

FLAWED MINING BILL MUST BE REPLACED BY A MORE INVESTOR-FRIENDLY VERSION

14 June 2018 | Johannesburg

Legal Briefings - By **Peter Leon, Partner and Co-chairman, Africa Group**

Among changes needed, administrative discretion should be narrowed and time-frames for decisions tightened.

In the six-and-a-half years since the first draft of the Mineral and Petroleum Resources Development Amendment Bill (MPRDA) was unveiled, it has been the subject of so many political and procedural wrangles that it is easy to forget precisely what changes it will make to the law now in place. Many now seem to assume that regulatory certainty — the bedrock of investment in the natural resources sector — is best served by passing the bill immediately, warts and all, rather than wasting more time on trying to improve it.

In his maiden budget address in May, newly minted Mineral Resources Minister Gwede Mantashe urged Parliament "to proceed faster towards finalisation of this bill, because it is key in entrenching regulatory and policy certainty necessary for investment".

Mantashe is correct that urgent steps are required to attract and retain investment in SA's mining industry. Statistics SA revealed recently that the mining sector contracted 9.9% in the first quarter of 2018, more than double the 4.4% contraction in the last quarter of 2017. The sector is now officially in recession for the first time since mid-2015.

Regrettably, the bill offers no remedy for this malaise. In truth, passing the bill will do more to erode regulatory certainty than "entrench" it. This is so for three important reasons:

First, the bill's textual effect on the existing Mining Code will be to remove vital ingredients of regulatory certainty and introduce elements of unpredictability. Second, Parliament appears to have made so many procedural errors in its handling of the bill that it is uncertain whether it will withstand constitutional challenge. Third, the bill's underlying economic nationalism represents a vision in stark contrast to President Cyril Ramaphosa's open and prosperous "new dawn". It is thus likely to cause not only concern but confusion about SA's regulatory direction.

Let us begin with the contents of the bill itself. Among other things, it will:

Remove almost all of the statutory time limits fixed for departmental decision-making (which the minister himself recently acknowledged are observed more in the breach than in observance), and leave these to ministerial regulation;

Give the minister full and unfettered legislative power over empowerment matters by elevating the embattled Mining Charter to the status of binding law and authorising the minister to amend it "as and when the need arises";

Extend the reach of the problematic section 11, so that prior ministerial approval (previously required only for the transfer of a controlling interest in an unlisted company) will be required even for the transfer of a controlling interest in a listed company, as well as any interest in an unlisted company that holds any interest in a prospecting or mining right; and

Empower the minister to "designate" any minerals to be offered at discounted prices to domestic beneficiaries, failing which they may not be exported without his prior consent. This almost certainly violates SA's international obligations as a member of the World Trade Organisation.

In short, the bill will make it even more difficult for businesses to predict whether, when and on what conditions they may be able to obtain, renew and transfer prospecting and mining rights, and export what they extract. This kind of uncertainty is anathema to investment.

Even under the current law, SA is seen as an unpredictable place to mine. In the Canadian Fraser Institute's latest Annual Survey of Mining Companies, in which SA ranked 48th out of 91 jurisdictions for overall "investment attractiveness", the main factor dragging the country downwards was "uncertainty concerning the administration, interpretation and enforcement of existing regulations". On this indicator, SA tied with Zimbabwe for the 10th worst in the world.

By contrast, Botswana tied with Finland for fourth best on this matrix, helping it to maintain a higher overall "investment attractiveness" than SA despite a major decline in its perceived geological potential. This is largely attributable to the objective licensing criteria and internal time-frames set by Botswana's 1999 mining code.

Thus, regulatory certainty is not simply about having a legal framework that remains substantially the same from year to year; it is much more about having a legal framework that minimises unpredictability in the content and timing of day-to-day regulation.

Leaving its substantive problems aside, passing the bill will not even achieve certainty about what provisions will become law. In the three years since former president Jacob Zuma referred the bill back to Parliament with reservations as to its constitutionality, the National Council of Provinces has lurched from one procedural misstep to another.

In May, the National Council of Provinces select committee on land and mineral resources in effect rubber-stamped a raft of additional amendments proposed by the Department of Mineral Resources in November 2016. This decision was ostensibly based on "negotiating mandates" from all of the provincial legislatures but one (the Western Cape), indicating that their support for the bill was subject to the incorporation of the department's revisions.

However, these amendments did not form part of the original bill, have never been opened to proper public comment and more importantly do not address any of the former president's substantive reservations (including the constitutionality of giving the minister legislative powers and imposing export restrictions).

For these reasons, the bill is almost certain to be referred to the Constitutional Court, whether by Ramaphosa (exercising the same constitutional prerogative used to refer the bill back to Parliament in 2015) or any other interested party. Thus, even the ostensible certainty expected from Parliament's impending passage of the bill will probably be subject to litigation.

Ironically, many of the department's belated revisions to the bill were meant to offer a quick fix to unlock investment into exploiting SA's shale gas and offshore oil reserves, which has been inhibited by the uncertainty around the bill, especially as it contains provisions directly affecting that sector. For example, it gives the government a minimum 20% free share in all upstream petroleum ventures, which the department's revisions aim to ameliorate by allowing petroleum companies to recover the cost of the government's 20% stake as well as to negotiate it down to 10%. Yet it is precisely these legislative patch-ups that arguably render the bill most vulnerable to procedural challenge, thus only prolonging the uncertainty.

Finally, the passage of the bill will make the international investment community more uncertain about whether the country is truly open for business. The bill materially contradicts the National Development Plan, which recommends "ensuring certainty in respect of property rights; and passing amendments [to the MPRDA] to ensure a predictable, competitive and stable mining regulatory framework".

Ramaphosa, and the Parliament that elected him, have rightly recommitted themselves to the National Development Plan. If they wish to show the investment community that the country is committed to bringing about real regulatory certainty, this aim would be best served by withdrawing the bill entirely and introducing a new bill aimed at narrowing rather than widening administrative discretion; tightening rather than loosening the time-frames for regulatory decisions; empowering workers and communities through the development of consensus-based, predictable and achievable programmes rather than unilateral ministerial fiat; and sensibly separating the upstream petroleum sector into a regime administered by the Department of Energy.

This would be an important first step in creating a "new dawn" for mining stakeholders — communities, labour and business.

This article was first published [Business Day](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PETER LEON
PARTNER
(CONSULTANT),
LONDON
+44 20 7466 2795
Peter.Leon@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close