PRESENTATION TO THE PARLIAMENTARY SELECT COMMITTEE ON LAND AND MINERAL RESOURCES
PUBLIC HEARINGS ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL B15D-2013

28 JUNE 2017
SUBMISSIONS TO THE PARLIAMENTARY SELECT COMMITTEE ON LAND AND MINERAL RESOURCES ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL

B15D-2013
Chamber of Mines - Who we are

• Voluntary employer organisation that supports and promotes the SA mining industry - provides strategic support and advisory input
• Advocacy and lobbying - no executive authority over its member companies
• Members comprise:
  • 38 major mining companies
  • 32 junior mining companies
  • 4 associations - Aggregates, Sands Producers Association of Southern Africa (ASPASA), South African Diamond Producers Organisation (SADPO), Association of Shaft Sinkers and SA Mining Contractors, Clay Brick Association of South Africa (CASA)
• Chamber member companies:
  • represent more than 90% of SA's mineral production by value
  • contribute around R11.3 billion in taxes per annum
  • employ around 400,000 people directly
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A. CONSTITUTIONAL ISSUES

INTRODUCTION

- PRESIDENTIAL RESERVATIONS
  - “this Act” (ss1 and 100(4), MPRDA)
  - Beneficiation (ss26(2B) and (3), MPRDA)

- NATIONAL ASSEMBLY DIFFERS

- CHAMBER SUPPORTS PRESIDENT
A. CONSTITUTIONAL ISSUES (contd.)

- “this Act” AND RELATED ISSUES
  - BILL PROPOSALS
    - s1, “this Act”: to include Codes, Standards and Charter
    - s25(2)(fA): obligation to comply with Charter
    - s47(1)(f): suspension or cancellation on contravention of Charter and Standards
    - s100(3): Standards, Codes and Charter as conditions
    - s100(4): amendment and repeal of Standards, Codes and Charter
A. CONSTITUTIONAL ISSUES (contd.)

- CHAMBER SUBMISSIONS
  - Transformation of Codes, Standards and Charter into Parliamentary Legislation
  - Offends against separation of powers between legislature and executive
    - Means Minister could amend or repeal Parliamentary legislation
      - Parliament cannot delegate its functions to make plenary legislation
    - Codes, Standards and Charter are not designed to be legislation
    - Punitive provisions in the MPRDA would apply without Parliament having control over the Codes, Standards and Charter
      (Western Cape Legislature, 1995 and 2000; Akani)

- CHAMBER REQUEST
  - Above clauses be deleted
A. CONSTITUTIONAL ISSUES (contd.)

BENEFICIATION AND RELATED ISSUES

- BILL PROPOSALS
  - s1, “mine gate price”: price at mine gate
  - s26(2B): producers obliged to offer prescribed percentage of production in prescribed quantities, qualities and timelines at mine gate price or agreed price
  - S26(3): no exports (other than by producers who have so offered) without Ministerial approval

- CHAMBER’S SUBMISSIONS
  - Producers suffer loss between export price (higher) and mine gate price (lower)
    - Expropriation of part of producer’s income per s25(2), Constitution
      - Property (loss of income)
      - Acquisition (by the State)
      (Agri)
A. CONSTITUTIONAL ISSUES (contd.)

- State will have to compensate for such expropriation per s25(3), Constitution and MPRDA Schedule II Item 12
- Claims for compensation under bilateral investment treaties
  - Broad definitions of “investment” and of “expropriation”
  - Survival of claims notwithstanding termination
    (Foresti)
- Deterrent to investment
  - Unconstitutionality for inconsistency with RSA’s international trade obligations
    - Restricts the quantity of minerals available for export
    - s233 of the Constitution recognises international law:
      - in interpretation of legislation
      - in determination of legality of subordinate legislation
    - ss7(2) and 39(1)(b) of the Constitution (State’s obligation to give effect to the Bill of Rights) requires consideration and implementation of international law:
      - by the executive (the Minister) in tabling a Bill, and
      - by the legislature in enacting legislation
        (Progress Office Machines; Glenister)
A. CONSTITUTIONAL ISSUES (contd.)

- Parliament in enacting ss26(2B) and (3) would violate SA’s international law obligations (the only way in which the Minister could implement these provisions would violate such obligations)

- International agreements which would be contravened:
  - GATT, 1994
  - WTO Agreement on Subsidies and Countervailing Measures
  - WTO Agreement on Trade Related Investment Measures
  - SA/EU Agreement on Trade, Development and Co-Operation, 1999
  - Southern African Development Community Trade Protocol, 1996
  - SA/EU Economic Partnership Agreement, 2016
  - Abovementioned Bilateral Investment Treaties (Fair and Equitable Treatment clauses)

- Related to the above: ss26(2B) and (3) will cause producers to breach their long-term contracts

- Therefore:
  - Ss26(2B) and (3) entail restrictions on quantities of exports
A. CONSTITUTIONAL ISSUES (contd.)

- Ss26(2B) and (3) breach SA’s international trade law obligations
- SA’s international law obligations are of constitutional relevance to:
  - Interpretation of legislation
  - Exercise of subordinate powers
  - Parliament’s making of legislation

  - CHAMBER’S REQUEST
    - The above clauses be deleted from the Bill
B. OTHER KEY ISSUES

- **INTRODUCTION**
  - CHAMBER SUPPORTS VARIOUS CLAUSES ON OTHER KEY ISSUES

- **OTHER KEY ISSUES**
  - INVITATIONS FOR APPLICATIONS (s9)
    - Dual system: Ministerial invitations, and retention of voluntary applications
    - Chamber requests reinstatement of s9(5) (preference)
  - TRANSFERS OF PARTS OF RIGHTS (s11 (2A))
    - Facility for transfer of parts of rights coupled with applications for amendment (s102) and for new right (ss16 or 22)
  - EXTENSION OF AREAS (s102 (2)(a))
    - Extension of not greater than the existing area
    - Such limitation not applicable to consolidations of existing adjacent rights
  - ASSOCIATED MINERALS (ss102(2)(c), (3) and (4))
    - Facility for mining, declaration, and addition, of associated minerals
B. OTHER KEY ISSUES (cont’d)

- ENVIRONMENTAL LEGISLATION (ss37, 38B and 43)
  - Accords with existing move to NEMA under Minister of Mineral Resources
  - Reflects transitional arrangements in NEMA
  - Residues also to be governed by NEMA not Waste Act
  - Case-by-case evaluation of post-closure financial provision (amount and period)
  - Chamber supports, but suggests further alignment of s38B with the transitional provisions in the National Environmental Management Laws Amendment Bill B14-2017

- HISTORIC RESIDUE STOCKPILES
  - Ownership for two years
  - Within mining area: holder must amend mining work programme
  - Outside mining area: owner has two years to apply for mining right or mining permit

- CHAMBER REQUEST
  - RETENTION AND ENACTMENT OF ABOVE CLAUSES AS AMENDED PER TABLE OF AMENDMENTS
INTRODUCTION

- TABLE OF PROPOSED AMENDMENTS
- CHAMBER SUBMISSION ON SOME AMENDMENTS

AMENDMENTS IN TABLE

- s1: "EFFECTIVE DATE"
  - Table proposal
    - Prescribed period for issue or execution of permit or right
      (Mawetse)
  - Chamber request
    - Commencement on issue or execution of permit or right
C. DEPARTMENT OF MINERAL RESOURCES
TABLE OF OTHER PROPOSED AMENDMENTS (cont’d)

- Ss9(2) and (5): DUAL INVITATION/APPLICATION SYSTEM WITH PREFERENCE TO APPLICANT
  - Table Proposal
    - Retention of Voluntary Application System: Chamber supports
    - Delete s9(5) (preference)
  - Chamber request
    - Retain s9(5) (preference)
C. DEPARTMENT OF MINERAL RESOURCES
TABLE OF OTHER PROPOSED AMENDMENTS (cont’d)

- s17(2)(b): CONCENTRATION
  - Table Proposal
    - Delete: Chamber supports
  - Chamber Request
    - Delete both ss17(2)(b) and 33(c)

- s25(2)(fA): COMPLIANCE WITH CODES, STANDARDS AND CHARTER
  - Table Proposal
    - Insert reference to Standards
  - Chamber Request
    - Delete s25(2)(fA) for unconstitutionality: see A above
C. DEPARTMENT OF MINERAL RESOURCES
TABLE OF OTHER PROPOSED AMENDMENTS (cont’d)

- s27(1)(c): MINING PERMITS
  - Table Proposal
    - Reserve mining permits for Black owned and controlled companies
  - Chamber Request
    - Delete since:
      - Chamber members, whether Black owned and controlled or not, need mining permits
      - The Mining Charter empowerment ownership target is 26% (or increased % in the Reviewed Mining Charter) which should remain applicable to mining permits
      - The proposal is unconstitutional in contravening:
        - the right to equality (s9, Constitution)
        - the right to freedom of trade, occupation and profession (s22, Constitution)
        - Parliamentary procedure (s76, Constitution and the Joint Rules of Parliament)
C. DEPARTMENT OF MINERAL RESOURCES
TABLE OF OTHER PROPOSED AMENDMENTS (cont’d)

- S47(1)(f): CONTRAVENTION OF CODES, STANDARDS AND CHARTER
  - Table Proposal
    - Suspension or cancellation on contravention of Codes, Standards and Charter
  - Chamber Request
    - Delete s47(1)(f) for:
      - Unconstitutionality: see A above
      - Unconstitutional Parliamentary procedure (s76, Constitution, and the Joint Rules of Parliament)

- S80(2A): EXPLORATION RIGHTS
  - Table Proposal
    - Applicants to comply with Mining Charter
  - Chamber Request
    - Replace with reference to Petroleum Charter
THANK YOU