MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL B 10-2007

Comment relating to lack of proper consultation provisions

MPRDAB 13

To: The Honourable Chairman
Portfolio Committee: Minerals and Energy
Parliament

From: Nkuzi Development Association and Association for Northern Cape Rural Advancement

1. Introduction

Nkuzi Development Association (Nkuzi) is a non-governmental organisation dedicated to assisting communities with protecting existing rights to land and where possible gaining access to land through various governmental programmes. Nkuzi submits this comment with the Association for Northern Cape Rural Advancement (ANCRA).

Like Nkuzi, ANCRA works with rural communities who live on land without tenure security either within commercial agricultural areas or on communal land, communities waiting to return to their land through the processes set out in the Restitution of Land Rights Act, No. 22 of 1994 and other poor landless communities.

2. This Process

At the outset Nkuzi and ANCRA would like to raise serious concerns about the consultation process around this Bill. By the time the Bill came to our attention, we had less than two weeks to review and consider this submission. We would have liked to take the Bill to communities that we are assisting to consult with them, explain the proposed amendments and their implications, and to allow them space to suggest what they thought of the proposed amendments and/or suggested changes.

Instead we have been forced, within a period of two weeks, to draft a submission that will narrowly focus on what we believe to be one of the fatal flaws of the Bill: the absence of adequate community consultation provisions. The short period that was given to submit comments demonstrates, we believe, a disappointing lack of understanding of the time consuming nature of community consultation in rural and traditional areas.

3. Failure of the proposed Bill to Adequately Protect and Promote full community consultation and benefit

The Limpopo and Northern Cape Provinces have large populations of previously disadvantaged South Africans who live in conditions of overcrowding and abject poverty and who might stand to benefit substantially from Mining laws and regulations

that are aimed at ensuring that the natural resources are used for the development of poor communities.

It has been the experience of Nkuzi and ANCRA, over many years of engaging with and consulting with rural communities that the nature of true community consultation takes time, requires an understanding of the social and power dynamics within communities, and gaining the trust of the most powerful as well as the most marginalised community members. The proposed amendments to the MPRDA do not improve the quality of community consultation, rather they cut back on the already limited provisions in the principal Act.

Specific Concerns with the consultation provisions of the Bill include the following:

a. In amending Section 5 of the MPRDA, the Bill proposes to eliminate the required consultation with the land owner or lawful occupier prior to prospecting, mining, conducting technical co-operation operations, etc. and instead requires only a 21 day written notice to the effected communities. We believe that this approach effectively slams the door on opportunities that marginalised members of communities, particularly women, might have to fully participate in decision making processes that will determine the long term use of land that they may have rights in. Written notices, most likely written in English or Afrikaans, are likely to mean very little to most people living in poor rural communities. At a bare minimum we would expect written notices to be circulated as part of a broader community consultation process that is as inclusive as possible. Written notices on their own provide information to the educated, already well resourced members of communities and do little to provide real or meaningful information to more marginalised community members.

b. The proposed amendment to Section 16 of the MPRDA requires anyone applying for a prospecting right whose application has been accepted by the Regional Manager to submit, within 60 days, a basic assessment report, standard environmental management plan AND to notify in writing and consult with the land owner or lawful occupier, the results of such consultation must be included in the basic assessment report. We do not believe that the time frame to submit all of this information is realistic. Even if the other reporting requirements were absent 60 days to consult with owners or lawful occupiers in many instances will be too short. Particularly in areas where there is contestation as to who the "lawful occupiers" of land are and the precise content of their rights to the land.

c. Likewise, the proposed amendment to Section 27 of the MPRDA requires the same process for anyone whose application for a mining licence is accepted by the Regional Manager. Our concerns in this regard are as stated above.

4. What Should Be Done

Clearly there has been some attempt by the DME to provide for consultation with communities who are living on and have rights in land that is rich in minerals. However the provisions demonstrate a lack of knowledge and understanding of the complex tenure and land administration systems that operate in many of the effected communities. We would hope, at the bare minimum that the DME would withdraw the proposed amendments in order to ensure that they are aligned with existing land legislation such as the Communal Land Rights Act and IPILRA.

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AGRISA

COMMENTS ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL

1. Currently the Mineral and Petroleum Resources Development Act No. 28 of 2002 ("the Act") provides for a consultation process with the landowner/lawful occupier of the land. Section 5(4)(c) prohibits any person from conducting reconnaissance operations, prospecting operations or mining operations (etc.) without first notifying and consulting with the landowner or lawful occupier of the land in question. This is a bland provision and does not specify when such consultation should take place. However, the consultation is dealt with further in Section 16(4)(b) which provides that the regional manager must notify the Applicant for a prospecting right that the Applicant should notify in writing and consult with the landowner or lawful occupier and any other affected party within 30 days of having been notified. This information is then forwarded to the regional manager and, subsequently, to the Minister for consideration.

2. Importantly in the above scenario (which is the current position) the Minister may not grant the rights to prospect unless the aforementioned notification and consultation process (with the landowner or lawful occupier of the land) has taken place.

3. The envisaged amendments to Section 5(d) of the Act (by removal of the requirement that the landowner or lawful occupier of the land be notified and consulted with but, instead, merely be given 21 days' written notice) effectively means that a right to prospect can be granted without any consultation having taken place. Looking at the proposed amendments to Section 16(b), it is noted that the regional manager is still required to notify the Applicant in writing to, in turn, notify in writing and consult with the landowner or lawful occupier. He is then to include the results of this consultation in his basic assessment report.

4. In other words, although the Applicant (for a licence) is required to notify and consult with the landowner/lawful occupier, he needs merely to include the

result of this consultation in his report. Given the amendment to Section 5, as aforesaid, the Minister would now be able to grant the right without any consultation having taken place whatsoever. (In other words, it is quite possible that the results of this consultation could be that the owner of the land was not available and that, accordingly, no consultation had taken place. This would satisfy the requirements of Section 16(4)(b) and would not contravene the requirements of Section 5(4)(c).)

5. Also concerning in the proposed amendment to Section 16(4)(b) is the removal of the words "and any other affected party". It is also concerning that he is only required to consult with the *"... landowner or lawful occupier .."* (my underlining). In other words, in terms of the amended provision, he could consult with a lessee, alternatively, possibly an employee of the landowner, and provided that such person was a lawful occupier, he would have satisfied the requirement of this provision. The same applies for the current wording of Section 5(4)(c) *"... landowner or lawful occupier of the land..."*.

6. The proposed amendment to Section 5 would also affect the obligation of the Applicant to consult with interested and affected parties in terms of Section 22(4)(b). In other words, the Regional Manager is required to notify the Applicant in writing to, in turn, notify and consult with interested and affected parties. However, on a strict interpretation, no obligation is placed on the Applicant himself to notify and consult; and in terms of the amended Section 5, it would not be unlawful for the Minister to grant a licence should no consultation have taken place.

7. In conclusion regarding the above, the envisaged changes to Section 5, when read with Section 16 and 22, would possibly have the effect of allowing mineral prospecting and mining licences to be granted without any consultation taking place whatsoever. This would constitute an unacceptable infringement of the landowner's constitutional and common law rights including, but not limited to, *audi alteram partem*.

8. Furthermore, the wording in Section 5(4)(c) (both currently and in the proposed amended version) could be read to allow for that consultation

process to take place with any "lawful occupier" of the land in question (leaving the landowner out of the picture altogether).

9. Regarding the proposed amendment to Section 17 of the Act, this envisages the substitution of sub-section 1(c) with the words *"... the prospecting will not result in unacceptable collusion, ecological degradation or damage to the environment..."* with *"...an environmental authorisation is issued..."*. Although it must surely have been envisaged by the drafters that the required environmental authorisation will take into account the fact that unacceptable pollution, ecological degradation or damage to the environment must be avoided, it is concerning that this is being taken out of the enabling Act. Section 24 of the Constitution affords everyone the right to have the environment protected by *inter alia* preventing pollution and ecological degradation and we suggest that the proposed new wording should instead be added to the existing wording, without excision of the latter.

10. Regarding the proposed amendment to Section 15 of the Act, this removes the obligation on the holder of reconnaissance permission to produce the permission and consult with the landowner or lawful occupier of the land before entering the land in question. In other words, provided such person has been given a permit to scout certain land for minerals, he is permitted simply to enter the land in question without first announcing or discussing this with the landowner. Firstly, this would expose any holder of a permit to possible danger, in as much as he might enter land which is dangerous without first having been warned of any dangers by the landowner. Furthermore, this would expose the landowner to unplanned, unannounced visits by persons unknown to him. The fact of an application for reconnaissance permission having been made also does not have to be communicated to the landowner by the regional manager (or by any person). Accordingly, the landowner might be completely unaware of the fact that such licence has been applied for (or granted). This constitutes a potential infringement of the landowner's rights in terms of Section 14 of the Constitution (right to privacy). (Notably, the right to conduct a reconnaissance on land constitutes a *prima facie* infringement of Section 14(b) of the Constitution (the right not to have one's property searched). However, this would probably constitute a reasonable and acceptable infringement of the

aforementioned right.) Regarding the proposed amendment to Section 27 of the Act, it is proposed that sub-section (5)(b) be amended. The distinction between landowner and lawful occupier (*"... landowner or lawful occupier ..."*) remains and it is suggested that this should be amended to *"... landowner and lawful occupier, if applicable ..."*. Once again, the requirement for action specified in sub-section 5 rests on the Regional Manager and not the Applicant. Accordingly, our comments in respect of the proposed amendments to Section 5 (etc), above also apply with regard to the aspect of consultation here.

11. Regarding the proposed amendment of Section 41 namely, the addition of sub-section (1)(6), the implications of this are unclear. Possibly it is meant that making the prescribed financial position envisaged in this sub-section (1) of the Act would not constitute avoidable transactions in terms of the Insolvency Act. Full clarity is required in respect of this proposed amendment.

12. Regarding the proposed amendment to Section 105 of the Act, this is in line with the aforementioned proposed amendments which remove the requirement to consult with the landowner or lawful occupier of the land. Nevertheless, this section itself does not affect the rights of the landowner/occupier.