**South African Institute of Race Relations NPC (IRR)**

# REPRESENTATIONS
# to the Department of Mineral Resources, regarding the minister's proposed moratorium on the granting, renewal, or transfer of prospecting and mining rights, as set out in a Notice in the *Government Gazette* (No 40989) on 19th July 2017

**Johannesburg, 3rd August 2017**

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## Introduction

The minister of mineral resources, Mr Mosebenzi J Zwane (the minister), has invited representations from relevant stakeholders on his proposed moratorium (the moratorium) on the granting of new prospecting and mining rights, the processing of applications for the renewal of such rights, and the granting of approval for the transfer of such rights, as set out in a Notice published in the *Government Gazette* (No 40989) on 19th July 2017.

These representations on the Bill are 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.

As directed by the minister, the IRR's representations are addressed to the deputy director general of the DMR, Mr Joel Raphela.

**Legality of the proposed moratorium**

According to the minister, his proposed moratorium on the granting, renewal, and transfer of prospecting and mining rights is to be adopted under Section 49(1) of the Mineral and Petroleum Resources Development Act (MPRDA) of 2002.

Section 49(1) of the MPRDA empowers the minister to 'prohibit or restrict the granting of any....prospecting right [or] mining right' by notice in the *Gazette*. In doing so, however, he must comply with the various requirements set out in this section of the Act.

Before implementing any such prohibition or restriction, the minister must 'invite representations from relevant stakeholders'. He must also 'have regard to the national interest, the strategic nature of the mineral in question, and the need to promote the sustainable development of the nation's mineral resources'. [Section 49(1), MPRDA]

In addition to fulfilling these requirements, the minister must identify 'the land' on which the relevant prohibition or restriction on prospecting or mining rights is to apply. [Section 49(1)(a), MPRDA] Alternatively, he may 'restrict' (but not prohibit) the granting of prospecting and mining rights 'in respect of a specific mineral or class of minerals identified by [him] for such period and on such terms and conditions as he may determine'. [Section 49(1)(b), MPRDA]

The minister's proposed moratorium does not comply with the express wording of these requirements in that:

a) it does not refer to 'the strategic nature of the mineral in question'; [Section 49(1), MPRDA]
b) it does not 'identify...the land' on which it is to apply; [Section 49(1)(a), MPRDA]
c) it does not 'identify...a specific mineral' or 'class of minerals' to which it is to apply; [Section 49(1)(b), MPRDA] and
d) it does not specify for what period it is to remain in force. [Section 49(1)(b), MPRDA]

On the contrary, the proposed moratorium is to apply for an indefinite period, and is to govern all land and all minerals throughout South Africa. However, Section 49(1) does not countenance or authorise such a general and indefinite moratorium on the granting of prospecting and mining rights. The minister's proposed moratorium is thus ultra vires the powers conferred on him by the MPRDA and is unlawful. [Section 49(1), MPRDA; *Business Day* 20 July 2017]

Moreover, Section 49(1) does not give the minister *any* capacity whatsoever to restrict or prohibit applications for the renewal of prospecting or mining rights. The minister's proposed moratorium in this regard – also an indefinite one to be applied to all minerals across the country – is again ultra vires his powers under the MPRDA and is similarly unlawful. [Section 49(1), MPRDA; *Business Day* 20 July 2017]

In addition, Section 49(1) does not give the minister *any* capacity whatsoever to restrict or prohibit the transfer of prospecting and mining rights under Section 11 of the MPRDA. The minister's proposed moratorium on 'the granting of Section 11 applications' – again an indefinite moratorium to be applied to all minerals across the country – is thus also ultra vires and unlawful. [Section 49(1), MPRDA; *Business Day* 20 July 2017]

**Damaging impact of the minister's proposed moratorium**

In assessing the likely damaging impact of the minister's proposed moratorium, each of its three component elements must be taken into account. Also relevant are its intended duration and its probable overall effects.

***Prohibition or restriction on the granting of new prospecting and mining rights***

This element in the proposed moratorium will have many negative consequences for the mining industry. A refusal to issue new mining rights will preclude direct investment in mines that would otherwise have brought jobs and other benefits to the country. A refusal to issue new prospecting rights will make it even harder for South Africa to attract investment in mining exploration. Yet investment in exploration has already dropped sharply – to a quarter of its level in 2007 – and needs urgently to be revived to secure the future of the mining industry. [John Kane-Berman, 'Diamonds and all that: The Contribution of Mining to South Africa', @*Liberty*, IRR, Johannesburg, Issue no 30, February 2017, p43]

The proposed moratorium on the granting of prospecting rights will also have negative ramifications for many existing mining operations. Existing mines that plan to expand need to make prospecting rights applications all the time, but will effectively be barred from doing so. This, in the words of Warren Beech, head of mining at law firm Hogan Lovells, will 'cut them off from the lifeblood of fresh mineral deposits'. [*Business Day* 20 July, *City Press* 23 July 2017]

It is also no answer to say, as the minister may seek to do, that his proposed moratorium will allow him simply to 'restrict', rather than always to 'prohibit', the granting of new mining and prospecting rights. Mining companies need certainty and predictability in the relevant rules. Vague provisions which empower the minister, at his discretion, to allow some applications while refusing others cannot provide the certainty required. They also raise the risk of unequal treatment on arbitrary grounds. Such treatment would contradict Section 9 of the Constitution, which guarantees equality before the law. It would also undermine 'the supremacy of the rule of law', which is a founding value of the democratic order and must be respected and upheld by the executive at all times. [Sections 9(1), 1(c), Constitution of the Republic of South Africa, 1996]

***Prohibition or restriction on the renewal of prospecting and mining rights***

Since mining rights may remain in force for 30 years under the MPRDA, the impact of the proposed moratorium will fall most heavily on prospecting rights, which have a much shorter duration. Under the MPRDA, prospecting rights remain in force for five years at most (and may be renewed once thereafter for a maximum period of three years). [Section 18, MPRDA;

*City Press* 23 July 2017] Many of the new order prospecting rights which have been issued since 2004, when the MPRDA took effect, may thus soon need to be renewed. Yet the proposed moratorium would frequently prevent renewals of this kind. Again, this will limit the search for exploitable mineral deposits and undermine the establishment or expansion of mining operations. It will also bring further harm to an already struggling mining industry.

***Prohibition or restriction on the transfer of prospecting and mining rights***

This aspect of the moratorium will generally prevent the sale of struggling mining operations. In particular, it will bar bigger mining companies that are battling to make money from marginal mines from selling these mines to smaller, often black-owned, firms with lower overheads and a greater capacity to keep struggling operations alive. However, it is important that such transactions should proceed – and especially so at a time when many gold and platinum mines are unprofitable and cannot easily survive. [*Business Day* 26 July 2017]

As Chris Griffith, CEO of Anglo American Platinum (Amplats), has recently noted, rand prices for the metals his company produces currently stand at the levels they had in 2013, whereas input costs have risen sharply since then. This means that 65% of local platinum mines are unprofitable, while another 5% are marginal. Significant restructuring and consolidation is required to preserve as many mines and jobs as possible, but the proposed moratorium will prohibit many of the necessary transactions. [*Business Day* 25 July 2017]

This aspect of the proposed moratorium could also bar the conclusion of many black economic empowerment (BEE) deals. It could, for example, block the proposed sale of the Union platinum mine, currently owned by Amplats, to black-owned Siyanda Resources. Yet, if the sale were to proceed, it would give Siyanda the capacity to produce some 160 000 oz of platinum a year. The proposed moratorium could also prevent Amplats from purchasing certain mining assets from beleaguered BEE mining company Atlatsa Resources, on terms that would include the writing off of R4.2bn in debt owed to Amplats. Barring these transactions from proceeding (as *Business Day* has warned in an editorial) could have 'dire consequences for jobs and livelihoods in an industry that is already seeing closures and job losses'. [*Business Day* 25, 26 July 2017]

Given the volume of the mining deals that need Section 11 approval, this aspect of the proposed moratorium is likely to prove particularly damaging. According to Mr Beech of Hogan Lovells, his team alone handles roughly eight to ten Section 11 applications per month. As journalists Dewald van Rensburg and Lesetja Malope have written in *City Press*: 'The volume of deals requiring ownership change can vary very sharply, but at this one law firm it represents transactions worth anything from R100m to R300m a month. Depending on how long Zwane intends his moratorium to last, this could quickly affect billions of rands' worth of deals.' [*City Press* 23 July 2017]

***A moratorium without time limit***

The minister's proposed moratorium is to apply indefinitely. This is implicit in the Notice published in the Gazette, which makes no mention of any time period within which the

minister's prohibitions and restrictions are to apply. It is also apparent from a release issued by the DMR on 20th July 2017, in which Mr Zwane said that 'the final moratorium would be in force until further notice'. This, he said, was intended to ensure that all new grants of mining and prospecting rights, along with all renewals and all transfers of such rights, would be subject to the new Mining Charter, as gazetted on 15th June 2017. [*Business Day* 26 July 2017] However, as the minister is well aware, the lawfulness of this charter has been challenged by the Chamber of Mines, while the real purpose of his proposed moratorium is seemingly to exert pressure on the chamber to withdraw or settle its law suit, as further described below.

***Overall impact of a three-fold moratorium***

The minister's proposed moratorium will add greatly to the uncertainty and unpredictability of the mining policy environment in South Africa. It will signal, in particular, that relevant mining rules, as laid down in the MPRDA, cannot be relied upon but may instead be jettisoned at the minister's whim. This will make it even harder to attract mining investment, or to persuade mining companies already operating in South Africa not to disinvest. Yet the mining industry has already lost some 70 000 jobs over the past five years, [*Business Report* 3 August 2017] while many more job losses are looming. In these circumstances, in particular, South Africa cannot afford this proposed three-fold moratorium.

In addition, the unexpected mooting of this moratorium has further strained relationships between the minister and the mining industry. Trust has been eroded, while the potential for conflict has grown. This too is likely to deter further investment in an industry which requires massive capital injections and generally has lead times which are very long. [*Business Day* 26 July 2017]

**Irrational restrictions without bona fide purpose**

The minister claims that his proposed moratorium is to be introduced 'in the national interest' and in order to 'promote the sustainable development of the nation's mineral resources'. This is what the wording of Section 49(1) requires him to say, but it is not what the proposed moratorium will in fact achieve.

It is clearly not 'in the national interest' to curtail the granting, renewal, and transfer of all prospecting and mining rights for an unlimited period. This will greatly harm the mining industry, rather than contributing to the 'sustainable development' of the country's mineral wealth. The proposed restrictions are thus not only ultra vires the MPRDA, but are also irrational and unreasonable.

The Chamber of Mines, which represents some 90% of mining companies in the country, has described the proposed restrictions as 'inexplicable', adding they lack any logical foundation and do not 'serve any legitimate governmental purpose'. The chamber also notes that the minister has failed to give any credible reasons as to why the moratorium is needed. 'This,' the chamber says, 'leads to the reasonable and indeed inevitable conclusion that his purpose

in imposing the restrictions is not a bona fide one and that he has some undisclosed ulterior motive.' [*Business Day* 20, 26 July 2017]

**Unconstitutionality of the proposed moratorium**

The proposed moratorium is not only ultra vires and economically damaging, but is also contrary to the Constitution. According to mining law expert Peter Leon of Herbert Smith Freehills, the minister's decision to invite written representations on the proposed moratorium does not necessarily constitute administrative action. However, any subsequent decision to implement a moratorium along the lines described in the Notice would clearly constitute such action. At the same time, the Constitution gives everyone the right to administrative action which is 'lawful, reasonable, and procedurally fair'. Since none of these criteria would be met, the implementation of the proposed moratorium would undoubtedly be unconstitutional. [Section 33, Constitution of the Republic of South Africa, 1996; Peter Leon, 'Zwane's skating on thin legal ice', *Politicsweb.co.za*, 22 July 2017]

The inherently uncertain terms of the proposed moratorium also contradict what the Constitutional Court has described as 'the doctrine against vagueness of laws'. The broad powers given to the minister to 'prohibit' or 'restrict' the granting, renewal, or transfer of prospecting and mining rights will erode a necessary certainty in the content of the relevant rules. They will allow the minister and his officials to allow certain applications and reject others on unspecified and essentially arbitrary grounds. Yet the Constitutional Court has made it clear (in the *Land Access* case, among others) that legal rules cannot be considered sufficiently certain if the minister and his officials can interpret the same provisions in different ways, all of which are plausible. Applying this test, the vague terms of the proposed moratorium are clearly inconsistent with the rule of law and core provisions of the Constitution. [*Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, [2016] ZACC 22, para 4, note 6, citing *Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108; see also Sections 1(c) and 9(1), Constitution]

**Legal action to bar the proposed moratorium**

On 20th July, the day after the minister's Notice was published in the Gazette, chamber CEO Roger Baxter wrote to Mr Zwane to say that his proposed moratorium would constitute an 'unlawful exercise of power'. Mr Baxter also warned that, if the Notice was not rescinded within four days, the chamber would approach the court for urgent relief to interdict the minister from giving effect to the Notice. In time, it would also apply to the courts to review and set aside the Notice. [*Business Day* 26 July 2017]

When the minister failed to withdraw the Notice, the chamber initiated court proceedings. In doing so, it asked that an evidently 'unlawful...process be urgently reviewed and set aside'. It also requested that 'the minister be interdicted from acting unlawfully in accordance with his expressed intention'. [*Business Day* 26 July 2017]

In its founding affidavit (deposed by Tello Chabana, senior executive for transformation), the chamber also stressed that there were sound legal reasons for the court to grant it the interdict it sought. Stated Mr Chabana: 'Where a functionary of the state has announced his intention to commit an unlawful act which will adversely affect the rights of those who will be subject to such action, the latter are entitled to approach the court for an interdict preventing such action and are not obliged to wait until the harm is done.' [*Business Day* 26 July 2017]

**An attempt to influence a legal challenge to the new mining charter**

When the new mining charter was gazetted by the minister on 15th June 2017, several legal experts warned that many of its provisions were unlawful and unconstitutional. Among those objecting to its illegality was Jacinta Rocha, a former director general of the DMR and now a consultant on mining law. Mr Rocha described the new charter as 'irrational and unconstitutional', and said it offended against 'basic principles of South African law'. [*City Press* 18 June 2017]

The chamber also objected to the charter's unlawfulness and the DMR's failure to consult with it before the document was released. However, Mr Zwane made it clear that he was not prepared to renegotiate the charter, and that the gazetting of the document had brought its new requirements into immediate operation. The chamber thus lodged an application with the North Gauteng High Court in which it asked for an urgent interdict to suspend the charter, pending a further court application to set it aside as unlawful. In a 274-page founding affidavit, the chamber argued that the minister, in gazetting the new charter, had acted beyond the powers granted to him by the MPRDA. It also warned that the charter would cause 'irreparable damage' to the mining industry. [*Businesslive.co.za*, 26 June 2017]

The chamber's application for an urgent interdict was set down for hearing on 18th July. However, on 14th July the minister gave the chamber a written undertaking that neither he nor the DMR would implement the new charter until such time as the Pretoria High Court had handed down its judgment in the pending interdict application. In return, the chamber gave the DMR more time to file its answering arguments, and agreed that the interdict application should be set down for hearing in September 2017. [*The Citizen* 21 July 2017; Herbert Smith Freehills, 'Update to the South African Mining Charter', 18 July 2017]

It is this agreement with the chamber that the minister's proposed moratorium is seemingly intended to circumvent. Writes Mr Leon of Herbert Smith Freehills: 'While the [minister's] Notice may not expressly contravene the agreement reached between the chamber and the minister on 14th July 2017,... it infers that the minister intends to circumvent the agreement's underlying purpose. In particular, it appears the minister intends using the Notice to coerce the chamber into a possible settlement of its injunctive proceedings'. [Peter Leon, 'Zwane's skating on thin legal ice with moratorium', Politicsweb.co.za, 22 July 2017]

Several other legal experts also believe that the proposed moratorium is aimed at putting pressure on the chamber to abandon or settle its legal challenge to the new mining charter.

[*Business Day* 20 July 2017] However, to introduce a moratorium for this illegitimate reason would be a further abuse of the minister's powers under the MPRDA.

**The minister should abandon his proposed moratorium**

The minister has no power under Section 49(1) of the MPRDA to implement an indefinite prohibition or restriction on the granting, renewal, or transfer of all mining and prospecting rights. In addition, the proposed restrictions seem to have no legitimate governmental purpose. Rather, they appear to be aimed at putting pressure on the chamber to abandon or settle its legal challenge to the new mining charter. If that is indeed the motivation for them, this would amount to a further abuse of the minister's powers under the MPRDA.

If the minister were to implement the proposed moratorium, this action would clearly be inconsistent with the Constitution's guarantee of administrative action that is 'lawful, reasonable, and procedurally fair'. The vague and uncertain wording of the restrictions would further contradict the equality clause and the Constitution's guarantee of 'the supremacy of the rule of law'.

If the minister were to proceed with implementation, the economic damage to the mining industry would be enormous. The proposed moratorium would reduce investment, hamper exploration, prevent the establishment of new mines, limit the expansion of existing mines, and make it harder for low-cost companies to come to the rescue of struggling mining operations. This would be likely to result in major job losses, not only in mining but also in the many sectors from which the industry currently procures some R245bn in goods and services each year. [Kane-Berman, 'Diamonds and all that', p32]

The wider message emanating from such a moratorium would be more damaging still. If the minister is able to implement new rules that flagrantly disregard the clear wording of the MPRDA, this would signal to the industry – and to all potential investors – that the rule of law no longer runs within the country. Few interventions could be more damaging to an already struggling economy.

For all these reasons, the minister should abandon the proposed moratorium, rather than make any further attempt to implement it.

**South African Institute of Race Relations NPC (IRR)** **3rd August 2017**