GET IT TOGETHER:
SOUTH AFRICA'S MINERALS POLICY AND ITS REGULATORY REGIME

By ***Sivalingum V Rungan***

The author is a lecturer at the University of the Witwatersrand, with research interests in the mining sector and development

Both government and mining companies need an effective, coherent and consistent policy and regulatory framework. This brief assessment calls for a review and reconsideration of the Mining Charter and the MPRDA.

Regulatory certainty is a major concern for any mining company. Regulations, however, change in response to the changing dynamics of society. Regulatory regimes thus seek to ensure stability both by establishing regulations and by establishing confidence in the transition from one regulatory regime to another. Any assessment of a regulatory regime must also include the policy framework which precedes it and upon which it is based.

Mining companies in South Africa have to comply with a number of legislative prerogatives, including the Mine Health and Safety Act, the Mineral and Petroleum Resources Development Act, the Mineral and Petroleum Resources Royalty Act, the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act, the National Environment Management Act, the National Environment Management Act, Air Quality Act, the National Water Act.

To highlight the complexities that a mining company faces to order to comply with the current regulatory


Sivalingum Rungan

regime, this commentary will consider only the Minerals and Mining Policy (White Paper of 1998) and the Mineral and Petroleum Resources Development Act (Act No 28 of 2002) (MPRDA), and in particular the Social and Labour Plan and Section 100 of the MPRDA.

MINERALS POLICY

In 1998, after wide consultation with interested parties, the department of minerals and energy (as it then was) published its white paper, A Minerals and Mining Policy for South Africa. It covered the following themes:

- business climate and mineral development
- participation in ownership and management
- people issues
- environmental management
- regional cooperation
- governance.

With a wide-ranging assessment of the state of mining in the country and internationally, it comprised a general discussion of the various themes and sub-themes, providing the government's intention in relation to each, the policy measures required to give effect to it, alternate views that had been received, and then the government policy.

Essentially, all aspects of the White Paper were shown to be carefully considered and the relevant policy justified. The policy document led to the enactment of the MPRDA, also after wide consultation with interested parties.

THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT

After the Mine Health and Safety Act, the MPRDA was arguably the most comprehensive piece of mining legislation in South Africa at that time. Its transitional provisions provided for easy integration and a smooth transition from the Minerals Act 50 of 1991. It also sought to protect the security of tenure of mining companies.

This was of particular importance because of Section 3, which provided that:

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.
(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –
    a. grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
    b. in consultation with the Minister of Finance, determine and levy, any fee payable in terms of this Act.
(3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environment policy, norms and standards while promoting economic and social development.
(4) The State royalty must be determined and levied by the Minister of Finance in terms of an Act of Parliament. (DMR 2002)

Section 3 was particularly important because it changed the common law position on mineral ownership, which had held that whoever owned the land owned the minerals within it. This is effectively a nationalisation provision that reflects the Freedom Charter demand that South Africa's mineral wealth should "be transferred to the ownership of the people as a whole".

These developments required mining companies to motivate for the retention of their existing mining operations, and for the recognition of their intentions to mine or prospect. In these engagements, mining companies transitioned from the previous regime to the newer MPRDA regime.

As part of the added legal compliance, the MPRDA requires mining companies to submit a Social and Labour Plan (SLP) with their applications for mining rights. The SLP contains:

- a human resources development programme, which must include
  - a skills development plan
  - a career progression plan
  - a mentorship plan
  - an internship and bursary plan, and
  - employment equity statistics;

The Mining Charter represented a negotiated consensus that was agreed to by industry, labour and government, ensuring that all parties had an interest in ensuring its success.

- a local economic development programme, which must include the
  - social and economic background of area where the mine operates
  - key economic activities of that area
  - impact that the mine would have on local and sending communities
  - infrastructure and poverty eradication projects that the mine would support in line with the Integrated Development Plan
  - measures to address the housing and living conditions of the mine employees
  - measures to address the nutrition of the mine employees, and
  - procurement progression plan and its implementation;
- processes pertaining to management of downscaling and retrenchment, which must include the
  - establishment of a future forum
  - mechanisms to save jobs and avoid job losses and a decline in employment
  - mechanisms to provide alternative solutions and procedures for creating job security where job losses cannot be avoided, and
  - mechanisms to ameliorate the social and economic impact on individuals, regions and economies where retrenchment or closure of mine is certain;
- financial provision for the implementation of the SLP in terms of implementation of
  - the human resource development programme
  - the local economic development programmes, and
  - the processes to manage downscaling and retrenchment.

From the above, it is clear that mining companies would need to undertake an in-depth study of these issues prior to applying for a mining right, and they would need to be absolutely certain of the financial viability of the resource to ensure that it could meet the objectives as outlined.

THE MINING CHARTER

Section 100 of the MPRDA required the development of a housing-and-living-conditions standard for the minerals industry, a code of good practice and a broad-based socio-economic empowerment charter.

The first of these to be developed, in 2002, was a proposed charter. After its ownership provisions proved controversial, this was replaced in 2010 by the Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry. The following discussion is based on this amended Mining Charter, which has provisions for: ➤➤

- ownership
- procurement and enterprise development
- beneficiation
- employment equity
- human resource development
- mine community and rural development
- housing and living conditions
- sustainable development and growth of the mining industry
- reporting (monitoring and evaluation), and
- non-compliance.

The Charter's vision was to "facilitate sustainable transformation, growth and development of the mining industry". Essentially, the issues covered in the SLP were to be fast-tracked by their inclusion in the Charter. It is worth noting that the Mining Charter represented a negotiated consensus that was agreed to by industry, labour and government, ensuring that all parties had an interest in ensuring its success.

The initial review was supposed to have been done in 2009, but was completed in September 2010. A second review, to assess the impact of the Charter, was to have been ready in 2014. On 31 March 2015, the minister of mineral resources presented a briefing on certain aspects of the review, but at the time of writing there is still no indication as to when the completed review will be released to the public.

Review and assessment

The minister's briefing (DMR 2015) included the following results.

Housing and living conditions:63 percent of right holders with hostels have converted hostels to family and/or single units. The drive to improve the living standard of mineworkers has not fully been realised. More needs to be done to address the broader objective of ensuring that mineworkers live in decent accommodation.

Employment equity: The percentage of right holders that met the 40 percent target for each category are:

- top management (Board) – 73 percent
- senior management (EXCO) – 50 percent
- middle management – 56 percent
- junior management – 68 percent
- core and critical skills – 79 percent.

Procurement and enterprise development:

- 42 percent met the target of procuring capital goods from historically disadvantaged South Africans (HDSAs)
- 33 percent met the target of procuring services from HDSAs
- 62 percent met the target of procuring consumables from HDSAs.

Human resource development: 36.8 percent of companies have spent the targeted 5 percent of total annual payroll on training.

Mine community development: 47 percent of mine community development projects are between 75 and 100 percent completion.

Sustainable development: Except for the analysis of samples in South Africa, the performance on sustainable development has not met expectations.

> **Clearly, the mining industry as a whole has not committed enough to the process to meet the targets. At the same time, there is a high level of compliance and the industry has actually changed.**

The issue of ownership is glaringly absent, but this is due to a dispute between the mining industry and the department of mineral resources (DMR) that has been referred for judicial review.

Clearly, the mining industry as a whole has not committed enough to the process to meet the targets. At the same time, there is a high level of compliance and the industry has actually changed. It would take a different form of assessment to ensure that the changes occasioned by the Mining Charter have been properly assimilated into the industry and that a better business practice has been developed.

The current minister of mineral resources has indicated that a new Mining Charter will be drafted. However, as the SLP is already legislated and the Mining Charter has reached its agreed conclusion, it is perhaps best for the DMR to begin to hold mining companies accountable in terms of their SLP commitments, without reference to the Mining Charter.[1]

THE CODES OF GOOD PRACTICE

The Codes of Good Practice for the Minerals Industry was gazetted on 29

April 2009, approximately a week after the national elections. After a general outcry from the mining industry about the lack of consultation, the DMR withdrew the Codes, acknowledging that a precedent of negotiated consensus had been established with the Mining Charter. The current state of the Codes is not known.

HOUSING AND LIVING CONDITIONS STANDARDS

The Housing and Living Conditions Standards for South African Minerals Industry was also published in April 2009. Its stated principles for housing were to:

- ensure a decent standard of housing for mine workers
- develop socially, physically and economically integrated housing
- be responsive to the housing demand
- ensure the involvement of employees in the housing administration system
- ensure security of tenure for employees
- provide best practices and compliance with minimum norms and standards, and
- promote the use of transparent and accountable financing schemes.

The principle of the standard of living conditions was to ensure proper healthcare services for mineworkers and families. As the minister reported, these standards have not been "fully realised" (DMR 2015). Much more needs to be done.

AMENDMENTS TO THE MPRDA

There have been two attempts to amend the MPRDA since its inception. The first (Amendment to the MPRDA, Act 49 of 2008) was signed during Thabo Mbeki's presidency. Various mining companies immediately issued notices of their intent to sue the DMR for various reasons, mostly relating to expropriation. The director-general announced that the Amendment would not be implemented and a new one drafted. This new amendment was approved by parliament and submitted to President Jacob Zuma just before the 2014 elections, but the new minister of mineral resources, Ngoako Ramatlhodi, expressed reservations and the president subsequently rejected the amendment as unconstitutional.

CONCLUSION

The minerals policy of 1999 ushered in a new regulatory regime that was encapsulated in the MPRDA. This led to the development of the SLP, the Mining Charter, the Codes of Good Practice and the Housing and Living Conditions Standards. The provisions of Section 3 of the MPRDA have occasioned significant changes to the minerals regulatory regime, and attention shifted to the Mining Charter.

Parliament's inability to draft effective mining legislation is responsible for creating a situation in which mining companies can't take the legislative process seriously.

The Charter in turn has been blighted by unnecessary and unqualified extensions of its deadlines. There are indications that the industry has changed, but improvement is still warranted and compliance issues have not been resolved. Government statements suggest that a new mining charter will be drafted, but the SLP provisions must be considered as an alternative way forward.

The two amendments to the MPRDA failed quite spectacularly. The first, which went through the full parliamentary legislative process and is a properly constituted law, could not be implemented. The second went through the process only to be found unconstitutional. Parliament's inability to draft effective mining legislation is thus responsible for creating a situation in which mining companies can't take the legislative process seriously.

In addition, the mining industry has changed in South Africa and internationally since the implementation of the MPRDA. Legislation must take account of such events as the global financial crisis, Marikana, and the protracted mining strike of 2014. Considering that the White Paper was published in 1998, this an opportune – if not critical – time for the DMR to review the county's minerals policy and to ensure that the regulatory regime becomes more current and more certain. NA

NOTE

1. Nokuhle Madolo (2015) sketches a future for the mining industry beyond the Mining Charter. Her strategies should be considered and an appropriate decision made by all parties, instead of simply implementing a new Mining Charter.

REFERENCES

Department of Mineral Resources (DMR). 2015. Minister Ngoako Ramatlhodi: Assessment of compliance with Mining Charter. Available at http://www.gov.za/speeches/minister-advocate-ngoako-ramatlhodi-assessment-compliance-mining-charter-31-mar-2015-0000, [accessed 4 August 2015].

Department of Mineral Resources (DMR). 2002. Mineral and Petroleum Resources Development Act (Act No 28 of 2002). Available at http://www.dmr.gov.za/publications/summary/109-mineral-and-petroleum-resources-development-act-2002/225-mineraland-petroleum-resources-development-actmprda.html [accessed 24 August 2015].

Madolo, N. 2015. *Transformation of the mining sector of South Africa: Strategies beyond the life of the Mining Charter in 2014*, unpublished PhD thesis, University of the Witwatersrand. Available at http://wiredspace.wits.ac.za/handle/10539/17662 [accessed 4 August 2015].