CALS
Centre for Applied Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

Comments regarding the

Draft Mine Community Resettlement Guidelines, 2019 (draft Resettlement Guidelines)

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Robert Krause
Researcher: CALS Environmental Justice Programme
Direct Tel: 011 717 8615
Email: Robert.Krause@wits.ac.za

Dr Louis Snyman
Senior Attorney and Head of Programme: CALS Environmental Justice Programme
Direct Tel: 011 717 8629
Email: Louis.Snyman@wits.ac.za

A) INTRODUCTION

About the Centre for Applied Legal Studies and its Work on Mining and Environmental Justice

1. The Centre for Applied Legal Studies ("CALS") welcomes the opportunity provided by the Department of Mineral Resources and Energy ("the Department") to make comments on the Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 28 November 2019 ("draft amendments")

2. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way that makes creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations.

3. CALS' Environmental Justice Programme, in particular, works with mining-affected communities and community networks such as Mining Communities United in Action (MACUA), Women Affected by Mining United in Action (WAMUA)

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and Mining and Environmental Justice Community Network of South Africa (MEJCON-SA), in in addressing the environmental, social and economic impact of mining. What is very clear from ongoing engagements in different fora (including research, capacitation workshops, meetings of coalitions and litigation) is that the mining industry is responsible for multiple and severe environmental, economic, social and cultural harms to communities with no tangible development of the community as a whole.[1] There is also rising anger at the continuing dispossession of communities to facilitate profits of many of the same mining sector which profited from and which was itself a driver of colonialism and apartheid.

4. Any framework for resettlement will be rightfully deeply scrutinised and contested due to the centrality of land to livelihoods, dignity and cultural identity and the long history of conquest and forced removals perpetrated on the Black majority. This is even more the case when, for many of the communities whose land hosts Africa's minerals complexes, dispossession is not only a living memory but also an ongoing reality. Communities (including communities with whom we have worked), who have seen other communities shattered by mining, are asserting the right to free and prior consent, including the right to say 'no' to mining and forced relocation.

B) KEY CONCERNS REGARDING THE DRAFT RESETTLEMENT GUIDELINES

Public participation in the formulation process

5. In February 2018, three of the largest mining-affected community networks (MACUA, WAMUA and MEJCON-SA) and four individual communities, obtained a historic court order recognising them as stakeholders for the purpose of consultation in the formulation of the Mining Charter.[2] Following the order, public consultation meetings occurred in key mining regions. Though there were many deficiencies with this process (including extremely short notice prior to meetings and very limited impact on the final draft), it did represent a step forward in

[1]See, for example South African Human Rights Commission *Investigative Hearing Report on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa (August 2018)* 56; Action Aid *Mining in South Africa 2018 – Whose Benefit Whose Burden – Social Audit Baseline Report (2019)* 17.
[2] https://www.wits.ac.za/news/sources/cals-news/2018/victory-for-mining-affected-communities.html.

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acknowledging that communities are stakeholders requiring ongoing consultation in the development of mineral laws and policies.

6. The considerations requiring broad-based consultation in relation to the Mining Charter apply equally or even more to the framework regulating resettlement. Given the severity of the impacts of resettlement and relocation, and the Constitutional value and right of substantive equality, it is critical that the views of precisely those communities who are and could be at the receiving end of resettlement be afforded the most significant weight. One would expect, therefore, the Department to develop any framework out of extensive consultations with mining-affected communities across the country.

7. It was highly unfortunate that the Department initially released the draft Resettlement Guidelines, shortly after the amendments to the MPRD Regulations, for comment within 30 days on 4 December 2019, a period in which the Department could foresee would include the summer vacations for most stakeholders.

8. We acknowledge that the Department listened to stakeholders and extended the comments period until January 31 2020. However, for the development process for any law and policy with such a profound impact to be legitimate, it needs to be proceeded by thorough engagement with those most affected and their partners in civil society. This includes different classes of mining-affected communities such as lawful occupiers of land, holders of informal rights, and other communities who will be directly impacted by relocations), community-based organisations and networks, civil society organisations and trade unions.

9. It is for this reason that a coalition of communities and civil society organisations is, on Friday 31 January 2020, submitting individual comments in person, together with a list of demands for, first, a broad-based and meaningful participation process for the amended MPRD Regulations, the resettlement framework and, second, for a new mining legislative framework based upon the pillar of free prior and informed consent in relation to any minerals decision-making.

10. A fair process in relation to resettlement would include mass-based meetings in the mining regions across the country and small-group meetings with mining-

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affected communities, community networks, and civil society organisations in particular.

Guidelines do not give effect to community self-determination and Free Prior and Informed Consent (FPIC)

11. Mining-affected communities are increasingly asserting the right to determine whether and how mining takes place on their land. Their stance is a response to the environmental, social and economic devastation mining brings to communities with little in the way of discernible broad-based benefit. They are drawing on African Law and on the emerging principle of international and regional human rights law of free prior and consent (FPIC) which is the product of the struggles of indigenous peoples.[3] FPIC is continuous (not a onetime event) and must be free (un-coerced), prior (before any development occurs) and informed (communities must have access to all information necessary to make an informed decision).

12. Communities living on communal land have utilised the Interim Protection of Informal Land Rights Act (IPILRA), which provides that no one may be deprived of informal land rights protected under the act without their consent.[4] Critically Section 2(2) of IPILRA provides that deprivation of land rights under African Law can only occur in accordance with the procedures under the law of the communities. In most or all cases, consent of the rights holder is required. In *Maledu* communities succeeded before the Constitutional Court which held that the award of a mining right does not have the effect of divesting someone of their informal right under IPILRA.[5] The most well-known struggle around the of communities to choose their own development path is of the community in Xolobeni, through their organisation the Amadiba Crisis Committee which has resisted a proposed titanium mine project for 15 years. They were victorious in the North Gauteng High Court which developed the law further to hold that in the

[3] See, in particular, Article 32 (2) of The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides that 'States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions in order 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.'

[4] Act No. 31 of 1996.

[5] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 (CC) at para 106.

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absence of obtaining consent through the process provided for in IPILRA and African Law, the Minister cannot issue a mining right.[6]

13. The draft Resettlement Guidelines (especially when viewed together with other governmental actions such as the signing of the Traditional and Khoisan Leadership Bill (TKLB)) is a troubling response to these campaigns and recent judgments.

14. Consent is conspicuous by its absence and the guidelines are explicit about their premise – that companies consult communities on the modalities (how of relocation) but that it is ultimately their decision. The standard is consultation not consent. The guidelines, therefore, are not premised on the self-determination of communities. It is our position that the framework governing resettlement of communities must be, as a matter of priority, amended to a process ground in consent not mere consultation.

Relegation of process highly invasive of rights to guidelines

15. Resettlement, evokes dispossession under colonialism and apartheid and which impacts on communities' self-determination and a range of Constitutional rights including, but not limited to, the environmental right (Section 24), the right to property (Section 25), housing (Section 26) socio-economic rights (section 27). It therefore warrants regulation by binding legal instruments able to provide speedy and certain recourse to communities seeking to protect their rights. No substantive rights, obligations, or procedures pertaining to relocation should be contained in guidelines that do not have the same binding force as legislation or even regulations. Guideline are instead appropriate for granular details (such as the layout of notices under the Act).

16. The fundamental problem is that the overall framework regulating engagement between mining companies and communities with rights to land on current or prospective mining, does not recognise the right to FPIC nor does it contain procedures for decision-making based on consent. Mining legislation, therefore, needs to be amended in order to achieve alignment with FPIC. This amended legislation, coupled with new regulations where required, should set a framework based on the following principles (amongst others)

[6] *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) at para 81.

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- No resettlement without the consent of the community and all individuals and/or households to be resettled;
- Any resettlement negotiations are to be characterised by genuine equality (e.g. communities can access similar legal and technical expertise as mining companies); and
- Provide independent grievance and oversight mechanisms to ensure any agreed resettlement will not render any communities worse-off

Dispute resolution processes

17. Speedy grievance mechanisms that are more accessible and solution-orientated than courts are necessary. However, for these mechanisms to assist community complainants against powerful mining companies, they cannot, prejudice resort to the courts where communities are of the view that this is the most effective forum for justice. The draft Guidelines follow the general approach of the MPRDA for the resolution of disputes between the applicant/holder and the landowner or lawful occupier through providing for three sequential processes – direct negotiations, negotiations mediated through the Regional Manager and formal mediation/arbitration. They seem to require all three processes to be exhausted before those at the receiving end of relocations can approach the courts.

18. There is no provision for an independent grievance mechanism that is, first, designed by communities as much as by mining companies, and second, to which holders of rights under the MPRDA must contribute. Further they refer to traditional authorities as possible alternative hosts of the party-party negotiations, in spite of the documented evidence that they frequently represent the mine's interest over the community.

Gender discrimination in resettlement

19. It is important that the Department has implicitly recognised that the harms of resettlement disproportionately impact on women and other vulnerable groups by expressly stating in the draft Resettlement Guidelines that resettlement must not infringe on gender equality. However, there is no identification of the concrete manner in which rights of the women and vulnerable groups are commonly infringed in the relocation process, for example the failure to recognise women's' right to land (and the role of many traditional authorities in disregarding women's rights). Neither are there any concrete interventions to address these issues including through mandatory representation of women, youth and vulnerable groups in the various fora provided for in the draft Guidelines. The draft Guidelines cannot be, in any meaningful way, characterised as gender

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responsive and as containing robust safeguards against the violation of women, youth, people living with disabilities, LGBQTI individuals and other members of groups disadvantaged by discrimination.

C) LEGAL POLICY AND FRAMEWORK (ITEM 4[7])

20. In the section outlining the legal framework, Subsection 25 (6) the Constitution is included. This provides that 'a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.' However, the Interim Protection of Informal Land Rights Act (IPILRA), which was enacted precisely to give effect to Section 25 (6), is not included. This seems deliberate given that it does not allow for deprivation of informal rights without consent. Furthermore, these Guidelines come shortly after the afore-mentioned *Maledu* and *Baleni* (Xolobeni) which require that the MPRDA be read in line with IPILRA and its requirement for consent.[8]

21. The next component of the legislative framework referred to is the MPRDA and in particular Sections 5, 22, 25, 54 and 55 which pertain to meaningful consultation with landowners, lawful occupiers and interested and affected parties (section 54 provides the framework 'for appropriate redress' through an agreement for compensation of loss or damage resulting in proposed mining/prospecting. This shows that the Guidelines are based on the assumption that the flawed provisions in the MPRDA that are, on the face of it, in tension with the requirement of consent, are sound.

22. Of course (as stated above) Guidelines which are of even a lower status than regulations (not binding) cannot go beyond what is provided for in the empowering legislation. Given the fundamental flaw of the legislative framework, civil society and community organization should reject the approach of the Department to use Guidelines and instead call for changes to the empowering legislation to set out minimum requirements for consent, including in the context of resettlement.

23. Other legislative or policy instruments cited are the expropriation act, NEMA (in relation to the Environmental Impact assessments with the draft Guidelines

[7] The draft Resettlement Guidelines are organised into items (1 to 16).
[8] See notes 4 and 5 above.

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referring to the need to take 'into account inter-related socio-economic, cultural and human-health impact); the National Water Act (water licensing requirements); PIE ('…and prohibits illegal evictions from land and provides recourse for affected parties'), the Local Government Municipal Systems Act and Development Facilitation Act ('…are also some of the pieces of legislation requiring public participation and regulating land tenure intended to afford communities sufficient legal protection in relation to their land and recourse in the event of arbitrary deprivation of land.')

D) FUNDAMENTAL PRINCIPLES FOR RESETTLEMENT (ITEM 5)

Meaningful Consultation

24. This principle is the one in which there is fundamental disagreement between the DMRE and communities and civil society partners. In relation to vulnerable communities whose tenure has been insecure due to colonialism and apartheid (protected by IPILRA) the standard should be consent. In a subsequent section of the Guidelines (7) the standard of meaningful consultation is elaborated upon.

Gender equality

25. We agree that the inclusion of gender equality as a principle is vital. However, as discussed above, the draft Resettlement Guidelines provide no content to this standard beyond stating that resettlement may not to violate Section 9 of the Constitution with respect to 'women, children, people with disabilities, and vulnerable members of a community.' There is no elaboration on what is entailed by not violating the right to equality in the context of resettlement of mining-affected communities.

Protection of existing rights

26. This sub-item prohibits the deprivation of rights to land without appropriate compensation but does not prohibit deprivation without consent.

Conditions relating to meetings

27. The draft Guidelines require sufficient notice in advance (without indicating how many days is sufficient), with sufficient information to make informed decision and proper records of meetings. Proper notice is critical but regulations are a more important place for specifying notice requirements and detail is crucial (the

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requirements NEMA EIA regulations constitute the best example in the environmental and mining sectors).

Avoid and minimise

28. Correctly, given the severity of the impacts and implication of resettlement, a principle of the draft Guidelines is to avoid and minimise. Specifically, this entails the following: First, to avoid resettlement wherever feasible; second minimize resettlement where population displacement is unavoidable; third avoid the breaking up of communities by only resettling entire communities and; forth, where resettlement is unavoidable, to ensure that affected people receive assistance so that they will be at least as well off as they would have been in the absence of the project.

29. An effective way to minimise the likelihood of resettlement would, however, be to require the consent of each person who stood to be resettled.

E) SCOPE AND APPLICABILITY OF GUIDELINES (ITEM 6)

30. Crucially, this item makes the draft Guidelines applicable to a comprehensive range (at application stage and following the award of the right/permit and the implementation of the project) which will have the effect of displacement or resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities. This includes ‘incremental project expansion.’ The draft Guidelines are, however, not retrospective and become applicable once published in the gazette for implementation.

F) MEANINGFUL CONSULTATION (ITEM 7)

31. The draft Guidelines state that consultation must be consistent with the earlier DMR Guidelines on Consultation of Interested and affected parties but also

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breaks down the duties of the applicant to consult in more detail than in the MPRDA. These duties include:

- transparent consultation;
- exploring whether an accommodation is possible;
- reconciliation;
- transparency and accountability in decision-making and; and
- complying with PAIA requirements for procedural justice.

32. While these duties are important, they are insufficient. Fundamentally, there is no provision for free prior and informed consent of communities in line with IPILRA and case law. Second, any duties should be in regulations rather than guidelines.

33. The Guidelines also provide an open list of stakeholders to be consulted by the applicant, including a stakeholder mapping exercise. Stakeholder mapping, including of all land rights is crucial. The open list is an inclusive one that takes the list in the DMR Guidelines on Consultation with Communities and Interested and Affected Parties as a starting point. To the list in the earlier Guidelines, it adds crucial stakeholders such holders of informal land rights, non-governmental organisations and community-based organisations. Naming the different stakeholders explicitly is very important for a number of reasons such as, for example, ensuring the process is not dominated by traditional authorities. We would strongly suggest, however, adding women, youth, LGBTQI persons and person living with disabilities that are holders of land rights as additional stakeholders to engage. Again, the list of stakeholders should be contained in a binding instrument such as regulations or legislation.

34. Finally, the Guidelines address the platforms of engagement applicants or holders must utilise and which the Guidelines phrase in permissive terms (‘may include’). The platforms are regular meetings; and surveys or roadshows. It also states that ‘announcements of the consultation process may be made on local radio stations, newspapers and relevant media.’ We are of the view that both the platforms for the meeting and the forms of notice should be mandatory (unless impossible in the circumstances), cumulative and contained in legally binding regulations.

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G) OBLIGATIONS OF AN APPLICANT OR A HOLDER OF A PROSPECTING RIGHT, MINING RIGHT OR MINING PERMIT (ITEM 8)

35. There is a list of 12 obligations of the applicant or holder with respect to resettlement from the stage of negotiating settlement agreements to the formulation and implementation of the Resettlement Plan and Action Plan and which includes setting up a monitoring structure. Crucially, the Guidelines require that the costs of the settlement to be borne by the applicant/holder.

36. Given the documented low levels of compliance with and effectiveness of SLPs, we are not optimistic that the plans for the restoration of livelihoods, access to assets and services, etc. will achieve their desired impact. This is especially if communities (including every individual facing resettlement) are not afforded the leverage of continuous consent and if there is no guarantee of access to expertise and to the independence of grievance mechanisms.

H) RESETTLEMENT AND COMPENSATION (ITEM 9)

37. This is the section containing the objectives of resettlement and the parameters governing resettlement. First, the overall objective is set out which is to ensure communities are, at least, not left off worse off from resettlement and, where possible, living conditions are even improved.

38. Second, and critically, a comprehensive resettlement agreement is a pre-requisite for mining activity. This is important in affording the range of community stakeholders a meaningful voice in the agreement. Again, this would afford communities stronger protection were it contained in a binding legal instrument.

39. The resettlement guidelines set out the principles calculating compensation for land and assets. The basic formula is the full replacement value, which is defined as market value plus transaction costs including legal.

40. There are a number of deficiencies with this approach. First, this does not make any provision for the extra-economic value of land, especially given the primacy of land in African societies and social identity and the long and brutal history of colonial dispossession. Second, the value of land for many community members is as a source of food security and livelihoods that may be lost following resettlement. We are cognisant that part of the required content for resettlement plans are measures to ensure livelihoods are restored. There, however, needs to

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be a guarantee that in the event that projects in the agreement failed, companies are liable for the full costs of loss of livelihood. This is especially important given the documented history of failure of community development projects (such as SLP projects) in the sector.

I) MINE COMMUNITY RESETTLEMENT PLAN (ITEM 10)

41. Item 10 regulates the content and process of resettlement plans. 10.1 states that plans must be developed by applicants and holders of rights and permits whenever applications will have the effect of physical resettlement. We observe that this wording only refers to 'applications' and not expansion of projects. This contrasts with item 6, which makes these guidelines applicable to expansions during the project. We would suggest using the more inclusive language of item 6 in 10.1.

J) RESETTLEMENT ACTION PLAN (ITEM 11)

42. The action plan contains the concrete steps and timeframes that applicants and holders must abide by to fulfil the resettlement plan. The draft Guidelines include Table A, which provides a sample Resettlement Action Plan to be followed.

K) RESETTLEMENT AGREEMENT (ITEM 12)

43. Item 12 regulates the content and procedure of the resettlement agreement, which must record the rights, and obligations of all parties to the agreement. It provides that an agreement is only valid if signed by 'authorised representatives of mine communities, land owners and lawful occupiers.'

44. The requirement that those who will be resettled sign is critical. However, the phrase 'authorised representatives' is ambiguous and seems to allow a narrow range of representatives (such as traditional authorities) to sign on behalf of those to be relocated, even when the affected persons do not themselves agree. Individual signoff of every holder of rights to land (including use rights) should be required.

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L) DISPUTE RESOLUTION MECHANISM (ITEM 13)

45. CALS' comment regarding the deficiencies of the dispute resolution mechanisms are contained in section B above.

M) REPORTING, MONITORING AND EVALUATION (ITEM 14)

46. Item 14 requires mining right holders to set up a multi-stakeholder Resettlement, Monitoring and Evaluation Committee (RMEC) to oversee the implementation of the resettlement agreement, plan and action plans. CALS favours multi-stakeholder bodies as potential avenues for governance in which communities, workers and civil society has a meaningful say over decision-making relating to the development and the environment. There are a number of favourable aspects of to draft Resettlement Guidelines' provisions on this body. We agree that the RMEC should sit before the resettlement occurs and continue to sit long after resettlement as many impacts take a long period to manifest themselves, especially given the number of social, economic, cultural systems that relocations disrupt. We also agree that its remit should not only be to monitor whether a plan is adhered to, but also whether the plan is achieving its objectives and if it needs to be amended to be more effective.

47. We, however, caution that in the absence of safeguards, the RMEC might serve, in practice, as a rubber stamp for the mining company's perception of its own compliance and of the success of its initiatives. Inequalities of access to information and to specialist expertise risks limiting the ability of communities to input meaningfully. These safeguards would include transparency and access to information, a capacity-building fund enabling communities to have access to similar expertise to mining companies, and the independence of the RMEC (a chair selected by both persons affected by resettlement and the mining company). Inequalities of access to information and to specialist expertise will limit the ability of communities to input meaningfully. Second, if the RMEC is chaired by the mining company, which as the agent responsible for resettlement should be held to scrutiny, there is a risk that its processes and outcomes could be biased towards the interests of the mining company.

N) RESETTLEMENT BENEFITS AND MPRDA COMMITMENTS (ITEM 15)

48. CALS is in favour of this item, which clearly specifies that benefits as part of the resettlement agreement, plan and action plan do not count towards and cannot

be conflated with fulfilment of a mine's social and labour plan. This is correct, first, because of a general principle CALS has consistently emphasised which is additionality. By this we refer to the principle that where there are multiple obligations that are meant to bring complementary and reinforcing benefits to vulnerable groups, there needs to be a prohibition on attempts to count fulfilment of one obligation as fulfilment of all. The purpose of this is to ensure the intended beneficiaries receive the full benefit intended by the benefit scheme. Second, the primary objectives of resettlement agreements, plans and action plans are different to SLPs. The former is primarily designed towards restoration and compensation for the harm of relocations, whereas the latter are meant to ensure net benefit from the baseline. Third, SLPs are aimed to benefit a broader class of impacted community members (and workers) whereas resettlement plans are solely meant to restore the living conditions of those who will be resettled to make way for mining.

O) REVIEW OF THE RESETTLEMENT GUIDELINES (ITEM 16)

49. Item 16 allows for the review of the resettlement guidelines by the Minister by notice in the Gazette. Our views with regard to community participation in the initial process of designing a resettlement framework equally applies to when such a framework comes under review. Notice in the gazette is inadequate, as the communities most affected will seldom have access to government gazettes. Notice of any process of review needs to be via a cumulative list of avenues including (in addition to government gazettes), newspapers (national and community newspapers) and community radio stations. Reviews need to include public hearings in all mining regions with provision of transport for communities needing to travel.

P) CONCLUSION

50. 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 or 011 717 8615. CALS welcomes any opportunity for further engagement on these draft Resettlement Guidelines.