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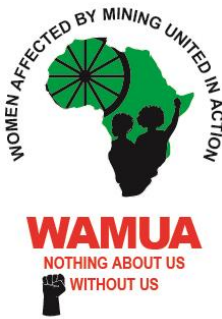
MACUA & WAMUA

SUBMISSIONS ON THE DRAFT ARTISANAL AND SMALL -SCALE MINING POLICY 2021

15 JUNE 2021.

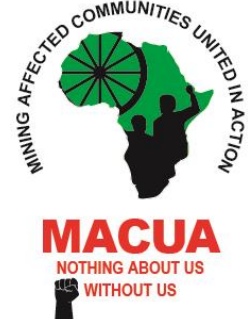
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Preamble:

Mining Affected Communities United in Action (MACUA) and Women Affected by Mining United in Action (WAMUA) are fraternal organisations formed in response to the need to protect the integrity and interests of the people impacted by mining.

MACUA and WAMUA form a movement aimed at raising the voice of communities who have not been consulted in the processes of allocating mining licenses, developing communities and in the distribution of mining rents and wealth, but who bear the brunt of the social, economic and environmental degradation and impacts of mining.

These appalling outcomes are enabled by the exclusion of communities and in particular the failure of mining/extractives law to include communities in all relevant decision-making processes that directly impact on their lives.

MACUA and WAMUA have been actively campaigning for the decriminalisation and Regulation of Artisanal Miners . From its first conference in 2015 when MACUA hosted the first Artisanal Miner's Conference on March 21 – Human Rights Day to the battles in Kimberly which resulted in the first group of Artisanal Miners obtaining a mining permit and the launch of the National Association of Artisanal Miners (NAAM) in 2019.

It is in light of this ongoing campaign to mobilise marginalised communities in defence of their dignity, that we are encouraged to submit our submissions on the Department of Mineral Resources and Energy's first Draft Policy proposal.

While we are encouraged by the movement towards regulation, we remain deeply concerned about the xenophobic tone of some of the proposals as well as the continued bias towards developing one set of laws for the poor and another set of laws for the rich.

Chapter I

1. Introduction:

- a. Artisanal miners have never been recognized within the current mining regulations and all definitions of ASM in the current legislation only makes reference to small scale mining. As such far from the government making efforts to include artisanal miners in the sector, they have instead actively criminalized those who have sort to find a livelihood through artisanal or informal mining.
- b. Even where provision has been made for issuing a mining permit for mining activities that do not intend to use more than 1.5 hectares, they are still required to meet onerous requirements in order to qualify for a permit. These include requiring that applicants (many of who would be generally marginalised and impoverished (both economically and socially) , provide Details of the land or area for which they seek a Mining Permit, Provide a plan as contemplated in Regulation 2(2) read with Regulation 2(3) of the Mineral and Petroleum Resources Development Act (MPRDA), Provide detailed documents proving that the applicant has the technical ability and financial resources that are readily available or how they will be provided for, Provide details of any mineral or minerals and the quantity thereof, which the applicant intends to remove and dispose of during mining operations. In addition that draft policy document concedes that : Small Scale Miners are virtually treated the same as Large Scale Miners in terms requirement for environmental management, water use, land use, health and safety and financial provisioning requirements. These requirements alone excludes the majority of informal miners that seeks to access the collective wealth of the country.
- c. Thus, if we hope to find lasting solutions to seemingly intractable problems, then it would be in our collective interest to honestly analyse the existing and historical situations. This means that we must confront the fact that it is not despite the policy and legislative efforts that the sector remains unregulated and largely informal. Instead it is precisely because we have not regulated the sector and ensured an inclusive minerals policy and regulatory environment. The sector remains largely in the hands a small monopoly of large scale mining corporates and the securocrat efforts by government to criminalise informal miners to protect large scale mining operations.
- d. We would suggest that contrary to the draft policies claim that the problem is merely one of not “ defining concepts”, it is our contention that the discrimination against poor and marginalised communities and individuals inherent in the MPRDA regulations, is at the heart of the problem. As such we fear that many of the class discriminations inherent in the MPRDA continues to be advanced in the Draft Regulations. One such unashamed effort to discriminate against the poor and marginalised is the clause which would allow for the “*Reservation of ASM permits for locals*” while no similar regulations are contemplated in terms of LSM. Besides its questionable legal standing the proposal is deeply problematic in that it seeks to treat working class individuals and communities are subject to a different set of laws than those that apply to the wealthy.

- e. This denial of the informal artisanal mining sector has meant that there is very little research or statistics available to inform decisions. As MACUA we have participated in one of the most extensive research projects to understand the nature, size, share and scope of informal AM activities in South Africa.
- f. The lack of effort by the DMRE to try and understand the local conditions and drivers of artisanal mining, is contrasted against its research into how other mining jurisdictions have regulated the sector instead. While it is undisputed that some comparison with other mining jurisdictions are important, the need to understand our own conditions first, before we can compare it with others, is not only putting the cart before the horse, it is also indicative that the focus of the DMRE is not so much to understand the local issues and context with a view to finding a lasting and sustainable solution, but rather approaches this process from a top down perspective in which the current legislation which has a bias towards protecting large scale mining interests are placed before the dignity of the miners and wellbeing of mining affected communities in particular and marginalized communities in general.

2. Objectives of the ASM policy:

- a. The objective of the policy cannot simply be to regulate and formalise the artisanal mining sector. Since the Draft Policy document affirms one of our central starting points that the sector has the *“potential... to contribute to socioeconomic development and improve the livelihoods of South Africans*, the objectives of the Policy must not be state centric, but must place people at its centre. To this end the Policy should mirror the objects of the MPRDA in that it should seek to achieve [***“equitable access to the nation’s mineral resources to all the people of South Africa, promote employment and advance the economic welfare of all South Africans.”***]

3. Definitions:

We propose the following changes:

- a. ***“Artisanal mining”***: *“means traditional and customary mining operations using traditional or customary ways and means – [including all mining activities concerned with the mining value chain; including mineral searching, ore extracting, processing and trading of mineral product]. This includes the activities of individuals using mostly rudimentary mining methods, manual and rudimentary tools to access mineral ore. [usually available on surface, or at shallow depths]*

The need to create an inclusive regulatory framework that recognises the sector in its entirety across the value chain, is critical to overcome the challenge of syndicates operating in the areas where the law appears to have left a vacuum or where otherwise law abiding persons are forced to operate outside of the law. We also would caution against restricting artisanal mining to surface levels only as this would not deal with the question of underground mining and illegal syndicates will still dominate underground mining. There should be no reason to limit underground mining if the sector is formalised and regulated. However, we are not suggesting a blanket approval for all artisanal underground mining. We propose that the envisaged regulatory structures, in conjunction with proper geological assessments which are funded by the state, should be used to regulate the level and safety of underground mining. Extension services such as geological information, health and safety collaborations with LSM's and other mining mechanisms can be provided as services to the sector. Collaborative efforts between artisanal mining cooperatives, LSM's and the regulator, may help to deal with this problem and squeeze out illegality. Simply banning an activity that is entrenched in the sector will not end the practise, especially since it remains a potentially lucrative source of income for many marginalised artisanal miners. A critical consideration of the South African context must consider that the SA context is different to other jurisdictions for several reasons. Importantly the geology of the country and the depth of available minerals often determines the level of mining that is possible. Restricting ASM operations to surface mining might affect the prospects of the sector in terms of the availability of deposits that are located close to the surface and that can be exploited using surface mining methods. This will in turn lead to the possibility that many miners will abandon efforts to operate within the regulations at surface level, as it may not yield sufficient returns. In this way the sector might be inclined to continue to pursue activities below the surface, leading to the ongoing development and entrenchment of criminal syndicates in the sector.

4. Abbreviations:

No Comment.

Chapter II

5. Comparative Mining Recommendations.

As indicated above we suggest that the effort to first seek a comparative governance framework, before fully understanding the complexities and unique conditions which impact on the artisanal mining sector in South Africa, opens up the possibility that we

would be introducing elements of governance and regulation which are not only misplaced in the South African context but which may also inadvertently carry with it, certain approaches that are antithetical to the South African constitution such as the imposition of one set of laws for the poor and another for the wealthy.

a. Reservation of ASM permits for locals:

- i. Currently, in the absence of a regulatory authority who can bring certainty and security of tenure to artisanal miners, there are conflicts between communities and groups of foreign nationals. Most groups are heavily armed and the use of force to claim and protect their access to mining sites, has been allowed to proceed as an underground/covert activity.
- ii. The organised efforts by marginalised groups to access livelihood options has not only led to the domination of criminal syndicates, it has also contributed immensely to the growing sentiment of xenophobia in working class communities.
- iii. Despite the intention to solve the problem by simply imposing a ban on foreign nationals, the proposed discrimination against foreign nationals will almost certainly not pass muster at a Constitutional level.
- iv. Our history has shown that solutions are to be found through inclusion and not through exclusion. The very fact that we are now trying to deal with such a complex challenge is due to the exclusion of artisanal miners from the mining regulations and the proposal to continue the exclusionary path by delineating ever narrower forms of exclusion is simply not sustainable and is contrary to the constitutional values of the country.
- v. We suggest that the attempt to develop one set of laws which apply to the poor and another set of laws which apply to the rich are also not constitutional sustainable and we are surprised that the DMRE has continued to promote such egregious xenophobic sentiments despite us having raised this with the DMRE previously.
- vi. As practical way forward, we would suggest that It would be preferable to licence groups rather than individuals where documented foreign nationals can then join cooperatives which are community based and majority owned by South Africans.
- vii. This would serve as a vehicle through which to discourage groups of foreign nationals to organise against local groups when it would be possible for them to access livelihoods through other regulated means and to foster inclusive growth and development.
- viii. The practice across some countries in Africa is to reserve ASM for locals has shown that even this deeply offensive and egregious action does not address the “illegal” participation of foreign nationals in the sector. We have seen this in several countries including Ghana where there is a high participation of Chinese nationals in the sector who exploit poor regulations.

- ix. However, while we propose that exclusion is not suitable to the South African context, we nonetheless recognise the role of artisanal mining in

socio-economic development. In the case of South Africa, Artisanal mining is an important avenue to poverty alleviation and improving the living standards of marginalised communities. The sector is also important in redressing past injustices and ensuring that historically excluded communities/individuals participate in and benefit from the mining sector. On that basis, it is important that locals be given priority in artisanal mining formalisation processes and interventions, but this cannot be done in an exclusionary manner where other marginalised groups are excluded.

- x. Any analysis of the current landscape of the ASM sector cannot ignore the fact that there are significant numbers of foreign nationals that engage in ASM activities. From the studies done, it is estimated that foreign national account for about 20% of active miners in the artisanal diamond mining sector and 30% in the artisanal gold mining sector. Based on this reality, while locals are to be given a priority, the policy needs to also create avenues that will accommodate foreign nationals. There are sub-leasing and tribute system/models that could be considered. The current model used by Bathopele in Kimberley could also be considered where foreign nationals are accommodated under permits granted to co-operatives/associations

b. Definition of concepts:

- i. We generally agree that artisanal mining should be separately defined from small scale mining as they are not the same. Please see our comments under “Definition” above.

c. Graduation Provisions:

- i. We agree that the regulations should set out when an operation will no longer comply with the definition of artisanal and when it needs to be assisted to graduate to small scale operations.

d. Co-existence between ASM miners and LSM:

- i. We support the notion that LSM’s have a responsibility to ASM’s to assist in building the capacity, technical expertise, and management processes of ASM’s.
- ii. We support the proposal that this responsibility should be built into legislation as part of the SLP’s or Broad-based economic empowerment commitments to empower the broadest possible section of society.
- iii. Mining and mining beneficiation Incubators which are linked to IDP’s are important considerations and should be mandated and regulated.
- iv. We would support a provision which ensures that a portion of LSM licence permits should be allocated to ASM’s as part of broad-based empowerment initiatives and must be based on sound geological assessments so that

informal miners are not left to mine unproductive sites while LSM's retain the profitable sites.

- v. Co-existence must include state regulatory structures and the state (including local government) must play a more extensive role in enforcing cooperation and co-existence.
- vi. Allocations of Mining sites must be based on geological surveys done by independent consultants so that ASM's are not left with the less mineral rich mining areas and environment and safety issues can be publicly accessible and part of the decision making.
- vii. The LSM should not have control over the concession of the ASM and they should have autonomy to make decisions appropriate to their needs and operations.
- viii. One of the main areas of conflict between ASM and LSM is land and mineral deposits. It is important that ASM operators are given access to mineral deposits.
- ix. The "first come first serve" model for license applications disadvantages the majority of ASM operators because they normally do not have resources to apply for mining licenses and hence end up being overtaken by LSM companies.
- x. It will be important to designate mining land to ASM operators. The designated areas should be viable in terms of quality and quantity of the minerals. We have seen cases where land that has been allocated to ASM operators is unviable compared to mining sites of LSM operations. There are already sites that the Department can demarcate for ASM where ASM activities are already taking place.
- xi. There might also be a need for government to initiate the release of LSM concessions that are not being mined.
- xii. It is also important that the ASM sector should not be seen/treated like a sub-set of LSM sector. It needs to be fully recognised because it also plays an important role in the socio-economic development of the country.
- xiii. The relationship between ASM's and LSM's should be strictly regulated to ensure that these relationships do not become new forms of labour outsourcing in which the bulk of profits are appropriated by the LSM.

e. Transferability and encumbrance

- i. While we would support the inclusion of a section which allows the Minister to transfer rights, we propose that certain key restrictions be included in the regulation which would make this possible. These should be based on the following:
- ii. A Cooperative model must be central, and the cooperative must be community based with direct benefits accruing to the community

- iii. Communities must have a direct benefit from ASM activities in their community and cooperatives must be domiciled in the community where it mines.
- iv. Gender issues must be specifically included to provide specific quotas for ownership by women in the sector and these targets should exceed those currently in the Mining Charter.
- v. Silent partners and other equity arrangements that encourage non participatory shareholding should be expressly prohibited.
- vi. Individuals with an annual income sourced from either permanent employment elsewhere, or income from other sources, should be excluded from participating in cooperatives to ensure that the system cannot be abused by connected individuals to enrich themselves.
- vii. In this way local economies are bolstered, and it ensures that any wealth/income generated is spent in the community and used to support the local economy.
- f. Designation of areas for the ASM industry.**
 - i. We support the idea that the Minister should be able to designate areas for ASM, however this power should be subject to proper negotiations with affected communities and stakeholders, based on the principles of Free Prior and Informed Consent.
- g. Limitation of ASM operations to surface mining:**
 - i. We would not support this limitation due to reasons noted above.
- h. Creation of district/regional mining offices**
 - i. We would suggest that we should be wary of creating extra levels of bureaucracy where new forms of patronage could be developed.
 - ii. Open and transparent processes which are decentralised and over which the community and other stakeholders can have oversight would be welcomed as a step in the right direction.
 - iii. However merely duplicating closed and untransparent processes would serve no purposes other than increasing the cost of accessing mining rights for marginalized communities.
- i. Formation of district Mining Committees.**
 - i. We would support such a proposal on the basis that it should not mirror the exclusionary structure of the MPRDA and that communities must have proper representation on such committees and that they have a clear legal mandate to provide oversight to the work of the district regional mining offices.
- j. Formation of ASM Associations.**
 - i. We support the emphasis on promoting associations of artisanal miners who can act collectively to manage and regulate the sector in collaboration with the District Mining Committees.
- k. Financial assistance to ASM operations**

- i. We propose to consider the Rehabilitation Fund as a possible avenue to fund clearing of dumps and pits using artisanal techniques which can reclaim minerals during the process.
- ii. We also would support a Review of the Small-Scale Mining Fund structure and eligibility requirements to make it more accessible to Artisanal/informal miners
- iii. The SEDA funds should also be used where appropriate for training and capacity building of cooperatives and informal miners.
- iv. Currently one of the only existing artisanal cooperatives, Bathopele co-op, cannot access loans or funding via the private sector and the state should consider a loan guarantee scheme for start-ups, so that cooperatives can have seed funding to start operations and to operate according to good governance principles.
- v. The provision of funding support and adherence to good governance principles can go hand in hand, thereby ensuring that new cooperatives are not left to fail without ensuring proper and comprehensive support structures are in place for them.
- vi. The DMRE needs to relook at the existing institutional arrangements which have been put in place to support ASM operations. This includes the support provided by institutions such as Mintek, Council for Geosciences, Mining Qualification Authority, IDC etc.
- vii. Access is an issue for most ASM operators. Some of the services provided by these institutions require payment which ASM operators normally do not have.
- viii. There is also an issue with the financial provision for rehabilitation which is a barrier to obtaining mining permits. This needs to be looked at as well.
- ix. There are various models of funding that could be considered. One such model is the shared funding model where instead of funding individuals, funding can be directed to designated ASM sites where it is used to fund equipment, resources etc. that will be collectively shared.

Chapter III

6. Differentiation of Concepts.

(a) Artisanal mining and small-scale mining

We propose the following definition:

- a. **“Artisanal mining”**: *“means traditional and customary mining operations using traditional or customary ways and means – [including all mining activities concerned with the mining value chain; including mineral searching, ore extracting, processing and trading of mineral product]. This includes the activities of individuals using mostly rudimentary mining methods, manual and rudimentary tools to access mineral ore. [usually available on surface, or at shallow depths]*

Chapter IV

7. Licensing Regime and Administration.

(a) Types of permits to be granted.

No Comment.

(b) Licensing method.

No comment.

(c) Licencing criteria.

We support the criteria outlined with the addition that Artisanal Mining should give preference to those who reside in, and consequently spend, in the local community.

(d) Legal Nature of the permit.

No Comment.

(e) Extent of a permit area in hectares.

No Comment.

(f) Duration of an ASM operation in years.

No comment.

(g) Power to demarcate areas as ASM areas.

We

support the idea that the Minister should be able to designate areas for ASM, however this power should be subject to proper negotiations with affected communities and stakeholders, based on the principles of Free Prior and Informed Consent

(h) Reservation of permits to South Africans.

Currently, in the absence of a regulatory authority who can bring certainty and security of tenure to artisanal miners, there are conflicts between communities and groups of foreign nationals. Most groups are heavily armed and the use of force to claim and protect their access to mining sites, has been allowed to proceed as an underground/covert activity.

The organised efforts by marginalised groups to access livelihood options has not only led to the domination of criminal syndicates, it has also contributed immensely to the growing sentiment of xenophobia in working class communities.

Despite the intention to solve the problem by simply imposing a ban on foreign nationals, the proposed discrimination against foreign nationals will almost certainly not pass muster at a Constitutional level. The Constitutional Court has made it clear that foreign nationals in South Africa are entitled to all the fundamental rights enshrined in the Bill of Rights. Reserving permits for South Africans will constitute unfair discrimination in violation of the right to equality. It will affect refugees and asylum seekers, who have the right to seek employment (including self-employment) in terms of the Refugees Act 130 of 1998, and people who have been granted the requisite visas to engage in business activities in South Africa in terms of the Immigration Act 13 of 2002. The discrimination in the Bill is immediately distinguishable from that under consideration in *Union of Refugee Women* – a case in which the Constitutional Court held that the State's exclusion of refugees from work in the private security industry did not constitute unfair discrimination. That case must be understood in light of the entire statutory scheme that was in issue. In this regard, the Court explained:

“The scheme is for a limited fixed period; it is not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry; it is flexible and has the capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner.”

In

Watchenuka, the Supreme Court of Appeal held that depriving asylum seekers of the right to work through a general prohibition would threaten to degrade those asylum seekers who have no other means for support. In the Court's words: "[A] person who exercises his or her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging."

The principle recognised in Watchenuka was extended to self-employment by the Supreme Court of Appeal in Somali Association -- a case in which the Court held that the constitutional right to dignity entitles refugees and asylum seekers to engage in trade if they have no other means of support. The Court appositely cautioned that the authorities must "guard against unwittingly fuelling xenophobia."

The Constitutional Court has held that refugees and asylum seekers are a particularly vulnerable group in our society. Depriving refugees and asylum seekers of the opportunity to earn their livelihoods by engaging in business activities in Gauteng townships will leave those refugees and asylum seekers who live in these communities destitute. This will clearly be a material and unjustifiable invasion of their right to dignity.

Our history has shown that solutions are to be found through inclusion and not through exclusion. The very fact that we are now trying to deal with such a complex challenge is due to the exclusion of artisanal miners from the mining regulations and the proposal to continue the exclusionary path by delineating ever narrower forms of exclusion is simply not sustainable and is contrary to the constitutional values of the country.

We suggest that the attempt to develop one set of laws which apply to the poor and another set of laws which apply to the rich are also not constitutionally sustainable and we are surprised that the DMRE has continued to promote such egregious xenophobic sentiments despite us having raised this with the DMRE previously.

As practical way forward, we would suggest that It would be preferable to licence groups rather than individuals where documented foreign nationals can then join cooperatives which are community based and majority owned by South Africans.

This would serve as a vehicle through which to discourage groups of foreign nationals to organise against local groups when it would be possible for them

to

access livelihoods through other regulated means and to foster inclusive growth and development.

The practice across some countries in Africa is to reserve ASM for locals has shown that even this deeply offensive and egregious action does not address the “illegal” participation of foreign nationals in the sector. We have seen this in several countries including Ghana where there is a high participation of Chinese nationals in the sector who exploit poor regulations.

However, while we propose that exclusion is not suitable to the South African context, we nonetheless recognise the role of artisanal mining in socio-economic development. In the case of South Africa, Artisanal mining is an important avenue to poverty alleviation and improving the living standards of marginalised communities. The sector is also important in redressing past injustices and ensuring that historically excluded communities/individuals participate in and benefit from the mining sector. On that basis, it is important that locals be given priority in artisanal mining formalisation processes and interventions, but this cannot be done in an exclusionary manner where other marginalised groups are excluded.

Any analysis of the current landscape of the ASM sector cannot ignore the fact that there are significant numbers of foreign nationals that engage in ASM activities. From the studies done, it is estimated that foreign national account for about 20% of active miners in the artisanal diamond mining sector and 30% in the artisanal gold mining sector. Based on this reality, while locals are to be given a priority, the policy needs to also create avenues that will accommodate foreign nationals. There are sub-leasing

and tribute system/models that could be considered. The current model used by Bathopele in Kimberley could also be considered where foreign nationals are accommodated under permits granted to co-operatives/associations.

(i) Issuing of permits to individuals or Co-operatives.

We agree in principle with the preference for cooperatives but accept that in some conditions and situations it may be appropriate to issue individual licences.

However, we propose that specific limitations be placed on Individual licences that would

1. ensure that the individual is resident in the community,

2. and that the individual works the sight by herself or himself without employing any additional workers or help. (where additional workers are required to work a site, that site should be converted to a cooperative in which the workers obtain a share of the permit as part of a cooperative.)
3. That no other equity arrangements are in place that encourage non-participatory shareholding or exploitative employment relations.
4. Individuals with an annual income sourced from either permanent employment elsewhere, or income from other sources, should be excluded from obtaining a permit to ensure that the system cannot be abused by connected individuals to enrich themselves.

(j) Restriction of ASM operations to the surface.

We caution against restricting artisanal mining to surface levels only as this would not deal with the question of underground mining and illegal syndicates will still dominate underground mining. There should be no reason to limit underground mining if the sector is formalised and regulated.

However, we are not suggesting a blanket approval for all artisanal underground mining. We propose that the envisaged regulatory structures, in conjunction with proper geological assessments which are funded by the state, should be used to regulate the level and safety of underground mining.

Extension services such as geological information, health and safety collaborations with LSM's and other mining mechanisms can be provided as services to the sector. Collaborative efforts between artisanal mining cooperatives, LSM's and the regulator, may help to deal with this problem and squeeze out illegality.

Simply banning an activity that is entrenched in the sector will not end the practise, especially since it remains a potentially lucrative source of income for many marginalised artisanal miners.

A critical consideration of the South African context must consider that the SA context is different to other jurisdictions for several reasons. Importantly the geology of the country and the depth of available minerals often determines the level of mining that is possible.

Restricting ASM operations to surface mining might affect the prospects of the sector in terms of the availability of deposits that are located close to the surface and that can be exploited using surface mining methods. This will in turn lead to the possibility that many miners will abandon efforts to operate within the regulations at surface level, as it may not

yield

sufficient returns. In this way the sector might be inclined to continue to pursue activities below the surface, leading to the ongoing development and entrenchment of criminal syndicates in the sector.

(k) Transferability and encumbrance.

We would caution against the approach which privatises mining permits to the extent that banks and other financial players (both legal and illegal) can obtain mining permits and use these to subvert the original intention of the policy, ie. to *“to facilitate entry and meaningful participation by HDSA into the mining industry; Contribute to socio economic development, job creation and poverty alleviation; and to prioritize the interest of women and vulnerable groups who are involved in the ASM industry.*

While AM's will require some seed funding and other financial support, these should be based on security of tenure rather than freeholding which can be passed on to financial or other investing or exploitative actors.

In this sense a mining permit should not be transferable with the Ministers consent but must be limited to the categories of persons and groups identified above.

We propose that certain key restrictions be included in the regulation which would make this possible. These should be based on the following:

- i. A Cooperative model must be central, and the cooperative must be community based with direct benefits accruing to the community. Meaning that a bank or other financial institution or commercial company cannot own a mining permit
- ii. Communities must have a direct benefit from ASM activities in their community and cooperatives must be domiciled in the community where it mines.
- iii. Gender issues must be specifically included to provide specific quotas for ownership by women in the sector and these targets should exceed those currently in the Mining Charter. Meaning no entity may own a mining permit where this criterion is not met.
- iv. Silent partners and other equity arrangements that encourage non participatory shareholding should be expressly prohibited.
- v. Individuals with an annual income sourced from either permanent employment elsewhere, or income from other sources, should be excluded from obtaining a mining permit, to ensure that the system cannot be abused by connected individuals to enrich themselves.
- vi. In this way local economies are bolstered, and it ensures that any wealth/income generated is spent in the community and used to support the local economy.

(l) Sale and trading in minerals.

We support the proposal for the establishment of a regulated market, or a central buying agency dedicated to Artisanal Miners and which is regulated through a transparent and open manner.

(m) Co-existence with large operations.

We would caution against the use of tributary arrangements as they have often been used as a fronting exercise which allows the LSM to outsource its work without incurring the liabilities of employing workers.

Where LSM's have unused mining sites, especially where the LSM has been in possession of the right to mine for a period exceeding 80% of the mining permit life, these sites should/may be allocated to artisanal mining activities. These must either be transferred to regulated Artisanal Mining cooperatives by the LSM via a regulatory process as part of the mines obligations to redress and development, or the area must be proclaimed as Artisanal Mining areas by the Minister and sites allocated accordingly. A portion LSM licence permits should be allocated to ASM's as part of broad-based empowerment initiatives and must be based on sound geological assessments so that artisanal miners are not left to mine unproductive sites while LSM's retain the profitable sites

Sites should be clearly demarcated between the LSM and the artisanal mining sites and the LSM should derive no benefit from such sites either through leasing or other similar type of arrangements and LSM's should not be able to buy the minerals from the Artisanal miners. All sales must go through a dedicated ASM market or buying agency.

Contributions of equipment or managerial time can then be claimed back as part of the mine's commitment to local economic development. This should be built into legislation as part of the SLP's or Broad-based economic empowerment to empower the broadest possible section of society.

Mining and mining beneficiation Incubators which are linked to IDP's are important considerations.

(n) Mining of tailings and mine dumps

Given the extreme levels of unemployment and joblessness in South Africa we would propose that this sector should be dedicated to artisanal mining and should only be open to LSM's where they are able to demonstrate that ASM activities are not feasible, not profitable, not environmentally friendly or that artisanal practises will present an imminent risk to the community or miners.

(o) Access to land.

We

submit that the current regulatory framework around obtaining land for the purpose of mining falls short of the participatory and inclusive values of the Constitution.

These include but are not limited to the following:

- a. Consultation Processes are not meaningful.
- b. Communities often do not have access to all relevant information regarding the project in an understandable format.
- c. Communities often do not have the opportunity to deliberate internally and communicate community priorities to the government and investors; and are often excluded from participating in and influencing relevant decisions regarding the project to the extent that such decisions will affect the community's rights or lands or resources.

The UN High Commissioner for Human Rights, while not a source of binding jurisprudence, has interpreted the right to take part in public affairs as including entitlements “to be fully involved in and to effectively influence public decision-making processes that affect them, and “to be consulted and to be provided with equal and effective opportunities to be involved in decision-making processes on all matters of public concern.

The African Union's Guiding Principles on Large Scale Land Based Investments in Africa also assert that communities affected by large-scale land-based investment should be “provided sufficient information, consulted on their views prior to finalising [largescale land-based investment] agreements and [have] these views taken into consideration

Consultation and Free Prior and Informed Consent processes must take place before authorization, and should be iterative first, only seeking to consult or obtain consent. Consultation and FPIC processes should commence prior to any authorization, and not only when the need arises to obtain the community's approval

Second, obtaining consent and consulting communities is not an obligation that can be fully and finally satisfied at any one point in time; instead, consent and consultation processes should take place regularly as part of “a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles. Continuous consent and consultation ensure a greater degree of participation and control for communities and improve communication between them and government and artisanal associations active in

their area. Here the fact that artisanal cooperatives must be required to be domiciled in the community would contribute to the need for continuous and ongoing community involvement.

There is an important distinction between ‘consultation’ or ‘participation’ and ‘consent’, The duty of the State to obtain peoples’ free, prior and informed consent entitles indigenous

peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes.

The use of the word determine indicates that 'consent' implies a greater level of control over the outcome than the term influence would suggest.

In order to ensure cooperative relations between the community and the artisanal miners it would be important to ensure that negotiation of benefit sharing arrangements that give the community a fair and reasonable share of the benefits from the project are negotiated upfront.

Benefit sharing goes beyond compensation for damages and might include support for job creation, education and infrastructure; a share of the royalties dedicated to community projects. Communities also expect to decide what kinds of social project are to be supported in the community.

The signing of an FPIC Agreement, this may be in the form of a Memorandum of Agreement of an Impact Benefit Agreement between the parties, and should take the form of legal contracts with the force of law.

Grievance mechanism: The agreement should specify channels to address grievances if there is any breach of the agreement.

The grievance mechanism(s) should be determined by the community, should respect their customary law and judicial institutions, and the community should identify who will monitor and enforce the agreement. This might be a multi-stakeholder monitoring team combining representatives of the community, the government and other independent bodies.

CHAPTER V

8. INSTITUTIONAL AND SUPPORT MECHANISMS

(a) Centralised/Regional mining offices

We broadly support the re-evaluation of the current institutional structure dedicated to ASM. However, we would suggest that the Artisanal Mining has considerably different developmental and support requirements than a Small-Scale mining Operation. For this reason, we would propose the establishment of an Artisanal Mining Directorate that is decentralised and available to marginalised sectors of society who often do not have access to the various forms of institutional capacity required to navigate the bureaucratic pathways towards obtaining a permit and being compliant in terms of regulatory requirements.

(b)

Formation of ASM Associations

While we broadly support the proposal for the formation of Associations, we would caution against a broad sweep approach which lumps artisanal miners with small scale miners. Each type of formation would have starkly different issues that affect their operations, and we would accordingly encourage the formation of Artisanal Associations separate from Small-scale Mining Associations.

Caution should also be observed with regards to the statutory role of Associations as the examples from the Taxi industry has shown that to allow associations to play any form of regulatory role which normally should be the prerogative of the state, such the right to control collective assets, services and access, creates a power dynamic which often fuels internal squabbles and violent altercations over access to these sources of power.

Instead, the Associations should be focused on representation. Given that it would be difficult for the regulator to engage with hundreds of small groups, these groups, through their association should be able to be represented in any negotiations or discussions with the state.

We also respectfully disagree with the claim that there are no national associations of artisanal miners. The National Association of Artisanal Miners (NAAM) was formed in September 2019 with the aim of aggregating and articulating the interests of artisanal miners. We would encourage the DMRE to work closely with NAAM and to assist and support the development of the very first association representing the interests of artisanal miners so that any legislative process can ensure that the voices of those directly affected by this policy is heard and included in the deliberations.

(c) Formation of District Mining Committees

We reject any attempt to compromise the representativity and cooperative nature of Artisanal Associations by compromising them by allocating any kind of statutory role in the awarding of licences and permits or controlling any collective assets and services.

District Mining Committees should not be “anchored” in Artisanal Mining Associations, but Artisanal Mining Associations should be represented on District Mining Committees to provide oversight, and to articulate the interests and needs of artisanal miners.

As far back as the early 1990’s The Goldstone Commission’s interim report on taxi

violence identified commercial competition between taxi operators as the main cause of taxi violence. The Commission also emphasised that the problem was aggravated by the Local Transportation Boards. The commission found that Local transportation Boards actually forced newcomers to join taxi associations at a very high cost,

since

they refuse to issue permits to applications not supported by these associations. As a result of fragmentation, lack of legal structuring and an inherent inability to order itself, the taxi industry became totally ineffective.

The first democratic government which convened the first National Taxi Workshop on the 18th March 1995 to address the ongoing violence in the sector. At this gathering the National Taxi Task Team (NTTT), a Ministerial Committee of the Minister of Transport, was established and its report was published in August 1996.

The most important findings about the general problems of the taxi industry in South Africa were condensed and the following six aspects were identified: lack of control, labour relations, economic sustainability, lack of skills, traffic safety and lack of infrastructure. The Task Team found that the violence in the industry can mainly be ascribed to a lack of control which resulted in overpopulation of the industry. "continuous conflict and violence in the minibus-taxi industry attest to the failure to create effective mechanisms and structures to control and regulate itself and to resolve conflict and decrease violence".

It is in light of this history in which efforts to impose state regulatory duties on associations of interested parties has resulted in an inward cycle of breakaway associations, violence and a general failure to regulate.

The state should not abdicate its responsibility to regulate the sector, especially to interested parties who then become both a referee and a player and which inevitably leads to tensions and violence. In a sector that already has a propensity to resolve territorial disputes through violence, we strongly suggest that this proposal be withdrawn.

(d) Formation of Co-operatives

We support the formation of cooperatives.

(e) Financial Assistance

We propose to consider the Rehabilitation Fund as a possible avenue to fund clearing of dumps and pits using artisanal techniques which can reclaim minerals during the process.

We also would support a Review of the Small-Scale Mining Fund structure and eligibility requirements to make it more accessible to Artisanal/informal miners

The SEDA funds should also be used where appropriate for training and capacity building of cooperatives and informal miners.

Currently

one of the only existing artisanal cooperatives, Bathopele co-op, cannot access loans or funding via the private sector and the state should consider a loan guarantee scheme for start-ups, so that cooperatives can have seed funding to start operations and to operate according to good governance principles.

The provision of funding support and adherence to good governance principles can go hand in hand, thereby ensuring that new cooperatives are not left to fail without ensuring proper and comprehensive support structures are in place for them.

The DMRE needs to relook at the existing institutional arrangements which have been put in place to support ASM operations. This includes the support provided by institutions such as Mintek, Council for Geosciences, Mining Qualification Authority, IDC etc.

Access is an issue for most ASM operators. Some of the services provided by these institutions require payment which ASM operators normally do not have.

There is also an issue with the financial provision for rehabilitation which is a barrier to obtaining mining permits. This needs to be looked at as well.

There are various models of funding that could be considered. One such model is the shared funding model where instead of funding individuals, funding can be directed to designated ASM sites where it is used to fund equipment, resources etc. that will be collectively shared.

(f) Training, Skills development, and innovation

While we generally support the proposal contained in this section, we strongly object to formal educational qualifications being used as a criterion to exclude any marginalised individuals from accessing the right to mine.

Our proposals to allow mainly cooperatives to be permitted to mine goes hand in hand with challenges that are faced by marginalised groups. In a group there may be different individuals with different skills and cooperating through a division of labour is intended to help the marginalised to navigate the broader world and its bureaucracy.

However, we strongly support the promotion of continued education and AM sites should contribute to training and skills development funds and initiatives in the local area and among artisanal miners.

CHAPTER VI

9. FISCAL REGIME

(a) Payment of Royalties

We would support the payment and collection of Royalties with the proviso that such royalties are ring fenced for local development purposes which are channelled back to the community through the District/regional Mining Committees or a similar local representative structure in which all stakeholders are represented.

(b) Taxes

No Comment.

CHAPTER VII

10. ENVIRONMENTAL MANAGEMENT, HEALTH, SAFETY AND WATER USE CONSIDERATIONS

We support the general policy proposals in this section but would include the following:

The process of identifying areas to demarcate for artisanal mining should include the various legislative requirements to have an EIA process completed.

Extension services such as geological information, health and safety collaborations with LSM's and other mining mechanisms can be provided as services to the sector through the government and the Regional Mining Committees.

The maintenance of ongoing servicing of environmental considerations can be channelled through the Regional Mining Committees.

CHAPTER VIII

11. GOVERNMENTS POLICY STANCE ON ILLEGAL MINING

It is our contention that historically and contemporaneously the lack of inclusivity in the mining sector and the reservation of mining rights for LSM's, corporates and the politically connected has been the main driver of illegality.

The legal recognition of artisanal miners will assist greatly in reducing "illegality" but it is most likely that some operators who wish to avoid any form of accountability to the community and the state will continue to operate outside of the regulatory framework.

Experience in the Taxi industry suggests that a critical element of reducing violence in the sector is the ability to properly regulate and to some extent "police" the system and its participants.

It is in the interest of the whole of society that pirate operators who refuse to be accountable to society should be criminalised.

However, we contend that a narrow focus on the poorest of the poor and marginalised communities and individuals is contrary to the spirit of the constitution and any regulations, task teams or police units should be mandated to tackle any forms violations in the sector and LSM should also be subject to criminalisation should they fail to comply with their obligations to the community, environment or society.

We reject any attempt to legislate one set of laws for the poor and another set of laws for the rich. LSM's and its management are not subject to policing in the same way that poor people are and this is reflected in the anti-poor bias of the current legislation.

The same enthusiasm that the policy shows to police and prosecute theft should be applied to prosecuting and policing the ongoing human rights violations perpetrated by LSMs against communities across South Africa.

There is a distinct lack of prosecutorial effort to police LSM's in the sector and even where criminal charges have been brought against mining executives of LSM's these have not been prosecuted.

Accordingly we reject any legislation or policy aimed only at policing the poor.

CHAPTER VIX

12. REPORTING AND ACCOUNTABILITY

While we acknowledge the need for reporting and accountability we would caution against a strict enforcement of the system where difficulties in reporting are used as a mechanism to exclude those who are genuinely seeking to eke out a living from the national resources in the ground.

It is our contention that a strict enforcement policy would drive many artisanal miners to operate outside of the regulatory framework instead. The intention of the policy and regulations must be to be inclusive and not to force marginalised groups to operate outside of the law. This only leads to increased tensions and a greater potential for violence and confrontation between competing groups.

We propose that the policy consider how to use the state regulated market and buying agency to track income of the individual entities. This then allows the state to have a clear indication of income for tax purposes.

This however does not suggest that reporting and accountability becomes irrelevant but rather that these are areas of learning and growth that could carry some form of penalty but should not be used to exclude as first resort. A serial defaulter who has been provided with training and ancillary services to support their compliance could eventually be considered for exclusion.

CHAPTER X

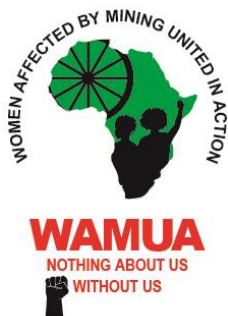
13. POLICY IMPLEMENTATION, ENFORCEMENT, MONITORING AND EVALUATION.

No Comment.

CHAPTER XI

14. POLICY REVIEW

No Comment.



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