

WRITTEN COMMENTS ON THE DRAFT MINE COMMUNITY RESETTLEMENT
GUIDELINES, 2019

Prepared by:

Mr Gaopalelwe Mathiba (Doctoral Researcher)

Mr Kennedy Chege (Doctoral Researcher) and

Prof Hanri Mostert (SARChI Research Chair: Mineral Law in Africa)

The DST/NRF South African Research Chair for Mineral Law in Africa

Department of Private Law: Faculty of Law

University of Cape Town

31 JANUARY 2020



1. About the SARChI: Mineral Law in Africa

The Research Chair for Mineral Law in Africa (MLiA) is part of the South African Research Chairs Initiative (SARChI), established by the Department of Science and Technology (DST) and the National Research Foundation (NRF), who are MLiA's main funders. We are hosted by the University of Cape Town within the Faculty of Law, Department of Private Law. Further information about MLiA, its objectives, projects and activities can be accessed from its official website.¹ Our research focus is generally on mineral law development in Africa. It produces independent, original research on matters concerning this field of expertise.

One of MLiA's objectives is to engage with mining policy frameworks in South Africa and the rest of the African continent. We make constructive contributions towards shaping the legislative framework. We do so to support the building of strong state capacity for the relevant institutions co-ordinating governance in the mining sector.

Among the projects currently conducted by MLiA is a doctoral research project on the mining-induced displacements and resettlements. This research intends to formulate proposals to enhance procedural integrity, improve transparency, accountability and meaningful engagement on resettlements on account of proposed mining operations. It urges an awareness of best practices by encouraging comparison with other appropriate jurisdictions, whilst being mindful of the local context.

This submission is in the service of our intention to promote and protect the integrity and quality of South African law and policy on mining-related matters. It also is concerned with the vulnerability created by mining-induced resettlement and displacement.

¹ This can be accessed at: <http://www.mlia.uct.ac.za/>.



2. Background and Context

On 04 December 2019, the Department of Mineral Resources (the “DMR”) published the Draft Mine Community Resettlement Guidelines, 2019 (the “Draft Resettlement Guidelines”).² Accordingly, the Minister of Mineral Resources and Energy, Gwede Samson Mantashe, invited interested persons and stakeholders to submit written comments on the Draft Guidelines by no later than 31 January 2020.³ Our written comments contained in this document responds to the invitation of the Honourable Minister. We wish to thank the DMR for this timely opportunity to provide our comments on the Draft Resettlement Guidelines.

The Draft Resettlement Guidelines correctly assert that the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA):

“has no explicit provisions for forced resettlement and displacement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities”.⁴

The Draft Resettlement Guidelines is envisioned to fill this vacuum. It intends:

“to outline the process and requirements to be complied with by an applicant or a holder of a prospecting right, mining right or mining permit when such application or right will result in physical resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities, from their land”.⁵

The scope of application for the Draft Resettlement Guidelines:

“extend to existing prospecting rights, mining rights or mining permits where incremental project expansion will have the effect of displacement or resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities.”⁶

² *Draft Mine Community Resettlement Guidelines, 2019*. Notice 1566 of 2019 (GG 42884, 04 December 2019). Available at: https://www.gov.za/sites/default/files/gcis_document/201912/42884gon1566.pdf.

³ *Ibid.* See the first page of the Draft Resettlement Guidelines, 2019.

⁴ Draft Resettlement Guidelines, 2019, p 3.

⁵ Draft Resettlement Guidelines, 2019, p 8.

⁶ Draft Resettlement Guidelines, 2019, p 8.

We acknowledge the efforts that the Department expressed in the Draft Resettlement Guidelines, which are of great importance. The Draft Resettlement Guidelines cannot be the silver bullet to all the woes and challenges facing the sector; nor do they propose to be. They will, however, become directional in dealing with some of the vulnerabilities caused or exacerbated by mining.

Even so, we are concerned by the salient issues, striking day-to-day matters and policy aspects that – for whatever reason – were omitted from the Draft Resettlement Guidelines. These issues include i.e. the structural and institutional framework, gender considerations and the self-determination of mine-affected communities, especially around the concept of free, prior and informed consent (“FPIC”). We respectfully submit that there is room to improve the Draft Resettlement Guidelines on these issues, and hence proceed to make the following submissions.

3. Matters Requiring Further Scrutiny

Several policy issues, deservant – in our opinion – of being considered and dealt with in the Draft Resettlement Guidelines (DRG), have been omitted. Below, these are organized according to the stage during which they should be taken into account. Each identified issue is immediately followed by a recommendation(s).⁷

3.1 Preparation/Planning Stage: Selection & Preservation of Resettlement Site

3.1.1 Involvement of all the key stakeholders in site selection for resettlement

First, the DRG is silent on the decision-making process for the selection of alternative sites for resettlement. In the current form it seems that an applicant or a holder of a prospecting mining

⁷ Recommendations are shown by Asterisks.

right is the sole decision-maker on site selection for resettlement.⁸ This arrangement is problematic and has an element of despotism, since an applicant can select a poor and inadequate resettlement site without any objection from affected persons.

It is recommended that the DRG be revised to involve other stakeholders – especially the host and mine communities (or at least their representatives) – in site selection process.

Secondly, the above omission potentially flows from the uncertainty around one or both of the following questions:

- (i) When and at what stage does meaningful consultation begin?
- (ii) Who decides on the alternative site for resettlement? If it is an applicant, does s/he do site selection alone (to the exclusion of other stakeholders in clause 7.2)?

The DRG is not clear on these questions.

It is recommended that the DRG be revised to: first, indicate the specific point/stage where meaningful consultation should be conducted; and secondly, clarify who does the selection of resettlement site.

Third, the use of permissive language (i.e. “may”) when indicating the stakeholders that should be consulted under section 7.2 of the Draft Resettlement Guidelines is problematic, especially relating to those stakeholders that are most vulnerable to displacement where mining activities take place, in the form of physical resettlement, exhumation of graves, loss and damage to property, influx of people to the mining community and a boom in informal settlements. Such stakeholders include *inter alia*: landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities. Further, the current formulation of the

⁸ See Clause 8: “Obligations of an Applicant or a Holder of a Prospecting Right, Mining Right or Mining Permit” of the Draft Resettlement Guidelines, 2019, 12.

Draft Guidelines creates the impression that the applicants for mining rights and permits merely have an option to use appropriate tools and platform to engage with the different stakeholders.

It is recommended that it is necessary for the law to use peremptory language i.e. “must” in section 7.2. Similarly, section 7.3 should stipulate that applicants and holders for mining rights and permits “must” use appropriate tools and platforms to engage with the different stakeholders.

Fourth, the Guidelines require an agreement regarding compensation to be reached prior to the commencement of mining activities. This is contrary to the Mineral and Petroleum Resources Development Act (MPRDA) as well as the Constitutional Court’s judgment in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 4 SA 113 (CC)* on the duty to consult. The CC held that one of the purposes of consultation with a landowner is to determine whether some accommodation is possible. The court further held that the MPRDA does not impose an obligation to reach agreement. Instead, the parties involved in the matter should engage in good faith to attempt to reach some reasonable accommodation.

It is recommended that the DRG be revised to be brought in line with the governing position in the law, as expressed by the Constitutional Court’s ruling in the Bengwenyama decision.

Further, the RDG apply to “communities” as defined in the MPRDA. However, it does not considered the potential practical challenges associated with determining who constitutes a community for purposes of the MPRDA and obtaining the consent of the authorised representatives of a particular community. This is especially difficult in communities riddled with internal division.

It is recommended that clearer direction is provided on the constitutive elements of communities protected by the RDG.



Finally, the RDG seem to apply also to holders and not merely applicants of mining rights and permits. It could pose a challenge for the Department of Minerals and Energy (DMRE) to compel holders of such rights to undertake new Resettlement Agreements where mining has already taken place and relocations already negotiated and implemented, since the Guidelines are not enforceable. By contrast, the Guideline for Consultation with Communities and Interested and Affected Parties, which was published by the DMRE, only applied to applicants.

It is recommended that clarification be brought to the RDG, and alignment with other guiding documents / policy be sought. If deviation is required, the same must be deliberate and thoroughly contemplated.

3.1.2 Preparation and adequacy of resettlement site

The DRG is not sufficiently clear on whose responsibility it is to prepare the site prior resettlement.

It is recommended that the DRG be revised to outline the test selection and adequacy criteria for resettlement site.

3.1.3 Measures on standby for unforeseen inconveniences and an opportunity for timely restoration of livelihoods

While the DRG acknowledges the “negative socio-economic and environmental impacts”⁹ of resettlements on mine-affected communities, it does not make any provision for preventive measures to be put in place. Unforeseen inconveniences – such as natural disasters – may ensue at any stage of resettlement project.

⁹ Draft Resettlement Guidelines, 2019, 3.

It is recommended that the DRG be revised to provide for compulsory inclusion of preventive measures and an emergency management plan as part of the Resettlement Action Plan;¹⁰ or that the same be incorporated as one of the elements of Resettlement Agreement.¹¹

3.1.4 Preparation of an influx management plan for the newcomers and resettled communities

While the DRG anticipates the “influx of people to the mining community and a boom in informal settlements”¹² because of resettlement, it does not make any provision on how these is to prevented, managed or mitigated. The influx of people is common in places where mining operations are ongoing, because of the promise of employment opportunities.¹³

It is recommended that the DRG should be revised to make a provision for a compulsory contingency plan to manage the potential influx of people.

3.1.5 Relocation schedule and plans to assist displaced communities with the physical movement to the designated resettlement sites

At present the DRG does not compel the Resettlement Agreement to contain details of the physical movement of displaced people.

It is recommended that Resettlement Action Plan and/or Resettlement Agreement should have a compulsory clause that outlines the details of the physical movement of displaced people.

¹⁰ Clause 11 of the Draft Resettlement Guidelines, 2019, 18.

¹¹ Clause 12.3 of the Draft Resettlement Guidelines, 2019, 20.

¹² Draft Resettlement Guidelines, 2019, 3.

¹³ Draft Resettlement Guidelines, 2019, 3.



There should be a relocation schedule, outlining dates and phased interventions, if resettlement goes on for several days.

3.1.6 Compulsory pre-feasibility or scoping activity on the continuity/restoration of public facilities and social services at the resettlement site

The DRG in its current form does not compel a pre-feasibility study, which in our opinion is crucial to avoid ill-considered resettlement decisions.

It is recommended that the DRG be revised to provide for compulsory pre-feasibility study. The aim should be to gauge the possibility of smooth resettlement process, continuity and fast restoration of displaced people's livelihoods (e.g. shops, schools, clinics etc).

3.2 Structural and Institutional Capacity

3.2.1 Recruitment of the relevant expertise and skills in the composition of the Resettlement Monitoring and Evaluation Committee (RMEC)

First, the DRG does not outline how the stakeholders of the RMEC – listed in clause 7.2 – are chosen and/or elected. There is also no provision for recruitment of relevant expertise to RMEC. Secondly, there is uncertainty around the representation of stakeholders in the RMEC. The DRG is not clear on the following questions:

- (i) To what extent are these stakeholders represented in the composition of RMEC?
- (ii) How much representation does each stakeholder get in the RMEC?
- (iii) Is there compelled representativity in terms of gender, race, education level etc.?

Lastly, the DRG does not provide guidelines on the terms of reference and rules of engagement for the RMEC. Key questions still need clarification. These include:



- (i) How does RMEC take its resolutions?
- (ii) Is quorum needed (and, if so, of how many stakeholders)?
- (iii) Do they vote? If so, what happens when there is a deadlock?

It is recommended that the DRG should be revised to provide leads on the recruitment of the RMEC's stakeholders, and outline the process of how they are to be elected. The DRG should also be revised to respond adequately to the above questions around the composition and internal operations of the RMEC. Lastly, the rules and procedures on how the RMEC make its decisions/resolutions should be developed and annexed to the DRG as complementary guidelines.

3.2.2 The roles and responsibility division/assignment to key role players (members of the RMEC)

The equal division of responsibilities among stakeholders of the RMEC in the current draft of the DRG also leaves some room for improvement. The DRG only outlines the obligations of an applicant or right holder.

It is recommended that the roles and obligations of each RMEC stakeholder be defined. The procedural steps to be taken when there is a failure in that regard should also be outlined.

3.2.3 Educative and capacity building programs/strategies for key role players (to enhance active and meaningful contribution)

The DRG does not provide for capacity building among RMEC stakeholders, although there is likely to be demand for it. At present the DRG does not express any strict requirements for requisite skills, expertise or education levels within the RMEC, and this may become a shortcoming if implemented. The effectiveness and efficiency of the RMEC may be



jeopardized if lack of capacity or apposite skills renders the RMEC sessions a mere box-ticking exercise.

There is a need to provide more explicitly for training and capacity building of those stakeholders (or their representatives) affected by mining-induced resettlement/dispossession.

3.2.4 Alternative source of funding for the RMEC

The funding model for RMEC activities is flawed. The DRG provides that an applicant or mining right holder is “responsible for all the costs, funding and resources requirements of the RMEC”.¹⁴ This financial dependency of the RMEC on the applicant bears the potential to compromise the RMEC’s objectivity and independence in its decision-making duty.

It is recommended that the DRG be revised with an aim to explore other potential sources of funding, given that the financial autonomy of RMEC is very crucial for its objectivity and independence)

3.2.5 Availability of adequate resources for managing the post-resettlement/displacement (rehabilitation and closures)

It is recommended that the DRG be revised to make a rehabilitation and closure plan a compulsory clause in the Resettlement Agreement and/or Resettlement Action Plan.

¹⁴ Clause 14.7 of the Draft Resettlement Guidelines, 2019, 25.

3.3 Compliance, Monitoring and Implementation

3.3.1 Enforceability

The RDG do not constitute legislation; as “guidelines” they serve to inform policy. Hence the RDG cannot be applied to have the force of law or to prevent an applicant or holder of a mining right or permit from adopting other means in regard to resettlement of affected persons.

It is recommended that enforceability of the RDG be specifically determined and spelled out.

3.3.2 Measures for the enforcement of compliance with the contents of the Resettlement Agreement

The DRG does not provide measures for enforcement of compliance with the Resettlement Agreement. It does not mention the nature and effect of the Resettlement Agreement. It also does not provide sanctions to be imposed in the instance of non-compliance.

While the DRG acknowledges the need for monitoring and evaluation,¹⁵ it fails to outline the key monitoring indicators to be used for gauging the implementation of the Resettlement Agreement.

It is recommended that the DRG should be revised to include measures and sanctions for the enforcement of the Resettlement Agreement.

¹⁵ Clause 14 of the Draft Resettlement Guidelines, 2019, 23.

3.3.3 Monitoring and reporting on the effectiveness of the Resettlement Agreement's implementation (including the actual progress on all the steps outlined in the Resettlement Action Plan)

It is recommended that the guidelines should compel the RMEC to conduct regular monitoring and evaluation of the progress made in achieving the objectives of the Resettlement Agreement. The aim of this exercise should be to harness implementation and compliance.

3.4 Gender Considerations

3.4.1 Special assistance – monetary and/or non-monetary - for women who suffer the drastic impacts resettlement projects

The DRG lack express provisions on the position of women (or gender issues more generally) in resettlement matters. It merely stipulates that the DRG must not violate the Constitutional right to equality for women, but does not shed more light on how women as vulnerable persons would be empowered in this context. In particular, the DRG does not provide any specific plan of affirmative action for women who suffer the negative effects of resettlement. This is a serious concern.

It is recommended that further revisions be made to the DRG to guide and inform the DMR on the mainstreaming and integration of women (and their access to land/property).

It is further recommended that the DRG specifically includes provision for any other restorative and redistributive concessions, feasible under the given circumstances, to alleviate the burden of resettlement on women and children.



3.5 Dispute Resolution: Grievance Redress Approach

3.5.1 A detailed step-by-step procedure for lodging and addressing grievances

In its current form, the DRG is not robust enough in providing a dispute resolution mechanism. While there are institutional arrangements (i.e. traditional and local leaders), it does not outline the procedures for handling the lodged grievances. Furthermore, the mechanisms for adjudicating grievances and appealing decisions are also not provided in sufficient detail.

It is recommended that the DRG be revised in line with the above two issues. It is further recommended that the DRG provide detailed description of alternative recourse and provisions for approaching a courts of law if other options fail.

4. Concluding Remarks

Any initiative to improve aspects of South Africa's mining policy and legal framework is readily welcomed. MLiA remains committed to continue participating in this process. We do not serve any client, nor have any private interests or hidden agenda that we seek to advance through this submission. Our researchers are at the disposal of the DMR for consultation in all the remaining stages towards the final consolidation of the Draft Resettlement Guidelines (2019).

