

## Submission

to the

**Department Of Mineral Resources and Energy**

on

**Draft National Mine Closure Strategy**

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## A) INTRODUCTION

### ***About the Centre for Applied Legal Studies***

1. The Centre for Applied Legal Studies (“CAL S”) welcomes the opportunity provide by the Department of Mineral Resources and Energy (“the Department”) to make comments on the Draft National Mine Closure Strategy, 2021 (“draft Closure Strategy”).
2. In the event that the Minister hosts public hearings on the draft Closure Strategy, CAL S hereby requests that it be placed on the roll to make oral submissions, electronically if the COVID-19 crisis persists.
3. CAL S is a human rights organisation and registered law clinic with the Legal Practice Council of the Northern Provinces, based at the School of Law at the University of the Witwatersrand. CAL S is committed to the protection of human rights through partnering with individuals and communities in the pursuit of systemic change.
4. CAL S’ vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. It fulfils this mandate by –
  - 4.1. Challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations;
  - 4.2. Providing professional legal representation to survivors of human rights abuses; and
  - 4.3. Using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of vulnerable persons and communities.’
5. CAL S operates across a range of human rights issues, namely home, land and rural democracy, business and human rights, environmental justice, gender justice, as well as civil and political justice. It adopts a gendered and intersectional

approach to interpreting, implementing and – where necessary – promoting the development of the law.

6. The environmental justice programme aims to counter this injustice and make environmental rights a reality for all who live in South Africa. We aim to change the behaviour of both the corporate actors that make use of natural resources, and the state which regulates this process. Our focus remains on the mining sector, which is a major contributor to economic growth in the country, but is also responsible for a great deal of environmental harm and exploitation. We work specifically on the social and labour plan system and other models for community benefit sharing, placing the issues of voice, participation and transparency at the centre of our work.

### **Background and legal framework**

7. Section 43(1) provides that “the holder of a ... mining right ... remains responsible for any environmental liability, pollution or ecological degradation, and the management thereof, until the minister has issued a closure certificate to the holder concerned.”<sup>1</sup>
8. Section 43(3) defines the circumstances in which a holder of a mining right may apply for a closure certificate.
9. Marais and De Lange (2021) argue that:  
*“Although mines are closing all the time, not much information can be found on anticipated closures; information on resource availability, on the other hand, is abundant. Back in 2002, the World Bank estimated that 20 large mines would close in the developing world in the next decade, but neither the World Bank nor the mining industry assessed this forecast for accuracy. The closure of a mine is often traumatic for local communities. Insufficient research has been done on the social aspects of mine closure. How mine closure can be planned for in a socially responsible way is an important question that this paper explores”.*<sup>2</sup>
10. The traumatic experiences of intersecting environmental, social and economic crisis on poorly planned closure – including continued environmental health harms, severe unemployment and collapse of local economies, and crime (including gender-based violence), the impacts of ownerless and abandoned mines and a

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<sup>1</sup> Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>2</sup> Marais and De Lange (2021) “Anticipating and planning for mine closure in South Africa” Futures (125) 102669.

lack of access to information regarding measures to address these impacts<sup>3</sup> is attested to by multiple communities as is documented in research and is one CALS has witnessed first-hand amongst communities we have engaged with and visited in the course of our work.<sup>4</sup>

11. For these reasons, the South African Human Rights Commission (“SAHRC”), as part of its investigative report in challenges of mining-affected communities directed the DMRE to develop a comprehensive closure strategy to provide a strategic framework for individual closure plan and consult communities and mineworkers in particular.<sup>5</sup>

## **B) THEMATIC ASSESSMENT OF THE DRAFT CLOSURE STRATEGY**

### ***The decision to pursue a Closure Strategy represents a step forward***

12. Given the vast costs of uncoordinated, non-transparent and non-participatory mine closure on the socio-economic, environmental and other rights of communities and mineworkers in particular, a strategy to promote pro-active planning, regional and sectoral alignment and participation has been long needed. The publication of this Draft Closure Strategy represents a step forward by the Department in acknowledging this need and respecting the recommendations and directives of SAHRC.

### ***Draft Closure Strategy’s recognition of the links between socio-economic and environmental aspects of closure***

13. We welcome the recognition in the draft Closure Strategy that environmental, social and economic sustainability are intertwined and that planning must provide for environmentally sustainable economic activities (agriculture, low carbon industries, renewable energy generation etc.) that is supported by the closure region.<sup>6</sup> Given the skills base in rural areas, agriculture and the processing and

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<sup>3</sup> Including the afore-mentioned

<sup>4</sup> J K Filitz Mining for Development: A socio-ecological study on the Witbank Coalfield Dissertation submitted in partial fulfilment of an LLM in Development Studies at University of Kwazulu Natal in 2011 ; South African Human Rights Commission Investigative Hearing Report on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa (August 2018) at 26-28; ES van Eeden, M Liefferink & JF Durand ‘Legal issues concerning mine closure and social responsibility on the West Rand (2009) 5 *Journal for Transdisciplinary Research in Southern Africa* 51 at 52-57.

<sup>5</sup> SAHRC Report at 86.

<sup>6</sup> 4.1. of the draft Closure Strategy.

beneficiation of crops is foreseen to play a significant role in many closure regions.<sup>7</sup> Energy generation and the need to leverage the self-generation of energy by mining companies is identified as a priority and there is reference to renewable energy.<sup>8</sup> As discussed below, however, more guidance is needed to ensure the most affected communities and workers are the principle beneficiaries of this process.

### ***Draft Closure Strategy's recognition of closure planning as proactive and beginning from inception***

14. Given the reality that all mines have a finite life but have environmental and socio-economic impacts on communities and workers in particular which are far-reaching both in scope and severity, it is imperative that planning occur from inception. The identification of through-lifecycle planning (from the earliest stages of pre-feasibility of the operation itself) as a focus area of the draft Closure Strategy therefore represents a welcome development.<sup>9</sup> It is also welcome that this includes identifying end-use scenarios from the outset that, together with the closure plan, evolves and develops through the entire mining lifecycle including construction, operation, decommissioning and post-closure.<sup>10</sup>
15. We also welcome that the policy recognises that 'engagement with stakeholders constitutes a critical component of the closure planning and implementation processes'. However, as will outlined under separate headings below, the draft Closure Strategy contains many gaps in this regard and does not go nearly far enough to ensure the meaningful participation of communities, workers and oppressed and marginalised groups including women and LGBTQI+ people.

### ***Draft Closure Strategy's recognition of need for co-ordinated approach – regional approach and alignment of role players***

16. The draft Closure Strategy recognises that sustainable closure cannot occur in silos and an approach that is both regional in scope (identifying mining clusters and planning on that level) and collaborative in nature – between mining companies and between sectors including the state (local and provincial

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> 4.2 of the draft Mine Closure Strategy.

<sup>10</sup> Ibid.

government cited) and different economic sectors (agriculture, energy, water, manufacturing and tourism cited).<sup>11</sup>

17. As will be discussed below, however the stated approach in the policy seems to emphasise the co-ordination of government and different sectors of capital over communities, workers and marginalised groups.

### ***Concerns regarding the process through which the framework was developed***

18. Given that closure has severe impacts on the lives, livelihoods and environmental health and well-being of communities and workers in closure regions in particular, it is imperative that the strategy be the product of a multi-stakeholder process with communities (and community networks in particular) and all trade unions in the sector at the centre of such discussions. This is necessary condition for the needs, priorities and local knowledge of role players to inform the policy from the ground up, as opposed to only after-the-fact comments on a completed draft. It has, however, come to our attention that the main national networks representing mining-affected communities, namely Mining Affected Communities United In Action/Women Affected by Mining United in Action (“MACUA/WAMUA”) and Mining and Environmental Justice Community Network of South Africa (“MEJCON-SA”) were not engaged prior to publication.
19. This failure to include organised mining-affected communities from the inception is reflective of the lack of representation of community networks on multi-stakeholder fora such as Mining Industry Growth, Development and Employment Task Team (MIGDETT).
20. In our view, the best way to rectify this in relation to the strategy would be to develop a meaningful consultation process to ensure communities and networks, organised labour and other key role players are able to put forward how they see the challenges of closure and what they would like to see in such a strategy. This process should be a thorough and not a rushed one and might best be deferred to when the majority of the population has received their COVID-19 vaccinations. Only following such a process, should a draft Closure Strategy reach the notice and comment stage.

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<sup>11</sup> 4.3 of the draft Mine Closure Strategy.

21. More broadly, the organised mining-affected community sector should to be admitted as members of MIGDETT and other multi-stakeholder consulting fora as equal parties.

***No reference to goals of just transition and community and worker ownership in carbon neutral post mining economy***

22. While there is reference to the need to align environmental and economic development in regional closure planning and some references to encouraging renewable energy generation, there is no express reference to the objective of local economies compatible with the carbon neutral development required to limit climate change to the critical 1.5 degree threshold identified by the International Panel on Climate Change (“IPCC”).<sup>12</sup> Nor is there to issues of ensuring the new local economies do not reproduce the same inequalities of ownership and benefit of colonial and neo-colonial capitalism. Indicative of this is the absence of the phrase “just transition” which captures the twin and interrelated imperatives of developing a carbon neutral economy and one which is on an egalitarian basis capable of advancing the right to equality, socio-economic rights, the environmental right and other rights contained in the Bill of Rights.

23. There is no mention, for example of the need for ownership by workers and communities in the envisaged post-mining economic activities and for a concrete goal of reducing unemployment and ensuring a living wage.

24. This lack of a clear just transition goal also, as will be discussed below, is translated into inadequate thought given to the enabling of meaningful participation of communities, workers and marginalised groups to ensure the type of democratic planning required to build local economies that advance equality and are environmentally sustainable.

***Provides insufficient guidance on community participation and measures to support it***

25. Through CALS’ work in partnership with organisations of mining-affected communities, including in relation to legal assistance, research reports and

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<sup>12</sup> IPCC [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)] Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty. At 7-10.

coalitions, we have gained awareness of several forms of obstacles to the meaningful participation of mining-affected communities in decisions regarding mining and development paths, their land, livelihoods and environment.

26. Fundamentally, the right to Free Prior and Informed Consent to decision-making at all stages in a development, an emerging principle of international human rights law as recognised in the Interim Protection of Informal Land Rights Act, 1996 ("IPILRA,") is not recognised by the empowering statute the MPRDA and by the Department. The right of historically disadvantaged communities, households and individuals to decide on whether there is mining on their land would increase their leverage and require meaningful participation.
27. The second layer is the exclusion of communities and community networks from the multi-stakeholder for a such as Mining Industry Growth, Development and Employment Task Team MIGDETT that influence policy, legislation and decision-making
28. A third layer is lack of access to information. Despite their public status, for most operations like environmental impact reports, environmental management programmes (which include the closure plan) and social and labour plans are difficult to obtain for public interest lawyers, let alone communities with access to far less resources. Many companies continue to refuse access while the DMRE in our experience still in practice facilitates access to these documents through the PAIA process. The Department typically decides to grant access at the end of the 30 day process following which months of emails and phone calls to regional offices are usually required, in CALS' direct experience. The situation is even worse for documents that report on the actual compliance status of mining companies.
29. A fourth layer is the manner in which public consultations occur in the sector such as in law and policy-making processes. Very short notice periods (sometimes of one day), failure to distribute any documentation to enable preparation, incorrect language/s being used, and limited opportunity for community engagement and input are commonly reported occurrences.
30. A fifth layer is the starkly unequal access to specialist knowledge (legal, environmental science, economic etc.) between on the one-hand mining-affected communities and workers and, on the other hand, mining companies which ultimately reflects the extreme inequalities of wealth and power of a system rooted in colonialism and apartheid. For this reason, communities and civil society

organisations have, for some time, been proposing a fund (financed for example through a levy on mining rights holders) which can be used to pay specialists selected by communities.<sup>13</sup> In the absence of a concerted and systemic initiative all planning processes are likely to favour large corporations and the wealthy over communities.

31. The policy unfortunately does not engage with nor offer avenues to address the realities identified above. Some of these barriers can, however, not be addressed primarily at the level of this policy but require a new legislative framework or thoroughgoing amendment of the MPRDA itself, as community networks and civil society organisations have been consistently advocating for.<sup>14</sup>

### ***No reference to the imperatives of gender equity in closure planning***

32. The policy does not acknowledge the economic and social marginalisation of women, the manner in which this results in bearing the disproportionate brunt of mining impacts, and the need for targeted measures to promote the inclusion of women and LGBTQI + people in decision-making processes regarding closure planning as well as in the post-closure economy. Further co-ordinated measures are required to ensure that women and LGBTQI + people are included and prioritised in decision-making processes, economic ventures and particular concerns (including land rights, unemployment and gender based violence) are attended to.

### ***Legislative reform of the MPRDA still required to provide an adequate framework for mine closure***

33. The afore-mentioned alignment of the processes under the MPRDA with IPILRA is critical and requires amendments to the Act itself with communities and community networks as central stakeholders in this process along with organised labour. Further, the present provisions in the Act on transformation should be strengthened to provide for explicitly binding transformation regulations catering for amongst others increased ownership by workers and communities, addressing gender inequality and violence against women, equalising access to technical expertise and ensuring democratic mine closure strategies aimed at achieving a just

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<sup>13</sup> These include organisations such as the Bench Marks Foundation.

<sup>14</sup> MACUA, for example have called for the replacement of the MPRDA with a new piece of mining legislation that is the product of a process in which communities are a central role player from inception.  
<https://macua.org.za/scrap-the-mprda/>

transition to a carbon neutral local economy centred around the needs and livelihoods of communities and workers.

## C) AIMS AND OBJECTIVES

34. The aims and objectives, a few of which include ‘manage[ing] the closure of mines in a demarcated area in an integrated and sustainable manner’, ‘...promote[ing] a strategic approach to managing water at mining and mineral processing sites so that water is more efficiently managed and valued and to develop a post closure mine water strategy for an area’ and ‘...integrating environmental management and related closure activities with socio-economic interventions’ are in the main sound. It is, however, doubtful that they can be achieved without meaningfully including communities and workers in these processes.
35. The final objective, and which particularly pertains to a focus area of CALS is the following:
- ‘Integrate environmental management and related closure activities with socio-economic interventions and aligning these with development of a post-closure economy, by rationalising current wasteful spending on Environmental Management Programme (EMPr), Social and Labour Plan (SLP) and Corporate Social Investment by reducing duplication of efforts and spending and aggregating available funding for coordinated regional projects.
36. While we are in favour of alignment and elimination of duplication, at the same time we are concerned that there needs to be community involvement and transparency around how that alignment of SLPs is achieved. Second, while pooling of resources would potentially lead to larger SLP projects with greater impact, based on the 80 plus social and labour plans we have read through our various research projects and work with communities, expenditure on SLPs is a very small percentage of mining turnover, especially given the magnitude of the disruption of lives and livelihoods caused by mining as well as the scale of investment needed to create viable co-operatives and other ventures for communities and mine workers. To our knowledge this tends to be around 1% of profits. We have consistently called for the MPRDA or regulations to set a minimum percentage to be pegged to projected turnover and not profits.

## D) KEY FOCUS AREAS OF MINE CLOSURE

37. As indicated above, the focus areas of the mine closure strategy namely ‘planning for closure beyond environmental rehabilitation, ‘closure planning throughout the mining life cycle’ ‘a regional approach to mine closure’ ‘collaborative regional development’ and ‘the identification of mine closure regions’ are in and of themselves necessary and important focus areas.<sup>15</sup>

38. The question, however, is whether this regional and inter-sectoral integration is envisaged as placing communities and workers at the centre or is only an integration of elites in business and government.

39. The wording of the focus area/principle of ‘collaborative regional development’, for example gives some cause for concern. Consider the following for example:

‘These [collaborative regional development programmes] should be cross-sectoral imperatives between mining companies, other sectors such as agriculture, energy, water, manufacturing and tourism undertaken in collaboration with provincial and local government.’<sup>16</sup>

40. Notably omitted in this sentence is any mention of impacted communities, workers and their organisations as partners.

41. The example cited of effective regional collaboration, the Impact Catalyst Imperative in the Limpopo Province also raises questions in this regard:

‘This is a development imperative between Anglo American, Exarro, the Limpopo Provincial Government, the CSIR, the University of Cape Town and NGOs such as World Vision

42. Again there is no mention of independent community-based organisations and networks such as MACUA/WAMUA and MEJCON-SA in this initiative. There is reference to NGOs like World Vision. The inclusion of NGOs and public interest legal organisations, while vital, is not a substitute for independent community organisations. Second, there is no mention of the civil society organisations most prominent in partnering with in campaigns and cases related to environmental rights nor gender justice – it is not clear beyond World Vision which other NGOs

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<sup>15</sup> 4.1, 4.2, 4.3.1 and 4.3.2.

<sup>16</sup> 4.3.1. of the draft Mine Closure Strategy.

are part of this initiative. Third, again there is no mention of the role of organised labour.

## **E) CONCLUSION**

43. Thank you for providing the opportunity to provide input. For queries and further information, please contact Robert Krause (Researcher) at [Robert.Krause@wits.ac.za](mailto:Robert.Krause@wits.ac.za) or 081 427 7818 or Dr Louis Snyman (Head of Programme) on [Louis.Snyman@wits.ac.za](mailto:Louis.Snyman@wits.ac.za) or 083 355 6482. CALS welcomes any opportunity for further engagement on this draft Mine Closure Strategy.