LARC
Land & Accountability Research Centre

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Minister of Mineral Resources and Energy, Samson Gwede Mantashe
c/o Ms. Sibongile Malie
Per email: sibongile.malie@dmr.gov.za

LARC contact: Zenande Booi, Land Lead Researcher, zenande.booi@uct.ac.za

Submission on the Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019

Introduction

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 framing the balance of power within which rural women and men struggle for change at the local level. It is in this context that we would like to make a submission on the Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019.

One of LARC's areas of focus relate to the impact of laws, policies, and practices of the state as well as the conduct of private parties on the rights protected in section 25(6) of the Constitution. Sections 25(6) and (9) of the Constitution deal with security of tenure and provide that tenure that is legally insecure as a result of past racially discriminatory laws or practices must be made legally secure in terms of legislation. We work with vulnerable, poor, and mostly black people and communities whose land rights were subverted and discriminated against historically. While these rights are now formally recognised by the Constitution and laws such as the Interim Protection of Informal Land Rights (IPILRA)[1] they are, in practice, constantly threatened. These rights are undermined by both the state and private parties through policies and practices that fail to appropriately recognise these rights as property rights enjoying constitutional protection.

[1] 31 of 1996.

With the majority of new prospecting and mining rights being granted over land in the former Bantustans, the operation of the Mineral and Petroleum Resources Development Act (MPRDA)[2] and related Regulations have a substantial impact on the security of the informal and customary land rights that exist within these areas. There are many improvements in the provisions added by the Draft Regulations however there are some gaps in them that are of some concern, these will be set out in detail below. It is of paramount importance that the operation of the MPRDA, as well as provisions of related Regulations, is cognisant of, and is sensitive to, the vulnerability of rights that exist on land it operates. The Constitution, IPILRA, and numerous court judgments have made it clear that the MPRDA does not operate in a vacuum. In giving effect to its provisions, the state and mining companies are obligated to respect other applicable legislation and policies.

This submission is structured as follows:

1. First, the submission considers who, in terms of the Draft Regulations, is entitled to take part in the consultation process;

2. Then the submission considers what consultation is envisioned to look like in terms of the Draft Regulations. Does the proposed process comply with requirements in applicable legislation and judicial precedent?

3. Does the 'consultation process' appropriately deal with nuances that present themselves in many contexts? Do the Draft Regulations adequately recognise and respond to past and present realities that exacerbate the vulnerability of black people's rights to land, particularly in the former Bantustans?

4. The submission will also consider the provisions related to Social Labour Plans (SLPs);

5. The submission will also consider the extent to which the dispute resolution processes and appeal processes in the Draft Regulations adequately provide for vulnerable rights to land;

6. Lastly, the submission will also consider the provisions related to the Notice of Profitability and Curtailment of Mining Operations Affecting Employment and Use of Land Surface Rights Contrary to Objects of the Act.

[2] 28 of 2008

Consultation with interested and affected persons

Regulation 3 relates to the consultation with interested and affected persons with regard to applications for permissions, rights, or permits in terms of the MPRDA by the Department as well as the applicant. This aspect of the application process is vital to ensuring that the rights that people hold over the land where operations are intended, or ongoing, are properly recognised and protected. The Draft Regulations keep the original overarching definition of interested and affected persons, being natural or juristic persons or an association of persons with interests in the operations or who will be affected by the intended operations. The Draft Regulations then expand on this definition by giving a non-exhaustive list of examples of persons that could be interested and affected persons.

This non-exhaustive list is an improvement from previous laws and policies. This non-exhaustive list attempts to recognise that there are different types of rights and interests that can exist over the same plot of land. Its explicit recognition of holders of informal rights illustrates this progress because these rights holders have been historically left out and have suffered greatly as a result. It is also very significant that lawful land occupiers and land claimants are finally being recognised as stakeholders that need to be part of processes related to possible mining operations on land they hold rights and interests over.

However, it is cause for concern that these categories are not defined. There is no clarity as to how each category is to be engaged with depending on the nature of rights or interests held by each person. It is also very worrying that the regulatory legislative framework applicable to many of the categories listed are not referred to at all. There is also no clarity about how these categories relate to one another, particularly in the context of the consultation process. Each category of stakeholders referred to in the expanded definition has different rights and interests in the land in question and the intended operations. In regulating consultation for the purposes of the MPRDA it is important that the differences and nuances are recognised and appropriately provided for – importantly, express reference needs to be made to the regulatory legislative framework related to each of these rights to ensure that the Department and applicants comply with all applicable laws and that any deprivation of rights is lawful.

Rights enquiry

It is worrying that neither the MPRDA nor the Draft Regulations require that a comprehensive rights enquiry be completed before any attempts at consultation are started. Such a rights enquiry is necessary to identify the different rights and interests that exist over the land earmarked for prospecting and mining operations. This land

rights enquiry must be linked with the specific laws that are applicable to the different categories of rights holders. These applicable laws will determine the appropriate definition to be applied to the relevant category and will set out how people that hold rights or interests in terms of these laws can be lawfully deprived of these rights.

Laws such as IPILRA; Extension of Security of Tenure Act (ESTA); Restitution of Land Rights Act; Land Reform (Labour Tenants Act); and the Prevention of Illegal Evictions Act (PIE) are routinely ignored and not complied with because laws, policies, and regulations such as this make no explicit reference to them or require that they be complied with. These laws need to form part of all decision making processes that relate to rights regulated by these laws. Requiring a comprehensive rights enquiry and expressly requiring that applicable laws will ensure rights that continue to be ignored are appropriately protected. It is also important that the Department and the Department of Agriculture, Rural Development and Land Reform (DARDLR) play an active oversight role in the rights enquiry process to ensure the veracity of the process.

Interested and affected parties

The categories of persons added in the definition of interested and affected persons, include:

- host communities;
- land owner ("traditional and title deed owners");
- Traditional authority;
- Land claimants;
- Lawful land occupier;
- Holders of informal rights (no mention made in regulations or MPRDA of IPILRA);
- The Department of Agriculture; Land Reform and Rural Development;
- Any other person - including people on adjacent & non-adjacent properties - whose socio-economic conditions may be directly affected by the proposed prospecting or mining operation;
- The Local Municipality;
- Relevant Government Departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project.

It is necessary for each of these categories to be appropriately defined, and clarity needs to be provided about what consultation with each of these categories looks like – including the appropriate manner to comply with the applicable regulatory legislative framework that applies to a given category. Some of these categories, including informal rights, are constitutionally recognised and protected therefore any attempt to deprive their holders of these rights must comply with the Constitution and applicable

law. These rights and applicable laws are routinely ignored by the state and private institutions such as mining companies because regulations and policies such as these make no specific reference to them and the need to comply with these laws. It is therefore essential that laws and regulations that affect constitutionally protected rights expressly require compliance with the Constitution and laws that give effect to those protections.

This submission will now consider specific categories listed as possible "interested and affected parties":

Host communities

No definition is given of what is meant by host communities. There is a definition of "communities" in the MPRDA, however it sets out that when it comes to negotiations and consultations required in terms of the MPRDA then "the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community". In the context of "host communities", questions that need to be answered by the Draft Regulations include – would this definition of community be expanded? What are the parameters of this expansion? How are the rights of members of host communities whose rights are directly affected – in the sense that the intended operations will be on land they specifically hold rights over – to be balanced with the interests of other members of the community who are not affected to the same degree?

As was discussed above, it is imperative that the consultation process related to applications for rights and permissions in terms of the MPRDA be preceded by a thorough rights inquiry to ascertain the nature and content of rights held over and around land where prospecting or mining operations are intended. Not having adequate clarity on these issues places rights that are already structurally vulnerable because of colonial and apartheid laws, policies and practice in further jeopardy and could result in unnecessary conflict within communities where rights and processes of dealing with those are not clear and transparent from the beginning.

Landowners (Traditional and Title Deed owners)

Having no definitions in the Draft Regulations also raises issues with regard to what is mean by landowners in the Draft Regulations. Title Deed owners presumably refers to land registered in the name of a person in terms of the Deeds Registries Act[3], which is alluded to in the definition of "owner" contained in the MPRDA. However, neither the MPRDA nor the Draft Regulations explain what is meant by "traditional owners" or

[3] 47 of 1937.

how an applicant, or the Department, is to appropriately ascertain whether an individual is a traditional owner; or how one proves that he or she is a traditional owner.

If the use of "traditional" refers to title held in terms of customary law or other forms of tenure systems, then clarity needs to be provided about how this title is to be appropriately ascertained or proven. Also, further down in the list of categories of "interested and affected parties" reference is made to "holders of informal rights". This presumably relates to rights held in terms of IPILRA. Rights to land held in terms of customary law and other tenure systems are regulated by IPILRA, but the Draft Regulations do not make clear if, or how, rights of traditional owners relate to, or differ from, informal rights holders. Since IPILRA regulates how these rights are ascertained, dealt with, and how holders of these rights are to be lawfully deprived, this would mean that the rights of traditional owners are regulated by the provisions of IPILRA.

IPILRA recognises that many informal rights are held in terms of customary or group tenure systems. IPILRA makes it clear that holders of these rights can only be lawfully deprived of their rights through expropriation or with consent. That consent needs to be obtained in terms of the customary law system that applies, with due regard to the requirements of IPILRA. Therefore, if "traditional owners" refers to people who are owners in terms of customary law – then any deprivation of those rights must comply with IPILRA and the applicable customary law system.

The above again illustrates that it is important for Regulations such as these to be explicit about the obligations of the Department and applicants to ensure that all applicable laws are complied with. Without this clarity rights are made even more vulnerable because there is no clear obligation on the Department and applicants to ascertain the nature and content of the rights held over land where operations are intended to ensure the correct laws are complied with. Without clear guidance on how each specific category of rights must be ascertained and dealt with, historically vulnerable rights will continue to get the short end of the stick.

Traditional Authority

It needs to be made explicit that the "traditional authority" with standing to be consulted in this context refers to traditional authorities that have transformed in full compliance with the provisions of the Traditional Leadership and Governance Framework Act (TLGFA)[4] and are not simply apartheid era institutions that has failed or refused to comply with the provisions of the TLGFA that 40% of Council members must be elected and one third must be women.

Also, the role of traditional authorities in the consultation process needs to be made absolutely clear. Traditional authorities may have an interest in operations on land

[4] 41 of 2003.

within their jurisdiction, however this cannot be construed as in anyway being a valid substitution for consulting with individual holders of rights to the land. There has been a long history of mining companies engaging and negotiating exclusively with traditional authorities – completely ignoring the individual rights of community members.

There is no law that conflates the jurisdiction traditional councils have over an area in terms of the TLGFA with ownership or control over the land within those traditional authority boundaries. The Communal Land Rights Act of 2003 attempted to provide traditional councils with control and ownership of 'communal land' but it was struck down by the Constitutional Court in 2010. Moreover, numerous laws and policies recognise and regulate the treatment of individual and family rights, such as informal rights through IPILRA, held by community members. The Department and applicants are obliged to respect and comply with these laws.

In the context of the recent signing into law of the Traditional and Khoi-San Leadership Act (TKLA)[5], it is all the more important to clarify the role of traditional leaders in negotiating and engaging with traditional authorities. Section 24 of the TKLA empowers traditional councils to negotiate and conclude partnerships and agreements with 3rd parties. This provision does not, where such agreements may relate to land, place clear obligations on the traditional council to appropriately treat the different rights held in respect of that land. It does not explicitly require that specific rights holders be identified, consulted and their consent be obtained before an agreement is concluded. It is important to also note that in its recent judgment *Maledu and others v Itereleng Bakgatla Mineral Resources (PTY) Limited and another* (*Maledu*),[6] the Constitutional Court made it clear that agreements concluded with traditional authorities that purport to deprive people of their rights in a manner that does not comply with the legislative framework that regulates those rights are not valid. In the *Maledu* case, the holder of a mining right had attempted to evict holders of informal rights without depriving them of those rights in terms of section 2 of IPILRA.

There have been numerous examples and instances that illustrate how the rights to land of community members are threatened or violated because of a close relationship between the traditional authority and mining company, or the mining company only meaningfully engaging with the traditional authority to the substantive exclusion of the rights holders. The recent Baloyi Commission that looked into, amongst other things, the financial corruption of the Bakgatla-ba-Kgafela (BBK) traditional community. The BBK case illustrated how a community rich in mineral resources can be robbed of its wealth when the traditional authority is allowed to unilaterally shape and represent community interests without properly consulting with community members in terms of applicable regulatory frameworks. Examples such as these are not unique to the BBK traditional community, as such there needs to be explicit requirements that laws aimed at recognising and protecting particularly vulnerable rights to land and resources must be properly implemented. People must be able to protect their rights as is envisioned in the Constitution and numerous laws and policies. They should not be left at the mercy of traditional authorities.

[5] 3 of 2019.
[6] 2019 (2) SA 1 (CC).

Land claimants

This category of possible interested and affected persons presumably refers to people that have launched claims for land or rights to land in terms of the Restitution of Land Rights Act;[7] Land Reform (Labour Tenants) Act;[8] or the Extension of Security of Tenure Act (ESTA).[9] Again, even though this is listed as a category the Draft Regulations makes no reference to these applicable laws. But, it needs to be made explicitly clear that the relevant processes that are set out in these laws and related regulations and policies must be complied with to lawfully deprive people of their rights and interests. The Draft Regulations also need to clearly place an obligation on the Department as well as any applicants to determine if any land claim is pending over land intended for prospecting or mining operations. Land claimants do not always live on the claimed land and they are sometimes scattered across the country as a result of displacement, thus it is imperative that claimants are accurately identified, notified, and are able to take part in the consultation process.

The Draft Regulations need to be cognisant of and provide guidance on how to deal with the difficulties that have plagued various categories of land claimants. The rights of land claimants are routinely ignored, and claimants are treated by the government and other entities as having no substantive rights to be protected. An extreme example relates to the claims of labour tenants. These claims have never been properly dealt with by the now Department of Agriculture, Rural Development, and Land Reform (DARDLR). The DARDLR has admitted to not knowing exactly how many people actually lodged labour tenant claims. It has also admitted to losing and having no record of thousands of claims made by labour tenants. These are just a few issues that plague labour tenant claims in particular, and land claimants in general. The Draft Regulations cannot act as if these historic, current, and political contexts that place rights held by the most vulnerable in South Africa even more at risk do not exist. These contexts need to be recognised and adequate provision needs to be made to, as far as possible, protect people's rights to land.

Holders of informal rights

Informal rights are regulated by IPILRA, which makes it clear that unless the state expropriates informal rights to land – consent of the rights holder is required to lawfully deprive them of their rights. The Draft Regulations need to expressly define holders of informal rights in terms of IPILRA, to ensure that in engaging with holders of these rights, applicants for rights in terms of the MPRDA know that IPLRA must be complied with.

In requiring that the consent of the holder of informal rights to be obtained to lawfully deprive them of their rights, it makes it clear that for rights held in terms of customary law – consent must be obtained in terms of customary law. Section 2(4) of IPILRA sets

[7] 22 of 1994.
[8] 3 of 1996.
[9] 62 of 1997.

out the minimum procedure for customary tenure systems when rights are to be deprived. However, many customary system procedures that have to be complied with provide more protections to land rights holders. They require more than IPILRA in order for people who hold rights in terms of those systems to be lawfully deprived of their rights. For example, section 2(4) of IPILRA require that a majority of rights holder present at an appropriately convened need to give their consent to the deprivation. However, in the *Baleni and others v Minister of Mineral Resources*[10] case the Umgungundlovu community showed that in terms of the customary law applicable their community consent by a majority of the affected rights holders is not enough. Instead, in terms of their customary law consensus on the decision needs to be reached otherwise any deprivation of rights is not lawful.

The 2018 *Maledu* judgment, the 2018 *Baleni* judgment, the 2019 Baloyi Commission Report, the 2017 Motlanthe High Level Panel Report[11], and the 2019 Presidential Advisory Panel Report[12] have made it clear that the operation of the MPRDA cannot be at the expense of rights to land recognised and protected by the Constitution. The Baloyi Commission Report[13] specifically stated that clear policies and guidelines need to be developed and adopted on how to appropriately comply with IPILRA. The MPRDA cannot continue to operate with no regard to the historical and current vulnerability of these rights to land, and the constitutional obligation the state, and private people and institutions, has to protect these rights.

Obligation on the part of the applicant to consult

The Draft Regulations have added a definition of "meaningful consultation." Meaningful consultation is defined as requiring good faith engagement by the applicant with the landowner, lawful occupier or interested and affected party about the land that is the subject of the application. This "engagement" must be about the impact of the intended activities on a person's rights over the land. Engagement is to be done by giving the owner, lawful occupier, or interested and affected party all the information relating to the intended operation. This information is meant to enable these parties to make an informed decision regarding the impact of the proposed activities. This definition is a welcome improvement to the previous Regulations that had no definition of "meaningful consultation." However the definition does raise a number of questions

[10] 2019 (2) SA 453 (GP).

[11] Kgalema Motlanthe, Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, retrieved from: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (last accessed 31 January 2020).

[12] Dr Vuyokazi Mahlati, "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture?, retrieved from: https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf, (last accessed 31 January 2020).

[13] Sesi Baloyi, SC, "Commission into Traditional Succession Dispute and Claims: Bakgatla-ba-Kgafela Traditional Community", retrieved from: http://www.saflii.org/images/baloyi.pdf (last accessed 31 January 2020).

related to how different rights and interests, and rights holders, will be treated in the consultation process. Other questions relate to the nature and meaning of "consultation" in the context of applicable legislation, recent judgments, and state commissioned reports that relate to many of the rights likely to be impacted by intended prospecting and mining operations.

Is meaningful consultation actually "meaningful?"

This definition initially appears to go some way in ensuring holders of rights have a substantive role in the processes related to prospecting and mining rights applications – but that is not actually the case. The seminal Constitutional Court judgment on the question of consultation in the context of the MPRDA is *Bengwenyama Minerals v Genorah Resources*.[14] This judgment lays down a number of principles that have been elaborated on in subsequent judgments, however, these principles are missing in the Draft Regulations. The judgment speaks about the fact that even though the MPRDA doesn't require agreement between the parties at the consultation stage, consultation should be in good faith with the aim of reaching agreement/accommodation that appropriately balances the rights of both parties. These Draft Regulations do not seem to envision that the aim of consultation is to move the parties (applicant and the owner/lawful occupier/ interested and affected party) towards reaching some sort of agreement or accommodation at this stage.

This is illustrated by the definition of meaningful consultation in the Draft Regulations being quite circular. The definition does not seem to be aimed at anything more than giving information so that a comment can be made:

- Meaningful consultation is good faith engagement; good faith engagement is giving owners, lawful occupiers, or interested and affected parties information about "the impact of the proposed prospecting or mining activities" on their rights so that they can make "an informed decision about the impact of the proposed activities".

This definition raises more questions than it answers - what decision is this definition empowering people to make? When and how is this decision-making process meant to play out? Provisions of the MPRDA, the current Regulations, and Chapter 6 of the Environmental Impact Assessment Regulations (EIA Regulations)[15] give no clarity on how laws and policies that regulate substantive rights will be complied with. Is the sum total of the obligation to consult to give information and an opportunity to comment?

[14] *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 (CC).
[15] Environmental Impact Assessment Regulations, 2014.

IPILRA makes it clear that holders of informal rights to land can only be deprived of these rights in terms section 2. The consent of the informal rights holder needs to be appropriately obtained – giving information about how this right is to be impacted and giving the right holder an opportunity to comment on that "impact" does not validly deprive people of rights held in terms of IPILRA. This was confirmed by the Constitutional Court in the *Maledu* judgment, and by the North Gauteng High Court in the *Baleni* judgment. This has also been reiterated by the Kgalema Motlanthe High Level Panel Report, the report of the Presidential Advisory Panel on Land Reform, and most recently the report of the Baloyi Commission. These all stress that IPILRA needs to be complied with when depriving informal land rights holders of their rights to ensure their rights are recognised and protected.

Even holders of other rights over land are entitled to more than just being given information and an opportunity to make a comment. In terms of *Bengwenyama* at the very least consultation entails good faith negotiation with an aim of reaching agreement/accommodation.

This lack of substance in the process is also illustrated in the description of the nature of the consultation that is required on the part of the applicant. The Draft Regulations require that the consultation by the applicant be in terms of specific provisions in the EIA Regulations. The consultation process provided for in the EIA Regulations in no way meets the requirements necessary to deprive people of their rights to land as required in the applicable legislation, policies, and court judgments. The provisions of the EIA Regulations envision interested and affected persons (which includes holders of informal rights, owners and lawful occupiers) not actually substantively taking part in decisions that directly impact their rights to land, they are really only being given an opportunity to "comment". The provisions of the EIA Regulations that set out the consultation process required by the Draft Regulations will be considered in more below.

Consultation in terms of EIA Regulations

The Draft Regulations provide that the consultation by the applicant contemplated in the MPRDA in sections 16; 22; 27 with landowners, lawful occupiers and interested and affected parties must be conducted in terms of the public participation process set out in the EIA Regulations 39; 40; 41; 42; 43 and 44.

Many of the rights implicated by the operation of the MPRDA in this context are rights that are recognised and protected by the Constitution and laws passed to give effect to these constitutional rights. Considering the importance of the rights in question, it is our submission that it would be more appropriate to develop a specific public participation process. This public participation process should be able to account for

and make appropriate provision for the issues and nuances that arise in the specific context of rights and interests being affected by the operation of the MPRDA. The provisions of the EIA Regulations do not adequately recognise and protect the rights that will be affected by the operation of the MPRDA and are not appropriate to be applied, verbatim, in that context.

EIA Regulation 39(1) requires that an applicant get the consent of the owner or person in control of the land before starting the EIA process. In terms of Regulation 39(2)(b), the requirement of obtaining consent falls away where the activity relates to prospecting or exploring for minerals or petroleum. EIA Regulation 40 gives interested and affected parties and relevant authorities thirty (30) days to make comments on an application that has been accepted in terms of the MPRDA; all information related to the application that would influence any decision by the Department must be made available and the process must include consultation with interested and affected parties and relevant authorities.

EIA Regulation 41 requires the applicant to give notice to potential interested and affected parties by way of - posting notices on the site the proposed activity is happening; giving written notice to occupiers of the site and to the owner or person in control of the site if the applicant is not the owner of the site. **There is no clear obligation to properly ascertain the nature of the rights and interests that exist on the land, who holds those rights or interests, and how each of these rights and interests should be appropriately dealt with.** For example, how would an applicant accurately identify and give notice to land claimants who do not always live on land they have made a claim over? The EIA Regulations only require that specific written notice be given to occupiers or the owner. There is no obligation to specifically notify interested and affected parties, which also includes informal rights holders, in writing. Notices on walls and advertisements in newspapers seemingly suffice to give notice.

EIA Regulation 41(6) says all relevant information must be given to potential and interested parties and that the applicant must ensure that public participation is facilitated in a way that all such parties have a reasonable opportunity to ***comment*** on the application. Again, there is no differentiation of the types of existing rights and how to appropriately deal with each of these rights. Furthermore, it is in the hands of the applicant to determine what is reasonable in facilitating public participation. No guidance is given on what is required of the applicant, at a minimum, to ensure that all interested and affected persons are able to participate in the consultation process – particularly vulnerable rights and rights holders.

EIA Regulation 42 requires that the applicant opens and maintains a register of interested and affected parties identified through their participation in the public

participation process; of people that request to be put on the register; and organs of state. This register then seems to be the list of people that future engagements, such as notices, announcements, and participation related to the application, are meant to focus on. This is very concerning considering that there is no initial process of comprehensively identifying and notifying rights holders and interested persons. In practice, the burden remains with the rights holder, or interested person, to ensure they are included in the process either at its initial stage, or they must later approach the applicant and request to be placed on the register.

The potential for harm is exacerbated by the likely limited effectiveness of how notices and information is disseminated. There is no clear obligation placed on the applicant to accurately identify rights holders or those who have an interest in the land or possible operations. More stringent obligations of identifying and informing rights holders is necessary. This is important for particularly vulnerable rights, and rights holders. Thorough rights enquiries that properly identify rights holders, the nature of the rights or interests held, and how to lawfully deprive people of their rights are necessary to adequately protect historically and currently vulnerable rights.

EIA Regulation 43 then provides that registered interested and affected people are entitled to ***comment*** on the application and bring to the attention of the applicant any issue he or she thinks is important in the consideration of the application. This again falls far short of how rights recognised and protected by the Constitution can be lawfully deprived. It is important that where rights are regulated by specific laws then those laws need to be listed in the regulations so that they can be complied with. IPILRA explicitly requires that the consent of informal rights holders be obtained before he or she can be lawfully deprived of their rights. All that Reg 44 requires is that these ***comments*** and responses to the comments be recorded in reports submitted to the competent authorities.

Both Regulations 43 and 44, illustrate the extent to which the public participation process, envisioned by the Draft Regulations and provided for in the EIA Regulations, does not comply with *Bengwenyama* and applicable legislation. *Bengwenyama*, at a minimum requires that consultation be in good faith and that engagement is aimed at reaching some sort of agreement or accommodation. Neither of these Regulations comply with, or even mention, IPILRA or other laws that regulate the rights of informal rights holders and lawful occupiers. The extent of 'meaningful consultation' appears to be giving out information to solicit comments. The Regulations provide rights holders no real opportunity to substantively take part in the decision that will drastically impact their lives as would be required by the laws regulating the various rights.

What does this envisioned public participation process mean for the groups stated to form part of the definition of "interested and affected persons"?

The Draft Regulations and EIA Regulations do not seem to even attempt to clarify how different layered and conflicting rights and holders of rights (and other types of interested and affected parties) are each meant to be engaged with depending on the nature of their rights. No distinction is made between 'interested' and 'affected' and how to determine which category someone falls under and what that means about how that person should be consulted.

In only requiring that rights holders and interested parties be given an opportunity to comment there is no clarity about the weighting of various comments. How will comments from the various categories of affected and interested parties be dealt with? Will a comment from an owner or informal right holder be treated the same as a comment from lawful occupiers of an adjacent plot? If there is a differentiation, what will that look like?

Are traditional authorities meant to be treated the same way as informal rights holders? What about government departments? The Draft Regulations need to be much clearer about how each person who holds different rights, or has an interest, should be appropriately engaged with to ensure any deprivations of rights is lawful. For example, with rights that are protected by IPILRA – the Draft Regulations need to make it clear that those whose land rights are directly affected can only be lawfully deprived of their rights in terms of section 2 of IPILRA. Same goes for rights that are held in terms of, and regulated by, ESTA or any other applicable laws.

As mentioned above, the Draft Regulations need to be clearer about how rights are to be defined, their nature ascertained, how to identify holders of these rights, and what this all means for how to appropriately engage with persons. For example, how is an applicant meant to ascertain whether a person is a lawful land occupier or an informal land right holder. It needs to be made clear that those two categories of people cannot be engaged with in the same way, their participation in the decision-making process cannot look the same. There seems to be no engagement with the fact that many of these rights, i.e. informal rights or rights of farm workers or labour tenants, are dealt with by specific and different laws that have specific requirements and processes for how holders of these rights must be engaged with to be lawfully deprived of their rights.

Social Labour Plans

Part II of the Draft Regulations relates to Social Labour Plans:

Labour sending area

Draft Regulation 41 adds "labour sending areas" as places that mining companies must ensure they contribute to the socio-economic development of, as opposed to only the areas they operate in. Labour sending areas are defined as areas from which a majority of mineworkers both historically and currently are or have been sourced from. This is an important acknowledgement of the impact that the migrant labour system that still characterises the mining industry affects the home communities that mineworkers come from.

However, the Draft Regulations need to make it clearer how and when labour sending area fit into the SLP compilation process. Furthermore, there is no guidance about how labour sending areas are identified. Can there only be one such community? Also, there is no guidance as to how communities can enforce this entitlement or advocate to be identified as such a community.

Compilation of SLPs

Draft Regulation 42 adds a requirement that after being notified of the acceptance of their mining right application, an applicant must within 180 days consult with 'communities' (presumably host communities and labour sourcing areas) so that the SLP addresses the relevant needs of communities and is aligned with the IDP of the municipal and local government structures. Explicitly requiring that there be a consultative process with the host communities is an important development since the Regulations as they stand have no such requirement. The lack of such requirement has adversely affected mine hosting communities as they were left out of determining the type of development that would be brought to their communities. Providing for a role for communities in the process of putting together a SLP is an important step in empowering communities to have some control over what happens in their communities and hold mining companies accountable for the delivery of the contents of the SLP. The consultation process to be used for SLPs is the one provided for in the EIA Regulations related to public participation process discussed above.

Further proposed improvements in the SLP process include regulation 45 which requires that the holder of a mining right give an annual report on the compliance with the approved SLP; regulation 46A requires that approved SLPs be published and the responsibility is that of the mining rights holder; regulation 46B requires that SLPs be reviewed every 5 years with input, comments and reports from the affected mine communities; adjacent communities; and labour sending areas. However, the process for obtaining this input is not set out – there is no explicit requirement to use the EIA Regulations public participation process. This is significant since regulation 41 says that it only applies when it is specifically required, so since there is no specific requirement the EIA Regulations would not apply. Clarity must then be provided by

the Draft Regulations on how this input from communities and stakeholders is to be obtained when SLPs are up for review.

Even though these additions to the Regulations are an improvement on the previous regulations, which did not require any community input in the development of SLPs, it is unclear how this will lead to realisable benefits. Presumably the mining company has the final word on the SLP that it accepts and finally sends through to the Department as part of its mining right application – but communities need only be consulted about the contents of the SLP, they're not empowered to accept or reject whatever the mining company has decided to put into the SLP after the consultation.

It is the Regional Manager who has the authority to direct that a SLP be amended or revised, at his discretion. But there is no requirement for the Department or Regional Manager to take part in the consultation process relating to the SLP so it is not likely he will be privy to the issues raised by the community that did not make it to the final draft of the SLP submitted to the Regional Manager. How would he then know that he needs to question what is placed before him by the mining company? This is exacerbated by the fact there is no mechanism for communities to go to the Regional Manager to raise concerns about the SLP draft before him, and there is no obligation for him to engage with communities and heed requests that the SLP be revised. The only other opportunity a community would feasibly have would be four years later when the SLP has to be reviewed. Even then, communities only need to be consulted and a much larger pool of stakeholders are included in the process of consultation when and SLP is being reviewed e.g. labour sending areas and adjacent communities.

Regulation on Compensation Payable under Certain Circumstances in terms of Section 54 of the Act

Section 54 of the MPRDA relates to when a resettlement or compensation related dispute cannot be resolved by agreement between the parties. Then the applicant or holder of a prospecting right, mining right or permit, must notify the Regional manager of the dispute. The notice must be in writing as per the form in the Draft Regulations and must be accompanied by a non-refundable fee of R1500. Even though the MPRDA envisions a process where an owner or other rights holder can trigger a section 54 process, the Draft Regulations make no provision for a community or individual rights holder to trigger section 54. Furthermore, no specific process is made for vulnerable people and communities – there is not even a process for poor people to have the R1500 fee waived. Vulnerable rights holders need to be specifically provided for in a manner that ensures their rights are protected.

Dispute resolution process

When the section 54 process is triggered the Regional Manager is required to constitute a negotiating team compromising of representatives from all affected parties. Examples of people that can form part of this include the applicant or mining/prospecting right holder; representatives from affected communities; and traditional leadership. The Draft Regulations give no clarity about how the affected community is to be determined and who can appropriately represent this affected community. Clarity in this regard is important, for example, the correct people would have to form part of the team where IPILRA rights are implicated to ensure IPILRA is complied with, as is required by the *Maledu* judgment.

It is also worrying that owners/informal rights holders/ lawful occupiers are grouped together as 'affected communities' in the listing of possible parties to the negotiations but traditional leadership is specially provided for. There needs to be clarity on what this means for actual substantive rights holders. What mechanisms will be put in place to ensure that the concerns of 'affected communities' are not overpowered by views of traditional leadership during the negotiation process?

The Regional Manager seems to have the unilateral power to develop the Terms Of Reference of the negotiating team, and there is no requirement for engagement or consultation in developing them. However, a democratic, transparent, and clear process related to developing the ToR would go a long way in ensuring that those who have to take part in it trust the impartiality of the process.

All affected parties must submit all relevant information that pertains to the dispute as evidence to support their claims. The type of 'information' listed as possible forms of evidence is not cognisant of the difficulties that can be faced by holders of informal rights (customary, statutory or otherwise) in proving rights, proving claims, sourcing documents – poor communities with no access to resources or legal representation would not be able to effectively take part in these negotiations on an equal footing.

If negotiation doesn't resolve the dispute and result in agreement, parties can go to arbitration. Nothing is said about what kind of support needs to be provided to vulnerable rights holders, whether it be explaining the nature of arbitration to parties and ensuring they know that there is also always the option to approach a court.

The Draft Regulations say nothing about the conclusion in the *Maledu* decision that mining operations cannot commence until the section 54 dispute resolution process is concluded. Neither the Regional Manager nor the applicant or right holder is obliged to

ensure that rights holders, particularly vulnerable unrepresented communities, know the full extent of their rights while taking part in this process.

The description of the negotiation process in this provision gives the sense that the desire is to have the negotiation process conclude as fast as possible. With the lack of protection for vulnerable rights holders, this will likely happen at the expense of vulnerable rights and rights holders who have no resources or access to legal representation to assist them in taking part in the negotiation process. More care should be placed in including provisions aimed at creating some semblance of 'equality' in the negotiation process with provisions that recognise the skewed nature of bargaining power.

The vulnerability of people is exacerbated by the Department seeming to have no enforceable obligations of oversight to ensure people's rights are protected. In the entire consultation process vulnerable people and communities are left to their own devices. Even at this very late stage of the dispute resolution process, the Department still plays a detached role of 'facilitating' a negotiation process – even in this context people and communities with vulnerable rights are in no way assisted or protected by the state.

Appeals

Draft Regulation 74 deals with the process of appealing decisions made in terms of the MPRDA. The original wording of the Regulations provided that an appeal to an administrative decision ***could be launched within 30 days of the person having become aware of the decision or should have reasonably become aware of the decision***. The Draft Regulations now provide that a written notice of intention to appeal must be ***launched within 30 days of the date of the decision being made.*** This seems to be the case whether or not the aggrieved person was aware of the decision. This drastically limits the rights of people to launch an appeal against decisions that affect them that they didn't know about. No explanation is given for this drastic limitation of the right to appeal administrative decisions (especially considering the shortcomings in the notice giving and consultation process).

The appeal notice is also drastically more onerous than is currently provided for in the Regulations. Rather than simply having to appeal to the "Minister or Director General, as the case may be", a notice must be lodged with the **"*Minister, the Regional Office from which the decision emanates and any other person whose rights may, in the opinion of the appellant, be affected by the outcome of the appeal.*"**

It is wholly within the discretion of the Regional Manager who else must be added to the appeal proceedings other than those listed by the appellant who in his/her opinion will have their rights impacted by the appeal. However, again with there being no rights

inquiry at the very beginning of the application process to properly ascertain who has rights over or interest in the land, it's likely many people will be left out from the very beginning and even in instances where decisions that adversely affect them are being challenged.

The internal appeal process described in the rest of the amended Regulation 74 is incredibly adversarial and complicated. Again, expediency that favours the processes of common law court proceedings will place vulnerable people and holders of vulnerable rights at an incredible disadvantage. They face real threats that could result in having their rights taken away from them and they will not have a meaningful opportunity to protect themselves or a meaningful opportunity to be properly compensated for the loss they will suffer as a result of mining operations. At no point is there an attempt to ascertain and understand what a fairer or more appropriate process of appeal could be applied in each context aimed at protecting people's vulnerable rights. This is true even in the dispute resolution process. People are forced to engage with systems that are foreign to them, with no support or attempt to ensure they are able to effectively take part in those systems.

Regulation on Notice of Profitability and Curtailment of Mining Operations Affecting Employment

Section 52 of the MPRDA requires mining companies who are preforming poorly to consult with trade unions and inform the Minister of their intention to downsize their operations and retrench workers. This requires them to subject themselves to certain reporting requirements and a Mining Board may investigate the situation, consult with stakeholders and make a recommendation to the Minister about whether corrective steps should be taken before dismissals or downscaling is authorised.

The effect of these Draft Regulations appears to make the notice requirements substantially more onerous for mining companies. In particular, mines have to give extensive documentary evidence about their prior consultations with trade unions and show that these consultations have concluded. If these regulations are enforced well, it seems they will significantly empower organised labour.

Use of Land Surface Rights Contrary to Objects of Act

Section 53 of the MPRDA provides that "*any person who intends to use the surface of any land in any way which may be contrary to any object of this Act or which is likely to impede any such object must apply to the Minister for approval in the prescribed manner*."

The Draft Regulations simply provide a template for how these applications should be made and what information should be provided. Of interest to us, questions on the

template include: "*Have the interested and affected parties identified above been consulted?*" The likely improvement of these Draft Regulations is that it will lead to more transparency concerning land use, and make the decision of the Minister less arbitrary, and hopefully, less discretionary. It provides criteria which can be used if these decisions are ever challenged, increasing the possibility of accountability. It certainly seems like an improvement on the blank cheque which previously existed.

Conclusion

Expanding the definition of "interested and affected parties"; attempting to define what "meaningful consultation" would look like for the purposes of the MPRDA; including communities in the drafting and reviewing of SLPs; and requiring that they be made public are all improvements being brought by the Draft Regulations aimed at ensuring rights holders and communities play a larger role in prospecting and mining operations.

However, as detailed above, there are a number of gaps in the framework created by the Draft Regulations that could mean that many vulnerable rights holders will continue to face threats of unlawful dispossession of their rights. Chief amongst these is the need for there to be a comprehensive rights enquiry at the very beginning of the consultation process. This rights enquiry needs to be linked to the laws that govern the rights encountered on the land earmarked for prospecting or mining operations.

Laws that govern categories of rights need to be expressly used to define those rights and determine how those rights can be lawfully deprived. Regulations, policies, and guidelines need to make express reference to these laws to ensure an understanding that failure to comply with applicable laws is a failure to comply with the Regulations. These laws cannot continue to be ignored at the expense of the rights of some of South Africa's most vulnerable people.

A schedule is needed as an annexure to the Draft Regulations. This schedule needs to set out the laws that are implicated in the operation and implementation of the MPRDA and the Regulations. The schedule needs to contain laws that regulate the rights categories specifically listed in the definition of "interested parties"; it needs to set out how these rights are appropriately ascertained; and the proper procedure for depriving holders of those rights.

Rights to land in the former Bantustans face historic and current threats to security. These vulnerabilities are not new and they need to be expressly and appropriately provided for in legislation and regulations that could potentially adversely affect these rights and holders of those rights.