the federation for a sustainable environment

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FSE'S COMMENTS ON THE DMRE's PRESENTATION ON THE MINERAL RESOURCES DEVELOPMENT AMENDMENT BILL 2024 (MRDB) DURING A CONSULTATION WORKSHOP ON THE 3rd OF SEPTEMBER, 2024

PREFATORY

The FSE was invited to the MPRDA Review Summit on July 2023, which the DMRE hosted. The purpose of the Summit according to the DMRE's invitation was "*to solicit inputs*" from key stakeholders, and that these inputs would form part of developing a Draft Bill. The FSE attended the MPRDA Review Summit, however, attendees were afforded limited opportunities to participate in the Summit. The South African Constitution makes it pertinent that in any form of decision-making or policy formulation, adequate and deliberate consultations and by extension, public participation must have been conducted in order for such decision or policy to pass the test of legality and rationality. The consultation requirements are in sections 59(1)(a) and 72(1)(a) of the Constitution, as interpreted by the Constitutional Court since 2006. An amendment to the National Environmental Management: Waste Act 2008 in the National Environmental Laws Amendment Act 2022, for example, was declared invalid and unconstitutional because the State had failed to comply with its constitutional obligations to facilitate public involvement in the legislation.

During the Consultation Workshop on the MRDB, on the 3rd of September, 2024, the FSE commented on the MRDB. The DMRE did not respond to the FSE's comments at the time and requested that the FSE submits its comments in writing, which we hereby do.

It should be noted that our comments relate to the abovementioned presentation of the DMRE, which we subjoin hereunder.

1. RATIONALE FOR THE PROPOSED AMENDMENTS

1.1 THE PROPOSED AMENDMENTS TO IMPROVE THE EASE OF DOING BUSINESS IN THE INDUSTRY; TO CREATE A CONDUCIVE ENVIRONMENT FOR INVESTMENT, GROWTH AND JOB CREATION; TO AUGMENT AND SUBSTANTIALLY INCREASE THE SOCIO-ECONOMIC DEVELOPMENT IMPACT THROUGH MINING; TO ENTRENCH THE PRINCIPLE OF SECURITY OF TENURE AND PROTECTION OF THE INVESTMENTS AS AN INTEGRAL PART OF SOUTH AFRICA'S MINING REGULATORY FRAMEWORK

1.1.1 We respectfully submit that the rationale for the proposed amendments must be aligned to Section 24 of the Bill of Rights, namely to "*secure **ecologically sustainable** development and use of natural resources while promoting **justifiable** economic and social development*."[1]

(Emphasis added.)

1.1.2 In its rationale the Bill ought to:

1.1.2.1 Recognise the concept of sustainable development, that is, intra- and inter-generational equity[2], and the interaction between socio-economic development and the protection of the environment[3].

1.1.2.2 Acknowledge that development cannot subsist upon a deteriorating environmental base and that <u>*unlimited*</u> growth of the mining industry is detrimental to the environment and the destruction of the environment is detrimental to development.

1.1.2.3 Give effect to the principles of the National Environmental Management Act, 107 of 1998 (NEMA) *inter alia* the environmental management principle contained in section 2(2) of the NEMA which requires that "*environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably*".

[1] Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 2 (Bill of Rights), Section 24 (b) (iii).
[2] The Brundtland Report defined sustainable development as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*". It described sustainable development as— "*[i]n essence . . . a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations*".
[3] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007)

1.1.3 In the light of the aforementioned, the proposed Bill's objectives must not only be to advance the interests of the mining industry and its investors, but also to ensure that the interests of **both** current and **future** generations are not compromised, and that the promotion of development within the mining industry requires, in addition, the protection of the environment.

1.1.4 It is common cause that mining by its very definition is unsustainable since it depletes a non-renewable source. It is also trite that mining produces waste (residuals). It is widely accepted that "*.....problems related to mining waste may be rated as second only to global warming and stratospheric ozone depletion in terms of ecological risk…the release to the environment of mining waste can result in profound, generally irreversible destruction of ecosystems*."[4]

1.1.5 In order to "*augment and substantially increase the socio-economic development impact through mining*", it therefore behoves the drafters of the proposed Bill to include requirements for mining companies to ensure economic succession and diversification during the life of mine and **sustainable** post closure land use, with its implications for socio-economic and environmental sustainability and sustainable livelihood opportunities.

1.1.6 We further recommend that the Bill be aligned to the proposed National Strategy for Mine Closure and the Management of Derelict and Ownerless Mines, whose aim is to resolve the following key issues:

1.1.6.1 Very few mines and, of great concern, no large mines with potentially severe environmental impacts are issued with closure certificates. As a consequence, mines are left in limbo, often in care and maintenance and ultimately entering liquidation before closure can be finalised.

1.1.6.2 In some areas, mines are interconnected and/or have integrated and cumulative environmental and socio-economic impacts. In these areas, legislation allows for the implementation of strategies to manage these cumulative effects. To date, these have not been formalised.

1.1.6.3 Mine closure can have a profound impact on the economy and social fabric of mining communities. While legislation recognises these impacts, successful transitions from mining to a sustainable post-mining economy are rare.

1.1.6.4 Communities often feel that they are excluded from decisions regarding their future, as mining and mine closure impact on the environment and local economy.

1.2 BRINGING THE ADMINISTRATION OF HISTORICAL STOCKPILES CREATED PRIOR TO THE PROMULGATION OF THE MPRDA INTO THE AMBIT OF THE ACT & PROPOSED AMENDMENTS: (Sec 42A)

[4] European Environmental Bureau (EEB). 2000. The environmental performance of the mining industry and the action necessary to strengthen European legislation in the wake of the Tisza-Danube pollution. EEB Document no 2000/016. 32 p

1.2.1 With reference to the rationale "*to bring the administration of historical stockpiles created prior to the promulgation of the MPRDA into the ambit of the Act*", we posits: There has been a long-standing intention to move the regulation of residue stockpiles and deposits from the ambit of the National Environmental Management: Waste Act 59 of 2008 (NEMWA) to that of the NEMA and the National Environmental Management Laws Amendment IV amended the NEMWA to specifically exclude residue stockpiles and residue deposits from the scope of "waste", providing that it will be regulated instead under NEMA, with the Minister of Mineral Resources and Energy remaining the competent authority. Despite the commencement of the relevant provisions under the NEMLA IV Act to amend the NEMWA to specifically exclude residue stockpiles and residue deposits from the ambit of NEMWA to that of the NEMA, the recent judgment[5] handed down by the Constitutional Court has stalled the regulatory transition.

1.2.2 It is unclear whether the Bill proposes that mine residue stockpiles and residue deposits, and the reclamation and expansion of historical pre-MPRDA residue stockpiles and deposits be brought under the ambit of the MPRDA notwithstanding the above regime and the judgement in the De Beers matter[6], which established that reprocessing of tailings are not subject to the control of the MPRDA and does not require a mining right/permit.

1.2.3 Since the NEMWA to NEMA transition remains ongoing, the Bill needs to provide clarity on the proposed regime change.

1.3 MACCSAND, MAWETSE AND BENGWENYAMA JUDGEMENTS

1.3.1 The rationale of the proposed Bill is also to address certain shortcomings identified in court cases including Maccsand, Mawetse and Bengwenyama.

1.3.2 With reference to the Maccsand judgment[7], the Court found that the granting of a mining right or permit in terms of the MPRDA does not obviate the obligation of an applicant to obtain authorisations in terms of other legislation that deals with functional domains other than minerals, mining and prospecting e.g. that an owner of land may insist that his land may not be used for mining purposes if it is not zoned for such purposes.

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[5] In its judgment in the South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others [2023] ZACC 18 matter, handed down on 26 June 2023, the Constitutional Court held that "Parliament had failed to comply with its constitutional obligation to facilitate public involvement in its legislative processes" in respect of specific provisions of NEMLA IV, including the amended definition of "waste". In the interim, and allowing Parliament "an opportunity correct the defect", the definition of "waste" as per NEMWA remains in force, with residue stockpiles and residue deposits regulated as such.

[6] The judgement in the De Beers Consolidated Mines Ltd and Ataqua Mining (Pty) Ltd and others matter in the High Court of South Africa (Orange Free State Provincial Division - Case No. : 3215/06), established that reprocessing of tailings are not subject to the control of the MPRDA and does not require a mining right/permit; that "mine", used as a verb in the MPRDA, does not include extraction activities in residue stockpiles; and that extraction of minerals from residue stockpiles constitutes processing that does not require a separate mining permit or mining right.

[7] Maccsand (Pty) Ltd v City of Cape Town (CCT 103/11) 2012 ZACC 7.

1.3.3 With reference to the Mawetse judgment[8], the Court found that even if there had been a lawful award of a prospecting right to a mining company (*in casu*, Dilokong) that right is 'lost' due to the unreasonable delay in exercising it and, as a result, the right has lapsed as it has expired.

1.3.4 With reference to the Bengwenyama judgement[9], the Court found that the Bengwenyama community "…*was entitled to adequate notice of the nature and purpose of the administrative action that was proposed in relation to the Genorah application. It was entitled to a reasonable opportunity to make representations in relation to the Genorah application. Once the administrative decision was taken the Community was entitled to a clear statement of the administrative action. It was entitled to adequate notice of any right to a review or internal appeal. It was entitled to adequate notice of the right to request reasons in terms of section 5 of the Promotion of Administrative Justice Act, 3 of 2000. It was entitled to reasons*."

1.3.5 In the DMRE's presentation on the 3rd of September, 2024 we were not informed how these identified shortcomings will be addressed.

2. PROPOSED AMENDMENTS

2.1 SECTION 5A,5B & 5C: ILLEGAL PROSPECTING AND MINING ACTIVITIES

2.1.2 There ought to be clear differentiation in the Bill between illegal prospecting and mining activities and artisanal and small scale mining.

2.1.3 The Bill ought to give effect to the Artisanal and Small Scale Mining (ASM) Policy, which proposes that:

2.1.3.1 ASM to co-exist with large operations through contributing agreements, equipment leasing, technical support and participation in the supply chain.
2.1.3.2 The Government is to train, empower and educate ASM Miners.
2.1.3.3 The Policy and legal framework must clearly distinguish between illegal mining from ASM.
2.1.3.4 The Government must strengthen laws re criminalisation of illegal mining to deter illegal mining activities and a trained detective unit is proposed.

2.1.4 The FSE recommends that the drafters of the Bill also give consideration the directives of the South African Human Rights Commission (SAHRC) pursuant to its investigative hearing in 2013 on the issues and challenges in relation to

[8] Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd (20069/14).
[9] Bengwenyama Minerals v Genorah Resources (CCT 39/10 [2010] ZACC 26 (30 November 2010).

unregulated artisanal underground and surface mining activities in South Africa[10]. The SAHRC recommended that:

2.1.4.1 Further research be conducted in order to:

a. Consider ASM links to the wider aspects of the informal and formal economy;
b. Build the profiles of zama zamas, illegal gold trading syndicates, and corrupt SAPS and security officials;
c. Addressing the gaps and contradictions in legislation identified above particularly in relation to worker safeguards and the environment as well as extra-legal government regulation;
d. Look at opportunities that ASM can offer for marginalised people to live off a hard day's work where other forms of employment do not exist and unpack the issues around formal versus informal ASM;
e. Address the potential contribution of ASM to production, rehabilitation, personal income and state revenues;
f. To unearth the hazards and risks - including in relation to health and also considering psycho-social factors - connected to ASM activities while recognising that different minerals involve different processes and will have different opportunities and risk profiles;
g. Ultimately propose a more inclusive approach, in consultation with good practices identified elsewhere on the continent and globally, to address the issues and challenges related to unregulated ASM in South Africa.; and
h. Address derelict mines and their rehabilitation closure plans, possibly including undercapitalised, inefficient, and unviable operations.
i. In addition, further studies need to be conducted around reports of children and women who have been taken underground for prolonged periods. Such reports raise additional human rights concerns for the Commission, given the issues pertaining to trafficking and children's rights.
j. Social conditions such as poverty and unemployment also be addressed by way of monitoring the implementation of the Social and Labour Plans (SLPs) and other development plans in mining areas, ensuring that they are closely linked to local development plans, and monitor their implementation. There must be processes in place for monitoring the adherence to the undertakings and obligations that exist in plans and there must be consequences for non-fulfilment of these.
k. The need for health studies and campaigns initiated in areas where zama zama activity is taking place. This could include the dissemination of information on the impact of mercury usage on human health and the environment; the health and social impacts of infiltrating shafts and holings not only in abandoned mine shafts but also alongside operational mines; and the need for personal protective equipment (PPE) usage in unregulated ASM activities.

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[10] SAHRC Unregulated Artisanal Undergroun

l. The DMRE to take a firm stance in addressing the extent to which illegality pervades the entire mining industry, causing negative environmental and health impacts, and not just ASM.
m. Further studies be undertaken to trace the value chain that involves illegally mined precious metals and that tests be done sporadically to establish whether illegally mined gold is going into the legal market by testing for residual mercury, and using gold fingerprinting technology.
n. Need for clarity regarding temporary cessation, partial closure, 'warehousing': care and maintenance obligations.
o. More rigorous and consistent monitoring of environmental health issues such as air quality and water quality is undertaken and the release and dissemination of the information.

2.2 SECTION 10: STAKEHOLDER CONSULTATION

2.2.1 Reference is made in the DMRE's presentation to the Baleni & Others v The Minister (Xolobeni) judgement[11]. In this matter, the Court held that the full and informed consent of customary communities, whose rights in land are protected under the Interim Protection of Informal Land Rights Act, 1996, is required for a mining right to be granted in terms of the Mineral and Petroleum Resources Development Act (MPRDA), 2002.

2.2.2 In accordance with the above-mentioned judgement, the Bill ought to include mechanisms that safeguard the individual and collective rights of indigenous and tribal peoples, including their land and resource rights and their right to self-determination. The minimum conditions that are required to secure consent include that it is 'free' from all forms of coercion, undue influence or pressure, provided 'prior' to a decision or action being taken that affects individual and collective human rights, and offered on the basis that affected peoples are 'informed' of their rights and the impacts of decisions or actions on those rights. Free Prior and Informed Consent (FPIC) is considered to be an **ongoing** process of negotiation, subject to an initial consent. To obtain FPIC, 'consent' must be secured through an agreed process of good faith consultation and cooperation with indigenous and tribal peoples through their own representative institutions. The process should be grounded in a recognition that the indigenous or tribal peoples are customary landowners. FPIC is not only a question of process, but also of outcome, and is obtained when terms are fully respectful of land, resource and other implicated rights.

2.2.3 While full and informed consent of customary communities is required, the consent of the surface owners and occupiers that do not regulate their lives, and in particular their tenure rights, in terms of customary law, is not required in terms of the MPRDA's current requirements of obtaining a prospecting or mining right. Since

[11] 2.2.1 Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018)

the entitlements which flow from a prospecting and mining right are so far-reaching, the law makes provision for an extensive variety of balancing mechanisms which are aimed at reducing and managing mining's impact on the environment, socio-economic conditions and cultural heritage. Meaningful consultation is one of the most important of these balancing mechanisms.

2.2.4 Meaningful consultation entails that sufficient information must be made available and sufficient time must be provided in order for the engagement to be meaningful.

2.2.5 Consultation must include awareness raising and disclosure, and the facilitation of communities' informed participation.

2.2.6 Meaningful consultation must be an **ongoing** process of mutual dialogue and decision-making whereby Applicants and mining companies have an obligation not only to consult and listen to stakeholder perspectives, **but to integrate those perspectives into their business decisions**.

2.2.7 Meaningful consultation must involve measures to overcome structural and practical barriers to the participation of diverse, marginalised and vulnerable groups of people. Strategies for addressing barriers must be appropriate to the context and the stakeholders involved, and may include, for example, logistics and other support to enable participation. Preconditions to meaningful engagement include: access to material information that can be reasonably understood; a structure that enables transparent communication; and accountability for engagement processes and outcomes.

2.2.8 Since they are the ultimate recipients of potential, ongoing and historical pollution and the potential future land users, **communities must be involved in decisions regarding the establishment of objectives for such future land use, as well as in discussing the alternatives for engineering interventions**, where decisions regarding such options will affect the future land use since they will have to live with the legacy.

2.2.9 In the light of the aforementioned, we recommend that the drafters of the Bill the above-mentioned requirements for meaningful consultation in its provisions.

2.3 TRANSFERABILITY & ENCUMBRANCE (SEC 11)

2.3.1 According to the DMRE's presentation, the Bill will require mining companies to request the Minister's consent prior to a change in the controlling interests in listed companies.

2.3.2 Listed mining companies ought to require the consent of the Minister not only for the change in the controlling interests but also for exiting a liability escalating

venture by changing the controlling interest of the corporate entity holding the right. There is no state oversight of this process at present.

2.3.3 Transferral of the interests and of environmental liabilities of unlisted companies and of listed companies ought to include public participation and not only the consent of the Minister.

2.4 PROPOSED AMENDMENTS: BENEFICIATION (SEC 26)

2.4.1 According to the DMRE's presentation, the Minister will be empowered to designate certain minerals for national developmental purposes in order to support national development imperatives such as industrialisation, energy security, food security, infrastructure development and fiscal stability and bring optimal benefit for the country; and ensure transformation and cost competitiveness of the mining industry and related sectors.

2.4.2 While we are agreed that consideration ought to be given to the potential strategic importance of the minerals to the country, of equal importance is the consideration of the impacts of mining applications on strategic water source areas, biodiversity features and the associated ecosystem services. The Minister's decision should fully take into account the environmental sensitivity of the area, the overall environmental and socio-economic costs and benefits of mining and an assessment of the optimum, sustainable land use for a particular area and not only the potential strategic importance of the minerals to the country.

2.5 PROPOSED AMENDMENTS: (Sec 43)

2.5.1 According to the DMRE's presentation, Sec 43 proposes that a holder's liability for latent and residual impacts and retention of financial provision to address these post closure liabilities be included in the amendments.

2.5.2 This proposed amendment is aligned with the requirements of the National Environmental Management Act (107/1998): Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations, which require that "*an applicant or holder of right or permit must make financial provision for remediation and management of latent or residual environmental impacts which may become known in future, including the pumping and treatment of polluted or extraneous water*".

2.5.3 The loopholes in the current legislation that need to be addressed and clarified are not only the liabilities of the holder of a mining or prospecting right but also the duties and liabilities of business rescue practitioners and liquidators in the event of business rescue or liquidation in addressing latent and residual impacts and the topping up of shortfalls in rehabilitation funds.

2.6 PROPOSED AMENDMENTS:(56)

2.6.1 According to the DMRE's presentation, Sec 56 makes proposals for liquidation, deregistration and sequestration of a right holder linked to Section 11 of the MPRDA. This section also empowers the Minister to give consent on transfer of rights upon liquidation or final deregistration of a mining company.

2.6.2 Transferral of a mining right ought to be accompanied by a due diligence process to determine whether the transferee has the resources, skills and intention to manage its environmental impacts responsibility.

2.6.3 The transferral of mining rights upon liquidation ought to involve a public participation process.

2.6.4 The proposed amendments ought also to address one of the most common practices for mining companies avoiding their closure commitments, namely "pass the parcel", that is, the selling of mines close to closure on to less resourced companies who will relieve them of the responsibility and liability of dealing with the problems of closure. This "pass the parcel" approach to the custodianship of the closure plan allow for mines to end up in the hands of the weakest companies who neither have the resources, will or intention to manage closure responsibly.

2.7 PROPOSED AMENDMENTS: (Sec 96)

2.7.1 According to the presentation by the DMRE mining related issues appeals will be directed to DMRE Minister, and all other appeals related to environmental issues will be directed to the DEFF Minister in terms of NEMA.

2.7.2 We respectfully request clarity regarding this proposed amendment:

2.7.2.1 If an environmental authorisation, in terms of the NEMA, is issued by the Minister of the DMRE for a mining application, will the Minister of Forestry, Fisheries and the Environment remain the Appeal Authority?

2.7.2.2 If a mining right is granted by the Regional Manager of the DMRE in terms of the MPRDA, will the Minister of the DMRE be the Appeal Authority?

2.7.2.3 If any person objects to the granting of a prospecting or mining right mining permit or mining right will the Regional Manager still be required to refer the objection to the Regional Mining Development and Environmental Committee (RMDEC).

3. ADDITIONAL ISSUES TO BE ADDRESSED IN THE PROPOSED AMENDMENTS

3.1 The FSE recommends that the drafters of the Bill give consideration to the findings and recommendations of the SAHRC pursuant to its 2016 hearings on the Underlying Socio-Economic Challenges of Mining Affected Communities in South Africa[12] and include these directives in the Bill.

3.2 The SAHRC recommended that:

3.2.2 The DMR must, when considering applications for mining rights, ensure that alternative land uses for sustainable local development are identified and considered. It is important to emphasise that considerations may include not to approve applications. Such land use approvals must be secured from the applicable municipalities prior to the DMR granting the licenses or permits.

3.2.3 In relation to existing mining licence applications in sensitive and protected areas, the DMR (and DEA) were directed to immediately issue public notices of such applications and convene extensive public participation, including with local communities, prior to the granting of such licences. The DMR is directed to report to the SAHRC on the number and particulars of applications received, the manner in which consultations are conducted, a list and details of objections lodged, the number of applications approved, as well as the conditions under which licences have been granted.

3.2.4 The DMR was directed to amend the content guidelines for EIAs and EMPs to include comprehensive information on the quality of land and sustainable options for potential post-closure land use.

3.2.5 The DMR was directed to report on the progress and anticipated timelines for the finalisation of the National Closure Strategy. This strategy should consider the issues that are relevant to mine rehabilitation and closure more broadly and develop strategic framework within which individual mine closure plans will fit and development goals are emphasised. The DMR must ensure that stakeholders such as communities and mineworkers participate in the development of the National Closure Strategy.

3.2.6 The DMR was directed to consider legislative reform to address the gaps in partial and full mine closure. Specifically, the DMR must: a. Provide clarity on the process for closure, including all processes followed by the Department prior to issuing of closure certificates, such as the need to ensure community participation, and monies set aside; Provide a detailed list of mines under "care and maintenance". The list should include monitoring measures undertaken by the Department; and c. Consider the establishment of a trust account where mining

[12] SAHRC Mining communities report FI

companies deposit funds, which the State can access to remedy water and other impacts caused by un-rehabilitated, abandoned or derelict mines.

3.2.7 The DMR must, together with relevant stakeholders, develop a Regional Master Plan aimed at addressing environmental rehabilitation and the remediation of derelict and ownerless mines. The Plan should specifically refer to legacy issues such as acid mine drainage and illegal miners, as well as sites with potential nuclear contamination and must include timelines and funding mechanisms.

3.2.8 The DMR was directed to reject mining licence applications where such applications fail to adequately address potential housing and accommodation issues that may arise from mining projects. Before licences are granted, the DMR must require that proposed housing and accommodation plans submitted as part of the mining licence application process align with local government plans and strategies under Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

SUBMITTED BY:

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25 September 2024.