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MEMO

TERMS OF REFERENCE

PROPOSED AMENDMENTS TO THE MPRDA: GOVERNMENT GAZETTE, NO. 36037 OF 27 DECEMBER 2012

Problem statement

Drastically increased numbers of mining prospecting applications are apparently being reviewed by the Department of Mineral Resources (DMR). In many cases, farmers are not even aware that their land has been targeted until mining companies turn up on their farms. It is therefore important that farmers know their rights and how the application process is conducted.

Estimates put the number of coal mining prospecting applications issued in South Africa at approximately 30 000. The majority are in Mpumalanga. Then there are vast areas identified for shale gas exploration in the Karoo, Southern KZN, Eastern Cape and Free State.

Agri SA is concerned about the impact of mining activities on agriculture, more specifically about the loss of arable land and production and the negative impact on water quality. Agri SA is of the opinion that there is not a proper balance between the rights of surface owners and the rights accorded to mining companies. For these reasons, Agri SA has been involved in litigation around the mining issue, specifically the Maccsand case and the case regarding the expropriation of mineral rights, both of which MacRobert were acting for Agri SA.

Agri SA is also concerned that the proposed amendments may skew the balance even further in favour of the mining companies and may wipe out gains achieved in, for example, the Maccsand case. Moreover, the implications of some of the proposed amendments are not clear to us, for instance that of the new definition of “a mining area”, and the fact that the Codes of Good Practice and the Broad Based Charter for

the mining sector is to be regarded as an integral part of the Act. We also need clarity on the implications of proposed changes to the process regarding environmental authorisations and the state's right to a "free carried interest" and the so-called "partitioning of mineral rights".

Procedure when a mining company applies for mining rights

Any person who wishes to acquire mining rights must apply to the Minister of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act no 28 of 2002 (MPRDA). If the regional manager accepts the application, the applicant must be notified in writing within 14 days. The applicant must also be notified in writing that they must:

- Conduct an environmental impact assessment (EIA) and submit an Environmental Management Programme Report (EMPR) for approval.
- Notify and consult with interested and affected parties within 180 days from date of the notice.
- No specific notification is required, but the mine manager must call upon interested and affected parties (IAPs) within 14 days to let them know that there is an application pending on their property. They will probably advertise a public meeting in the media and invite IAPs to attend on day 30. The mining company has to submit a scoping document establishing what has to be investigated, and what information the process has to provide in order to assess the project's impact and sustainability. This is the foundation document and sets out plans for how mining will happen. Yet often, the DMR's letter of acceptance only reaches the mining company after the 30-day period, making it impossible for a scoping report to be completed in time. Alternatively, mining companies ignore the participation principle.
- On day 60, the DMR gets state departments' comments back and gives feedback to the mining company. On day 70, the mining company knows the issues it is facing. It then has to ask experts for quotes and contract them to do studies, which takes another 30 days at least.
- The public should get the EMPR on day 150 in order to have enough time to submit their comments. However, this normally only happens after day 180, the deadline by which the process must be finished. If the public is only given access to the EMPR after this, the DMR will read it without their comments. This is procedurally unfair.

The system was set up for failure as there is not enough time allowed to complete the studies and public participation process. A water baseline study requires at least a year to be conducted – yet a month at most is provided for it. The same applies to ecological surveys and dust sampling.

We need to understand whether the proposed amendments will bring about any improvement to this situation, from a landowner's point of view. Relevant clauses in this respect are clause 7 (establishment of regional mining and environmental committees,

clause 11 (amendment to existing section 16), clause 13 (amending section 18 of the Act), clause 22 (amending section 27 of the Act) and clause 28 (amending section 37 of the Act).

Environmental considerations

Normally, in South Africa, all new developments have to undergo some form of Environmental Impact Assessment (EIA), prior to them taking place. **The one exception to this has been the mining industry, which, to date, has been exempted from environmental authorisations issued by the Department of Environmental Affairs**. Instead it has been subjected to less rigorous processes overseen by the Department of Mineral Resources, which had little expertise, interest in, or incentive to undertake environmental management.

The threat of uncontrolled mining on agricultural land, water, air quality and biodiversity:

- The role of the Department of Mineral Resources as the key department responsible for authorising mining applications (albeit with the understanding that they consult with all other government departments) whilst also responsible for promoting mining in South Africa is seen as having a serious conflict of interests.

- Lack of legal means to sterilise certain areas as *"no-go"* areas (where it is believed that mining cannot take place without having a significant impact on biodiversity) is seen as a major stumbling block. The National Environment Management: Protected Areas Act (NEMPAA) should have the legal status to secure areas from mining.

- There is not consistency in the way in which the EIA and Environmental Management Plan (EMP) reports take note of relevant biodiversity studies/data and also the way in which it is assessed by regional and national authorities before a mining permit is issued.

- A first step in addressing these shortcomings is to decide upon streamlining the authorisation processes and inter-linkages between the National Environmental Management Act (NEMA) and the MPRDA. Should it be decided that mining falls under the NEMA-EIA regulations, this may solve many of the above shortages. For one, the public participation processes in the NEMA-EIA regulations are considered much more comprehensive.

- Ideally mining activities should be subject to the same regulatory requirements as any other sector and undergo the same authorisation process. Currently this is not the case and should be rectified.

- Some of the above constraints were demonstrated in the Maccsand Constitutional Court case between the Minister of Mineral Resources and the Minister of Water and Environmental Affairs upon the powers of local *versus* national legislation pertaining to the granting of mining licences.

Shale gas development

Hydraulic fracturing is the latest example of a new technology that is likely to be introduced. The present questionable consultation process will be relevant after one of the oil companies receives an exploration right from the oil and gas regulator, the Petroleum Agency of South Africa (PASA). This body simultaneously has the legal role of promoting and regulating the oil and gas industry, demonstrating a strong internal conflict of interests. Applicants for this exploration rights have to lodge Environmental Management Plans, and have 120 days in which to publish this. Only then will registered interested and affected parties consulted, with a short time to comment.

Agri SA needs to comment on the proposals to amend the Act in order to provide for shale gas exploration dispensation, which will ensure that it will be conducted in an environmental friendly manner, considering all the present concerns regarding this technology.

Conclusion

Essentially Agri SA is seeking legal opinion on the following:

- Whether rights of farmers with respect to protecting surface rights will be improved by the proposed changes to the MPRDA.
- To what extent the proposed institutions, i.e Regional Mining Development and Environmental Committees and the Ministerial Advisory Council can bring about a more balanced approach between agricultural and mining considerations as well as to allow for improved participation by land owners/farmers in mining considerations.
- To what extent a more prominent role will be assigned to environmental considerations especially in relation to NEMA with a specific emphasis on the protecting of water availability and quality.
- The impact and meaning of fixed time periods to be replaced by “Prescribed periods” especially in relation to time constraints previously alluded to.
- The comprehensiveness of proposed legislation dealing with shale gas exploration especially with respect to the rights of land owners, redress if environmental damages occur and especially the protection of water resources.