



## CONTRADICTIONS IN LEGISLATION ON MINING AND ITS COMMUNITY BENEFITS *February 2015*

### WHAT'S IN IT FOR SOUTH AFRICA?

Mining in the Economy:

- South Africa has nearly 90% of the world's known platinum reserves and more than 40% of the gold still in the ground;
- Mining accounts for about R260-billion or 8.3% of total annual production in South Africa. The Chamber of Mines says the industry's indirect contribution is closer to 18% of GDP;
- Mining employs about 525 000 people directly and accounts for another 840 000 jobs that are indirectly dependent on mining;
- The 37 biggest mining companies earned R327-billion in 2013. Their shares were worth R675-billion on the Johannesburg Stock Exchange in June 2014;
- The SA Mining Charter says Historically Disadvantaged South Africans must own 26% of these companies – about R175-billion.

### WHAT'S IN IT FOR MINE-HOSTING COMMUNITIES?

Mining offers two potential sources of direct revenue to the occupiers of mineral-bearing land.

- 1) Surface lease: A surface lease defines the terms upon which a mine may exercise its right under s 5 of the MPRDA to prospect for minerals or to access minerals to which it has secured a right. Such a lease may involve compensation or a payment to owners or occupiers of the land.
- 2) Mining royalty: A mining royalty is defined generally as “a payment to the owner of a mineral resource in return for the removal of the minerals from the land”.

In South Africa, the Mineral and Petroleum Resources Development Act, 2002, (MPRDA) recognises a “state royalty” as the revenue share payable to the government in terms of an Act of Parliament; and a “contractual royalty” as a payment agreed to between parties to a mining or production operation.

Contractual royalty agreements in favour of host communities that were in place when the MPRDA went into force on 1 May 2004 were preserved in terms of the transitional arrangements listed in Schedule II of the Act on condition that the revenue is used “for the benefit of all members of the community in question”.

## LAWS THAT PROTECT MINE-HOSTING COMMUNITIES

Mining takes place at the intersection between several laws, regulations and policies which seek on the one hand to eliminate the legacies of apartheid, ensure that poor communities can protect their rights and benefit from mining while, on the other hand, to ensure that the mining industry is and remains attractive to investors, most of whom come from abroad.

A surface lease for community land must be negotiated mainly under the Interim Protection of Informal Land Rights Act, 31 of 1996, (IPILRA) which says in s 2(4):

“For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.”

The official IPILRA guidelines say, amongst other things that:

- Members of (any) relevant group, community or tribe should be treated as the co-owners of the land, even though formal legal ownership may be held by the State.
- Any decision in respect of ownership issues is valid only if it reflects the view of the majority of "co-owners";
- The rightful ownership of communal land vests not in chiefs, tribal authorities or committees, but in the members of the group which holds the land;
- Decisions relating to land rights must be taken by the majority of members of the group or tribe;
- It is not acceptable or sufficient for a chief, tribal authority or committee to reject or accept proposals unless their view is based on the majority decision of the members of the tribe or community.

The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) binds all companies and includes amongst its six objectives:

- “The Mining Charter seeks to... promote employment and advance the social and economic welfare of mine communities and major labour-sending areas.”

Most mining companies acknowledge in their statements of principle that they seek to collaborate with host communities and to ensure that those living around their operations benefit from them:

- “We are successful when... the communities in which we operate value our relationships” – Lonmin CEO Ben Magara;
- “We respect the communities within which we operate; we care for the socio-economic well-being of the communities within which we operate” – Impala Platinum;
- “Our social licence to operate is a key pillar of the Ivanplats strategy, so we recognise that the ongoing support of the neighbouring communities is essential to the success of our project” – Ivanhoe Mining.

### LAWS THAT PROTECT MINING COMPANIES

But mining legislation contradicts the intention of these measures. Mining companies are obliged in terms of several laws, policies and official guidelines to consult host communities about prospecting and mining proposals, but if they have a licence to prospect or to mine, they are entitled to access the land in question.

- “Subject to this Act [MPRDA], any holder of a prospecting right, a mining right, exploration right or production right may (a) enter the land to which such right relates together with his or her employees...and may bring onto that land any plant, machinery or equipment...which may be required for the purposes of prospecting, mining, exploration or production...” – MPRDA s 5(3);
- “No person may...commence with any work incidental thereto on any area without... notifying and consulting with the landowner or lawful occupier of the land in question” – MPRDA s 5(4).

The MPRDA’s official Guideline for Consultation with Communities and Interested and Affected Parties requires a consultation report, but it does not allow for a host community to say: “No”.

- “Consultation means a two-way communication process between the applicant and the community or interested and affected party wherein the former is seeking, listening to and considering the latter’s response...”
- “The purpose of consultation with the landowner, affected parties and communities is to provide them with the necessary information about the proposed prospecting or mining project so that they can make informed decisions, and to see whether some accommodation with them is possible insofar as the interference with their rights to the affected properties is concerned. Consultation under the Act’s provisions requires engaging in good faith to attempt to reach such accommodation.”

The MPRDA obliges mining companies to include a Social and Labour Plan (SLP) with applications to commence mining. The aim of this plan is to contribute to the transformation of the mining industry, and ensure that all holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.

These SLPs are not automatically public documents but can be obtained through the Promotion of Access to Information Act (PAIA). There is at this point no credible mechanism to monitor the manner and extent to which mining companies implement the promises made in SLPs.

### **SOUTH AFRICA BELONGS TO ALL WHO LIVE IN IT**

The reformative intentions of the writers of South Africa's 1996 Constitution are being contradicted by more recent policies and legislation crafted to appease investors, but used to facilitate the elite capture of programmes and revenues intended to transform the lived reality of rural communities.

The tendency to put the interests of mining companies before the Constitutional, statutory and human rights of rural communities must be challenged at every level from community to Parliament and to court.

Communities should organise to demand transparency about mining projects from the moment they are first rumoured. They should demand from the government, traditional authorities and companies their right to informed consultation and demand not only to speak, but to be heard.

Where necessary, public-interest litigators must be ready to support communities that challenge the abuse of their status as the rightful owners of South Africa's mineral-rich rural areas.