South African Institute of Race Relations NPC

Submission to the Minister of Mineral and Petroleum Resources

regarding the

Draft Mineral Resources Development Bill of 2025

13 August 2025

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1 Introduction

The Minister of Mineral and Petroleum Resources ("the minister") has invited interested persons to submit public comments on the Draft Mineral Resources Development Bill of 2025 ("the Bill") by 13th August 2025.

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The constitutional need for proper public consultation

The founding values of the Constitution require "openness" and "responsiveness" on the part of the government, while Chapter Ten states that "the public must be encouraged to participate in policy-making".[1] In addition, both houses of Parliament have as an obligation to "facilitate public involvement in the[ir] legislative…processes".[2]

The constitutional need for proper public consultation is thus a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning two decades. These rulings include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*, *Doctors for Life International* v *Speaker of the National Assembly and others*, *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, and *Mogale and others* v *Speaker of the National Assembly and others*.[3]

In August 2025, moreover, in a unanimous ruling handed down in *Corruption Watch (RF) NPC* v *Speaker of the National Assembly and others*, the Constitutional Court reiterated the importance of proper public participation, saying: "The right of members of the public to participate meaningfully in democratic governance is a hallmark of our constitutional democracy. Public involvement in the legislative and other processes of all three spheres of government is not merely a fashionable accessory; it is a thread woven into the fabric of our democracy."[4]

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: "What matters is that…a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to *have an adequate say*". This passage was quoted with approval in *Doctors for Life*, the *Land Access* case, and the *Mogale* judgment in 2023.[5]

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[1] Sections 1(d), 195(1)(e), Constitution of the Republic of South Africa, 1996 ("Constitution").
[2] Sections 59(1), 72(1), Constitution.
[3] (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); [2016] ZACC 22; [2023] ZACC 14.
[4] *Corruption Watch (RF) NPC* v *Speaker of the National Assembly and others*, [2025] ZACC 15, para. 1.
[5] Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59; *Mogale* judgment, at para. 34.

2.1 The need for an accurate socio-economic impact report

The best way to ensure that the public *know about the issues* and can then *have an adequate say* is to provide them with a comprehensive and objective report on the likely socio-economic impact of a bill. This is also what the government's own policy requires.

According to the government's *Guidelines for the Socio-Economic Impact Assessment System (SEIAS)* – which were developed by the Department of Planning, Monitoring, and Evaluation in May 2015 and took effect in September that year – all new legislation in South Africa is supposed to be subjected to a comprehensive "socio-economic impact assessment" before it is adopted. The aim of the SEIA system is to ensure that "the full costs of regulations and especially the impact on the economy" are fully understood before new rules are introduced.[6]

According to the *Guidelines*, the SEIA system must be applied at various stages in the policy process. Once new legislation has been proposed, "an initial assessment" must be conducted to identify different "options for addressing the problem" and making "a rough evaluation" of their respective costs and benefits. Thereafter, "appropriate consultation" is needed, along with "a continual review of the impact assessment as the proposals evolve".[7]

A "final impact assessment" must then be developed that "provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome". When a bill is published "for public comment and consultation with stakeholders", this final assessment must be attached to it. A particularly important need is to "identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration".[8]

2.2 The need to comply with the National Policy Development Framework

The government's *National Policy Development Framework* ("the *Framework*") also puts a great emphasis on "encourag[ing] the public…to participate in policy making".[9] The *Framework* was approved by the Cabinet in December 2020 and is intended to help give effect to the *National Development Plan: Vision 2030*. It seeks to improve policy development by "ensuring meaningful participation" and "inculcating a culture of evidence-based policy making".[10]

Towards this end, the *Framework* lists some of the key requirements for proper public participation. "Consultation with stakeholders should commence as early as possible," it says. All relevant stakeholders should be identified, including "those who will benefit when [existing] problems are addressed" and "those who will bear the cost of implementation of the proposed intervention". In addition, policy-makers must identify and counter all "barriers to active participation" and ensure that "consultation is infused in all aspects of the policy-making cycle".[11]

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[6] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p. 3, May 2015.
[7] *SEIAS Guidelines* p. 7.
[8] *SEIAS Guidelines*, p. 11.
[9] Ibid, p. 19.
[10] National Policy Development Framework, 2020, p. 3.
[11] Ibid, pp. 19 – 20.

According to the *Framework*, policy-makers must consider different policy options and give adequate thought to "which policy solutions would best achieve the public policy objective". They must also "inform and engage stakeholders" on "the nature and magnitude of a policy issue", along with its likely "impacts and risks". All assessments made by policy-makers, moreover, must be "informed by the best available evidence, data, and knowledge".[12]

In addition, policy-makers must be willing to adjust their proposals in the light of the evidence provided. "Policy-makers must not impose their preconceived ideas…and pre-empt the outcome of the policy consultation process. They need to be willing to be persuaded and acknowledge the input of stakeholders with a view to creating a win-win policy outcome." They must also avoid any impression that "the consultation process is staged, managed, cosmetic, token and a mere compliance issue". Instead, they must "strive to produce an outcome based on bargaining, negotiation, and compromise".[13]

Policy-makers, the *Framework* adds, must also provide adequate feedback to those who have submitted comments. Such feedback must include "rational reasons" as to why "submissions and comments…were not consolidated into the final policy document". In addition, policy-makers must "report in the SEIAS (final impact assessment: consultation section) on the results of their early engagement with stakeholders". They must explain "what stakeholders viewed as possible solutions, benefits, and costs and how these influenced the selection of the proposed policy solution".[14]

2.3 Little regard for these obligations

These important instructions to policy-makers have been disregarded in relation to the Bill. No SEIA report has been drawn up and appended to the Bill to help the public to "know about the issues" and then to "have an adequate say". The *Framework*'s directions as to what must be included in a SEIA report have likewise been ignored. The mining industry has also stressed (as further outlined in *The unconstitutionality of the Bill*, below) that its evidence-based representations to the minister have been brushed aside.[15]

3. The Content of the Bill

The Bill contains many damaging provisions likely to deter investment and prevent the mining industry from realising its great potential. The following clauses are particularly detrimental.

3.1 New empowerment provisions

The Bill proposes four key changes to empowerment requirements for mining companies applying for or holding mining rights. First, empowerment obligations are to be more closely aligned with those contained in the Broad-Based Black Economic Empowerment Act of 2003 ("the BEE Act"). Second, the mining minister will be required to "impose" relevant BEE

[12] Ibid, p. 20.
[13] Ibid.
[14] Ibid.
[15] Faku, D, 'Miners unite against draft Bill', Sunday Times Business Times 1 June 2025: https://www.businesslive.co.za/bt/business-and-economy/2025-06-01-miners-unite-against-draft-bill/

requirements in granting applications for new mining rights. Third, the minister will be empowered to "repeal or amend" the empowerment obligations resting on companies with existing mining rights. Fourth, the minister will have the power to make new empowerment rules by regulation.

3.1.1 A shift to "black persons" and the BEE Act

The Mineral and Petroleum Resources Development Act (MPRDA) of 2002 seeks to confer its empowerment benefits on "historically disadvantaged South Africans" or HDSAs, whereas the Bill requires a shift to "black persons", as defined in the BEE Act. In keeping with this approach, the Bill defines broad-based economic empowerment as "having the meaning assigned to it" in the BEE Act.

These changes are set out in Clause 1 of the Bill, which amends the definitions contained in Section 1 of the MPRDA. According to the Bill, "'*Black person'* has the meaning assigned to it in the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)". In similar vein, "'broad based economic empowerment' has the meaning assigned to it in the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)".[16]

In keeping with this change, Clause 1 of the Bill deletes the Act's current definition of HDSAs from section 1 of the MPRDA. Confusingly, however, it nevertheless retains a reference to HDSAs in an unchanged sub-section 100(2) of the MPRDA. This provision requires the minister, within "six months" of the Act's taking effect, to "develop a broad-based socio-economic empowerment Charter" providing for the "active participation of historically disadvantaged South Africans" in the mining industry and allowing them to "benefit" from it.[17]

The Bill does not say whether HDSAs are in future to be equated with "black persons". Nor does it clarify what its changes might mean, for example, for existing HDSA ownership deals that might include white women. This creates uncertainty and is in conflict with the rule of law.

3.1.2 "Imposing" BEE obligations on applicants for mining rights

The Bill seeks to insert a new sub-section 100(3), under which the mining minister "must", "when granting applications" for mining rights, "impose…the broad-based socio-economic empowerment prescribed elements of Black Economic Empowerment ownership, inclusive procurement, supplier and enterprise development, human resources development, employment equity and mining community development".[18]

These BEE elements are not defined further, making for great uncertainty and undermining the rule of law. However, the list provided echoes that contained in the mining charter gazetted in September 2018.[19] This suggests that the Bill's objective is to empower the mining minister to require compliance with all the key clauses in the 2018 charter from companies seeking new mining rights.

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[16] Clause 1, Mineral Resources Development Bill (the Bill).
[17] Section 100(2), Mineral and Petroleum Resources Development Act (MPRDA) of 2002
[18] New section 100(3), Mineral Resources Development Bill of 2025 (the Bill).
[19] Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, *Government Gazette* No 41934, 27 September 2018

This raises further questions and uncertainties, for three reasons. First, some clauses in the 2018 charter were struck down by the North Gauteng High Court ("the Pretoria high court") in September 2021, after the Minerals Council South Africa ("the Minerals Council") challenged their validity. One such clause required 30% HDSA ownership on the transfer or renewal of existing mining rights. Another demanded compliance with extraordinarily onerous preferential procurement rules. A third required 100% compliance with HDSA ownership obligations, failing which companies could have their mining rights suspended or cancelled under the MPRDA.[20] These three clauses are invalid and cannot be revived by inserting Section 100(3) into the Bill.

Second, the 2021 Pretoria high court judgment makes it clear that the mining minister has no law-making power under the MPRDA. The 2018 Charter is thus a mere "instrument of policy" and has no binding legal force.[21] The wording to be inserted into the Bill is not sufficient to change this, for it is also a fundamental constitutional principle that legislative power is vested in Parliament and not the executive.

Third, a different Pretoria high court judgment – one handed down in April 2018 – casts doubt on the validity of both the 2010 and 2018 mining charters.[22] The wording of sub-section100(2) of the MPRDA is crucial here, for it empowers the minister to develop "*a"* socio-economic empowerment charter "*within six months"* of the Act's coming into operation.[23] Since the MPRDA took effect on 1 May 2004, the single charter it envisaged had to be developed before 31 October 2004. Any charter developed thereafter is clearly *ultra vires* (beyond the powers) given to the minister.

This second judgment also prevents the minister from overriding or repealing a key clause contained in the 2004 charter. This clause requires that the "continuing consequences of all previous deals" be taken into account, even after HDSA investors have exited. The 2018 judgment thus bars the minister from demanding "top-up" ownership deals by mining companies which have previously met the 26% ownership requirement.[24] Again, this ruling retains its binding effect regardless of whether the Bill is enacted into law.

One of the main purposes of the Bill is nevertheless to find a way to circumvent these two judgments and (supposedly) give the minister the law-making powers he lacks. This is also what mining officials have long been planning to achieve. In November 2021, two months after the September 2021 high court ruling, some of these officials told the relevant parliamentary portfolio committee that no appeal would be lodged against this judgment so as to avoid any risk of becoming "bogged down in the courts". Instead, the MPRDA would be amended to "incorporate the transformation objectives the judgment had overturned" and make "compliance obligatory".[25] This aim is (supposedly) being achieved via the new-sub section 100(4) introduced by the Bill.

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[20] Minerals Council of South Africa v Minister of Minerals and Energy and others, [2021] ZAGPPHC 633: https://www.saflii.org/za/cases/ZAGPPHC/2021/623.html
[21] Ibid, para. 59.
[22] The Chamber of Mines of South Africa v Minister of Mineral Resources and others, [2018] ZAGPPHC 8, para 76: https://www.saflii.org/za/cases/ZAGPPHC/2018/8.html
[23] Section 100(2)(a), MPRDA, emphasis supplied by the IRR.
[24] Ibid, para. 109.
[25] Parliamentary Monitoring Group (PMG), 'High Court Judgment on Mining Charter: DMRE briefing', 23 November 2021: https://pmg.org.za/committee-meeting/33889/

3.1.3 Empowering the minister to "repeal or amend" an empowerment charter

In keeping with this aim, the Bill includes a new sub-section 100(4) which gives the minister the power, "as and when the need arises", to "amend or repeal…the broad-based socio-economic empowerment prescribed elements of BEE ownership, inclusive procurement, supplier and enterprise development, human resources development, employment equity and mining community development".[26]

Clearly, the plan is that, once the Bill has been enacted, the minister will be able to use these powers to "amend" the 2004 charter (the only one that is undoubtedly valid) by repealing its present clauses and inserting instead, say, all the clauses in the 2018 mining charter. This would (supposedly) restore the clauses struck down in 2021. It would also (supposedly) end the "continuing consequences" principle and require all mining companies to do top-up deals when black investors sell out. The minister could perhaps even go beyond the 2018 rules and include, in his amendments, still higher targets for BEE ownership and other empowerment elements, of the kind outlined in due course.

3.1.4 Adding new empowerment targets by regulation

The Bill also seeks to give the minister the power to make regulations regarding empowerment. Under a new sub-section 107(1)(jD), the minister "may", by notice in the *Gazette*, "make regulations regarding…the promotion of transformative elements of [BEE] ownership, inclusive procurement, supplier and enterprise development, human resources development, employment equity and mining community development." Such regulations might, again, either mirror the rules in the 2018 charter or introduce higher BEE ownership and other targets.

The wording used in the Bill suggests that the minister will be able to introduce these new BEE requirements without having to "consult with affected stakeholders". The obligation to consult is to apply where the minister makes regulations under new sub-sections 107(1)(jA) and (jC) (see *Additional regulatory powers*, below), but not where he acts under sub-section 107(1)(jD). That no consultation on new empowerment obligations is envisaged – even with existing mining rights holders – will further undermine the certainty of mining rights in South Africa and deter the fresh direct investment, especially in exploration, that the country so badly needs.

3.1.5 What higher BEE ownership targets might the minister seek to introduce?

The 2018 charter sets a 30% ownership requirement for new mining rights, but generally retains a 26% target for companies with existing mining rights. However, the African National Congress (ANC) has long wanted a 51% ownership target in the mining industry and may regard the Bill as a vehicle to achieve this.

The 51% ownership goal was evident back in 2002, when an early version of the mining charter was leaked to the media.[27] The news caused a stock market panic, in which the value of mining shares fell by some R55bn and the ANC was compelled to draw back.[28] By contrast, little

[26] New Section 100(4), Bill.
[27] Staff reporter, 'Mining empowerment charter draws flak', Mail & Guardian, 30 July 2002: https://mg.co.za/article/2002-07-30-mining-empowerment-charter-draws-flak/
[28] Seccombe, A, 'Mining Charter minefield', Miningmx.com, 2 March 2009: https://www.miningmx.com/uncategorized/20514-mining-charter-minefield/

attention has been paid to a May 2025 draft BEE sector code for the transport sector, which proposes a 51% BEE ownership target for companies in the sector that want to enter into procurement contracts with the state.[29]

Under this draft code, a 51% BEE ownership requirement could be imposed for procurement contracts for the repair of the crumbling rail network, for example. However, having to sell a majority stake to BEE investors at a probably discounted price could significantly erode the willingness of many enterprises to partner with Transnet for this purpose. Yet, despite the urgency of restoring rail efficiency to earlier levels, the proposed 51% BEE ownership target in the draft sector code has passed largely unremarked. The relative silence here could encourage the mining minister to use the Bill to impose a 51% BEE ownership target on the mining sector too.

A 51% BEE ownership requirement would make the mining sector yet more "uninvestable" – and especially so if the minister also seeks to remove the "once empowered, always empowered" principle. Even if is only the latter that is done – while BEE ownership targets are kept at the levels envisaged in the 2018 mining charter (26% for existing rights holders and 30% for new mining rights) – mining companies could be bankrupted by having to do repeated "top-up" ownership deals whenever BEE investors sell out. If a 51% ownership target is indeed imposed, then this, in combination with the demise of the "once empowered" rule, could result in significant disinvestment from the mining industry.

3.2 Additional section 100 "transformation" obligations

Sub-section 100(1) of the MPRDA empowers the minister, within five years of the statute's coming into operation, to (a) "develop a housing and living conditions standard for the minerals industry…after consultation with the Minister for Housing"; and (b) to "develop a code of good practice for the minerals industry in the Republic".[30]

The powers thus given to the minister are similar to those given to him under sub-section 100(2)(a) to "develop" a broad-based socio-economic empowerment charter. Since the minister has no law-making powers under the MPRDA – as the Pretoria high court confirmed in 2021 in the context of the mining charter – neither the housing and living conditions standard ("the living standard") nor the code of good practice for the minerals industry ("the code") have binding effect. Like the charter, they are mere "instruments of policy" without binding legal force.

Under the Bill, however, both the living standard and the code are to made part of the Act. This is to be done by redefining "this Act" to "include the Codes of Good Practice for the South African Minerals Industry and Housing and Living Conditions Standards for the Minerals Industry".[31] This is clearly intended to give both documents binding force. (There is, however, some uncertainty here, as this clause uses the plural and Section 1 of the MPRDA uses the singular in referring to these documents.)

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[29] Parker, D, 'Transport sector faces major BBBEE overhaul with tougher compliance rules', Engineering News, 16 May 2025: https://www.engineeringnews.co.za/article/transport-sector-faces-major-bbbee-overhaul-with-tougher-compliance-rules-2025-05-16

[30] Section 101(1)(a),(b), MPRDA.

[31] New Section 1, MPRDA

Moreover, since the 2009 living standard is a mere "instrument of policy", can it be given legislative force simply by defining it as forming part of the Act? This would imply that the minister does indeed have law-making powers, which would undermine the doctrine of the separation of powers. The living standard is often vaguely worded too, which opens the door to uneven enforcement and prima facie conflicts with the rule of law.

Further complications may arise from the purported repeal of the 2009 living standard by a revised living standard adopted in 2019. The 2019 document is clearly *ultra vires* the minister's powers under sub-section 100(1)(a) of the MPRDA and thus invalid. An invalid document surely cannot repeal its 2009 predecessor. This means that it is the 2009 living standard that would become part of the Act, rather than the 2019 one.

Seeking to make the living standard legally enforceable would impose heavy implementation costs on mining companies for housing, roads, sanitation, schools, recreational facilities, clinics and health services. Costs of this kind may be difficult for mining companies to afford, especially when commodity prices are depressed and input costs keep rising. They may also undermine the global competitiveness of the industry and erode South Africa's attractiveness to investors.

Further complications arise regarding the 2009 code of good practice. This code echoes many of the empowerment obligations in the 2004 charter, but omits the charter's "aspirational" character. On management control, for example, the charter says companies should "aspire to a baseline" of 40% HDSA representation within five years. The 2009 code, by contrast, translates this aspirational goal into seemingly binding 40% targets for black people at all levels of management (with an additional 10% target for "women in mining"). However, it does not clarify the legal basis for this shift.[32]

Like the living standard and the mining charter, the code is a mere "instrument of policy". This raises doubts as to whether it can be made into binding law simply by defining it as forming part of the Act. Moreover, since it was developed in 2009, its content reflects the empowerment targets set out in the 2004 mining charter. (The 2018 mining charter contains stricter targets in all spheres, but was developed outside the six-month period specified in subsection 100(2)(a) of the MPRDA and is thus *ultra vires* and invalid.)

3.3 Additional "social and labour plan" obligations

Under the MPRDA, applicants for mining rights are expected to draw up "social and labour plans" ("SLPs") aimed at promoting the well-being of mine communities and the areas from which mine labour is commonly drawn. Many of these plans seek to improve the skills of both employees and community residents and make them more employable in spheres outside mining. This is commonly done via certificated courses and mentorship. SLPs often also focus on local development projects aimed at equipping communities to become more self-sustaining.[33]

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[32] Jeffery, A, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, p. 226; Department of Minerals and Energy, Codes of Good Practice for the South African Minerals Industry, April 2009, para. 2.2.2: https://cer.org.za/wp-content/uploads/2014/02/Codes-of-Good-Practice-for-the-Minerals-Industry.pdf

[33] Umsizi Team, 'SLP A – Z, Everything you need to know about social and labour plans': https://umsizi.co.za/slp-a-z-everything-you-need-to-know-about-social-and-labour-plans/.

The 2018 Mining Charter, though its validity is doubtful, further illustrates the types of obligations that mining companies are expected to take on. According to this document, mining companies must focus on the developmental priorities of mine communities, as identified in consultation with the communities themselves, municipalities and other stakeholders. The charter also urges mining companies to meet 100% of these SLP commitments in every financial year.[34]

Under the current MPRDA, once a mining right is granted, the mining company is expected to implement the commitments made in its SLP. The Bill makes this explicit. Under a revised sub-section 25(2)(f), "the holder of a mining right must…implement the approved social and labour plan despite the operational status of the mine, which must be reviewed every five years for the duration of the mining right".[35]

The new wording, though clumsy, seeks to make SLPs binding on mining companies for the full period of their mining rights and irrespective of whether a mine – perhaps because of reduced mineral prices – has been placed on care and maintenance, in whole or part. Mine revenue may be much diminished in such circumstances, but costly SLP obligations will not be.[36] This too will undermine economic viability and make it harder for many mines to sustain their competitiveness.

The Bill also requires that SLPs be reviewed – and possibly amended, if communities so wish – at five-yearly intervals. At the same time, under a revised sub-section 102(1), the Bill states that a "social and labour plan…must not be amended or varied… without the written consent of the Minister".[37] Having to obtain the minister's written permission for changes at five-yearly intervals will add significantly to the compliance burden on both mining companies and an already struggling Department of Mineral and Petroleum Resources.

3.4 "Meaningful" consultation

Already, mining companies often find it difficult in practice to consult adequately on their SLPs and environmental management programmes because traditional or other community leaders may be replaced from time to time, vitiating community agreements earlier obtained. Community representatives may also develop different perspectives on mining-related issues over time.

Under the Bill, the difficulty of complying with consultation requirements is likely to increase. According to the Bill, there must in future be "meaningful" consultation with all interested and affected persons. A new definition of "meaningful consultation" requires that a mining company provide "all relevant information" needed for "informed decisions regarding the impact" of

[34] Fabricius, P, 'The September 2018 Mining Charter: An improvement, but transformation still trumps sustainability', IRR, *@Liberty*, April 2019, p. 12: https://irr.org.za/reports/atLiberty/files/liberty-april-2019-2014-issue-41.pdf.
[35] New sub-section 25(2)(f), Bill.
[36] Lorimer, J, 'New minerals bill will throw away mining industry's scope to boost growth', Daily Friend, 30 May 2025: https://dailyfriend.co.za/2025/05/30/new-minerals-bill-will-throw-away-mining-industrys-scope-to-boost-growth-lorimer/.
[37] New sub-section 102(1), MPRDA; see also Leon, P, Leyden, P and Müller, P, Amendment of Rights' in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', 27 May 2025.

proposed mining. Some of these terms – "relevant", "informed" and "impact" – have uncertain meanings. Different officials are thus likely to interpret them in different ways at different times. This will make for arbitrary and uneven enforcement and undermine the rule of law.

3.5 Additional "beneficiation" requirements

"Beneficiation" is generally understood as involving the addition of value to raw minerals by processing them in various ways. Under the current MPRDA, the minister "may" encourage domestic beneficiation but is not required to do so. Under the Bill, by contrast, the minister "must" promote the domestic beneficiation of "mineral resources". This change in wording introduces uncertainty as mineral "resources", by definition, are unsevered minerals beneath the ground, which generally cannot be beneficiated until they have been extracted.[38]

Under the current Act, the minister "may" also "prescribe the levels required for beneficiation", as a 2008 amendment to the MPRDA lays down.[39] By contrast, the Bill makes various changes to Section 26. The minister must thus "ensure sustainability for the supply of minerals in the national interest"; "develop local beneficiation capacity"; and "consult with other ministers in government on a holistic approach to support local beneficiation". In addition, he must "ensure transformation of the mining and other sectors involved in the beneficiation of minerals or mineral products". He must also "take into consideration…national developmental imperatives", including "energy security, industrialisation, food security and infrastructure development".[40]

The Bill adds that "every producer of minerals must make available minerals or mineral products for local beneficiation".[41] This provision is vague. As law firm Herbert Smith Freehills points out, "the Bill does *not* contain specific quantitative restrictions on the export of minerals, nor do there appear to be any prescribed percentages, quantities or prices on the minerals or mineral products to be made available for beneficiation". Moreover, if any such quantitative restrictions are introduced in the future, this might "contravene South Africa's obligations under the General Agreement on Tariffs and Trade, 1994…and the European Union – Southern African Development Community Economic Partnership Agreement, 2016". The new clause could also, depending on what the minister requires, put pressure on mining companies to disregard their existing offtake and supply agreements.[42]

The Bill nevertheless seeks to ensure that mining companies comply with the new rules by indicating that their applications for the renewal of their mining rights may be denied unless they have met their beneficiation obligations. The key clause here is the Bill's new sub-section 25(2A), which requires the minister, in deciding on an application to renew a mining right, to "take into consideration the provisions of section 26".[43] Again, however, this wording is intrinsically vague, open to varying interpretation, and inconsistent with the rule of law.

The Bill also introduces a new and simpler definition of beneficiation. Instead of setting out different "stages" of beneficiation, as the MPRDA currently does, it says that beneficiation

[38] New section 1, MPRDA.
[39] New section 26(1), (2A), MPRDA.
[40] New section 26(1), (2), MPRDA.
[41] New section 26(2B), MPRDA.
[42] Leon, et al, 'Beneficiation', in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', op. cit.
[43] New section 25(2A), MPRDA.

"means [the] transformation or value addition of a mineral or mineral product, or a combination of minerals, to a higher value product over baselines determined by the Minister, which can either be consumed locally or exported".[44]

In tightening up beneficiation obligations, the Bill ignores various practical realities. The first is that a significant amount of beneficiation is already taking place without the government's instructing this. The second is that many mining companies have been obliged to close existing smelters, either because electricity supply has become too costly and erratic or because they cannot compete with the Chinese manufacturing behemoth.

Both mining minister Gwede Mantashe and President Cyril Ramaphosa seem to assume that most minerals are currently exported in their "raw" state. In July 2025, as the *Daily Maverick* reports, Mr Mantashe told a critical minerals conference in Sandton: "The time for exporting raw commodities has come to an end." At much the same time, Mr Ramaphosa told the Liberation Movements Summit held in Johannesburg: "Rather than export rock, sand and soil, we should be exporting finished products that the world needs". Such statements, writes mining journalist Ed Stoddard, overlook the fact that "much of South Africa's resource wealth is not exported 'raw' – [but] is 'cooked' first".[45]

South Africa's platinum group metals (PGMs) are refined domestically before they are exported. The same is true for gold. Chrome is often still processed into ferrochrome too, though the proportion being treated in this way is diminishing as many smelters are forced to close. Mr Mantashe seems to object to these closures, saying South Africa "can't allow our chrome to be exported" raw. Nor can it allow China to "build a bigger chrome industry than us when we mine chrome" and China does not. But this assessment, writes Mr Stoddard, ignores the fact that South Africa's smelters "cannot compete with China because its production costs are much lower".[46]

Merafe Resources, for one, used to process more of the chrome it mines. However, it has recently closed several of its ferrochrome smelters because Eskom tariffs have risen by 108% in the past five years. This has eroded its earlier cost advantage over smelters in China and Indonesia. In addition, China increased its ferrochrome production by 25% in 2024 and the "resultant market oversupply has put downward pressure on ferrochrome prices".[47]

In these circumstances, it makes little sense for the Bill to demand more minerals beneficiation than is commercially viable (or for the government to introduce a chrome export tax, as it has also proposed). Instead, the ANC should focus on implementing the reforms needed to attract more fixed investment in relevant infrastructure, regain a reliable and cost-effective electricity

[44] New section 1, MPRDA.
[45] Stoddard, E, 'Loaded for Bear: Ramaphosa and Mantashe are smoking the pipe dream of "beneficiation"', *Daily Maverick*, 30 July 2025: https://www.dailymaverick.co.za/article/2025-07-30-loaded-for-bear-ramaphosa-and-mantashe-are-smoking-the-pipe-dream-of-minerals-beneficiation/?
[46] Ibid.
[47] Ibid; Steyn, R, 'Junior miners: Fool's gold or diamonds in the rough', Financial Mail, 10 July 2025: https://www.businesslive.co.za/fm/features/cover-story/2025-07-10-junior-miners-fools-gold-or-diamonds-in-the-rough/; see also Webster, J, 'Merafe expects lower first-half earnings as low prices weigh', Business Day, 25 July 2025: https://www.businesslive.co.za/bd/companies/mining/2025-07-25-merafe-extends-losing-streak-amid-low-prices/.

supply, restore the efficiency of its transport logistics, and lighten the regulatory load that pushes up business costs and undermines South Africa's competitiveness.[48]

3.6 Continuing environmental liability even after mine closure

The MPRDA already states that the holder of a mining right "remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance with the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued a closure certificate".[49]

Now, however, the Bill seeks to introduce a sub-section saying: "(1A) Despite the issuing of the closure certificate, the holder or owner referred to subsection (1) remains liable for any latent or residual environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water which may become known in the future."[50]

The Bill thus imposes on mining companies – even after the state has authorised the closure of their mines – permanent environmental liability for impacts that cannot be predicted, may come to light only decades after mining operations have ended,[51] and may be difficult to distinguish from impacts resulting from subsequent mining or other events.

This additional liability will inevitably increase the amount of money – the "financial provision" – a mining company is required to make available in advance to cover the anticipated costs of environmental management and rehabilitation. The Bill also empowers the minister, in issuing a closure certificate, to "retain any portion" of a company's financial provision to cover any latent environmental impact that might emerge in the future. The minister may retain this portion "for such period, as [he] may determine, having regard to the circumstances relating to the relevant operation, which portion and period must be determined in the prescribed manner".[52]

These new rules could significantly raise the overall costs of investing in South Africa's mining industry. The most important need is to strike an appropriate balance between protecting the environment and ensuring the sustainability of the mining industry. In doing so, it is important to take advantage of international experience.

According to the *Extractive Industries Source Book*, the modern approach in environmental management is for states to move away from overly prescriptive requirements with heavy compliance costs. Instead, the aim is to develop "goal-setting" regulations, generally backed up by non-mandatory guidance notes. Such regulations set out the objectives to be achieved, but allow flexibility in the methods to be used by mining companies in doing so. This relieves the regulator of the burden of having to decide in detail on the relevant rules and puts the onus on companies to come up with environmental management plans that are reasonable, responsible, and tailored to their particular circumstances.[53] This "internal control principle"

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[48] Stoddard, 'Loaded for Bear: Ramaphosa and Mantashe are smoking the pipe dream of "beneficiation"', op cit.
[49] Section 43(1), MPRDA.
[50] New section 43, (1A), MPRDA.
[51] 'Mining's big hangover', *Mining Mirror*, July 2016; Clydeco.com, 'New financial provision regulations under NEMA', 9 February 2016, p1; *Saturday Star* 22 July 2017
[52] New section 49(6), MPRDA.
[53] Section 5.7.1, *Extractive Industries Source Book*.

avoids the problem of ever more prescriptive regulations which cannot easily cater for complex situations.

International experience also points to less costly ways of dealing with latent impacts that become apparent only after mines have closed. South Africa could, for example, introduce a mine rehabilitation fund (loosely modelled on a similar institution in Western Australia) to which all mining companies would contribute annual levies amounting to a specified percentage of their estimated total rehabilitation costs up to and including closure. This fund could then be used to deal with all post-closure latent impacts that become apparent in the future.

3.7 New rules regarding historic mine (or 'tailings') dumps

When the MPRDA was enacted, it made provision – in its clauses on "residue stockpiles" and "residue deposits" – for the mine (or "tailings") dumps that would be created in the future as a result of mining operations carried out under its new regime. However, it failed to deal with historical mine dumps that had already been created before it was enacted.[54] Such mine dumps could be valuable, for they might contain gold or diamonds, for example, which could not easily be extracted at the time the entire ore body was removed from the ground but which might become easier to process as technologies improved. In time, thus, the question arose as to whether the state had "custodianship" under the MPRDA over the diamonds likely to be contained in a historic dump belonging to the De Beers mining company.

In 2007, in *De Beers Consolidated Mines* v *Attaqua Mining and others*,[55] the Free State High Court ruled that historic mine dumps which had already been created before the MPRDA took effect were not regulated by the Act. Said the court: "The MPRDA targets mining rights in unsevered minerals in the ground, not in tailings which have been mined."[56] Such mine dumps, even if they are large and heavy, are movable, unlike unsevered mineral resources beneath the ground. They belong to the mining company which has created them "with money and labour and time".[57] Said the court: "A finding that the state is now the custodian of the minerals remaining in tailings dumps would amount to expropriation."[58]

However, the Bill now seeks to bring about such expropriations. It does so by amending the definition of "residue stockpile" to "include historic mines and dumps created before the implementation of this Act". It also inserts a new Section 42A, which deals with "the management of historic residue stockpiles and residue deposits".

This section begins by stating, in sub-section 42A(1):"[A]ll historic residue stockpiles and residue deposits currently not regulated under this Act belong to the owners thereof and shall continue in force for a period of two years from the date on which the Mineral and Petroleum Resources Development Amendment Act, 2025, commences."

[54] Ibid, para. 57; see also Leon et al, 'Historic mine dumps', in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', op cit.
[55] *De Beers Consolidated Mines* v *Attaqua Mining and others,* [2007] ZAFSHC 74.
[56] De Beers v Attaqua, op cit, para. 68, viii.
[57] Ibid, para 68, i, ii.
[58] Ibid, para. 68, vi.

During this two-year period, the Bill goes on, current owners will have two choices, depending on whether their historic mine dumps are located within or outside a mining area already subject to a mining right granted under the MPRDA.

If the historic mine dump is inside such a mining area, its owner may apply to amend its existing mining works programme to include the historic mine dump. Says the Bill, in sub-section 42A(2): "The holder of a mining right…who owns historic residue deposits or residue stockpiles which are located within the mining area has an exclusive right to apply for an amendment of the mining works programme in terms of section 102 to include such deposits and stockpiles into the right". (Under Section 102 of the MPRDA, a mining right may be amended "by the addition of minerals", but this can be done only with "the written consent of the Minister", as further described in due course.)[59]

If the historic mine dump is outside such a mining area, then the owner of the historic mine dump must apply within two years for a mining right and will have an exclusive right to do so. Says the Bill, in sub-section 42A(4): "The owner of any historic residue deposit and residue stockpile located outside the mining area has an exclusive right to apply…[at the relevant regional office] for a mining right… within a period of two years from the date of commencement" of the legislation.[60]

However, the owner has no guarantee that a mining right will be granted. According to the Bill, this will be done only "if the applicant satisfies the requirements contemplated in section 23".[61] What this means in practice is that the owner of the historic mine dump – and the already severed minerals within it – will have to comply with all the usual onerous requirements for the granting of a mining right. These include empowerment obligations, the 2009 living standard, all relevant social and labour plan requirements, and complex environmental and consultation rules. The owner may also have to obtain a water-use licence and make adequate financial provision in advance for environmental rehabilitation obligations that will continue, as regards potential latent impacts, even after the granting of a closure certificate.

However, if the owner fails to apply for a mining right within the two-year period, then (says the Bill), "the custodianship of the minerals in such historic residues and stockpiles shall revert back to the State".[62] However, the state has never had custodianship of the minerals in historic mine dumps, so custodianship cannot "revert" to it. Nor can the state validly claim custodianship over movable minerals which have already been severed and were obtained with "money and labour and time" before the MPRDA took effect. If the state nevertheless seeks to "compulsorily acquire" these movable minerals, this will amount to an expropriation for which compensation must be paid under the Expropriation Act of 2024 and Section 25 of the Constitution.

Pan African Resources, which operates the Evander tailings facility in Mpumalanga, is reportedly consulting its lawyers regarding a possible legal challenge to the Bill. The company's

[59] New sub-section 102(1), MPRDA.
[60] New sub-section 42A(4), MPRDA. Under this provision, the owner could choose rather to apply for a small-scale mining right or an artisanal mining permit. However, such rights generally last for only five or two years, respectively. If the owner wants the 30-year period available for mining rights, then a mining right will have to be sought.
[61] New sub-section 42A(6), MPRDA.
[62] New sub-section 42A(9), MPRDA.

head of investor relations, Hethen Hira, told *Business Times* in June 2025: "We will be challenging the Bill as it amounts to expropriation, and we understand our industry peers will be doing the same, along with the Minerals Council."[63]

The Democratic Alliance (DA) has also criticised these clauses. According to James Lorimer, DA MP and spokesperson on mineral and petroleum resources: "One of [the Bill's] most egregious provisions [is] to re-define mine dumps that prior to 2004 were designated movable assets that did not require a prospecting or mining right. They [will] now be treated as mines requiring mining licences with all the consequent race participation requirements.[64] Adds Mr Lorimer: "The Bill expropriates movable historic mine dumps and forces those processing them to apply for mining rights to continue to operate, failing which those movable tailings dumps will be forfeited to the state. This is a grotesque piece of legislative chicanery that serves to legalise theft."[65]

3.8 Transferability of rights

Under the current Section 11 in the MPRDA, a mining right, or "an interest in such a right", cannot be transferred or otherwise disposed of without the written consent of the minister. However, this restriction does not apply "in the case of a change of controlling interest in a listed company".[66]

The wording of the clause was considerably widened in the initial version of the Bill, to read: "A…mining right, or an interest in any such right, or any interest in an unlisted company or any controlling interest in a listed company… which holds a… mining right…or an interest in any such right, may not be ceded, transferred, encumbered, let, sublet, assigned or alienated…without the prior written consent of the Minister, as prescribed."[67]

The previous exemption for the transfer of a controlling interest in a listed company thus fell away. In addition, said law firm Herbert Smith Freehills, the wording used indicated that "the transfer of *any* interest (and not simply a controlling interest) in an unlisted company [would] now require ministerial consent". This was likely to be "a deterrent to investors who already waited lengthy periods for applications to be processed". It would also place an "additional administrative burden on the Department of Mineral and Petroleum Resources". [68]

The initial provision was clearly unworkable, noted Mr Lorimer: "Ministerial approval would now be required for the change of control of any listed company holding a mining licence, even if the

[63] Faku, D, 'Miners unite against draft bill', *Sunday Times Business Times*, 1 June 2025: https://www.businesslive.co.za/bt/business-and-economy/2025-06-01-miners-unite-against-draft-bill/.
[64] Lorimer, J, 'New minerals bill will throw away mining industry's scope to boost growth', Daily Friend, 30 May 2025: https://dailyfriend.co.za/2025/05/30/new-minerals-bill-will-throw-away-mining-industrys-scope-to-boost-growth-lorimer/.
[65] Lorimer, J, 'New mining bill still toxic despite Mantashe's concessions', Politicsweb.co.za, 16 June 2025: https://www.politicsweb.co.za/politics/new-mining-bill-still-toxic-despite-mantashes-conc
[66] Sub-section 11(1), MPRDA.
[67] New sub-section 11(1), MPRDA, as initially gazetted in May 2025.
[68] Leon, et al, 'Section 11 Applications', in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', op cit.

change of control of the South African company occurred indirectly on a non-South African stock exchange."[69]

In June 2025 Mr Mantashe gazetted a correction with further changes to section 11. This revised version deletes any reference to a "controlling interest in a listed company". It now reads, in essence: "(1) A...mining right, or an interest in any such right, in an unlisted company,...may not be ceded, transferred, encumbered, let, sublet, assigned or alienated without the prior written consent of the minister".[70]

This correction is an important improvement. However, it still leaves open considerable questions as to what is required as regards unlisted companies with interests in mining rights. Comments Mr Lorimer: "As it stands, it seems that the selling of even a minority interest in an unlisted company will require ministerial consent. The delay, administrative burden and, frankly, opportunity for corrupt rent-extraction will remain high."[71]

3.9 Associated minerals

The MPRDA, as initially enacted, failed to deal with the "associated minerals" that often form part of a single ore body, together with the primary mineral which is the main target of mining operations. In time, questions thus arose as to whether Lonmin's platinum mining right under the MPRDA included the right to mine and dispose of the nickel, copper and chrome being extracted by it as byproducts of its platinum mining operations. [72]

When Lonmin continued to extract and sell these associated minerals, the Department of Mineral Resources (DMR), as it then was, instructed it in 2010 to stop. The DMR also granted another company, Keysha Investments (which had links to the ANC), the right to prospect for associated minerals inside Lonmin's long-established platinum mine. When the DMR refused to retract this grant, Lonmin found that it had little choice – if it wanted to avoid costly litigation – but to buy up Keysha's prospecting right for $4 million.[73]

The Bill now seeks to regulate the mining of associated minerals. Its begins by defining such minerals as meaning "any mineral which occurs in mineralogical association, with and in the same core deposit as the primary mineral being mined in terms of a mining right, where it is physically impossible to mine the primary mineral without also mining the associated mineral".[74]

The Bill goes on to give mining companies the opportunity to include associated minerals in their mining rights, provided they have the consent of the mining minister. An amended sub-section 102(1) begins by stating, in essence, that a mining right "must not be amended or varied (including by extension of the area covered by it or by the addition of minerals...) without the

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[69] Lorimer, J, 'The new minerals bill is a disaster in the making', Statement issued by James Lorimer MP, DA Spokesperson on Mineral and Petroleum Resources, 28 May 2025: https://www.politicsweb.co.za/documents/the-new-minerals-bill-is-a-disaster-in-the-making-.

[70] Correction of Draft Mineral Resources Development Bill, 2025, Government Gazette 52842, 9 June 2025: https://cer.org.za/wp-content/uploads/2025/05/mineral-resources-development-bill-2025-correction-publication-of-the-draft-mineral-resources-dev.pdf.

[71] Lorimer, J, 'New mining bill still toxic despite Mantashe's concessions', Politicsweb.co.za, 16 June 2025: https://www.politicsweb.co.za/politics/new-mining-bill-still-toxic-despite-mantashes-conc.

[72] Jeffery, A, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, p. 240.

[73] Ibid.

[74] New section 1, MPRDA.

written consent of the Minister". It goes on to say, in a new sub-section 102(3): "Subject to compliance with subsection (4), any right holder of prospecting or mining (sic) of any mineral must, while prospecting or mining such mineral, also prospect, mine and dispose of associated minerals in respect of which such holder is not the right holder, but which must of necessity be prospected or mined with the licenced mineral, and the right holder must declare such associated minerals or any other minerals discovered in the prospecting or mining process."[75]

This clumsy wording indicates that the opportunity to add associated minerals to the mining right applies only where such minerals have been "discovered…in the mining process". This will not help a mining company in Lonmin's earlier position as Lonmin had always known about the presence of associated minerals forming part of "the same core deposit as the primary mineral". (The Bill's wording is ambiguous, however, for it could also be read as limiting the need for "discovery" to "any other minerals", not "associated" ones. This uncertainty undermines the rule of law and must be resolved.)

A new sub-section 102(4) gives the holder of a mining right 60 days from the date of its declaration to apply for an amendment, saying: "The right holder contemplated in subsection (3) must, within 60 days from the date of making a declaration, apply for an amendment of the right in terms of Section 102 to include the mineral so declared."[76]

If the rights holder fails to apply within the 60-day period, the associated minerals will be "relinquished" to the state under a new section 102(5), which states: "Subject to sub-section 4, should the right holder not apply to include such associated mineral, those associated minerals are relinquished to the State."[77]

The word "relinquished" suggests a voluntary surrender or waiver. In fact, associated minerals will then be "forfeited" to the state (the term that HerbertSmithFreehills more accurately uses).[78] In practice, forfeiture might be a common result under the current wording of the Bill – especially if the right to apply for their addition depends on the associated minerals having been "discovered" in the course of mining.

A better approach is needed. Since associated minerals forming part of the same ore body must necessarily be extracted together with the primary mineral, a mining right granted for the primary mineral should always have been interpreted as including all associated minerals, whether this was spelt out in the MPRDA or not. Now, however, that doubt has been created, the Bill should seek to remove it by clearly providing for the automatic inclusion of all associated minerals in existing mining rights for primary minerals.

Instead, the Bill's wording reflects yet another attempt by the ANC to curtail existing mining rights and expand the powers of the state. Companies linked to ANC cadres could also benefit in time if the minister grants them mining rights to the associated minerals already being extracted from established mines.

[75] New sub-section 102(1), (3), MPRDA.
[76] New sub-section 102(4), MPRDA.
[77] New sub-section 102(5), MPRDA.
[78] Ibid.

3.10 Small-scale, artisanal and illegal mining

3.10.1 Small-scale mining permits

Under the current MPRDA, mining permits may be issued for minerals which can be mined optimally within mining areas of less than 5 hectares (ha). Such permits remain in place for up to two years, and may be renewed for a further three-year period. The Bill effectively retains this permit but now names it a "small-scale mining permit". Such a permit applies for a maximum of five years and may be renewed for another five years. The Bill also introduces "artisanal mining permits" for minerals which can be mined optimally within a period of two years" and in a mining area "not exceed[ing] 1.5 hectares in extent". These permits can be renewed for another two years. [79]

Under the Bill, small-scale mining permits are to be issued under an amended Section 27 of the MPRDA. Applicants must satisfy the minister that "the mining will not result in unacceptable pollution, ecological degradation or damage to the environment" and obtain "an environmental authorisation…where necessary". They may also have to provide "proof of application" for a water-use licence.[80]

According to the Bill, applications for the renewal of small-scale mining permits must, among other things, "state the reasons for the renewal, and be accompanied by a detailed report reflecting the mining results, the interpretation thereof and the mining expenditure incurred". Applications must also be "accompanied by a report reflecting the extent of compliance with the conditions of the environmental authorisation". In addition, they must demonstrate compliance with the "terms and conditions of the mining permit and…any relevant provision" of the statute.[81]

3.10.2 Artisanal mining permits

All provisions dealing with artisanal mining permits are new. The Bill starts by defining "artisanal mining" as meaning "traditional and customary mining operations using traditional or customary ways and means, which 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".[82]

Applications for artisanal mining rights are governed by a new section 27A in the Bill. The applicant "must simultaneously submit an artisanal mining environmental authorisation, as prescribed", consult as necessary with land-owners and other "interested and affected parties", and show an "ability to comply with health and safety guidelines".[83]

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[79] New subsection 27A(1), Bill; Leon, et al, 'Small-scale and artisanal mining' in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', op. cit.
[80] New sub-section 27(1), MPRDA.
[81] New sub-section 27(2), MPRDA.
[82] New sub-section 1, MPRDA.
[83] New sub-section 27A(2), (4), (5)(c), MPRDA.

Lili Nupen, a director at law firm NSDV, queries why the Bill gives preference to artisanal mining, rather than using tax holidays and other incentives to promote the junior mining sector with its greater capacity for minerals exploration and extraction.[84]

3.10.3 Provisions applying to both small-scale and artisanal permits

The holders of both small-scale and artisanal permits must "keep proper records of mining activities and proper financial records". They must submit "prescribed monthly returns", along with "prescribed annual reports" providing "accurate information and data in respect of mineral reserves and resources within the[ir] mining areas". As "producers" of minerals, they must also "make available minerals or mineral products for local beneficiation" under a new Section 26(2B) of the MPRDA.[85]

According to the Bill, the minister "must" invite applications for small-scale and artisanal mining permits (or for mining or prospecting rights) "in respect of land or minerals relinquished or abandoned" or previously subject to a right under the MPRDA which has lapsed or has been "cancelled or relinquished". The Bill also gives the minister the power to "prescribe…the period within which any application may be lodged…and the procedures which must apply in respect of such lodgement".[86]

As regards small-scale and artisanal mining permits, "the Minister may, by notice in the *Gazette"* and "after" consulting the Council for Geoscience (wording which allows him to disregard the Council's views), "designate certain areas for black persons for small-scale and artisanal mining" and then invite applications for such permits within them.[87]

As Ms Nupen of law firm NSDV writes, many questions remain as to "how the Bill intends to manage artisanal mining via an unclear process of invitation". This process is "subject to ministerial discretion" and will be made available "only to black persons" under the Broad-based Black Economic Empowerment Act (BEE Act).[88]

3.10.4 Illegal mining

According to Mr Mantashe, a key purpose of the new artisanal mining permit is not only to "ensure compliance with environmental, safety and labour regulations" but also to "reduce the risk of illegal mining activities".[89] However, neither of these goals is likely to be achieved.

Illegal mining is widespread – and is already estimated by the state to result in "nearly $1bn in [lost] annual revenue".[90] It is also largely under the control of often ruthless criminal syndicates that will not readily release their hold on illicit mining activities. In addition, illegal mining is likely to keep offering higher returns to its foot soldiers than a compliance-focused artisanal mining regime will do.

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[84] McKay, D, 'The long descent of junior mining', *Financial Mail*, 10 July 2025: https://www.businesslive.co.za/fm/features/cover-story/2025-07-10-the-long-descent-of-junior-mining/.
[85] New sub-section 28(1), (2)(c); 26(2B), MPRDA.
[86] New sub-section 9A(1)(a), MPRDA.
[87] New sub-sections 7A, 9A(1)(b), MPRDA.
[88] McKay, D, 'The long descent of junior mining', *Financial Mail*, 10 July 2025: https://www.businesslive.co.za/fm/features/cover-story/2025-07-10-the-long-descent-of-junior-mining/.
[89] Ibid.
[90] Ibid.

The Minerals Council says the Bill does not reflect its input on illegal mining (or on other issues). As *Business Day* reports, the Minerals Council wants "proper policy interventions [that] address all stages in the illegal mining value chain, from the physical underground miners to the often globally-connected criminal syndicates processing and smuggling minerals and metals out of the country". A comprehensive definition of illegal mining is essential too, as the police (in the absence of this) often end up charging illegal miners with minor offences, such as trespassing. In addition, much faster progress is needed in rehabilitating an estimated 6,000 abandoned or derelict mines which currently provide illegal miners with relatively easy access to lengthy networks of mining tunnels often far below the surface.[91]

The Bill also seek to strengthen the MPRDA's limited provisions on "illegal prospecting and mining activities". Under sections 5A, 5B and 5C, it prohibits any person from prospecting or mining without proper authorisation, including an "artisanal mining permit".[92] In practice, this prohibition may prove easy to evade if criminal syndicates are able, by illegal and corrupt means, to obtain artisanal mining permits for their illegal operatives.

The Bill also bars any person from "assist[ing] or provid[ing] any service to any person…in committing an illegal prospecting and mining activity". It also seeks to clamp down on the illegal possession and transportation of minerals by stating: "No person may possess or transport in any manner minerals outside the boundaries of any mine, works or other property or place where such mineral is mined, or worked with, unless he or she is in possession of the prescribed documentation".[93] What this "prescribed documentation" might be remains unclear.

An amended sub-section 98(a)(i) makes any failure to comply with sections 5A, 5B and 5C an offence. An amended sub-section 99(1)(a) adds that such an offence is punishable on conviction by "a fine not exceeding 10 percent of the person's or right holder's annual turnover in the Republic and its exports from the Republic during the person's or right holder's preceding financial year or [by] imprisonment for a period not exceeding ten years, or [by] both such fine and such imprisonment".[94]

Under the current MPRDA, by contrast, maximum penalties are R100,000 fine and/or imprisonment for up to two years. However, given the general ineffectiveness of policing in South Africa – especially against organised criminal syndicates – the prospect of successful investigations and prosecutions is limited. There is thus, as the Minerals Council has long been urging, a pressing need for much more effective policies against illegal mining. (The need for such policies became still more urgent in January 2025, when a flawed government strategy to crack down on illegal mining – by preventing food and other essentials from being sent down into abandoned shafts – led to the deaths of 72 "zama-zamas", as illegal miners are often called.)[95]

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[91] Webster, J, 'Minerals Council calls for proper strategy to stop illegal mining', *Business Day*, 1 July 2025: https://www.businesslive.co.za/bd/national/2025-07-01-minerals-council-calls-for-proper-strategy-to-stop-illegal-mining/.

[92] New section 5A(c), MPRDA.

[93] New sub-sections 5A, 5B, 5C, MPRDA.

[94] New sub-sections 98(1)(a), 99(1)(a), MPRDA.

[95] Webster, 'Minerals Council calls for proper strategy to stop illegal mining', op. cit.

3.11 Additional ministerial regulatory powers

Under an amended section 107, the minister has additional powers to make regulations, among other things, on "the rehabilitation of disturbances of the surface of land" which are "connected to prospecting or mining operations"; on "the terms and conditions applicable to [the] beneficiation of mineral resources"; on "the procedure applicable in respect of an invitation for applications" for mining rights and other permits; on the manner and form of consultation required with…interested and affected persons"; and on "the promotion of transformative elements of Broad-Based Black Economic Empowerment ownership, inclusive procurement, supplier and enterprise development, human resources development, employment equity and mining community development".[96]

The Bill expressly provides that the minister, when making regulations on beneficiation, must "consult with affected stakeholders". Absurdly, however, the obligation to consult does not apply when he makes regulations regarding BEE requirements.[97]

3.12 Additional penalties

Under the existing MPRDA, the penalties for a limited number of offences are relatively minor. Under sub-section 99(1)(a), the maximum penalties for offences listed in sub-section 98(a)(i), as identified below, is a fine of R100,000 or imprisonment for up to two years, or both. Under the Bill, by contrast, the maximum fine rises from R100,000 to "10 percent of the person's or right holder's annual turnover in the Republic and its exports from the Republic during the person's or right holder's preceding financial year". The maximum prison term is increased from two years to ten years for any person or right holder convicted of a listed offence.[98] At the same time, the list of sub-section 98(a)(i) offences to which these penalties apply is greatly extended.

Under the current MPRDA, the only offences listed under sub-section 98(a)(i) are sub-section 5(4), which was deleted in 2008, and section 28, which requires the submission of "Information and data in respect of mining or processing of minerals". The information to be provided under section 28 includes prescribed monthly returns, audited financial statements, and annual reports detailing "the extent of compliance" with the mining charter and "the approved social and labour plan".[99]

Under the Bill, by contrast, a revised sub-section 98(a)(i) lists 16 sections under which draconian fines could be imposed – or mining directors could be sent to jail for up to ten years. The most important of the offences to which the new penalties apply include:[100]

- failing to "implement social and labour plans in areas in which [mining companies] are operating, including labour sending areas" (under a revised section 2);
- failing to comply with "the provisions of the Act" and the terms and conditions of the mining right (under a revised section 25(1)(d));

[96] New sub-sections 107(1)(aA), (jA), (jB), (jC), (jD), MPRDA.
[97] Leon, et al, 'Additional Regulations', in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', op. cit.
[98] New sub-section 99(1)(a), MPRDA.
[99] Existing sub-section 98(a)(i), read with existing sub-section 99(1)(a), MPRDA.
[100] New sub-section 98(1)(a) and the sections of the MPRDA it lists, read with new (99)(1)(a), MPRDA.

- failing to comply with the conditions of the environmental authorisation issued in terms of National Environmental Management Act, 1998 (Act No. 107 of 1998) (under a revised section 25(1)(e));
- failing to comply with "the requirements of section 100(3)(*b*)", which gives the minister the power, in granting mining rights, to "impose" the conditions of the living conditions standard, code of good conduct, and "prescribed" BEE elements (under a revised section 25(1)(fA));
- failing, as "a producer of minerals", to "make available minerals or mineral products for local beneficiation" (under a revised section 26(2B));
- failing to "remain responsible" for "any environmental liability…until the minister has issued a closure certificate" (under a revised section 43(1));
- failing, "despite the issuing of a closure certificate", to take responsibility for "any latent or residual environmental liability, pollution, ecological degradation, [and] the pumping and treatment of extraneous water which may become known in the future" (under a revised section 43(1A)); and
- purporting to add "additional minerals" – such as associated minerals – to existing mining rights without the written consent of the minister (under a revised section 102(1)).

Failure to comply with many other provisions, sometimes revised and sometimes unchanged, will also become punishable in these draconian ways. Relevant sections also listed in sub-section 98(a)(i) include Section 15, dealing with "Rights and obligations regarding reconnaissance permission"; Section 19, dealing with "Rights and obligations of holder of prospecting right"; Section 20, dealing with "Permission to remove and dispose of minerals"; Section 21, dealing with "Information and data in respect of reconnaissance and prospecting"; Section 25 on the "Rights and obligations of holder of mining right"; Section 26, dealing with "Mineral beneficiation"; Section 27, dealing with "Application for, issuing and duration of small-scale mining permit"; and Section 28, dealing with "Information and data in respect of mining or processing of minerals". A revised Section 29 will also require "the holder of a mining right [to] submit to the Minister the prescribed annual report detailing the holder's compliance with section 2(d) and (f), the broad-based socio-economic empowerment prescribed elements of ownership, inclusive procurement, supplier and enterprise development, human resources development, employment equity and mining community development and the approved social and labour plan".

Other relevant sections listed in sub-section 98(a)(i) include Section 35, dealing with "Rights and obligations of holder of retention permit" and Section 43, which deals with the "Issuing of a closure certificate". The new section 43 confirms the minister's power to "retain any portion of [the] financial provision for latent and residual environmental impact which may become known in the future for such period, as the Minister may determine, having regard to the circumstances relating to the relevant operation, which portion and period must be determined in the prescribed manner".

The new penalties stipulated in sub-section 99(1)(a) for failures to comply with this long list of clauses are unduly heavy. Fines of up to 10% of annual turnover in South Africa, plus the value of mineral exports in the preceding financial year, could place a heavy burden on mining

companies – especially those confronting rising input costs and falling mineral prices. The risk of imprisonment for company directors for up to ten years could also have a chilling effect. Overall, the penalties laid down could well, as HerbertSmithFreehills notes, "be disproportionate to offences committed".[101]

3.13 Greater risks of rights being suspended or cancelled

Once the Bill has greatly extended the list of sub-section 98(a)(i) offences to which these draconian penalties apply, the risk that mining rights might also be suspended or cancelled could increase.

Under section 47 of the MPRDA, "the minister may cancel or suspend any…mining right…if [its] owner or holder…(a) is conducting any…mining operation in contravention of this Act; (b) breaches any material term or condition of such right; (c) is contravening any condition in the environmental authorisation; [or] has conducted the transactions mentioned in section 11(1) before obtaining the necessary prior written approval of the Minister."[102]

The Bill leaves this wording unchanged. However, by creating many more offences, it may make it easier for the minister to contend that a mining company which has failed, for example, to "implement" its social and labour plans in both mining and labour sending areas is "conducting [its] mining operations in contravention of the Act" or is "in breach of" a "material condition" of its mining right.

Certain safeguards do, however, apply. The minister must "set out the reasons" he is considering suspension or cancellation. On the other hand, though the current wording requires him to give the mining company "a reasonable opportunity" to make representations in response, the Bill changes this to "a period of 30 days". The Bill also requires the minister to "direct the holder, in writing, to take specified measures to remedy any contravention, breach or failure". If this is not done, the minister must (it seems) allow him a further "period of 30 days" to make additional written representations. The minister must "consider" all representations made to him, but need not respond to them or give reasons for rejecting them.[103]

4 Ramifications of the Bill

South Africa urgently needs mining legislation that is clear, certain and capable of encouraging investment, growth and employment in a vital but struggling sector. The Bill fails to meet these core requirements.

4.1 A declining industry with little investment in exploration

Since the MPRDA came into effect in 2004, the mining sector in South Africa – which used to be one of the most important mining jurisdictions in the world – has contracted and declined. In 2024, its contribution to gross domestic product (GDP) stood at 7.3%, down from 21% in 1980. However, it still employed close on 475,000 people, generated R190bn in employee earnings,

[101] Leon et al, Penalties', in 'Unpacking the provisions of the Mineral Resources Development Bill, 2025', op. cit.
[102] Sub-section 47(1), MPRDA.
[103] Sub-sections 47(2)-(4), MPRDA.

and contributed some R44bn in corporate taxes to the fiscus, along with R21.5bn in VAT, and R16bn in royalties. Employees across the sector also paid R36bn in personal income tax.[104]

Exploration spending is essential to the industry's survival and future growth, but has slowed dramatically. South Africa used to attract 5% of global exploration spending, which it last achieved in 2003, but it now brings in less than 1%. In 2024, writes investment banker Paul Miller, "real capital formation in mineral exploration…was R779.5m – the lowest in the dataset going back to 1993". This was a small portion of "the R6–R8bn *per year*" that is needed. It was also "less than half" the R1.6bn figure in 2018, when Mr Mantashe was appointed mining minister and in time began promising to restore South Africa's share of global spending to the 5% level. Each year, however, that target (first set by him in 2019) keeps retreating further. [105]

South Africa also used to attract 35% of the global exploration spending going to Africa. Now it brings in a meagre 8%. Warns Mr Miller: "Countries with fewer resources but better governance – like Namibia, Botswana, Ivory Coast and even Malawi – are attracting investment. [But South Africa's] mining sector is in decline. Investor flight, regulatory chaos and policy failures are driving capital elsewhere, leaving the country's mining future at risk."[106]

A similar assessment has been made by civil society organisation Good Governance Africa (GGA), in partnership with Mining Dialogues 360 (MD360°), based on their discussions with industry stakeholders in 2023 and 2024: "Without the lifeblood that is investment, it will not be possible to realise the sector's growth prospects, nor will the sector be able to play its part as the driver of economic development and transformation that it otherwise could. Concerns exist about the mining sector's underperformance and its capacity to remain globally competitive, attract investment, create jobs, and promote sustainable economic development. This raises the daunting prospect that without sweeping changes, further decline is likely."[107]

Decline has long been visible in South Africa's falling rankings on the authoritative *Annual Survey of Mining Companies* compiled by the Fraser Institute, a civil society organisation in Canada. In 2024 South Africa ranking declined again, making it the 68th most investable mining jurisdiction out of the 82 surveyed. It scored particularly badly (in 70th place out of 82) on investor perceptions of the attractiveness of its mining policies. As Mr Lorimer reports, "South Africa decreased its policy score by almost 20 points and dropped to the 70th spot out of 82 jurisdictions after ranking 66th out of 86 in 2023".[108]

A better mining bill could help strengthen investor confidence and bring exploration spending closer to the 5% of global spending goal that Mr Mantashe has espoused since 2019. Instead, the current Bill is set to make the mining industry still more "uninvestable". Most of the key

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[104] Harvey, R and Perkins, D, 'Big Read: How mining can save the day again while the economy stutters', *Business Day*, Life, 27 May 2025: https://www.businesslive.co.za/bd/life/2025-05-27-big-read-how-mining-can-save-the-day-again-while-the-economy-stutters/.
[105] Miller, P, 'Govt's minerals exploration target is a policy fever dream', Miningmx.com, 1 August 2025: https://www.miningmx.com/opinion/61948-govts-minerals-exploration-target-is-a-policy-fever-dream/.
[106] Ibid; McKay, D, 'The long descent of junior mining', *Financial Mail*, 10 July 2025: https://www.businesslive.co.za/fm/features/cover-story/2025-07-10-the-long-descent-of-junior-mining/.
[107] Harvey and Perkins, 'Big read: how mining can save the day again', op. cit.
[108] Lorimer, J, 'SA mining sinks in investment attractiveness', *Politicsweb.co.za*, 31 July 2025: https://www.politicsweb.co.za/documents/sa-mining-sinks-in-investment-attractiveness--jame

problems in its wording have already been outlined. However, the Bill's provisions on BEE are particularly damaging and merit further examination – especially as far more effective empowerment policies could easily be devised and introduced.

4.2 Particularly damaging BEE provisions

As earlier noted, section 100 of the existing MPRDA authorises the minister to develop "a" single socio-economic empowerment charter for the mining industry, which he was obliged to do within six months of the statute's coming into effect. The only valid mining charter under the MPRDA is thus the original charter, which was finalised in 2003 and came into effect on 1st May 2004, on the same date as the MPRDA itself.

The initial 2004 charter required mining companies to transfer 26% of their equity or assets to historically disadvantaged South Africans (HDSAs) by 2014. This 26% stake was to be valued "at fair market value on a willing seller/willing buyer basis". The charter also confirmed that "the continuing consequences of all previous deals" were to be taken into account in measuring HDSA ownership, so as to protect mining companies from having to do ever more "top-up" deals when these investors sold out.

Under the 2004 charter, mining companies also undertook to fulfil various aspirational goals – to "aspire" to 40% HDSA representation in management, for example – which the 2009 Code of Good Practice then sought to turn into more clearly binding targets, as earlier described. Under the MPRDA, which remains unchanged by the Bill in these spheres, the minister has no power to "develop" an additional empowerment charter, while any attempt by him to do so is *ultra vires* the MPRDA.

Successive ministers have nevertheless introduced new mining charters in 2010, in 2017 and again in 2018 (though key parts of this last charter were struck down in 2021 by the Pretoria high court). These mining ministers have also sought to amend or repeal the "continuing consequences" principle, despite a binding 2018 North Gauteng High Court judgment upholding its validity. Each new charter introduced has been *ultra vires* the MPRDA. Each has also set out stricter empowerment targets, likely to be inordinately difficult to fulfil. Each new charter has thus undermined the certainty of mining rights and made it more difficult for the mining industry to attract the investment it needs to sustain and expand its operations.

The ANC has persisted in ratcheting up BEE requirements in mining (and elsewhere) because of its decades-long commitment to what it describes as a "national democratic revolution" (NDR). The NDR is a Soviet-inspired strategy, which aims to take South Africa by incremental policy steps from a largely free-market economy to a socialist future. The ANC and its allies in the South African Communist Party (SACP) and the Congress of South African Trade Unions (Cosatu) see the NDR as offering "the most direct route" to socialism.[109]

The tripartite alliance has been implementing the NDR since 1994. One of its key strategic objectives is to change the "ownership and management" of the economy in ways that expand state power and control. Many NDR interventions are being implemented under the rubric of BEE. These policies are useful to the revolution in various ways. They also bring closer the NDR

[109] Jeffery, A, *Countdown to Socialism*, op cit.

goal of ensuring that "all centres of power and influence…become broadly representative of the country's demographics".[110]

In devising its BEE rules, whether in successive mining charters or elsewhere, the ANC has relied heavily on a supposed "norm" of demographic representivity (which has also been used by Left-leaning organisations to legitimise racial targets in the United States and other Western democracies). In 1998, SACP member[111] Firoz Cachalia, then an ANC office-bearer in Gauteng (and recently appointed the acting minister of police), summed up this supposed "norm" in saying: "Since ability is randomly distributed among the entire population, black and white South Africans should be represented in the workforce according to their share of the overall population. If whites instead consistently outnumber blacks in management, skilled jobs, and the professions, then for those who reject the idea of superior and inferior races, the only explanation is that white dominance is the result of racial discrimination."[112]

Mr Cachalia's argument might seem superficially convincing, but in fact it overlooks many variables highly relevant to eligibility for BEE ownership deals, management posts, preferential procurement contracts, and the like. These variables are particularly significant in South Africa, where some 50% of black people are too young (under the age of 35) for such onerous responsibilities; 46% are unemployed (on an expanded definition that includes discouraged workers not actively seeking jobs)[113] and have little business experience; and only 5% have the university degrees often necessary or advisable for management posts.[114]

Against the background of this skills deficit, the higher targets contained in successive mining charters have become increasingly unrealistic and damaging. Mining companies have nevertheless been threatened with the loss of their mining rights if they fail to fulfil them. Both the MPRDA and successive mining charters have thus weakened the property rights of mining companies. They have also sought to deprive these companies of many of the essential perquisites of management, including the capacity to choose business partners, appoint senior staff and select suppliers of goods and services on merit – and without reference to race.[115]

Escalating BEE requirements in mining are not only unlawful but also increasingly damaging to business operations. They also help explain why South Africa has fallen so far on the Fraser Institute's *Annual Survey of Mining Companies*, despite its enormous mineral wealth. Each successive change to BEE requirements has made the relevant rules still more uncertain – while also deepening doubts as to the government's willingness to respect and uphold the mining rights it has previously granted. This explains why the additional changes now contained in the Bill have evoked such adverse reactions – not only from the Minerals Council but also from many commentators keen to see the industry prosper and expand.

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[110] African National Congress (ANC*), Strategy & Tactics* document, Stellenbosch national conference, 2002; ANC, *Strategy & Tactics* document, Polokwane national conference, 2007; ANC, *Strategy & Tactics* document, Mangaung national conference, 2012, para. 43; ANC, *Strategy & Tactics* document, Nasrec national conference, 2017, para. 49.
[111] Wikipedia, 'Firoz Cachalia', https://en.wikipedia.org/wiki/Firoz_Cachalia (accessed 9 August 2025).
[112] *Business Day,* 5 May 1998.
[113] Statistics South Africa (Stats SA), *Quarterly Labour Force Survey, Quarter 4, 2024, Statistical Release P0211*, 25 February 2025, p. 40: https://www.statssa.gov.za/publications/P0211/P02114thQuarter2024.pdf.
[114] IRR, *South Africa Survey* 2023, Johannesburg, pp. 9, 267, 396.
[115] Jeffery, A, *BEE: Helping or Hurting?* p. 382.

In the words of Mr Lorimer: "It is the fifth time since the MPRDA came into effect that the government has introduced or tried to introduce a tightening of the BEE requirements for…mining rights. As each tightening threatens profitability, it doesn't just add to uncertainty, it creates the certain expectation that laws will continue to change and that the trend will be for investments to become less profitable and therefore less desirable."[116]

The changes the Bill proposes are even more damaging than those earlier put forward. The Bill seeks to give the minister the capacity to devise and "impose" new BEE rules, even though the power to make law is reserved for Parliament under the doctrine of the separation of powers. In addition, the intention underpinning the Bill is clearly to bypass the Pretoria high court rulings from 2018 and 2021. Yet those rulings remain in force under a Constitution which requires the minister to respect and uphold them.

The proposed changes have important economic ramifications too. If Mr Mantashe uses his (supposed) law-making powers to increase the BEE ownership target in the mining industry and remove the "continuing consequences" principle, many mining companies could be pushed into bankruptcy by having to do successive and costly deals at below market prices. Moreover, if the ownership target is moved up to 51% (as the ANC has previously suggested), they will also be expected to surrender majority control.

At the same time, BEE requirements, whether in mining or elsewhere, have clearly failed to help the great majority of poor black South Africans to get ahead. Instead, they have enriched only a relatively small black elite: mostly individuals with links to the ruling party. Some ANC cadres have benefited so often and so much as to become billionaires. At the same time, BEE requirements have harmed the great majority by eroding accountability, fostering corruption, wasting scarce resources, eroding the rule of law, inhibiting fixed investment, limiting growth, undermining productivity, and making the unemployment crisis even worse.

By helping the few and harming the many, BEE has worsened inequality – which is now often greater *within* the black population than it is between whites and blacks. This largely explains why the country's Gini co-efficient has risen from 59 in 1994 to 63 in 2022.[117] In 2017 the SACP noted that the "intra-African inequality" which BEE had fostered was "the main contributor to South Africa's extraordinarily high Gini coefficient" of income inequality. Added the party: "Enriching a select BEE few via share deals…or (worse still) looting public property…in the name of broad-based black empowerment is resulting in….increasing poverty for the majority, increasing racial inequality, and persisting mass unemployment."[118]

The "entire focus" of BEE is "misplaced" added Professor Ricardo Hausmann of Harvard's Kennedy School of Government during a return visit to South Africa in 2016. (Professor Hausmann is a former Venezuelan planning minister who chaired an international growth panel

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[116] Lorimer, J, 'New mining bill still toxic despite Mantashe's concessions', Statement issued by James Lorimer MP, DA spokesperson for mineral and energy resources, 13 June 2025: https://www.politicsweb.co.za/politics/new-mining-bill-still-toxic-despite-mantashes-conc.

[117] Editorial, *The African Communist,* 1st Q 2017, Issue 116, February 2017; Steward, Tightening the screws, 17 December 2018; https://www.businesslive.co.za/bd/opinion/editorials/2022-03-15-editorial-give-serious-thought-to-the-world-banks-recommendations-on-inequality-and-policy-failures/; see also Jeffery, A, *Countdown to Socialism: The National Democratic Revolution in South Africa since 1994*, Jonathan Ball Publishers, Johannesburg and Cape Town, 2023, p. 121; https://wisevoter.com/country-rankings/gini-coefficient-by-country/.

[118] Editorial, *The African Communist*, 1st Quarter 2017, Issue 116, February 2017.

established by former finance minister Trevor Manuel.) South Africa's main problem, he says, lies in "the millions of people who are unproductive and unemployed". Hence, "the real inequality the country suffers from isn't so much between blacks and whites but between those with jobs and those without".[119]

Hence, the true challenge is not to "change the asset ownership for a few rich blacks in the country" but rather to "empower the millions". If this is to be achieved, Professor Hausman adds, the government must shift away from its "obsession with making the top of society black" and concentrate rather on "making the bottom of society better". This means that the most important need is to create many more businesses, rather than to keep "tinkering with ownership and trying to transform the few enterprises" the country already has.[120]

If many more businesses and jobs are to be created, this requires a new focus for empowerment policies: one that recognises the private sector's vital economic contributions to productivity and growth and gives business incentives to expand. A new approach must also be non-racial – if only to stop the black elite from capturing its benefits – and find practical ways to reach down to the grassroots and provide the poor with the inputs they most need to get ahead.

In 2019 Professor William Gumede of Wits University affirmed the need for a different approach to empowerment, saying "the current BEE model, which enriches a few politically connected political capitalists, should immediately be abolished". He recommended that "rich blacks should be treated the same way as rich whites: as advantaged". BEE interventions should thus be based on socio-economic disadvantage, "rather than colour", as "blacks would automatically be the largest beneficiaries" in any event.[121]

4.3 A need to shift to Economic Empowerment of the Disadvantaged (EED)

The IRR has for many years been developing a similar alternative to BEE, which it calls Economic Empowerment for the Disadvantaged or EED. An EED strategy would have three core features: a non-racial focus in keeping with the Constitution; a scorecard that recognises and rewards important business contributions to growth, employment, and upward mobility; and a tax-funded voucher element that empowers the poor and helps them meet their core needs for sound education, housing, and healthcare.

4.3.1 A non-racial focus in keeping with the Constitution

EED – like the social grants system it is intended to complement – would rely on a means test to determine disadvantage and stop using race as a proxy for this. EED would thus extend to poor whites, but this group is so small – only 1% of those living in poverty[122] – that the benefits of EED would still go overwhelmingly to black South Africans. At the same time, EED's non-racial approach would accord with the Constitution's founding values, while bringing an end to odious race classification and unlawful racial preferencing.

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[119] *Financial Mail* 19 September 2018.
[120] Ibid.
[121] William Gumede, 'The DA's campaign battle plan was simply wrong', *News24.com*, 19 May 2019
[122] Human Rights Commission of South Africa, https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf\

4.3.2 A scorecard that recognises vital business contributions

The various mining charters – like the generic and sector scorecards developed under the BEE Act – overlook the vital contributions that business makes to gross fixed capital investment, production, employment, salaries, tax revenues, export earnings, and innovation. Yet these are by far the most important inputs the private sector can make to economic growth, rising prosperity, and the upward mobility of all South Africans.

These important contributions need to be recognised and incentivised, not disregarded. Under a revised generic EED scorecard for businesses in all sectors, enterprises would thus earn voluntary EED points for sustaining or increasing production or sales, retaining or expanding jobs, maintaining or adding to fixed investment, contributing to tax revenues and export earnings, engaging in research and development (R&D), and appointing and promoting people on an expanded concept of merit that takes account of disadvantage.

4.3.3 A voucher element that reaches down to the grassroots

EED would reach down to the grassroots by equipping the poor with the sound schooling, housing, and healthcare they need to help them get ahead. Some R740bn has been budgeted for schooling, healthcare, and housing and related infrastructure development in the current financial year.[123] But the state's centralised and top-down delivery system is so mismanaged and inefficient that outcomes are generally extraordinarily poor. In addition, the state's repeated promises to do better have brought little change. Hence, the most effective way to kick-start improvements is to empower ordinary South Africans to start meeting their own needs in three key spheres.

EED also recognises that current budgets – which are already bigger than in many emerging markets – cannot be increased. The key need is rather to get far more bang for every buck. This can be done by redirecting much of the revenue now being badly spent by bureaucrats into tax-funded vouchers for schooling, housing, and healthcare for the poor. Low-income households empowered in this way would have real choices available to them.

In the schooling sphere, dysfunctional public schools would have to up their game, while many more independent schools would be established too. In the housing arena, people could stop waiting endlessly on the state to provide and start building or upgrading their own homes. In the health sphere, people could join low-cost medical schemes or take out primary health insurance policies, giving them access to sound private care.[124] In each of these areas, competition would promote efficiency and encourage innovation, which would help to keep costs down and push quality up.

Since all families would want maximum value from their vouchers, tax revenues would be far more efficiently spent. The voucher system would also widen individual choice, build self-reliance, inject a new dynamism into the economy, and bring real benefits to millions of people now marginalised and destitute. Tax-funded vouchers for education, housing, and health care are thus integral to EED and are a key factor distinguishing it from BEE. Repeated rounds of IRR

[123] National Treasury, 'Budget Highlights', *2025 Budget Review*, 12 March 2025, pp. ii, iii: https://www.parliament.gov.za/storage/app/media/Docs/budgt/01dx3n75h5hogcy6zuarhlcrksdzkwc7r5.pdf.
[124] Jeffery, A, 'Critical Race Theory & Race-Based Policy', *@Liberty*, IRR, Issue 42, May 2021, pp. 5 –8.

opinion polling have shown high levels of popular support, often above 80%, for such empowerment vouchers.

4.4 An EED charter tailored to the mining sector

The general EED scorecard earlier outlined would need to be adapted for the mining sector, so that mining companies can earn voluntary EED points for their contributions in the economic, labour, environmental, and community spheres.

In the *economic* sphere, mining companies would earn voluntary EED points for making fixed capital investments; maintaining and expanding production; helping to grow the wider economy through upstream procurement; adding value to minerals extracted by milling, smelting, or otherwise processing them; and contributing to tax revenues, export earnings, R&D spending, and innovation.

On the *labour* pillar, mining companies would earn voluntary EED points for maintaining and expanding employment; paying salaries and contributing to PAYE; taking steps to improve the health and safety of mineworkers; promoting skills development; helping to find innovative and cost-effective housing solutions for migrant workers not wanting permanent homes in mining areas; and assisting employees where necessary with financial counselling and debt management.

In the *environmental* sphere, mining companies would earn voluntary EED points for contributing to environmental rehabilitation funds; guarding against water and dust pollution; reducing electricity and water consumption; minimising waste (including waste rock); rehabilitating areas disturbed by mining as much as possible; and helping to develop innovative ways of managing environmental impacts.

As regards *community development*, mining companies would earn voluntary EED points for helping to upskill teachers in local schools; finding effective ways to improve the quality of schooling through e-learning and the effective use of artificial intelligence (AI); contributing to the development of low-cost housing options for community members; and helping to meet community water needs through, for example, the treatment of mine waste water. Further voluntary EED points could also be earned by seconding staff or retired personnel to work with municipalities in mine communities to help solve operational problems, manage wastewater plants, and sustain or expand local clinics.

A shift to EED in mining and elsewhere would free the economy from the leg-iron of ever more damaging BEE requirements. It would also empower the majority in a way that successive mining charters – and the damaging law-making powers proposed by the Bill for the mining minister – will never be able to achieve.

With the mining industry still largely in the doldrums and the Bill's fundamental flaws readily apparent, it is time to shift away from the fake transformation evident in the Bill. Instead, it is vital to embrace true transformation – the kind that genuinely helps the poor great majority to get ahead – by embracing an EED charter for mining instead. It is time, in short, to think out of the box and so help revive investor confidence, kick-start growth in a vital sector, and re-ignite the prospects of a better life for millions of South Africans by

5 The unconstitutionality of the Bill

The Bill is currently unconstitutional on both procedural and substantive grounds. On procedural grounds, public participation has clearly been inadequate – if only because no final SEIA report was attached to the Bill when it was gazetted for public comment to help people "know about the issues" and then "have an adequate say".

In addition, little attempt has been made to engage with key industry stakeholders on different legislative options – or even take their views into account. Instead, the minister has emphasised that the BEE requirements in the bill are non-negotiable, because (in his words) "the mining industry has a responsibility to create more successful black miners".[125]

This stance rides roughshod over the minister's obligations, as set out under the *National Policy Development Framework* of 2020, to ensure that "consultation is infused in all aspects of the policy-making cycle". As a policy-maker, the minister must also, as the *Framework* stresses, consider different policy options and give adequate thought to "which policy solutions would best achieve the public policy objective".[126] In addition, he must take full account of all likely "impacts and risks" and ensure that the Bill is "informed by the best available evidence, data, and knowledge".[127]

Instead – to name but one example – the minister has declined to acknowledge the inefficiency, corruption and widening infra-African inequality that BEE has promoted since the MPRDA came into operation in 2004. He has also sought to put all the responsibility for "creating" successful black miners solely on the private sector. However, business lacks both the tax revenues and the legislative power that the government has at its disposal. In addition, it is the government's responsibility to create a policy and governance environment in which the mining industry can thrive and expand. More specifically, it is the government's obligation to improve skills, productivity, electricity supply, logistics, and municipal capacity – and to adopt the policies likely to create an attractive investment climate.

In the policy-making sphere, it is the minister's responsibility to consult fully with all key stakeholders – and particularly with the Minerals Council that currently represents some 90% of the mining industry. Yet the views of the Council have largely been overlooked in the drafting of the Bill. According to Minerals Council CEO Mzila Mthenjane, the Council has made various suggestions, but these are not reflected in the final Bill as published for comment. Sibanye-Stillwater spokesperson James Wellsted agrees, saying: "We don't believe this new bill has been appropriately considered or reflects our inputs."[128]

The content or substance of the Bill is often unconstitutional too. Much of the wording used is uncertain and open to interpretation in different ways by different officials. This conflicts with the doctrine against vagueness of laws. It also undermines the rule of law, the "supremacy" of which is a founding value of the Constitution.

[125] Faku, 'Miners unite against draft bill', op cit.
[126] National Policy Development Framework, op. cit, p. 20.
[127] Ibid, p. 20.
[128] Faku, Miners unite, op cit.

A particular example of vagueness is found in the Bill's amendments to Section 26 of the MPRDA. This section includes a new subsection 26(2(B)), which states: "Every producer of minerals must make available minerals or mineral products for local beneficiation." This wording contains no guiding parameters at all. Instead, the Bill leaves it entirely to the minister to fill in all the necessary detail by regulation. It then also fails to provide any guidance for his regulations. Instead, the Bill merely empowers the minister to "determine terms and conditions applicable to beneficiation of mineral resources, as contemplated in section 26".[129] These clauses gives the minister an untrammelled discretion to devise beneficiation rules as he sees fit. Yet the Constitutional Court has warned against untrammelled discretion of this kind and stressed that appropriate guardrails must always be put in place.

Section 100 of the MPRDA, as revised by the Bill, is also intrinsically uncertain. An unchanged sub-section 100(2) of the MPRDA gives the minister the power to "develop", by 31st October 2004, "a" [single] "broad-based socio-economic empowerment charter" to set "the framework" for facilitating the "active participation of historically disadvantaged South Africans in the mining industry". This charter is a non-binding "instrument of policy", as the Pretoria high court ruled in 2021. Yet the Bill purports to give the minister the power to "impose" this charter on applicants for new mining rights. Via sub-sections 98(a)(i) and 99(1)(a), it also purports to make any failure to comply with the often aspirational targets contained in the 2004 charter an offence punishable by a draconian fine and potential ten-year prison term.

In sub-section 100(4), moreover, the Bill seeks to give the minister the power to "amend" the 2004 charter by introducing into it "the broad-based socio-economic empowerment prescribed elements of BEE ownership, inclusive procurement, supplier and enterprise development, human resources development, employment equity and mining community development". Yet the minister, as earlier noted, has no law-making authority to do this. The introduction of BEE elements targeted solely at black South Africans is also at odds with the reference, in sub-section 100(2), to the (single) "framework" needed to empower HDSAs in mining. This wording creates further legal uncertainty, breaches the doctrine against vagueness of laws and undermines the rule of law.

The Bill's BEE provisions are also inconsistent with other clauses in the Constitution. Preferential access to ownership deals, management posts and procurement contracts – of the kind contained in the 2018 mining charter or set out in the BEE generic codes – cannot be fulfilled without the continued use of apartheid-era race classifications and the overt preferencing of some South Africans over others, based on the colour of their skins. Yet this is prima facie inconsistent with the Constitution's founding value of "non-racialism". It also contradicts its express prohibition of unfair racial discrimination by both the state and private persons.[130]

Also relevant is Section 195 of the Constitution, which recognises a need for "broad representivity" in "public administration". "Broad" representivity is different from the strict arithmetical quotas evident in the 2018 mining charter and the BEE generic codes, which cannot be justified by this provision. In addition, by confining the need for broad representivity

[129] New section 107(1)(jA), MPRDA.
[130] Sections 1(c), 9(1), (3)-(5), Constitution.

to "public administration", the Constitution recognises that a similar level of representivity is not required in the mining industry (or the broader private sector).[131]

The Constitution's provisions on BEE preferential procurement are set out in Section 217 of the text. Again, these provisions are confined to state entities of various kinds. This again means that the Constitution's (limited) authorisation for preferential procurement does not apply to mining companies (or business in general).[132]

Many commentators have long assumed that BEE is implicitly authorised by Section 9(2) of the Constitution, which allows the taking of "legislative…measures designed to…advance [those] disadvantaged by unfair discrimination" and "promote the achievement of equality". However, as the Constitutional Court ruled in the *Van Heerden* case in 2004, race-based remedial measures are valid only if they satisfy three tests: they must (1) target the disadvantaged, (2) help advance them, and (3) promote equality.[133]

The Constitutional Court has never properly applied these tests in adjudicating on BEE. Were it to do so, however, BEE rules would fail on all three grounds. First, BEE does not target the disadvantaged, as it helps only a relative elite (the most advantaged 15% within the black population) and not the great majority of poor black people. Second, BEE has failed to "advance" the black majority, which has instead been greatly harmed by it, as earlier outlined. Third, BEE has failed to "achieve equality", for it enriches the few even as it keeps the great majority of black South Africans unskilled, unemployed, and mired in destitution.[134] As earlier noted, this also explains why the Gini coefficient of income inequality is higher now (at 63 in 2022) than it was at the end of the apartheid era, when it stood at 57.[135]

The Bill's attempts to empower the minister to "impose" or introduce the "prescribed elements of BEE ownership, inclusive procurement, supplier and enterprise development [and] employment equity" are inconsistent with the Constitution's founding value of non-racialism. They also breach the provisions of Section 9. Nor can these BEE provisions be justified under either Sections 195 or 217 of the Constitution.

Other clauses in the Bill – particularly those dealing with historic mine dumps and associated minerals – are also unconstitutional. This time the inconsistency is with Section 25 of the Constitution, the property rights clause. As regards historic mine rights, as earlier outlined, the severed minerals extracted before the MPRDA took effect and now present in historic mine dumps do not constitute mineral "resources", within the meaning of the MPRDA. Hence, the state has no custodianship over them. Nor can it acquire it under the MPRDA, which gives the state custodianship solely over "mineral resources" (not severed minerals) that are "the common heritage of all the people of South Africa".[136] Hence, there can be no question of the custodianship of these already severed minerals "reverting" to the custodianship of the state,

[131] Section 195(1), Constitution.
[132] Section 217, Constitution.
[133] Minister of Finance and another v Van Heerden, 2004 (6) SA 121 (CC).
[134] Steward, D, 'Tightening the Screws: The true significance of the Employment Equity Amendment Bill', *Politicsweb.co.za*, 14 December 2018, pp. 2 – 3.
[135] Jeffery, A, *Countdown to Socialism: The National Democratic Revolution in South Africa since 1994*, Jonathan Ball Publishers, Cape Town, 2023, p. 121; https://wisevoter.com/country-rankings/gini-coefficient-by-country/
[136] Section 3(1), MPRDA.

as the Bill provides. Any such taking would amount to an expropriation for which compensation must be paid, yet the Bill makes no provision for this.

The Bill's provisions on the supposed "relinquishment" of associated minerals to the state are also prima facie unconstitutional. On any proper interpretation of the MPRDA, the granting of mining rights for primary minerals should automatically include mining rights for all associated minerals. Hence, there should be no need for mining companies to apply for the minister's consent for the "addition" of associated minerals to existing mining rights. Nor, where the minister's consent is not forthcoming, should mining companies be deemed to have "relinquished" their associated minerals to the state. Instead, any loss of associated minerals to the state under these flawed provisions should be recognised as an expropriation for which compensation must be paid. Again, however, the Bill makes no provision for this.

6 The way forward

The Minerals Council has rejected much of the Bill and seems intent on testing the constitutionality of many of its provisions in the courts. Various commentators have also warned strongly against the Bill. As Mr Lorimer has written, the Bill, if adopted in its current form, "will effectively end the already tottering case for foreign investment in South African mining".[137] Peter Major, a veteran mining analyst and director of mining at Modern Corporate Solutions, agrees, saying the Bill "doesn't have one redeeming feature to attract any investment, local or foreign".[138]

Journalist Michael Avery has summed up the negative consequences of the Bill in particularly apt and pithy words: "Since the first version of the MPRDA in 2004, South Africa's mining sector has been eviscerated. Mining's share of GDP has collapsed from 21% in 1980 to just 7.3% today. Exploration spend has dried up to a trickle. We attract less than 1% of global exploration budgets, despite our immense mineral endowment. Thousands of jobs have vanished. Foreign investors have voted with their feet. We've slipped into the bottom 10 countries in the world for mining attractiveness, as ranked by the internationally respected Fraser Institute. And yet, astonishingly, the new bill seems to believe the problem is not too much ministerial interference but too little."[139]

As the Minerals Council and many commentators agree, it is time to call a halt. The only solution is to withdraw the Bill and replace it with an entirely new measure that reflects global best practice in every sphere and will help restore investor confidence in what easily again become the best mining country on the African continent.

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[137] Lorimer, J, 'The new minerals bill is a disaster in the making', *Politicsweb.co.za*, 28 May 2025: https://www.politicsweb.co.za/documents/the-new-minerals-bill-is-a-disaster-in-the-making-.

[138] Faku, D, 'Miners unite against draft bill', *Sunday Times Business Times*, 1 June 2025: https://www.businesslive.co.za/bt/business-and-economy/2025-06-01-miners-unite-against-draft-bill/.

[139] Avery, M, 'Mantashe drops a steaming pile of excrement on the mining sector', *Business Day*, 27 May 2025: https://www.businesslive.co.za/bd/opinion/columnists/2025-05-27-michael-avery-mantashe-dumps-a-steaming-pile-of-excrement-on-the-mining-sector/.

A new approach to empowerment is particularly important too – one that moves away from the fake transformation that has enriched the few while harming the many. Instead, new mining law must embrace true transformation of an EED kind that upholds non-racialism, recognises the massive contribution that business makes to growth and upward mobility, and genuinely empowers the truly disadvantaged through tax-funded vouchers. Little could be more effective at encouraging mining companies to invest, employ, innovate, compete and grow than to free them from the BEE leg-iron that so hurts the many while helping only the few.

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