and affected parties, which is expressly required by NEMA.

4.4 Amendment of section 1 of the MPRDA (clause 1 of the Bill)

4.4.1 The proposed amendment to the definition of *"environmental authorisation"* in section 1(e) of the MPRDA, read together with the proposed amendment to section 39 of the MPRDA, seeks to give the Minister, through the Department of Minerals and Energy ("**DME**") control over the environmental processes relating to mining. In pursuance thereof, the Minister is given responsibility for issuing environmental authorisation.

4.4.2 We respectfully submit that, in terms of environmental best practice, the Minister is not the appropriate authority to issue such an authorisation. The Minister's primary interest is to promote mining whereas the environmental provisions of the MPRDA are supposed to serve the interests of environmental protection.

4.4.3 It is foreseeable that "conflicts of interest" might arise between the DME and the Department of Environmental Affairs and Tourism ("**DEAT**"). Such a conflict is likely to frustrate the laudable objects of the MPRD Act relating to development of the nation's natural resources in a sustainable manner while protecting the environment.

4.4.4 In the alternative we propose that provision be made whereby the DME is required to follow the recommendations of the DEAT in relation to the decision to grant, or refuse to grant the proposed environmental authorization. Section 39 (4) of the MPRD Act merely requires the Minister to consider the comments of other departments charged with the administration of any law which relates to matters affecting the environment.

4.5 **Proposed amendment to section 39 (clause 31) of the Bill**

The proposed section 39(3) provides that the Minister must prescribe (by regulation) requirements and time frames for the consideration and decision-making on the entire process of applying for, the supporting information to be submitted and related matters to obtain an environmental authorisation.

The section does not stipulate the criteria which the Minister must take into account and/or the basis on which a decision to grant or refuse to grant an environmental authorization, save for the provisions of section 39(4)(b) which requires consideration only of recommendations by the Regional Mining Development and Environmental Committee and other departments charged with the administration of any law which relates to matters affecting the Environment.

We respectfully submit that regulating all these matters by regulation is not appropriate and will effectively further increase the Minister's discretion on environmental regulation in relation to mining.

5. **Amendment of sections 16, 22 and 27 of the MPRDA (clauses 11, 16 and 22 of the Bill)**

5.1 The proposed amendment to sections 16(2) of the MPRD Act provides that the Regional Manager must accept an application for a prospecting right, mining right or mining permit 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".

5.2 Section 16(3) of the MPRDA expressly 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.

5.3 We note that this amendment has been applied to all sections [16(2), 22(2) and 27(3)(b)] of the MPRDA dealing with the conditions of acceptance of any application for prospecting rights, mining rights and mining permits.

5.4 Second, the Bill effectively prevents the possibility of conducting different activities (i.e. reconnaissance, prospecting or mining,) on the same land for different minerals.

5.5 The practical consequences of these proposed amendments should not be underestimated as this may prevent, for example, an applicant from obtaining a prospecting right and from conducting prospecting on an area where it is known that substantive gold, platinum or other strategic mineral reserves exist or might exist, as long as another entity already holds a mining right for sand, granite or similar minerals occurring on the surface of the same land, for a 30 year period.

5.6 We respectfully submit that these amendments will result in the untoward sterilisation of South Africa's mineral resources in a manner inconsistent with the express objects of the MPRDA to promote economic growth and mineral and petroleum resources development as well as the creditable purpose of promoting investment in mining, with which we respectfully agree.

5.7 Further, we respectfully submit that it is necessary to clarify the wording of the proposed amendment of subsection 4 paragraph (a).

5.8 The suggested clarification applies to the same proposed amendment of section 22 (grant of a mining right) and section 27 (grant of a mining permit) as described in paragraph 5.3 above.

6. **Amendment of Section 16(4)(a) and Section 27(5)(a) (Sections 11 of the Bill)**

For purposes of grammatical and interpretive clarity, we submit that section 16(4)(a) and section 27(5)(a) should be amended to read as follows:

> *"to apply for an environmental authorisation, and lodge within 60 days from the date of notification a basic assessment report and a standard environmental management plan; and".*

7. **Amendment of Section 16(4)(b) and Section 17(5)(b) (Sections 11 and 22 of the Bill)**

Our view is that is advisable that notification and consultation should be done in respect of all interested and affected parties, and not just in respect of the owner or occupier, to avoid disparity between the requirements of NEMA and that of the MPRD Act. We recommend that Section 16(4) should therefore be amended to read:

> *"to notify in writing and consult with the land owner or lawful occupier and other interested and affected parties, and to include the result of this consultation in the basic assessment report."*

8. **Amendment of Section 43 (Section 37 of Bill)**

We welcome the proposed addition of subsection 8. We respectfully submit that in order to avoid disputes with the authorities and to ensure that amendments are acceptable, an amendment of the authorisation or plan must be approved by the Minister. We submit that the subsection be amended to read:

> *"The holder of a prospecting right, mining right, retention permit or mining permit operating within an area with a cumulative impact must, subject to the approval of the Minister, amend the environmental authorisation and the standard environmental management plan or environmental management plan accordingly or must submit a closure plan which is aligned with closure strategies for such areas as published by the Minister from time to time by notice in the Gazette."*

9. **Openness and Transparency**

Our experience in legal practice in the Natural Resources Industry reveals that there is a lack of openness and transparency in the decision making process of the DME and that it is difficult and time consuming to obtain information from the DME in terms of the provisions of the Promotion of Access to Information Act. We respectfully submit that interested and affected parties in respect of all decisions taken by the DME and the Minister ought to have access to the factors considered by the Minister in arriving at such decisions. Of particular relevance is the provisions of section 39(4)(b), the fact that the Minister must consider any recommendation by the Regional Mining Development and Environmental Committee and the comments of any State Department charged with the administration of any law which relates to matters affecting the environment. Interested and affected parties are not privy to these recommendations. These facts do not support the requirement of section 6(1) of the MPRD Act in terms of which all decisions taken in terms thereof must be taken in accordance with the principles of lawfulness, reasonableness and procedural fairness. We would therefore recommend that section 39(4)(b) be expanded to provide that the Minister be obliged to make the recommendations of the Regional Mining Development and Environmental Committee and the comments of any State Department charged with the administration of any law which relates to matters affecting the environment, on application be made available to interested and affected parties.

10. **Introduction of section 41A (section 34 of the Bill)**

10.1 In terms of the proposed new section 41A, financial provision for the cost of environmental management through the use of a trust fund, must be solely in respect of the right or permit granted.

10.2 We respectfully submit that this requirement (of a dedicated trust fund for each right or permit granted) will necessarily give rise to a proliferation of trust funds. This will be impractical, unnecessarily costly and create an unbearable administrative burden on the administration of multiple trust funds.

11. **Lack of amendment of item 9**

11.1 Item 9 of Schedule II provides for the continuation of reservations, permissions and rights granted under the legislation which preceded the

Minerals Act. Item 9 relates to rights to use the surface of land such as surface right permits, industrial stands and similar rights granted in terms of the Precious and Base Metals Act, 1908 and the Mining Right Act Number 20 of 1967.

11.2 Item 9(2) provides that the holder of such rights must register such rights in the Mineral and Petroleum Titles Office within one year from the date on which the MPRD Act took effect, i.e. before 30 April 2005. The item does not regulate the consequences of a failure to comply with item 9(2).

11.3 There are numerous holders of such surface rights who were not aware of the requirement to register such rights before 30 April 2005. Officials in the Mineral and Petroleum Titles Registration Office refuse to register transfers of these surface rights unless they have been registered in terms of item 9(2). The aforesaid leads to sterilisation of these rights which impacts detrimentally on the holders' ability to trade with and/or transfer such surface rights. No apparent reason exists why section 9(2) was inserted in Schedule II as all the relevant rights were previously registered in the Mining Titles Office. Neither is there any apparent reason for the short time (one year) allowed to register (or re-register if that was the intention) such rights. We were informed that the Department of Minerals and Energy seeked legal opinion from the State Law Advisors on the effect of non-compliance with item 9(2) but currently the situation remain unresolved. We respectfully submit that legislative amendment is required to address this issue.

11.4 The most practical way to achieve this would, in our respectful submission, be to allow the designated official in the Mineral and Petroleum Titles Registration Office a discretion to register the relevant rights subsequent to 30 April 2005 on application where such right was not registered before that date.

12. **Amendment of Item 11 of Schedule II**

12.1 Item 11 of Schedule II provides for the continuation to accrue, of any existing consideration, contractual royalty or future consideration ("**Royalties**") which would cease to be payable by virtue of the cessation to exist of old order rights in terms of Schedule II. Two categories of recipients of such Royalties' right to Royalties are preserved by item 11 namely:

12.1.1 individuals (under certain circumstances); and

12.1.2 communities (subject to certain conditions).

12.2 Contractual rights to Royalties which accrue to the State and various organs of State are not so preserved. Table 3 to the Taxation Laws Amendment Act Number 16 of 2004 does provide for the continuation of the obligation of lease, royalty or similar payments to the State if the holder of a mining right, production right or mining permit or prospecting right with a permission to remove and dispose of minerals acquired that right upon conversion of an old order right or OP26 right and was immediately before that conversion required to make lease, royalty or similar payment. However, we respectfully submit that Table 3 has two shortcomings namely:

12.2.1 the amounts of the "*lease, royalty or similar payments*" are not the amounts contractually agreed upon between the State (or an organ of State) and the holder of the right, but an amount which the Minister of Finance must determine in consultation with the Minister of Minerals and Energy according to the same practices, formulae and procedures which applied before conversion [paragraph (2)(a)]; and

12.2.2 the provisions of Table 3 will cease to apply on 1 May 2009.

12.3 The provisions of Table 3 regulate adequately lease, royalty or similar payments which accrue to the State as such. However, we submit that these provisions are inadequate to regulate lease, royalty or similar payments which accrue to various organs of the State which resulted from specific contractual negotiations and agreements and with pre-determined formulae to determine the amounts so payable. Those organs of State will be severely prejudiced if the contractual lease, royalty or similar payments cease to be payable on 1 May 2009. We are aware of instances where organs of the State have granted valuable consideration in exchange for a contractual right to receive Royalty payments.

12.4 Recommendation

Our respectful submission is that these inequities could be resolved by expanding the provisions of item 11 of Schedule II to provide for continued contractual lease, royalty and other payments which accrued to organs of

State and which are not paid into the State Revenue Fund but directly to such organs of State.

13. **Old Order Rights held in undivided shares**

13.1 Our practical experience in natural resource legal practice is that a particular issue which deters investment and gives rise to inequitable results, is the fact that the MPRDA does not provide for acquiring prospecting, mining exploration and production rights, upon conversion in terms of Schedule II in undivided shares. This arises from the fact that, in terms of the Minerals Act, prospecting permits were issued to the holder of an undivided share of mineral rights, without reflecting the undivided share.

13.2 The transitional provisions of Schedule II give rise to uncertainty on the question whether the holder of an undivided share in an old order right, when converted, will acquire an undivided share only, or a full share of the converted right. This could give rise to the illogical result that a person who held 10% of an old order right can convert his right to a full new order right to the exclusion of all other holders of undivided shares in the same old order right.

13.3 This uncertainty may lead to further unintended consequences. There may be various reasons why a number of investors in a natural resource project, do not wish to establish a new company but would prefer to form an unincorporated joint venture to pursue the project. In these circumstances, the investors would wish to acquire the prospecting or mining right in undivided shares. The MPRD Amendment Bill provides the ideal opportunity to address this issue by amending the Act to provide for multiple holders having a share in a prospecting, mining exploration or production right.

14. **Conclusion and recommendation**

14.1 The Bill provides the ideal opportunity to address various matters which are considered to be shortcomings or opportunities to improve the implementation of the MPRD Act.

14.2 We respectfully submit that inadequate public participation process have been conducted in respect of the Bill. We further submit that inadequate time was allowed for proper consideration of the proposals set out in the Bill. We

recommend that extension of time be granted and that all shareholders be granted proper opportunity to consider and to make representations on the Bill.

14.3 We reiterate that these submissions are being submitted in an attempt to promote the objectives of the MPRD Act, in an attempt to participate constructively in the legislative process to the benefit of our country and all its people and with the objective of improving the natural resource laws of our country. We would appreciate an opportunity to make verbal representations to the PC.

THE NATURAL RESOURCES AND ENVIRONMENTAL LAW UNIT
WEBBER WENTZEL BOWENS