



Date: 17 June 2021

To: **Ms Sibongile Malie**
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001

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Dear Sirs/Madams

SUBMISSIONS AS A RESPONSE TO THE DRAFT ARTISANAL AND SMALL SCALE MINING POLICY 2021 DATED 5 MAY 2021 (“DRAFT POLICY”)

We refer to the prior consultations held with the Department of Mineral Resources and Energy (“**DMRE**”) legislative drafting division (“**LDD**”) held with National Association of Artisanal Miners (“**NAAM**”) and numerous others civil society organisation on 29 and 30 September 2020 and the Draft Policy. During these prior consultations, the LDD shared the initial proposals, project plan, timelines and initial views and submissions on the subject matter of the draft artisanal and small-scale mining policy.

The International Labour Research and Information Group (“**ILRIG**”) and the Legal Resources Centre (“**LRC**”) have jointly prepared a response to the Draft Policy.

INTRODUCTION AND BACKGROUND

1. This is a submission prepared by BMF, ILRIG and LRC. Below is a short introduction to each organisation and the previous work that has been done in regard to artisanal mining.

2. The BMF, ILRIG and LRC have set up a coalition that began at the end of 2019 which discusses issues and implements solutions around artisanal mining and the formalisation thereof.
3. Collectively BMF, ILRIG and LRC have since 5 June 2021 brought attention to the Draft Policy, shared information with mining communities and artisanal miners as well as held a workshop to explain the Draft Policy. We have also assisted NAAM and other organisations with direction on how to make submissions to the Draft Policy.

4. BMF

- 4.1. BMF has done the following in terms of its work regarding artisanal mining:
 - 4.1.1. Held a high-level meeting with Deputy Minister Oliphant around legislating artisanal mining.
 - 4.1.2. Participated in consultation processes of DMRE from 2016.
 - 4.1.3. Placed the topic in the media spotlight locally and internationally for ten years.
 - 4.1.4. Built relationships with the workers in the sector while it was unpopular and regarded criminal. They brought human and family perspectives of the artisanal mining sector and argued for sector regulation rather than criminalisation.
 - 4.1.5. During Covid-19, together with ILRIG and LRC, distributed sanitisers and masks, mapped areas of operation from Nigel in the east to Margate village in Matlosana.
 - 4.1.6. Participated in the current consultation process of legislation framework for artisanal miners processes.
 - 4.1.7. Commissioned writing of this paper for submission to government portfolio committee, the same document will also be used as a factsheet that will be shared for advocacy campaign.

5. ILRIG

- 5.1. The ILRIG was founded in 1983 as a labour service organisation in the interests of advancing unions and worker power. ILRIG's constituency has changed in recent years, as our orientation is now jointly towards social movements, community organisations and worker formations. The core of our work and activism is dedicated to research, education, training, and production of popular materials, with a view to facilitating greater unity of the broad working class. All our work stresses democratic participation and interaction, and is geared towards supporting strong, principled working class organisations able to develop alternatives to the neoliberal agenda. ILRIG has only recently begun to focus on artisanal miners, their conditions and struggle. Together with the BMF and the LRC, we have over the past year and more, provided degrees of material, educational and practical support to various artisanal mining groups mainly in Gauteng, have held consultative workshops, conducted a mapping survey of these groups and begun to establish a relationship with NAAM.

6. LRC

- 6.1. The LRC is one of South Africa's oldest public interest law firms founded in 1979, focusing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to the socio-economic transformation in South Africa and beyond. In this regard, the LRC's clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC has and is still committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental constitutional rights.
- 6.2. The LRC has offices situated in various cities in South Africa namely Johannesburg, Cape Town, Durban and Makhanda.
- 6.3. The LRC's previous work in artisanal mining is:

- 6.3.1. In 2016 the LRC published an Artisanal Mining Report which gave an overview of artisanal mining in South Africa and its legislative framework.¹
- 6.3.2. In March 2019 the LRC held a roundtable which was attended by artisanal miners, civil society, DMR officials, South African Police Services and the mineral council. This was the first-round table of this nature.
- 6.3.3. The purpose of the round table was to provide a platform as an effort to promote inclusive development in the mining sector by advocating for the exploration of bringing the informal means of subsistence practised by artisanal miners into the formal economy as an alternative to the formal large scale-mining which currently characterises South Africa's mineral sector.
- 6.3.4. During November 2019, the LRC attended two meetings with the DMR LDD. These meetings were also attended by NAAM and Mining Affected Communities United Action ("**MACUA**"). The LLD was researching to develop legislation for formalisation of artisanal mining.
- 6.3.5. The purpose of the meetings was to provide engagement between the DMRE and NAAM, to allow for their voices to be heard.
- 6.3.6. We currently are in contact with NAAM and artisanal miners and provide *ad hoc* assistance and advice. Through our contact we have found that the right to freedom of person in Section 12 has not been protected as has been found in our work with police brutality. Therefore, we have been conducting the following work:
- 6.3.6.1. LRC has produced a guideline document to aid legal practitioners, medical and psychosocial personnel in interviewing torture and other cruel, inhuman or degrading treatment or punishment survivors (empathetic interviewing) and documenting torture.

¹ Legal Resources Centre *Artisanal Mining Report*
http://lrc.org.za/wp-content/uploads/pdf/2016_Artisanal%20Mining%20Report_LRC%20Publication.pdf
(Accessed on 8 March 2021) 25.

- 6.3.6.2. Assisted in producing a short video on the prevention of torture. The video also advocates for the prohibition on the manufacture, trade and use of certain equipment used to advance torture, including body-worn electronic devices, spiked batons and thumb cuffs among others which are often used on artisanal miners and other persons in police custody.
- 6.3.6.3. We have assisted artisanal miners who have been charged with illegal mining and held several meetings with senior police officials urging them to stop the brutalisation of artisanal miners.
- 6.3.6.4. We hold training workshops to train police officials, legal personnel and psychosocial professionals on the various legal instruments including the Prevention and Combating of Torture of Persons Act, the Convention against Torture and the ICCPR.
- 6.3.6.5. We assist in referring individuals to a psychosocial support programme which provides victims of torture with trauma counselling.
- 6.3.6.6. Building a website through which people can report torture directly to the LRC in order for us to lodge complaints on their behalf.

STRUCTURE OF THE SUBMISSION

7. The submission is structured in the following way, namely:

- 7.1. Background to the mining industry and artisanal mining in South Africa.
- 7.2. Comments to Draft Policy
 - 7.2.1. The non-negotiable aspects that must be reflected in the Draft policy
 - 7.2.2. Page 11 (a)
 - 7.2.3. Page 11 (b)
 - 7.2.4. Page 14 (e) Extent of a permit area in hectares
 - 7.2.5. Page 15 (f) Duration of an ASM operation in years

- 7.2.6. Page 15 (g) Power to demarcate areas as ASM areas
- 7.2.7. Page 15 (h) Reservation of permits to South Africans
- 7.2.8. Page 16 (j) Restriction of ASM operations to the surface
- 7.2.9. Page 16 (l) Sale and trading in minerals
- 7.2.10. Page 16 (m) Co-existence with large operations
- 7.2.11. Page 19 (c) Formation of District Mining Committees
- 7.2.12. Page 19 (d) Formation of Co-operatives
- 7.2.13. Page 19 (e) Financial Assistance
- 7.2.14. General comments on the Draft Policy
- 7.3. We deal with each of these in turn below.

8. Background to the mining industry and artisanal mining in South Africa

- 8.1. South Africa is a mineral based economy² and has the fifth largest mining industry in the world.³ The major mining sectors in South Africa are gold, coal, platinum, and diamonds.
- 8.2. The mineral wealth in South Africa can be indicated as:
 - 8.2.1. Gold in the Witwatersrand Basin.
 - 8.2.2. Platinum in the Bushveld Complex.
 - 8.2.3. Manganese and iron ore in the Transvaal Supergroup.
 - 8.2.4. Bituminous coal and anthracite resources in the Karoo Basin.

² Cawood, F.T and Minnitt, R.C.A "A Historical Perspective on The Economics of the Ownership of Mineral Rights Ownership" The Journal of the South African Institute of Mining and Metallurgy 369 (November/December 1998) 369.

³ Legal Resources Centre (note 1 above) 13.

- 8.2.5. Copper, phosphate, titanium, vermiculite, feldspar, and zirconium ores in the Phalaborwa Igneous Complex.
- 8.2.6. Diamonds in the kimberlite pipes.
- 8.2.7. Heavy mineral sands; and
- 8.2.8. Lead-zinc ores associated with copper and silver are found near Aggeneys in the Northern Cape.⁴
- 8.3. The mining methods used in South Africa are open-pit mining, underground mining, and underwater mining (both in freshwater and ocean salt water).
- 8.4. Present framework:
 - 8.4.1. It is important to highlight the current mining structure because it highlights the contradictions in rights afforded to all in terms of the Constitution of South Africa, the MPRDA's purpose and the effects of the implementation of mining sector legislation.
 - 8.4.2. Constitution:
 - 8.4.2.1. The Constitution was enacted in 1996, in response to the apartheid legal system that was institutionalised racism. The Constitution is the highest and supreme law of South Africa, and all other policies and legislation must be in line with the Constitution.
 - 8.4.2.2. In Section 7⁵ of the Constitution, the Bill of Rights is stated to uphold the "democratic values of human dignity, equality and freedom". In section 8⁶ of the Constitution, the Bill of Rights binds all spheres of government, all Court systems, juristic persons, and natural persons.

⁴ South African Government "Mineral Resources and Energy" <https://www.gov.za/about-sa/minerals> (Accessed on 24 January 2019).

⁵ Section 7: "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. (2) The state must respect, protect, and fulfil the rights in the Bill of Rights".

⁶ Section 8 states that: "(1) the Bill of Rights applies to all law, and binds the legislature, the executive and the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to

- 8.4.2.3. The rights enshrined in the Bill of Rights which have relevance to the mining industry are listed below.
- 8.4.2.4. The right to equality in Section 9 states that: *“(1) everyone is equal before the law and has the right to equal protection and been fit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination”*.
- 8.4.2.5. The right to dignity in Section 10 states that *“Everyone has inherent dignity and the right to have their dignity respected and promoted”*.
- 8.4.2.6. The right to freedom of person in Section 12 states that *“Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way”*.
- 8.4.2.7. The right to choose a trade in Section 22 states that: *“Every citizen has the right to choose their trade, occupation or profession freely.*

the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.

The practice of a trade, occupation or profession may be regulated by law”.

8.4.2.8. The right to a healthy environment in Section 24 states that “*Everyone has the right – (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*”.

8.4.2.9. The right to property in Section 25 states that:” *(1) no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (4) For purposes of this section – (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural sources; and (b) property is not limited to land*”.

8.4.3. Minerals and Petroleum Resources Development Act 28 of 2002 (“MPRDA”)

8.4.3.1. The South African mining sector is regulated by the MPRDA with it stating that the mineral resources in South Africa are common heritage with the state being the custodian for the benefit of all South Africans.⁷ With this custodian role the state acts through the minister of mineral resources who grant, issue, refuse, control, administer and manage any right or permit.⁸

8.4.3.2. In terms of the MPRDA it is unlawful to remove, mine, conduct technical co-operation operations, reconnaissance operations, exploring, producing any mineral or petroleum or any work indirectly

⁷ Legal Resources Centre (note 1 above) 27.

⁸ Legal Resources Centre (note 1 above) 27.

related without having the relevant mining right from the state.⁹ Any person wanting to do any activity/operation related to mining operations will need the relevant mining right or the activities will be unlawful with hefty fines and jail time.¹⁰

8.4.3.3. In the MPRDA a prospecting right can be applied for.¹¹ A prospecting right is granted for a designated mineral area and a period of five years.¹² A prospective right is used to determine whether there are minerals available to be mined. Should the prospecting indicate that mining is lucrative, a mining right or mining permit can be applied for with the DMRE to commence any mining activity.

8.4.3.4. Mining rights are usually used by large-scale mining due to the long period of time granted for the right and the high capital that is required. Mining permits are usually used for small-scale mining as the limited real right to mine is in a limited area and for two years while a mining right grants a limited real right over a larger area and for a period of thirty years.¹³

8.4.4. The National Environmental Management Act 107 of 1998 (“NEMA”)

8.4.4.1. All environmental issues, including effects of mining on the environment are dealt with in NEMA.¹⁴ International principles of sustainable development and the polluter pays are recognised by NEMA.¹⁵ The environmental authorisation as required for a mining right and a mining permit in terms of section 38A¹⁶ of MPRDA are

⁹ Legal Resources Centre (note 1 above) 27.

¹⁰ Legal Resources Centre (note 1 above) 27.

¹¹ Legal Resources Centre (note 1 above) 27.

¹² Mineral and Petroleum Resources Development Act 28 of 2002, Section 16.

¹³ Mineral and Petroleum Resources Development Act 28 of 2002, Section 27.

¹⁴ Legal Resources Centre (note 1 above) 29.

¹⁵ Legal Resources Centre (note 1 above) 83.

¹⁶ Mineral and Petroleum Resources Development Act 28 of 2002 section 38A states that “(1) *The Minister is the responsible authority for implementing environmental provisions in terms of the National Environmental Management Act 1998 (Act No. 107 of 1998) as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration, production or production area (2) An environmental authorisation issued by the Minister shall be a condition prior to the issuing of a permit or granting of a right in terms of this Act*”.

regulated in terms of NEMA. Without an environmental authorisation neither a mining permit nor right can be granted.¹⁷ Should a party conduct mining activity without the authorisation, the activity is an offence and unlawful.¹⁸

8.4.4.2. Other acts work together with NEMA to regulate and provide for the management of mineral resources when it impacts the environment which are the National Water Act¹⁹, the National Environmental Management Air Quality Act²⁰ and the National Environmental Management Waste Act²¹. Should any of these acts or NEMA be breached it can result in imprisonment and criminal fines and/or administration penalties.

8.4.4.3. The Minister of Mineral Resources is responsible for environmental regulation in terms of operations of mining.²²

8.4.5. Mine Health and Safety Act 29 of 1996 (“MHSA”)

8.4.5.1. The health and safety of employees and other persons affected by mining activities are protected by the MHSA with the obligation to ensure the health and safety of employees falling on the employer.²³ This obligation still exists even if the mine is not being worked but a closure certificate has not been issued.

8.4.5.2. The obligation to enforce the provisions of the MHSA falls on the DMRE who can do inspections, audits, and investigations. Should an injury or a fatality take place, the DMRE must hold a formal enquiry.²⁴

¹⁷ Legal Resources Centre (note 1 above) 30.

¹⁸ Legal Resources Centre (note 1 above) 30.

¹⁹ 36 of 1998.

²⁰ 39 of 2004.

²¹ 59 of 2008.

²² Legal Resources Centre (note 1 above) 31.

²³ Legal Resources Centre (note 1 above) 31.

²⁴ Legal Resources Centre (note 1 above) 32.

- 8.4.5.3. At present, mining operations can either be done legally by applying for a mining right, usually used by large-scale mining, or applying for a mining permit, usually used by small-scale mining.

8.5. Large Scale Mining in terms of the MPRDA:

- 8.5.1. For large –scale mining operations to commence a mineral right must be applied for in terms of MPRDA which sets out the procedure that must be followed. The application is made to the Regional Manager who is appointed by the Minister for Mineral Resources in the area. If requirements are met the application must be accepted.
- 8.5.2. On the more pertinent requirements is that the granting of the right should further the objects as mentioned in section 2(d) and (f) of the MPRDA which state that: “(d) *substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources*” and “(f) *promote employment and advance the social and economic welfare of all South Africans*”. The section is legislation created in pursuance of the right to equality and inherent dignity in the Constitution. It speaks to the right for everyone to choose their trade, occupation, or profession freely as in section 22 of the Constitution.
- 8.5.3. Should the application for a mining right be accepted, the Regional Manager then informs the applicant to conduct an environmental impact assessment and consult with interested and affected parties within 180 days of the notice. The Regional Manager will give notice to interested and affected parties to submit comments on the application for the mining right.
- 8.5.4. In regard to common law ownership, the Minister of Mineral Resources may grant a mining right against the will of the landowner.
- 8.5.5. The Minister of Mineral Resources has extended this practice to customary land rights which are currently protected by the Interim Protection of Informal Land Rights Act 31 of 1996 (“**IPILRA**”). The power of the Minister

of the DMRE and the rights granted in terms of the IPILRA have been tested in the Courts. The judiciary has confirmed that the lawful occupiers of land in terms of customary law have stronger rights to the land than the Minister of Mineral Resources has to grant a mineral right.

- 8.5.6. To counter the effects of apartheid and large-scale mining that resulted in racial inequality, laws were brought into place to create small scale mining, which was hoped would create opportunities for rural communities, creating jobs and creating skills development well countering the economic exclusion of indigenous South Africans.²⁵

8.6. Small-scale Mining

- 8.6.1. The MPRDA caters for small scale mining in that a mining permit can be applied for to the DMRE as it is more suited for smaller mining operation. To commence mining operations, a mining permit will be applied for. The costs and procedures of a mining right are too onerous for small-scale miners.
- 8.6.2. Small Scale miners must provide the DMRE with a financial guarantee for environmental rehabilitation.to commence mining.²⁶
- 8.6.3. Mining permits for small scale mining are only issued in regard to a specific mineral resource, should there be any fluctuation in price, the small-scale miner is harder hit and not able to depend on another mineral resource.²⁷
- 8.6.4. Should a breach of NEMA or the MHSA take place by a small-scale mining operation there are high costs and fines which can even result in operations being completely halted.²⁸

²⁵ Legal Resources Centre (note 1 above) 25.

²⁶ Legal Resources Centre (note 1 above) 33 and 34.

²⁷ Legal Resources Centre (note 1 above) 34.

²⁸ Legal Resources Centre (note 1 above) 35.

- 8.6.5. The above shows how unfeasible obtaining a mining permit is for poor and marginalised individuals who would be able to support themselves with mining activities.

8.7. Artisanal Mining

- 8.7.1. The phenomenon of artisanal mining is recognised by the DMRE who on their website states that *“many previously disadvantaged South Africans have begun to see small-scale mining as a way to a new life...it is essential that small-scale miners in South Africa become integrated into the great South African mining community and that the sector becomes streamlined it into the mainstream economy. As a result, the South African government has taken active measures to promote the development of this sector. The small-scale mining sector includes artisanal or subsistence mining operations (new entrants); sub-optimal formal mining operations; and entrepreneurs with upfront capital”*.²⁹
- 8.7.2. The term artisanal and small-scale mining is frequently used in South Africa. However, there is specific challenges that artisanal mining faces and this is considered separately.³⁰ The reason for this is small-scale mining has been legislated with it possible to apply for and be granted a mining permit in terms of the MPRDA while in the case of artisanal miners there is no right which can be applied for with the mining permit for small scale mining not being affordable for artisanal miners.³¹ This means that all activities done in terms of mining by artisanal miners in South Africa is not regulated and thus illegal.
- 8.7.3. Unregulated artisanal mining can briefly be described as informal/artisanal miners extracting minerals from old, disused, and abandoned mines normally under dangerous conditions.³²

²⁹ Mineral Policy and Promotion – Small Scale Mining [online: <http://www.dmr.gov.za/mineral-policy-promotion/small-scale-mining>] (Accessed on 15 January 2019).

³⁰ Legal Resources Centre (note 1 above) 5.

³¹ Legal Resources Centre (note 1 above) 27.

³² “Artisanal and Small-Scale Mining” – position paper *Minerals Council of South Africa* 2.

- 8.7.4. Artisanal miners use rudimentary mining methods and tools to access mineral ore. Artisanal mining can be done at the surface, shallow depths, or relatively deep levels.³³
- 8.7.5. According to the DMRE the most mined resources in artisanal mining are gold, diamonds, and sand.³⁴ Artisanal mining is recorded to have taken place in seven provinces.³⁵
- 8.7.6. After 1994, there was hope that poor and marginalised indigenous people would be able to benefit from the economy to alleviate poverty after apartheid. Large-scale mining had dominated the mining industry. Artisanal mining was seen as a way to alleviate the poverty and for individuals to become financial independent.
- 8.7.7. However, this was not the case as the mining laws enacted after 1994 did not provide regulations for artisanal mining.³⁶
- 8.7.8. The majority of artisanal miners in South Africa are illegally mining due to the inability to access a mining permit or mining right due to financial constraints.
- 8.7.9. This means that the status quo from Apartheid still exists. Large mining companies remain dominant with poor and marginalised individuals not able to enter the market due to the unaffordability of a mining permit. The only other alternative is to engage in illegal artisanal mining.
- 8.7.10. At present, poor, and marginalised individuals wanting to enter the market have opted to engage in illegal artisanal mining for the reasons listed below.

8.8. Reasons for the increase in artisanal mining in South Africa

³³ Minerals Council of South Africa (note 58 above) 2.

³⁴ Legal Resources Centre (note 1 above) 83.

³⁵ South African Human Rights Commission "The South African Human Rights Commission Newsletter" 1 – 30 September 2015 Volume 37 9.

³⁶ Mkhize, M C "New Interventions and Sustainable Solutions: Reappraising Illegal Artisanal Mining in South Africa" *SA Crime Quarterly Institute For Security Studies and University of Cape Town* (2017) 67.

- 8.8.1. In 2008 the world went into an economic crisis which pushed up the price of gold. The economic crisis led to a higher unemployment rate in South Africa. This resulted in an increase in artisanal mining.³⁷
- 8.8.2. There is a direct correlation between retrenchments of miners and increases in informal/artisanal mining taking place at the mines.³⁸ Reasons for retrenchments include mechanisation of mines that gives the advantage of safer working conditions but has led to workers being replaced by machinery.³⁹ Other factors contributing to loss of employment are mine closures the search for even higher profits.
- 8.8.3. Illegal artisanal mining has been able to function South Africa due to lack of enforcement of legislation in terms of mine closures. Opportunity to conduct artisanal mining is given when companies do not follow regulations and proper procedures.⁴⁰ In some instances mines have not been closed properly. In terms of South African law, the DMRE must issue a Certificate of Closure when the mine has been shut down to a position where it is safe and ecologically sound condition.⁴¹ However this has not taken place and has been an opportunity for artisanal miners to mine in the abandoned tunnels.

8.9. Challenges of artisanal miners

- 8.9.1. From Apartheid to the present day, poor and marginalised indigenous people have continued to be oppressed and used as cheap labour to benefit an elite group of individuals. Therefore, as artisanal miners they do not have the funds to apply for a mining permit or right.

³⁷ Legal Resources Centre (note 1 above) 17.

³⁸South African Human Rights Commission “Report of the SAHRC Investigative Hearing : Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa” (2015) [https://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf\(theSAHRCReport\)](https://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf(theSAHRCReport)) at 11.

³⁹ Legal Resources Centre (note 1 above) 47.

⁴⁰ Love, J (note 72 above) 9.

⁴¹ Legal Resources Centre (note 1 above) 17.

8.9.2. This has led to artisanal miners, mining illegally with the repercussions that they are considered criminals in an attempt to make a livelihood. This criminal persona further increases negative public perception.

8.10. Illegality of artisanal miners

8.10.1. In terms of section 5A of the MPRDA, it is illegal to “*prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without (a) an environmental authorisation, (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and (c) giving the landowner or lawful occupier of the land in question at least 21 days written notice*”.

8.10.2. This means that unless you have complied with the requirements, you are committing an illegal act. Unfortunately, this legislative framework has led to any party who does not comply, to be considered a criminal and includes artisanal miners.

8.10.3. Further when artisanal miners are charged in the criminal courts, further charges of lacking the necessary authority is added under Section 250 of the Criminal Procedure Act 51 of 1977, where authority is assumed to be lacking should proof not be given.

8.10.4. Artisanal miners are also found guilty of the crimes of trespassing in unused or abandoned mines as the property belongs to a third party. This further entrenches the idea of artisanal miners being criminals.

8.10.5. The state has not provided any regulations, as artisanal mining is done by the poor and not the wealthy.⁴² It is strange that the state makes no attempt to regulate artisanal mining even in the face of its intensification

⁴² Legal Resources Centre (note 1 above) 5.

and the opportunities it may offer to economic, social, and cultural rights in South Africa.⁴³

8.10.6. The criminalisation of artisanal miners has been entrenched by the Courts as in the case of De Beers Consolidated Mines (Pty) Ltd v Seekoei and Others⁴⁴.

8.10.6.1. In the De Beers case, the Applicant was seeking a final interdict restraining the illegal artisanal miners from entering their property, processing/removing any material and mining or prospecting for diamonds.

8.10.6.2. The artisanal miners agreed they had been mining on the abandoned floors of De Beers' mine, but that consent had been given. The artisanal miners argued that they were in the process of regulating their mining operations with the Minister of Mineral Resources. They advised that granting an interdict against them would result in their eviction as well as take away their means to fend for themselves or their families. By taking away this right to make a living it would infringe their right to dignity as in the Constitution.

8.10.6.3. The Court did not accept the arguments of the artisanal miners and ordered that the interdict be upheld. The Court's decision was based on the point that the artisanal miners were engaging in illegal activity, which the court rules, could not be condoned.

8.10.7. Many of these legal requirements in the mining industry came from the apartheid period and were used to exclude the majority of the population from benefitting from the mineral wealth in South Africa.

COMMENTS TO THE DRAFT POLICY

9. The non-negotiable aspects that must be reflected in the Draft policy

⁴³ South African Human Rights Commission (note 72 above) 11.

⁴⁴ (1488/17) [2018] ZANHC 21 (20 April 2018).

- 9.1. The state should acknowledge the fundamental rights of artisanal miners in the Constitution including:
- 9.2. The right to equality in Section 9.
- 9.3. The right to dignity in Section 10;
- 9.4. The right to life in Section 11;
- 9.5. The right to choose your own trade, occupation or profession in Section 22; and
- 9.6. The right to a healthy environment in Section 24.
- 9.7. Further recognition of the situation of abandoned mines in South Africa need to be recognised as artisanal mining increases are linked to the increases in abandoned mines.
- 9.8. There are 5 906 officially listed abandoned mines in South Africa as of the end of May 2008. The majority of the 5 906 abandoned mine closed down prior to 2002 when the MPRDA came into effect. It furthermore states that only 5 of the 5 906 abandoned mines in South Africa have been rehabilitated thus far at a cost of R42 Million Rand.⁴⁵
- 9.9. This has made rehabilitation of mines an important issue to address and for consideration of this aspect to be covered in any artisanal mining policy.
- 9.10. Further funds that have been provided for rehabilitation for mines in terms of NEMA and MPRDA can be provided to artisanal miners to assist. Therefore, artisanal miners can be the solution to the government's problem of needing to rehabilitate and exploit taxpayers.
- 9.11. They are a willing-to-work force and with formalisation would be a benefit to this issue.

⁴⁵ "Abandoned Mines in South Africa – Auditor General Report" *Environment*
<https://www.environment.co.za/acid-mine-drainage-amd/auditor-general-report-on-rehabilitation-of-abandoned-mines>.

- 9.12. The issue of abandoned mines with no closure certificates will need to be addressed. If no closure certificate is issued in terms of the MPRDA, no other person or entity is able to provide any license/rights to mine on the property. Therefore, artisanal miners would not be able to access these areas.

10. Page 11 (a)

- 10.1. Artisanal mining has several different definitions, but is generally understood to be small-scale, informal, or unorganised mining that does not make use of sophisticated machinery (e.g., manual labour and the use of hand tools).⁴⁶ More specifically, many artisanal miners are informal miners who mine in abandoned mines or the tailings left behind and do this work to be able to support themselves and their dependents as their only means of income. Artisanal miners work independently and not with companies.

11. Page 11 (b)

- 11.1. Small scale mining is used in the context of organised miners that may not necessarily use sophisticated machinery and which nets more revenue. Small scale mining is permitted in terms of law with a mining permit which can be applied for in terms of section 27 of MPRDA.⁴⁷ Small scale mining normally involves companies and the making of profit. This is not done for subsistence.

12. Page 14 (e) Extent of a permit area in hectares

- 12.1. Artisanal miners normally go to abandoned mines to mine. Therefore, the area should be the extent of the abandoned mines mining right that must then be transferred to artisanal miners. The state should provide the expertise, equipment, health and safety and environmental authorisation. The state is firstly liable for the rehabilitation of these mines and such it is its responsibility to ensure it is dealt with. The state has the rights to assist artisanal miners in terms of Section 12 of the MPRDA which is assistance to historically disadvantaged persons in that:

⁴⁶ LRC (note 1 above).

⁴⁷ LRC (note 1 above).

“(1) The Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations...(3) Before facilitating the assistance the Minister must take into account all relevant factors, including-(a) the need to promote equitable access to the nation's mineral resources; (b) the financial position of the applicant; (c) the need to transform the ownership structure of the minerals and mining industry; and the state to assist the applicant concerned in the development of his or her prospecting or mining project.”

- 12.2. Further should there be private land owners Section 55 of the MPRDA should be used by the state to expropriate land “Section 55 Minister's power to expropriate property for purpose of prospecting or mining (1) If it is necessary for the achievement of the objects referred to in section 2 (d), (e), (f), (g) and (h) the Minister may, in accordance with section 25 (2) and (3) of the Constitution, expropriate any land or any right therein and pay compensation in respect thereof.”
- 12.3. In terms of hectares, it would also depend on the type of mining and where resources are available therefore an inspection would need to determine this for the most accurate determination.
- 12.4. It is suggested that there be only artisanal mining zones which can be utilised by artisanal miners' groups with the necessary permits instead of specific hectares or areas been assigned in permits. Furthermore, it must be a permit for mining in general due to the fluctuation, demand and value of minerals at certain times.

13. Page 15 (f) Duration of an ASM operation in years

- 13.1. It is highly problematic that the proposal states that a mining license will only be granted to artisanal miners for three years with renewal only be allowed once. Artisanal miners need to be able to mine for the duration of their careers to be able to make artisanal mining sustainable. Therefore, the time frame of three years are not problematic but that it may only be renewed once.

14. Page 15 (g) Power to demarcate areas as ASM areas

14.1. Equitable access to land needs to be provided to artisanal miners as provided for in Section 25 of the Constitution. Equitable access means to give everyone the same opportunities in respect of access. This is comparative to small-scale fishing and farmers where everyone should have equitable access to land and natural resources. These needs to be used to enact the legislation being created for artisanal miners. Large scale mining companies and artisanal miners should be given the same opportunities regardless of resources and power.

15. Page 15 (h) Reservation of permits to South Africans

- 15.1. This proposition would not be supported as many large-scale miners have outsource labour for the mines from other African countries.
- 15.2. This can be illustrated by the silicosis case where the Legal Resources Centre with Richard Spoor Attorneys and Abraham Kiewitz brought a class action against 30 mines in 2012.
- 15.3. The full bench of the South Gauteng High Court on 26th July 2019 approved the settlement agreement reached in the silicosis class action and that on 10 December 2019 the settlement agreement became unconditional.
- 15.4. Through enquiries it has been seen that miners who worked in South African mines came from other African countries including Lesotho and Swaziland
- 15.5. Further to make a distinction between South Africans and other individuals could result in fuelling xenophobia. Unfortunately, South Africa has had a wave of xenophobic incidents to the extent where the South African government in March 2019 adopted a government action plan to combat xenophobia.⁴⁸
- 15.6. At present, from consultations with NAAM and the Batho Pele Co-operatives issued have been raised in regards to conflict between individuals who have been granting mining permits to artisanal mine versus a large amount of

⁴⁸ "Human Rights Watch "South Africa: Widespread Xenophobic Violence"<https://www.hrw.org/news/2020/09/17/south-africa-widespread-xenophobic-violence>

individuals who have not. This has resulted in violence and tensions in the community.

- 15.7. This needs to be avoided and a policy that is exclusionary of artisanal miners who are not South African will in all likelihood result in further violence and tensions.

16. Page 16 (j) Restriction of ASM operations to the surface

- 16.1. This would not be supported as many artisanal miners as mentioned above engage in mining for minerals that are underground. In terms of Section 12 of the MPRDA the state needs to provide support and structures to allow for this type of mining to happen.
- 16.2. Also, in regard to mining and more specifically artisanal mining, there are various minerals that are mined which use different mining methods. These mining methods include open cast and underground mining. Therefore, to limit it to surface mining or open cast mining would unfairly limit the minerals which could be mined by artisanal miners.

17. Page 16 (l) Sale and trading in minerals

- 17.1. The ownership and rights to tailings need to be addressed, with specific licenses for this time of mining.
- 17.2. The state should provide collection of resources and security on sites of artisanal miners due to criminal syndicates. The state needs to support artisanal miners as illustrated in Section 12 of the MPRDA. Artisanal miners need support especially when dealing with expensive mineral resources. Further the state has the obligation to protect the right to security of persons in terms of the Constitution. In terms of Section 2(g) of the MPRDA this security must also be provided in terms of the land that is being used for prospecting, exploration, mining, and production operations.
- 17.3. A local buyers' market must be established with a national buying entity to regulate prices and ensure the minerals of South Africa stay within South Africa. People in South Africa need to finally see the benefits of the mineral

resources of South Africa, as in the past colonial and Apartheid practices coupled with large scale mining have deprived the majority of this benefit. Currently, large illegal buyers are alleged to be fuelling the market of minerals in South Africa. These buyers are far more willing to purchase illegal minerals as the prices are cheaper. This needs to be dealt with by the state or legal artisanal mining will not work.

- 17.4. In terms of the objects of the MPRDA: there needs to be promotion of equitable access to the nation's mineral resources to all people of South Africa. This is further mentioned in Section 12 of the MPRDA and in the Constitution under Section 25(5). The object also includes providing opportunities to previously disadvantaged persons to enter and act in the mineral industry and benefit from the resources.
- 17.5. Mining companies should be involved in the marketing and assisting of artisanal miners in the selling of their goods. This should be enacted in the law, as the Constitution and the rights afforded apply to juristic persons as well. This means mining companies need to realise the right to equitable access to all mineral resources for the people in South Africa.

18. Page 16 (m) Co-existence with large operations

- 18.1. In section 8 of the Constitution, the Bill of Rights binds all spheres of government, all Court systems, juristic persons, and natural persons.
- 18.2. Juristic persons bound by the Constitution would include large scale mining companies. In the history of mining in South Africa, large scale mines have profited and benefited on the backs of the poor and marginalised within South Africa. Large scale mines are slowly closing due to mining not being as profitable, with artisanal miners entering the market. Large scale mines should recognise the wrong doings of the past and assist in training, supporting, and providing assistance to artisanal miners as their social responsibility.
- 18.3. In terms of the MPRDA Section 2(d) the state must provide substantial and meaningful opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral

and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources. Therefore, the state needs to prioritise artisanal mining and miners over large-scale mining. Presently large-scale mines are supported.

19. Page 19 (c) Formation of District Mining Committees

- 19.1. From experience, having district mining communities can result in better management and communication with communities.
- 19.2. District Mining Committees must include real representation from artisanal miners and mining communities.

20. Page 19 (d) Formation of Co-operatives

- 20.1. For the same reasons that district mining communities would be supported would be the same reason to agree with co-operatives. Co-operatives include resolutions being taken and constitution which allow for communities and groups to agree to a common purpose and being organised. Individuals would not have this.

21. Page 19 (e) Financial Assistance

- 21.1. State funding or large-scale mining funding (in terms of a tax) should be provided to artisanal and small-scale mining which is focused on uplifting previously disadvantaged individuals and mining communities.
- 21.2. This is recognised in the preamble of the MPRDA by stating that “recognising the need to promote local and rural development and the social upliftment of communities affected by mining” as well as “reaffirming the State’s commitment to reform to bring about equitable access to South Africa’s mineral and petroleum resources”.
- 21.3. Further the preamble in the MPRDA advises that “*Being committed to eradicating all forms of discriminatory practices in the mineral and petroleum industries*”. This is of particular importance in terms of funding due to many

mining companies and operations being owned and profiting foreign entities and not mining communities.

- 21.4. The State additionally has an obligation to assist historically disadvantaged persons in terms of Section 12 of the MPRDA.

22. General comments on the Draft Policy

- 22.1. We strongly recommend that the LDD conducts on site visits to the South African artisanal mines first, before finalising the policy for artisanal mining. More importantly that the site of the Northern Cape Artisanal Miners/Batho Pele Cooperative is visited and that there is a study conducted into the successes and failures.
- 22.2. It has been alleged that the Batho Pele Cooperative have not been able to mine with their license for over four months. This is due to criminal syndicates operating there and has been exasperated by:
- 22.2.1. No support from the office of the Premier or DMRE; and
- 22.2.2. No support from the South African Police Services even though several charges have been made.
- 22.3. Therefore, we demand this situation is resolved by the DMRE.
- 22.4. This will speak to the Draft Policy on artisanal mining of the DMRE as it is a case study to base the draft policy on.
- 22.5. Further that the artisanal miners in “diamond rush” in Kwazulu Natal are given who discovered the minerals are supported and prioritised by the DMRE to mine this area. Further that large scale mines are not entitled to come in and throw out these artisanal miners. Should this situation not be dealt with in terms of the Draft Policy’s ideas then the Draft Policy will not have any strength in implementation.
- 22.6. For enquiries contact:

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