

To: Samson Gwede Mantashe
Minister of Mineral Resources

From: Land and Accountability Research Centre

Re: Written Representations on the draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018

Date: 31 August 2018

Introduction

- 1 The Land and Accountability Research Centre (“LARC”) is based in the University of Cape Town’s Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in empowering rural citizens to advance their interests in engagements with mining companies and the State.
- 2 In this context, LARC submits these written representations regarding the draft Broad Based Socio- Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (“the draft Mining Charter”).
- 3 These representations centre around the impact of mining on the land rights of people living in former homeland areas. The Constitution recognises that where tenure is legally insecure as a result of past discriminatory laws and practices, those affected are entitled to legally secure tenure or to comparable redress (Section 25(6)). The laws that governed the former homelands were designed to deny black land rights and to make black people’s occupation and use of land subordinate to state control. The Interim Protection of Informal Land Rights Act (IPILRA) of 1996 which was enacted to secure vulnerable land rights,

explicitly included all the land in the former homelands and de facto land rights derived from custom, usage and customary law in recognition of this history of the denial and undermining of black land rights.

- 4 From LARC's extensive experience, the current Mining Charter has failed to uphold the tenure security of black people living in former homeland areas, or improve the lives of communities directly affected by mining.
- 5 In these submissions, we first set out the reasons that LARC has identified for these failures.
- 6 We then consider the draft Mining Charter. In summary, these submissions welcome the requirement of a minimum of eight percent shareholding for communities, with five percent free carried, as positive. These submissions argue, however, that this development will not secure meaningful benefit or tenure security to mining affected communities unless:
 - 6.1 The definition of 'host community' is amended to specifically reference households directly affected by mining.
 - 6.2 Host communities are empowered to negotiate the terms of their shareholding under the principle of free, prior and informed consent.

Context

- 7 Historically, mining in South Africa has meant poverty and land dispossession for black South Africans. Although mining operations resulted in the development of cities in places such as Kimberley and Johannesburg, this infrastructure development has not taken place in the former homeland areas where mining is currently concentrated - for example in the platinum belt.
- 8 Mining has long been the backbone of South Africa's economy. Given



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the racially discriminatory policies of the colonial and apartheid regimes, black people have hardly benefitted, and have usually suffered disruption or dislocation, when mining operations occur on their land. They are far more vulnerable than white landowners who have title deeds to prove their rights and lawyers to negotiate surface leases.

9 Parliament sought to address this legacy by passing the Mineral and Petroleum Resources Development Act 28 of 2002 (“the MPRDA”), which provides for, among other things:

9.1 Local and rural development and the social upliftment of communities affected by mining;

9.2 Equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

9.3 Substantial and meaningful expansion of opportunities in mining for black South Africans, “including women and communities”; and

9.4 The transformation of the mining industry through ownership, participation and benefit for communities that host or supply labour to mining.

10 Section 100(2) of the Act empowers the Minister to develop a broad-based socio-economic Charter that sets a framework for the entry of historically disadvantaged South Africans into the mining industry and advances the transformative goals of the MPRDA.

11 The first Mining Charter came into force in 2004. The current Mining Charter replaced it in 2010 (“the 2010 Mining Charter”).

12 The Mining Charters have had some success in advancing transformation in the mining sector.

13 In the experience of the rural communities that LARC and its partners engage with, members of mining affected communities rarely experience



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any of the positive impacts of the Mining Charter and certainly nothing equivalent to the negative impacts of mining on these communities.

- 14 Partly this is because entities that hold shares for communities rarely participate in the mining entity as equal parties and do not derive the full benefits of shareholders due to unfavourable vendor financing arrangements, transfer pricing, and other challenges associated with being a minority shareholder with limited capacity.
- 15 A more immediate challenge is the current practice of equity being held by entities established by traditional councils, represented and controlled by traditional leaders, rather than the households and groups who are directly impacted by mining.
- 16 This has led to the widespread reality that benefits do not reach the people who are deprived of their surface rights to land, or those directly affected by mining pollution.
- 17 Issues of scale are crucial here. The Mapela traditional council in Limpopo has jurisdiction over 42 far-flung villages. The Bakgatla ba Kgafela traditional council has jurisdiction over 32 villages. Mining shafts typically impact directly on the land of one or two villages, as opposed to that of the entire 'tribe'. Traditional council members may come from villages that are over 50km from where the mining takes place. When the traditional council authorises mining deals that generate revenue for the council, there is no direct equivalence between the council that reaps the benefits and the people whose rural livelihoods are destroyed by mining (Mnwana & Capps, 2015).
- 18 According to the then Chamber of Mines (now the Minerals Council South Africa), the Department of Mineral Resources routinely advises potential investors to deal directly with traditional leaders (Chamber of Mines, 2017) even though traditional leaders do not have the legal authority to sign deals binding communal land. Only the Minister of



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Rural Development and Land Reform has that authority as the nominal owner of most communal land. And he or she is bound by IPILRA to obtain the consent of those whose informal land rights (as defined in the IPILRA) to occupy, use or access land would be affected. If they do not consent, their rights must be expropriated, and duly compensated.

- 19 The Minister's failure to enforce IPILRA combined with the fact that some traditional leaders have stepped up to sign surface leases and mining deals while having no explicit legal authority to do so has resulted in many deals being legally precarious. This is also because many traditional councils (in fact all traditional councils in Limpopo and Mpumalanga, and the majority of traditional councils in North West) have failed to comply with the legal requirement that they must include one third women members and 40% elected members.
- 20 The Memo attached to the Traditional Leadership and Governance Framework Act Amendment Bill (TKGFAAB) gives this as the reason for the proposed amendment to remove the consequence of legal invalidity for traditional councils that fail to include women or hold elections.
- 21 To address the fact that traditional leaders do not currently have the legal authority to sign deals binding communal land another bill before Parliament, the Traditional and Khoi-San Leadership Bill (TKLB), attempts to provide traditional leaders with that authority (clause 24.2). However the bill is unlikely to survive constitutional scrutiny as it does not require the consent of those whose land rights would be affected by such third party deals.
- 22 The practice of mining houses dealing directly with traditional leaders, rather than the individuals and the sub groups directly affected has contributed to the lack of effective financial oversight to guard against the theft of mining revenue that has happened to the Bapo ba Mogale, Bakgatla ba Kgafela and many other communities (Manson, 2013).



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- 23 The dual application of the MPRDA and the TLGFA has stripped rural people of the capacity to hold their leaders to account, and to ensure that compensation and mining royalties are properly reported and fairly distributed. Recent investigations (Human Rights Commission 2018; Bloom & Wales-Smith, 2018) have laid bare the scale at which poor rural people are losing out through mining deals.
- 24 It is massive: in 2017, the Public Protector reported on the R600 million missing from the 'tribal account' of the Bapo ba Mogale in North West province (Public Protector, 2017/2018). More recently, the Baloyi Commission sitting in Rustenburg heard evidence of how the Bakgatla ba Kgafela community lost billions of rands in mining revenue through secret deals negotiated between Kgosi Nyalala Pilane and veteran South African mining magnate Brian Gilbertson's Pallinghurst Resources Ltd, among others (Bloom & Wales-Smith, 2018).
- 25 Government is deeply implicated. The account from which the R600 million of the Bapo ba Mogale went missing is held in the North West Premier's office and supervised by officials of the Department of Traditional Affairs (Bloom, 2016). The office of the Auditor-General has confirmed in public hearings that the account has not been audited since 1994, despite this being a requirement of the TLGFA.
- 26 This is generating opposition at a scale that cannot be ignored. Mining companies indicated in October 2017 that protests involving road blocks, vehicle stoning and assaults on people going to work had caused a significant reduction in platinum production at Mogalakwena, the world's largest open-pit platinum mine, and Impala Platinum's Marula mine (Stoddard, 2017). Impala has said that it may soon have to close Marula, which would be the first such shutdown in South Africa linked purely to social upheaval. Chris Griffiths of Anglo Platinum told Reuters that 'what we are trying to do is get away from some of the previous structures where we felt obliged to pay the money over to the Kgoshi (chief)' (Stoddard, 2017).



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- 27 In a written submission to the High-Level Panel about problems confronting mining-affected communities the Minerals Council South Africa wrote (Chamber of Mines, 28 July 2017):
- 28 *The legitimacy of traditional leaders is disputed by some community members in some jurisdictions, and that this can be the source of negative relationships between mines and adjacent communities... There have also been cases where the proceeds of these transactions have been mismanaged. None of this is satisfactory for the mines and the companies that own them... However, the industry's interest is in greater stability and a reduction of social conflict both within those communities and between disaffected members of those communities and the mines. That would need to include acceptance of greater accountability by traditional leaders.*
- 29 Given that the definition of 'traditional community' in the TLGFA and the TKLB defaults to the tribal boundaries put in place by the controversial Bantu Authorities Act of 1951, revenue from mining will continue to be deposited into tribal accounts, rather than compensation being paid to those directly affected. The law governing trust property in South Africa, the Trust Property Control Act of 1988, was not designed for trusts with hundreds of thousands of beneficiaries, and the complex interface with laws such as the TLGFA. It is notorious in failing to include effective oversight, and mechanisms to address breaches and internal disputes.
- 30 Despite the MPRDA's lofty aims, the discovery of key strategic minerals, such as platinum group metals, coal, and iron ore in the former homeland territories has continued to result in dispossession and extinguishing of customary land rights. This is largely because of past discriminatory laws, which ensured that most people in these communities do not have title deeds – their land is held in trust by government and overseen by the Department of Rural Development and Land Reform. Often, the Minister acts in the interest of mining corporation rather than the communities.



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31 This has resulted in inappropriate and inadequate infrastructure being provided through Social and Labour Plans, mismanagement of community royalties and funds, constant protests, and the emergence of informal settlements together with serious health and environmental hazards for people living near the mines.

Draft Mining Charter

32 In its preamble, the draft Mining Charter's observations on the challenges facing communities is closely aligned with LARC's experiences:

32.1 The Charter highlights that "a proliferation of communities living in abject poverty continues to be characteristic of the surroundings of mining operations."

32.2 The Charter notes that the trickled flow of benefits to community entities primarily services debt.

32.3 The Charter finds that "the interests of...communities are typically held in nebulously defined Trusts, which constrain the flow of benefits to intended beneficiaries."

33 The draft Mining Charter therefore sets out to address these challenges to effect "broad based and meaningful transformation."

34 In some areas, it succeeds.

35 Clause 2.1.3.2 provides that for new mining rights host communities must hold a minimum of eight percent of shareholding, and that five percent shall be free carried. Clause 2.1.3.3 provides for trickle dividends to communities where dividends are not paid. Clause 2.1.3.5 provides that host communities shall have representation on the board.

36 These are improvements on the previous charter. But there are major flaws that remain.



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- 37 Firstly, these improvements only apply to new applications. There is no empowerment of communities where mining is currently happening. This is particularly concerning given the stark poverty of people living in these areas and the lack of recourse where compensation for lost land rights has gone to traditional leaders rather than the people whose land rights are directly affected. Even in those cases where the Public Protector has detailed how mining revenue went missing, there has been no redress or compensation to the people directly affected.
- 38 Importantly, there is absolutely no provision to correct the challenge the draft Charter itself describes as the ‘nebulously defined trusts’.
- 39 Nor does the charter engage with the fact that if mines continue to deal directly with traditional leaders who claim to have sole authority to represent vast groups of people, the revenue must be deposited into dysfunctional tribal accounts from which vast amounts of money have gone missing.
- 40 The auditor general has admitted that these accounts, that are meant to be governed by the TLGFA and its provincial counterparts, have not been audited and are in a chaotic state.
- 41 By failing to clarify and define what it means by ‘host community’ the draft Mining Charter will reinforce the current practice of revenue being paid to traditional councils (formerly named ‘tribes’) represented and controlled by traditional leaders.
- 42 It should also be noted that clause 2.1.3.2(ii) the draft Mining Charter provides that community equity may only be held “in the form of a community trust as prescribed”. Communities are prevented from holding equity in the form of their choice. Indeed, the clause provides no power for the community holding the equity to have any say whatsoever in the structuring of the shareholding.
- 43 If these sections are not changed, the defects which ‘constrain the flow



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of benefits to intended beneficiaries' identified in the Preamble will remain in place.

- 44 To correct these issues, we propose two changes to the draft Mining Charter to address these issues.
- 45 The first amendment would change the provisions of clause 2.1.3.2 to provide that the equity arrangement can only be approved if the community has consented to the terms of the arrangement in terms of its custom and practice. Unless and until the Mining Right holder has reached an agreement with the community that complies with this provision, no mining may commence.
- 46 The second relates to the definition of 'host community'. Guiding principles to include here are:
 - That the definition must be incapable of being substituted by the definition of 'traditional community' contained in the TLGFA and TKLB
 - The current definition of community in the MPRDA is a good start, in that it focuses on the people directly affected by mining and on user groups to land with shared rules and practices rather than overarching 'tribes'. However the reality is that traditional leaders have been treated as the de facto representatives of people directly affected by mining despite having no legal authority to act as such. Instead of benefits accruing to the individuals and small groups directly affected who would be able to exercise accountability in relation to one another, revenue has disappeared into opaque tribal and community trusts which cannot be held to account
 - Mapping exercises are necessary to clarify what land and which people will be affected by mining to allow for both individual compensation for those whose land rights are affected, and group based forms of compensation to those whose access to natural resources such as grazing and water are affected, or who suffer pollution and other



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hazards from mining operations.

- The host community should be defined on the basis of such mapping exercises and allow for different quantum of revenue and vehicles to distribute it in compensation for the varying degrees of impact caused by mining

Thank you for accepting our submission. LARC would appreciate the opportunity to make an oral presentation of our submission.

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