

## Comments regarding the

### DRAFT BROAD-BASED BLACK ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2018 (DRAFT REVIEWED MINING CHARTER)

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## A) INTRODUCTION

### ***About these submissions***

1. These submissions are made by the Centre for Applied Legal Studies (CALs) in our capacity as representatives of the mining-affected community networks Mining-Affected Communities United in Action (MACUA); Women Affected by Mining United in Action (WAMUA); and The Mining and Environmental Justice Community Network of South African (MEJCON-SA).

### ***About the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA)***

2. MEJCON-SA describes itself as follows:

'The Mining and Environmental Justice Community Network of South African (MEJCON-SA), is a network of communities, community based organisations and community members whose environmental and human rights are affected, directly or indirectly, by mining and mining-related activities.'<sup>1</sup>

### ***About Mining-Affected Communities United in Action (MACUA)***

3. MACUA describes itself as follows:

'Mining-Affected Communities United in Action (MACUA) is a voluntary movement specialising with capacitating communities and activists on issues of the environment when dealing with corporations, transitional corporations and government. MACUA operates in all nine provinces affected by mining in South Africa.'<sup>2</sup>

### ***About Women Affected by Mining United in Action (WAMUA)***

4. WAMUA describes itself as follows:

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<sup>1</sup> Comments of the Mining and Environmental Justice Community Network on the Mineral and Petroleum Resources Development Act Draft Amendment Bill, 2012.

<sup>2</sup> Paragraph 1 of the founding affidavit by MACUA in the matter of *Chamber and Mines and Others v the Minister of Mineral Resources*.

'In most community based organisations women's voices are not heard. It became of paramount importance women to mobilise against mining that tends to be exploitative to mining affected communities. Women need to be at the forefront of championing those struggles as they are there ones who carry the burdens of mining or environmental degradation on land and mining resources.<sup>3</sup> As a result, a women's movement was established as part of MACUA. WAMUA was founded on 5 December 2012. Our membership is spread across 8 provinces within the country where MACUA has its own presence.'<sup>4</sup>

## **Summary of submissions**

### **B) FLAWS IN THE PUBLIC PARTICIPATION PROCESS WITH RESPECT TO MINING-AFFECTED COMMUNITIES**

5. The importance of the Mining Charter cannot be overstated, being one of two key mechanisms for the transformation of the minerals sector. A key sector in the South African economy, with linkages to other sectors such as construction, energy and metallurgy, the distribution of wealth and power in the sector has had and continues to have a significant impact on configurations of class, race and gender power in South African society as a whole. In particular, the sector has historically been implicated in the dispossession and exploitation of black workers, communities, and has contributed to gender inequality.
6. Any changes to the Charter therefore have significant implications on the lives of millions of workers and members of mining-affected communities. For this reason, and to live up to its billing as a broad-based charter, it is especially vital that communities, workers and women in particular are afforded the opportunity to play a meaningful role in shaping what the mining charter looks like.
7. On 14 November MEJCON, MACUA and WAMUA, represented by CALS, were admitted as parties in the case of the matter of *Chamber of Mines and Others v Minister of Mineral Resources* with case number 71147/17, arguing that the Mining Charter of 2017 be set aside on the ground of a failure to meaningfully engage in the process of developing the Charter, and seeking an order requiring the DMR to meaningfully engage with mining-affected communities in the formulation of a new Charter. At the same time, four mining-affected communities represented by the Lawyers for Human Rights (LHR) namely the Bakgatla Ba

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<sup>3</sup> Paragraph 5 of the supporting affidavit by WAMUA in the matter of *Chamber and Mines and Others v the Minister of Mineral Resources*.

<sup>4</sup> Ibid at paragraph 6.

Sefikile; Lesthleng; Babina Phuti Ba Ga Makola; and Kgatlu communities were also admitted as parties.

8. On 20 February 2018 the court issued an order recognising MEJCON, MACUA and WAMUA, together with the communities represented by LHR as ‘interest [sic] and relevant stakeholders for the purpose of consultation on the Charter formulation process.’
9. Subsequent to the handing down of the order, CALS, in its capacity as legal representatives of MACUA, WAMUA and MEJCON, wrote a series of letters to the DMR and the Presidency in relation to the public engagement and community consultation process in fulfilment of the court order. Out of these letters, CALS only received a response to the letter dated 4 July 2018. The main purposes of the letters were to obtain clarity on the department’s public engagement plan so that our clients could prepare; to bring defects in the process to the attention of the department and request that these be remedied; and to obtain clarity on the nature of logistical support the department would provide to enable our clients to attend.
10. Though there were exceptions, the general pattern of the engagement, especially during the first two months, following the order, was of non-response to letters by legal representatives and of notification of meetings the day or two before they occur. This makes it difficult for members of community networks, many of whom are unemployed, to attend hearings and meetings that are at some distance from where they reside. Some of the key objections and themes of our clients we conveyed through the letters were:
  - 10.1. The inadequate notice period afforded to communities to attend the meetings (typically 1 or 2 days prior to the meeting)
  - 10.2. The exclusion of community members through selecting unsuitable (e.g. too small) venues
  - 10.3. The absence of logistical and transport provided for communities coupled with the consultations taking place during work hours
  - 10.4. Insufficient time at meetings for community members to make inputs

- 10.5. The absence of any information being provided to delegates prior to meetings (e.g. copies of the 2017 Charter that was to form the basis of the new charter)
- 10.6. Reports by some communities that they were not being addressed in the predominant first languages spoken in the area.
11. We do acknowledge that the Department improved the manner of engagement with mining-affected communities as the process unfolded. An important milestone were the one-on-one meetings between community networks and the Department in which the former presented the draft 2018 Mining Charter and community members were given an opportunity to provide verbal comments. However, the regional public engagements, which were a critical component of the public participation process, were flawed for the reasons discussed above.

## **C) PEOPLES MINING CHARTER**

12. On 26 July 2016, representatives of mining-affected communities across South Africa endorsed the Peoples' Mining Charter, embodying their demands and aspirations.<sup>5</sup> It contains 9 principles including but not limited to free prior and informed consent and community voice in decision-making; communities sharing in all benefits from mining; adequate rehabilitation; compensation for all losses as a result of mining; and women's rights to land, including to inherit land.
13. Despite the broad legitimacy of the document and communities' persistent advocacy of it in legislative and policy engagement fora, to this date no law or policy makes reference to it and their content is far removed from its approach. This is symptomatic of a broader pattern of exclusion and disregard for the aspirations and interests of mining-affected communities.

## **D) DEFINITIONS**

### **COMMUNITY**

14. It is critical that mining-affected communities are carefully defined in the mining charter and other legislation and policy instruments in order to ensure that the beneficiaries of programmes are the same people who experience the most direct negative impacts of mining.

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<sup>5</sup> Peoples Mining Charter, adopted on June 26 2016 in Berea.

15. The 2017 Mining Charter defined “Mine Community” as follows:

*“Mine Community” refers to communities where mining takes place, major Labour Sending Areas, as well as adjacent communities within a local municipality, metropolitan municipality and /or district municipality;*

16. The 2018 Mining Charter, instead of an umbrella definition, provides two separate definitions:

*“Host community” refers to a community/ies in the local, district, metropolitan municipality or traditional authority within which the mining area as defined in the MPRDA is located.*

*“Labour sending areas” refers to an area from which a right holder sources majority of its current or historical South African employees.*

17. The draft 2018 Mining Charter takes away the direct reference to communities where mining takes place but refers to the definition of ‘mining area’ in the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). The legislative definition does refer to land on where mining takes places and adjacent and impacted areas.

This concept of ‘mining area’ is not, however, explained in the text of the draft 2018 Mining Charter. It is also not clear, whether there is a particular focus on communities residing in the mining area or merely on the unit/s of local government in which the mining area is located.

18. We submit that, based on an understanding of impact and geography, mining-affected communities should be, for the purposes of the mining charter, be distinguished into at least three definitions.

18.1. First there are communities who reside in the mining area and for whom the fullest range environmental, social and economic impacts of mining are experienced directly on a daily basis. In other words people, who see, hear and breathe in the mining operation on a daily basis.

18.2. Second, there are also communities who may live somewhat further from the mine but still fall within a local economy, society and physical environment significantly shaped by mining operations. For this broader

community, the use of markers such as the municipality is more appropriate.

- 18.3. Finally, as is already distinguished in the draft 2018 Mining Charter, there are the communities from where mining operation source or have sourced the majority of its employees.
19. We have also observed that both the 2017 Mining Charter and the draft 2018 Mining Charter restrict the definition of 'labour sending areas' to areas in South Africa. This is in spite of the fact that companies have, since the early years of the industry, employed migrant workers from neighbouring countries including Lesotho, which is entirely surrounded by South Africa.

## **E) OBJECTIVES OF THE MINING CHARTER**

20. The draft 2018 Mining Charter, sets out its objectives which are as follows:
- 20.1. (a) Recognise the internationally accepted right of the State to exercise sovereignty over all its mineral resources
  - 20.2. (b) Deracialise ownership of the mining industry by redressing the imbalances of past injustices
  - 20.3. (c) Substantially and meaningfully expand opportunities for Black Persons to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources
  - 20.4. (d) Utilise and expand the existing skills base for the empowerment of Black Persons
  - 20.5. (e) Advance employment and diversify the workforce to achieve competitiveness of the industry and productivity;
  - 20.6. (f) Enhance the social and economic welfare of mine communities and major labour sending areas in order to achieve social cohesion;
  - 20.7. (g) Promote sustainable development and growth of the mining industry;
  - 20.8. (h) Catalyse growth and development of local mining inputs sector by leveraging the procurement spend of the mining industry; and
  - 20.9. (i) Promote beneficiation of South Africa's mineral commodities
21. In comparison to the 2017 Mining Charter, the objectives are substantively the same though with the exception of objective (c) the reference to the 'mining and minerals industry' has been replaced with 'the mining industry' only.



22. In comparison to the previous 2010 Mining Charter, this represents two new objectives, which are, however, implicit in the objectives of the earlier Charter. The 2010 Mining Charter did not directly list amongst its objectives:
  - 22.1. 'advance employment and diversify the workforce to achieve competitiveness of the industry and productivity' ('advancing employment' was placed together with promotion of welfare of communities in the 2010 charter)
  - 22.2. 'Catalyse growth and development of local mining inputs sector by leveraging the procurement spend of the Mining Industry'
23. These are vital transformative objectives and part of any evaluation of the Charter should be based on how fit for purpose its substantive provisions are for realising these purposes.
24. There are, however, some omissions of importance that indicate limits to the Charter's vision of transformation when considered in light of Constitutional imperatives.
25. Most notably there is no specific reference to women in these objectives. Historically and currently mining entrenches gender inequality both in the community and amongst the workforce. The problems will be discussed in more depth later in the comments.
26. Further, the objectives simply refer to benefits from mining without acknowledging the costs that are externalised by companies and which are born by mining-affected communities and which include displacement from homes and land, blasting damage, and loss of access to water and food security. These impacts should not be solely seen as biophysical environmental impacts, but also directly impacting on communities' ability to develop economically.

## **F) ELEMENT ONE – OWNERSHIP**

### ***Black Persons ownership stake and breakdown***

27. Like the 2017 Mining Charter, the draft 2018 Mining Charter increases the required share of ownership by Black Persons in holders of mining rights from 26% to 30%. Further, the 2018 mining charter continues the requirement that host communities and workers receive a share of equity and the basic allocation

of the share in new mining operations remain between 14% allocated to BEE entrepreneurs, 8% to host communities and 8% to 'qualifying employees'.

## ***Community and worker ownership***

28. As stated above, the minimum equity share of host communities and workers in all new mining rights remains the same from the 2017 Mining Charter at 8% each.
29. The 2018 Mining Charter departs from the 2017 version in specifying that at least 5% of host communities and workers' shares is non-transferable free carried interest. This means that, firstly there is a guaranteed 5% share which communities and workers do not have to finance via loans and, secondly, that the share cannot be sold on the market to people who are not communities or workers.
30. The remainder 3% stake would be financed, like the 14% BEE entrepreneurs stake, through loans and other vehicles.
31. We welcome the free carried interest requirement as an important step in addressing inequality in the mining sector. Given the extent to which mining impacts negatively on the rights and interests of mining-affected communities and workers, it is important that, to begin to balance this, the share be provided in the form of free carried interest.
32. The first respect in which the ownership provision could be democratised is for requiring the full black economic empowerment share for all new operations to be divided equally between host communities and employees. The Constitutional imperative of transformation is about the achievement of substantive equality, which involves the redistribution of wealth and power to the victims of colonialism and apartheid so as to enable social and economic equality. Communities and employees represent the broadest categories of persons impacted by mining and the people that historically and presently bear the economic, social and environmental costs of mining and who live in poverty amidst the wealth of a minority. Black capitalists have been empowered through the prior iterations of the Mining Charter. Going forward, entrepreneurs outside the community should be required to purchase shares
33. Second, as pointed out by John Capel of the Bench Marks Foundation, there are no community and worker equity requirements for existing mining operations.

The mining charter should specify requirements for community and worker equity for existing operations over and above the existing BEE stake.

34. Another feature introduced by the draft 2018 Mining Charter is the provision for a 'trickle dividend' to be paid to communities and workers during a 12 month period where dividends are not declared. The obligation to pay the dividend kicks in in the sixth year of the mining right. The trickle dividend is 'a minimum of 1% of Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA).'

### ***Community trusts for managing community equity***

35. As stated in our comments on the Charter's definitions above, we applaud the decision of the Department to jettison the Mineral Transformation and Development Agency (MTDA) as the vehicle for overseeing the management of the community equity trusts. This is because the MTDA concentrated excessive power in the Minister and lacked mechanisms for governance and accountability to communities.
36. We also welcome the recognition by the department, as communicated in the various engagement fora, that communities should have the right to choose the vehicle (whether community property association or other) for managing their share of equity in the mining right.
37. However, members of the largest national community networks (MACUA, WAMUA, and MEJCON-SA) have registered their concern regarding the failure of the Mining Charter to contain any safeguards to address the present and widespread problem of the abuse of communal resources by traditional leaders, politicians or other local elites. Examples of communal land where this problem has been reported on include the Bakgatla-ba-Kgafela area (Pilanesberg, North West), the Bapo-Ba-Mogale (near Rustenburg), and Mapela (Mokopane, Limpopo).<sup>6</sup>
38. True community control, as opposed to control by a narrow elite, is impossible if there are no mechanisms by which the broader community can hold the managers of community funds/equity accountable for their decisions on the allocation of resources and the implementation of those decisions. This is, in turn, impossible unless everyone in the community has access to comprehensive

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<sup>6</sup> S Mswana 'Chief's justice? Mining, accountability and the law in the Bakgatlababa-Kgafela Traditional Authority Area' (September 2014) 40 SA Crime Quarterly 21; G Capps and S Malindi 'Dealing with the tribe: The politics of the Bapo/Lonmin Royalty to Equity Conversion Working Paper 8 (May 2017) Society, Work and Development Institute, University of Witwatersrand; M Phalane 'Kgoshi accepted R175m deal while on Anglo Platinum's dime' Mail & Guardian (17 June 2016).

documentation on the activities of the vehicle. Therefore, far from removing community agency, the outlining of basic principles of democratic decision-making, accountability and transparency is critical for ensuring whichever model is adopted by communities leads to real community control.

39. Representatives of MACUA, WAMUA and MEJCON, as well as civil society organisations have, in workshops, identified the following principles that should be included in the mining charter with regard to community trusts:

39.1. Community control over the equity;

39.2. All decisions to be driven by a broad community mandate;

39.3. Regular elections of members of structures;

39.4. Regular auditing and financial reports;

39.5. Regular public meetings (no-closed door meetings for elites);

39.6. Complete transparency and dissemination of information to the community.

## **G) ELEMENT 2 – INCLUSIVE PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT**

40. The 2016 draft Mining Charter and 2017 Mining Charter introduced an important change to the targets pertaining to procurement of mining goods. Whereas in prior versions of the mining charter, the target was only for procurement from South African companies, from the 2016 draft, the goods need to be manufactured in South Africa. This is very important for boosting the South African manufacturing economy.
41. There is, however, an important omission. There draft 2018 Mining Charter does not require that any proportion of goods or services be procured from the mining-affected community or even that the company must do an audit of available goods and services from the community.
42. Further the targets for procurement of goods and services for women and youth entrepreneurs/companies are formulated as 'either/or' rather than 'both and.' The effect is to minimise the importance of providing opportunities to both women and

young people and to create uncertainty amongst both women and youth that they will benefit.

43. In light of the above we suggest the following changes to this section of the draft 2018 Charter

- 43.1. Set targets for procurement from host communities.

- 43.2. Provide a positive duty for mining right holders to do an audit of available goods and services from host communities.

- 43.3. Set separate targets for procuring goods and services from, firstly, women entrepreneurs/women controlled companies; youth entrepreneurs or youth controlled companies.

## **H) ELEMENT 3 – HUMAN RESOURCES DEVELOPMENT**

44. Skills development (referred to as ‘human resources development’ in our legislative framework) is critical for the economic advancement and security of both mine workers and mining-affected communities. Given that all mining operations eventually close and the reality that most community members will not be employed on mines, training in in-demand portable skills is at least as vital as training in mining related skills.
45. As before, there is provision for 5% of a leviable amount to be invested in essential skills development. In the 2017 Mining Charter, 2% went to the MTDA leaving 2% for essential skills (employees and communities) and 1% for research and development in a number of areas (exploration, mining processing, technological efficiency, beneficiation, environmental conservation and rehabilitation). In the draft 2018 Mining Charter, the MTDA is abandoned and the amount is divided into 3.5% for essential skills (for employees and communities) and 1.5% for research and development.
46. We welcome the decision to devote the entire sum of money for the stated purposes rather than to the MTDA. We also welcome the retention of the provision that skills development programmes be offered to mining-affected communities as well as employees.

47. We hope that this leads to the DMR requiring greater commitments to portable skills, bursaries and other community skills development programmes in SLPs.

## **I) ELEMENT 4 – EMPLOYMENT EQUITY**

48. We recognise and applaud the department's decision, in the draft 2018 Mining Charter to, to for the most part, maintain the substantial increase in the targets for Black Persons in the management of mining rights holders introduced in the draft 2016 Mining Charter and the 2017 Mining Charter. This correctly recognises that the ongoing goal is to ensure that racial inequality in management is eradicated and that each Charter represents a progressive step towards this goal.
49. However, the draft 2018 Mining Charter is far less ambitious and progressive when it comes to advancing gender parity.
50. First, the draft 2018 Mining Charter, in common with the 2010 and 2017 iterations and the 2016 draft, does not provide targets for employment of women as mine workers.
51. This is of concern as one of the impacts that the vast gender disparity in recruitment and employment in mining has is that it weakens and marginalises women socially and economically. Women in mining-affected communities have observed the male population of mining areas increase, as jobs are understood to be available to men. Secondly, the reality that the bulk of women who experience the gendered impacts of mining, including on land rights and food security' will not be employed on the mine renders them economically vulnerable, which in turn renders them more vulnerable to abuse and exploitation.
52. The second problem relates to the targets for the employment black women in all levels management (board, executive/top management, senior management, middle management and junior management). Whereas the 2017 Mining Charter provided that half of the specified minimum posts in each category needed to be occupied by black women, in the draft 2018 Mining Charter these were dropped to around one third (the exact share for black women varies slightly between the different levels of management).
53. In response to the criticisms voiced by community and civil society organisations (women's representatives in particular) of this reduction in targets, the department referred to the input by and the latest 2017-2018 Annual Report of the Commission for Employment Equity. The department's argument seems to

be that given the present (low) representation of women at different levels of management, the targets in the 2017 mining charter were too ambitious.

54. The 2017-2018 annual report does indeed show that representation of black women in the different levels of management of mining companies is very low (about 7.5% at top management, 7.4% at senior management, 12.6% at 'professionally qualified and experienced specialists and mid-management; and 12.6% at Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents.<sup>7</sup>
55. This is also further evidence of the broader marginalisation of black women in particular in the economy.
56. This however, can also be read as evidence of how little gender transformation has been prioritised and does, not in of itself, show that it is impossible for companies to, within the next five years, achieve 25% black women on the board, 25% black women in top management, 25% black women in senior management, 30% black women in middle management and 35% black women in junior management.
57. Another aspect of transformation is in addressing the barriers to meaningful participation of groups of people who are marginalised and oppressed. For example violence, sexual harassment and other discrimination against women in the workplace, whether in corporate offices or on the mine site. The failure of the Charter to address this problem will be discussed in the standalone section of these comments discussing the 2018 draft Charter and gender.

## **J) ELEMENT 5 – MINE COMMUNITY DEVELOPMENT**

### ***Introduction***

58. This is a particularly detailed part of our submission, given the focus of our work so we will divide it into the following themes: community participation and the relationship between SLPS and IDPs, access to information and dissemination, regulation of the scale of SLPs, the status of unfulfilled SLP obligations in the next SLP cycle, and the legal source of the standards governing SLPs.

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<sup>7</sup> At 79.

## ***Community participation and the relationship between SLPs and IDPs***

59. The 2010 Amended Mining Charter did specify that companies must in collaboration with communities, conduct a needs analysis and identify projects in line with the municipal integrated development plan (IDPs) for their contribution to community development. While the relationship between the two processes of consultation was not specified it did provide in principle that a.) There must be direct engagement with communities on their needs and preferred projects and that b.) Such projects needed to be aligned with the IDP. Unfortunately SLPs were not expressly mentioned as the vehicles for such projects.
60. Following the review of the 2010 mining charter, the draft 2016 mining charter changed the formulation to:
- ‘Meaningful consultation and co-ordination between mining companies, communities and local municipalities is a critical element in ensuring mine community development consistent with international best practices...’
61. The formulation was in fact less clear than its predecessor and again did not mention SLPs directly.
62. The 2017 mining charter revised the language in the following manner:
- ‘District, metropolitan, and local municipalities as constitutionally, mandated institutions for community development, have a responsibility to develop integrated development plans (IDP’s) in consultation with all relevant stakeholders in a transparent and inclusive manner in terms of applicable legislation. A holder must contribute towards Mine Community development by identifying priority projects as per the approved IDP.’
63. While correctly providing that development projects identified by mining companies (i.e. SLPs, though the term is not used in this paragraph) need to be aligned with municipalities’ IDPs, there is no provision for direct participation by communities in identifying needs and desired projects. The formulation seems to assume that IDPs always perfectly reflect the needs of the broader community. There is evidence, however, that while there is a broad-based consultation process preceding the development of IDPs, the content of the IDP that emerges often does not reflect the priorities of communities. This evidence has emerged



both from studies and in our own engagements with mining-affected communities.<sup>8</sup>

64. The draft 2018 Mining Charter adjusts the formulation to the following:

‘to this end, a right holder must, in consultation with relevant municipalities, mine communities, traditional authorities and affected stakeholders identify developmental priorities of mine communities. The identified developmental priorities must be contained in the prescribed and approved Social and Labour Plan of a right holder.

65. The draft 2018 Mining Charter therefore returns the provision for direct community participation in addition to engagement with the municipality and, in this, is consistent with the growing demands by communities to participate in the SLPs of the mines on their doorsteps. Representatives of organised mining-affected communities have, however, been critical of the specific mention of traditional authorities. They argue that under African Customary Law, authority resides in the people as a whole and traditional leaders are merely custodians. The specific mention of traditional authorities seems to recognise them above the heads of communities who are the source of their authority. There are even customary communities that lack the institutions of hereditary rule. It is through consultation with the broader community that the nature and role of traditional authorities will be ascertained. T

66. Community members have also raised the issue of the failure of the draft Mining Charter to set out principles for the process of community participation in SLPs. In consultations between community networks, civil society partners and legal representatives a number of parameters:

66.1. Adequate notice of any meetings or release of documents, such that notices can realistically reach the full cross-section of the community taking into account local communication channels;

66.2. Meetings to be public and in venues accommodating the maximum number of community;

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<sup>8</sup> Njenga ‘A Critical Analysis of Public Participation in the Integrated Development Plans (IDP) of Selected Municipalities in Some Provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa.’ Submitted in partial fulfilment of the requirements for the degree of Master of Social Sciences (Policy and Development Studies) in the Faculty of Humanities, Development and Social Sciences in the University of KwaZulu-Natal, Pietermaritzburg (2009) 53.

- 66.3. Materials (e.g. draft SLPs and summaries) to be provided in advance of meetings to enable meaningful participation;
- 66.4. All meetings to be conducted in the predominant first language/s of the communities benefiting from the SLP;
- 66.5. Meetings must be broad-based and the charter must clear state that participation by a narrow elite is not enough to be compliant;
- 66.6. Content of SLP projects to be derived from community mandates;
- 66.7. Communities must be privy to and part of all meetings between the company, local government, the DMR and other branches of government relating to the alignment of SLPs, IDPS and other developmental frameworks.

### ***Access to and dissemination of information***

67. A persistent challenge experienced by communities and civil society partners is accessing information pertaining to SLPs (draft SLPs, final SLPs, annual compliance reports etc.). For this reason we welcome the retention of the requirement, that first introduced in the 2017 Mining Charter that SLPs are 'to be published in English and other languages commonly used within the Mine Community.'
68. However this formulation could still be improved. For SLPs to be public documents in practice as well as there, **there need to be positive duties on mining companies to, within a timeframe, post all SLPs and associated documents on their websites.** Further, there should be a positive duty to provide physical copies to community members. The form of access is a vital question, because one of the barriers communities and civil society organisations are currently facing is that even when national headquarters of the DMR agrees to grant access to the documents, the regional offices where the documents are held often do not give effect to this decision. Often they do not respond for prolonged periods to phone calls and emails, and even when there is a line of communication, multiple follow ups are often required. This is time and resource intensive, especially for community members.

69. There are also important sets of information relating to SLPs that communities and civil society organisations have difficulty accessing. First, we have encountered a resistance in the department to releasing financial information pertaining to SLPs (and other license conditions). For accountability, it is vital that communities know how much money is budgeted for each community project and how that money has been spent. Given that the MPRDA recognises that these are the peoples' resources and the state (and by extension the right holder) is merely a custodian, all information pertaining to how these resources are managed, including where all revenue and expenditure pertaining to legal compliance travel, must be public. This includes in addition to expenditure on SLPs, all financial reports on companies. The flow of taxes and royalties to the state must be public knowledge.
70. Second, there have been instances in which directly affected communities (residing with sight of the mine) have unsuccessfully sought access to draft SLPs through engagement with mining companies and access to information requests under PAIA. Community participation in developing SLPs is meaningless if they do not have access to drafts so that they can comment. If the concern of the DMR is to prevent confusion, all draft documents can be labelled as such to prevent this. Draft SLPs should therefore be public documents for communities, mine workers and local government in particular.

### ***Regulation of the scale of SLPs***

71. A major lacuna in the legal framework for SLPs is that there is no framework for determining the scale of SLP investment by a company required. This absence of such a formula can lead to SLPs that are insignificant in their impact when measured against the impacts of the operation. It can also enable the abuse of the consolidation of SLPs for different mining rights for the same right holder in a particular area. Consolidation of SLPs can make sense as it can allow larger more impactful projects and avoids duplication. However it cannot be used to allow companies, with, for example 5 mines in the Welkom area to consolidate the operations into a single SLP, and spend the same total amount that they would normally spend on each operation. A formula is therefore necessary. The main variables should be the size of the mining operation (possibly projected turnover) and the scope and intensity of the negative impacts of the operation on communities.

72. The 2016 draft Mining Charter took a step forward and required that mining companies 'Annually contribute a minimum of 1% of annual turnover towards local community development and labour sending areas.' Though the text itself did not state this, this seems to be a reference to SLPs.
73. The 2017 Mining Charter omitted reference to a specific quantum but retained the principle that 'a Holder's contribution towards Mine Community development must be proportionate to the size of the investment.'
74. In the 2018 Mining Charter even this principle has been omitted.
75. For the reasons outlined above recommend that the department reintroduce a specific formula for determining what is the minimum permissible expenditure by companies on SLP. It is important that the formula be calculated with reference to turnover rather than profits. Turnover will represent a larger sum. In addition, the use of after tax profits will provide companies with more discretion and therefore avenues for minimising their contribution. This should be accompanied by a clear provision forbidding companies from reducing their expenditure on SLPs in the event actual turnover falls short of what is projected. There should also be a requirement that companies secure the financial provision for SLPs as they are already required to do for environmental rehabilitation.

## **K) HOUSING AND LIVING CONDITIONS**

76. Procurement is, potentially, a powerful lever for the development of areas and communities and for the de-racialisation of upstream and downstream industries. For this reason, the Mining Charter contains targets for procurement from BEE compliant companies. The draft Reviewed Mining Charter has revised the BBEE procurement provisions through increasing the targets to 60% capital goods, 70% consumables and 80% and providing more detail to help ensure the requirements have the desired impact.

## **L) INSUFFICIENT MEASURES TO PROMOTE GENDER EQUALITY**

77. The South African Constitution, most directly through Section 9 (2) of the Constitution, provides government with a mandate to protect and advance the interest of persons or categories of persons disadvantaged by unfair discrimination. The colonial and apartheid orders were founded on racial and gender discrimination as well as discrimination on sexual orientation and other ground. The mining sector was founded on the exploitation of black workers but

also on the exclusion of women who nevertheless provided unpaid and unrecognised labour, without which mining would have not operated.

78. The objects of the empowering legislation, the MPRDA, as outlined in Section 2 therefore include

‘(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa; and (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, 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;’

79. Further, the prescribed purpose for the Mining Charter, in the empowering provision, Section 100 (2) of the MPRDA, is ‘to ensure the attainment of governments objectives for addressing the historical, social and economic inequalities as stated in the Constitution’ and refers specifically to the objects referred to in 2 (c), (d), (e), (f), and (i) of the Act.
80. The draft 2018 Mining Charter does not significantly depart from previous iterations in relation to gender.
81. Like its predecessors there are no measures for addressing the gendered impacts of mining on communities – i.e. the ways in which mining exacerbates gender inequality. The arrival and/or expansion of mining operations is increasingly associated with the dispossession of rights to communal land, including use rights. This has impacted on women who have customary rights to work the land. Where mining dispossesses women of these rights, they are placed in an economically vulnerable position which ultimately increases their vulnerability to gender-based violence. At the same time mining operations employ men nearly exclusively which skews economic power in communities. In the mining charter participation process, women have stated that the arrival or expansion of mining in their communities changes the demographic balance in favour of men.
82. The mining charter could remedy this, firstly, through requiring companies’ local economic development projects (in SLPs) include income generating projects specifically targeted at women. Secondly, were mining legislation and policy to uphold free prior and informed consent (FPIC) to mining projects and provide a

process for restitution and compensation for the full losses experienced as a result of mining, it would be easier to ensure mining does not economically disenfranchise women.

83. The second area on which the Charter is silent is on the employment of women as workers on the mine site. Women remain a vulnerable minority on mines. If accompanied by other requirements, including adequate processes to address gender-based violence on the mine site, the progressive inclusion of more women on the mine site could contribute towards addressing this.
84. There are concrete measures that could create a working environment more conducive to the dignity, safety and career progression of women on the mine site. Some of these measures can be expressed as targets in a Mining Charter. These include infrastructural requirements (equipment suitable for women, separate changing and ablution facilities etc.); shift management (steps to ensure women are not significantly outnumbered by men in the crew/cage). There are also institutional measures. For example requiring all mining companies have policies against gender-based violence and victim-centred processes for responding to gender-based violence. Another barrier identified by Benya in her MA study of women in mining is the lack of support structures for women who are pregnant.<sup>9</sup> There should therefore be requirements pertaining to the support for women mineworkers giving birth and childcare facilities.
85. Such requirements are notable by their absence in the draft 2018 Mining Charter, like its predecessors. We strongly recommend that Mining Charter require basic measures to address the barriers faced by women on the mine.
86. As discussed in the section dealing with employment equity above, the draft 2018 Mining Charter provides targets for the representation of Black women in management that are significantly lower than in the 2017 Mining Charter (see above section for argument against this change).

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<sup>9</sup>A Benya 'Women in Mining: A Challenge to Occupational Culture in Mines' (2009) A dissertation submitted to the Faculty of Social Science and Humanities of the University of the Witwatersrand, Johannesburg, South Africa, in partial fulfilment of the requirements for the degree of Master of Arts (Industrial Sociology). At 121-124

## M) THE FAILURE OF THE MINING CHARTER TO ADDRESS ENVIRONMENTAL SUSTAINABILITY

87. A longstanding objection by communities and civil society organisation is that Charter only focuses on benefits and does not recognise the need to compensate for environmental losses as a result of mining. For this reason the omission of environmental issues in the 2018 draft Mining Charter, in contrast to the 2017 Mining Charter comes as a disappointment.
88. Local economic development cannot be advanced on a long term basis without meaningfully addressing the impacts of environmental degradation on the local economy. As the Constitutional Court recognised in the landmark *Fuel Retailers* judgement, 'development cannot subsist upon a deteriorating environmental base.'<sup>10</sup> Consequently, local economic development can be imperilled by the harm to local ecosystems goods and services as a result of mining. This means that when conceiving of the economic benefits of mining one must factor in the economic value of the environmental goods and services that have been lost as a result of mining.
89. Given the significant impact of mining-related environmental impacts on health and livelihoods it is to be expected that many of the struggles of mining-affected communities centre around environmental justice. One of the most prescient examples is the Amadiba Crisis Committee's struggle to save the community's lush and pristine ancestral land from mining. Further many organisations and networks representing mining-affected communities are specifically organised around challenging environmental injustices to the extent of naming themselves accordingly and MEJCON-SA, Waterberg Environmental Justice Forum (WEJF), and the Green Revolutionary Council to cite just three examples. The Peoples Mining Charter, the document which represents the vision, demand and aspirations of over 150 mining-affected communities, further refers to the environmental losses experienced by communities.<sup>11</sup>
90. We note the argument by the DMR that the environmental impacts of mining are now, in the one environmental system, regulated under different legislation (namely the National Environmental Management Act, 1998 and the National Water Act, 1998) and that the DMR must not encroach on other departments'

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<sup>10</sup> *Fuel Retailers Association of Southern Africa v Director-General, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) (Fuel Retailers Case) at para 44.

<sup>11</sup> Peoples Mining Charter Adopted on 26 June 2016 in Berea.

competencies. We further note the argument that including such measures in the Mining Charter duplicates existing regulations. We, however, are not satisfied that this argument justifies a complete failure to deal with environmental issues, which are at the core of concerns expressed by mining-affected communities in the draft 2018 Mining Charter. Numerous aspects of the Charter have always involved departments and core mandates apart from the DMR, most notably the provisions on employment equity and housing and living conditions. It is entirely possible to add distinct targets pertaining to the mining industry that are in conformity with the existing legislative framework for the area and which are arrived at following consultation with the competent authority for regulatory area.

91. There is a critical developmental dimension to environmental sustainability and management which is not acknowledge in the draft 2018 Mining Charter and which represents a missed opportunity. This is the significant resources required for the rehabilitation of mines, which be utilised to provide employment and skills development opportunities to mining-affected communities, especially in the mine closure context. We therefore recommend that rights holders be required to develop programmes involving the training and employment of community members in the process of environmental rehabilitation.

## **N) THE FAILURE TO ADDRESS COMMUNITIES' RIGHTS TO FREE PRIOR AND INFORMED CONSENT**

92. Like its predecessors, the draft 2018 Mining Charter, does not uphold the right of communities to say no to mining. There is increasing documentation that the lack of legal protection of the rights of community to say 'no' to mining is enabling the continuation of the dispossession of rural Black South Africans. This often occurs through agreements concluded between traditional authorities and mining companies.
93. The right to Free Prior and Informed Consent (FPIC) is an emerging rule of international human rights law as evidence by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 32 (2) of UNDRIP provides that:

'States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in



connection with the development, utilization or exploitation of mineral, water or other resources'

94. FPIC honours a longstanding principle of African Customary Law. This is recognised in the Interim Protection of Informal Land Rights Act (IPILRA), enacted to give effect to Section 25 of the Constitution of South Africa, pending the establishment of a permanent legislative framework for recognising previously unrecognised forms of tenure of Black South Africans.<sup>12</sup> IPILRA provides that people cannot be deprived of rights to land in terms of the act unless they consent to being deprived of the land, or the land is expropriated by the government and suitable compensation is paid.<sup>13</sup>
95. Recognising the right to say no to mining would allow communities to choose their own developmental path. Also it would allow communities who do accept mining to negotiate the terms of mining, including SLPs, from a position of greater parity.
96. In engagement fora, such as the Mining Charter Summit, the DMR has responded to this demand of communities by pointing out that the issue of FPIC is instead to be dealt with in the process of amending the principle act, the MPRDA.
97. It should, however, be emphasised that there is an extensive record of communities and civil society organisations raising this issue in comments during the lengthy MPRDA amendment process that commenced at the end of 2012 as well as during other processes. For example during the initial DMR administered comments process prior to the introduction of the Bill to parliament, MECJON-SA pointed out the need to amend the MPRDA to be consistent with this right:

'Where land occupation or ownership is governed by customary law, the consultation procedures and accountability mechanisms inherent to customary law must be respected and followed...The MPRDA must be amended to reflect these requirements specifically.'<sup>14</sup>

98. The Peoples Mining Charter, which has been presented to the DMR at multiple fora including engagement on the MPRDA amendments, has as its first

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<sup>12</sup> Act No. 31 of 1996.

<sup>13</sup> Section 2(1) of IPILRA.

<sup>14</sup> Comments of the Mining and Environmental Justice Community Network on the Mineral and Petroleum Resources Development Act Draft Amendment Bill, 2012

principle 'Community Voice in Decision Making through negotiation based on right of consent to determine what activities occur on one's land.'<sup>15</sup>

99. When President Jacob Zuma referred the bill back to parliament on account of possible unconstitutionality (substantive and procedural), a chorus of submissions called for FPIC including submissions by Land Access Movement of South Africa (LAMOSA), Amadiba Crisis Committee, and Bench Marks Foundation, and by CALS, called for FPIC to be recognised in the MPRDA.
100. At present before the Gauteng High Court is the application by the Amadiba Crisis Committee, which is seeking to prevent the DMR from issuing a mining right on their communal land and arguing that communities have a right to free prior and informed consent under African Customary Law and IPILRA.

## 0) CONCLUSION

101. Thank you for your consideration. For queries and further information please contact Robert Krause (Researcher) at [Robert.Krause@wits.ac.za](mailto:Robert.Krause@wits.ac.za) or 011 717 8615 or Louis Snyman (Senior Attorney) at [Louis.Snyman@wits.ac.za](mailto:Louis.Snyman@wits.ac.za) or 011 717 8629.



<sup>15</sup> Peoples Mining Charter, adopted on June 26 2016 in Berea.