



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Dear Ms Mamogale

WRITTEN REPRESENTATIONS ON THE DRAFT MINE HEALTH AND SAFETY AMENDMENT BILL, 2022

1. We address you as the Centre for Environmental Rights (CER), a non-profit organisation of activist lawyers who provide assistance to communities and civil society organisations in South Africa to realise their constitutional right to a healthy environment, by advocating and litigating for environmental justice.
2. We submit these written comments to the Draft Mine and Health and Safety Amendment Bill 2022, published on 15 June 2022 in Government Gazette No 46546 under Government Notice 1086 (the Amendment Bill).

Introduction

3. We acknowledge that one of the primary objects of the Mine Health and Safety Act 29 of 1996 (the Act) is to provide for protection of the health and safety of employees and other persons at mines. However, some of the provisions of the Act impose important duties on mines which extend beyond a mine's boundaries and concern the rights of communities living near to mines and who are not necessarily mine employees but who are directly affected by the operations at a mine. While communities may experience a range of impacts in relation to living in proximity to a mine, we submit these comments on the Amendment Bill below focusing specifically on the regulation of blasting at mines.

Structure of representations

4. These comments are structured under the following headings:
 - a. General Comments
 - b. Specific comments on the provisions of the Draft Mine Health and Safety Amendment Bill
 - c. Recommendations
 - d. Concluding Remarks

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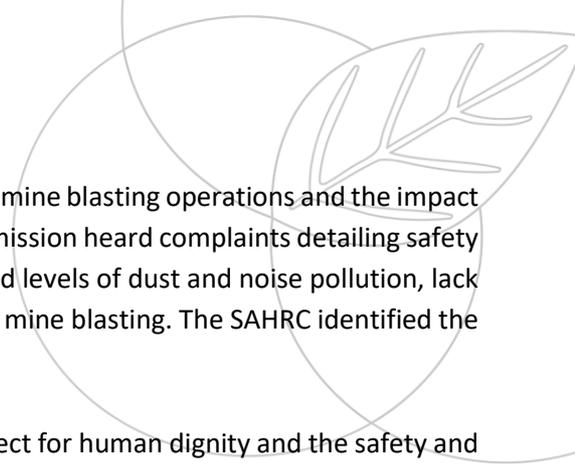
General Comments

5. We submit that the Act in its current form does not adequately provide for the protection of mining affected communities' Constitutional right to an environment that is not harmful to health and wellbeing specifically as a result of mine blasting impacts. We submit that additional consideration needs to be taken of the significant impacts that blasting has on communities living nearby to mines which conduct blasting. The impacts of mine blasting on these communities are widespread across the country and predominantly relate to concerns around health, safety and wellbeing.
6. A number of Constitutional rights are threatened by mine blasting: surrounding communities experience an environment that is harmful to their health and wellbeing, and their dignity, equality and rights to property and housing are negatively impacted by mine blasting.
7. At the Centre for Environmental Rights, we frequently receive requests for assistance from communities suffering from the impacts of mine blasting. Their pleas detail physical impacts such as cracked walls and windows of community houses, school and clinics as well as the psychological impacts related to regularly experiencing air and ground shockwaves from nearby mine blasting operations. The severe impacts on lives and livelihoods of dust and fume emissions from mine blasting are also common complaints. The impacts of mine blasting disproportionately affect women, children, the elderly, and those suffering illness or disability.
8. The current regime as provided for in the Act and its Regulations does not adequately provide for these affected communities in that:
 - a. Mines do not comply with the general duty contained in section 5(2)(b) of the Act to ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety;
 - b. This duty in any case does not adequately provide for the wellbeing of communities directly affected by mine blasting (in addition to their health and safety);
 - c. The regime for mine blasting within 500m from private houses and other infrastructure contained in the Regulations under the Mine Health and Safety Act (GNR 93 of 15 January 1997) is not sufficient to protect those who experience significant negative impacts from mine blasting but who may live outside the 500m radius;
 - d. The lack of any enforceable standards for ground and air shockwave levels means that it is difficult for communities to hold mines accountable for harm caused by blasting operations or to have the general duty enforced with any certainty;
 - e. The lack of statutory blasting levels means that the onus is placed on mines to determine 'safe' blasting levels and communities are not able to participate in these decisions resulting in unbearable living conditions which many communities affected by mine blasting currently face;
 - f. There are insufficient complaint mechanisms or remedies available for communities experiencing violations of their Constitutional environmental or property rights as a result of mine blasting.

South African Human Rights Commission Report

9. In 2016, the South African Human Rights Commission (SAHRC) held national hearings on the underlying socio-economic challenges of mining-affected communities in South Africa.¹ In its report following the hearings, the

¹ See <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>.



Commission made a number of findings and recommendations relating to mine blasting operations and the impact of mine blasting on communities. In respect of blasting impacts, the Commission heard complaints detailing safety concerns, claims of damage to housing and other infrastructure, increased levels of dust and noise pollution, lack of sufficient notice, and the general disruption caused to communities by mine blasting. The SAHRC identified the following as crucial factors in its report:

- a. blasting is carried out in a way that is not conducive to a respect for human dignity and the safety and well-being of persons in affected communities;
- b. monitoring and evaluation of blasting operations is insufficient;
- c. a number of mining companies submitted that damage to infrastructure is often a result of poor quality structures and not a direct result of blasting operations;
- d. mining companies should consider the quality of housing structures before carrying out blasting operations; and
- e. the practical difficulties in providing compensation where blasting is determined to be the direct cause of damage to community structures.

10. The Commission found that *“the lack of regulation around blasting operations is problematic given the frequency in which issues arise. Discrepant practices across the industry and the propensity for blasting operations to negatively impact communities and the environment compound the seriousness of these issues. The Commission further finds that industry bodies, such as the Chamber of Mines (CoM), are not duly active in monitoring behavioural trends within the industry or guiding members on best practice concerning blasting operations. The Commission identifies an immediate need for the DMR, as the competent authority responsible for developing regulations, to take urgent action to address this gap.”*

11. It went on to state that *“mining companies are responsible for ensuring that, prior to conducting blasting operations, appropriate safety mechanisms are in place to prevent property damage (with due consideration given to the quality of structures in surrounding communities) and any risk to persons’ health and safety. Mining companies should conduct ongoing engagements to ensure that such operations occur in a manner that has the least impact on people and the environment”*

12. We have not been able to find any steps which the Department of Mineral Resources and Energy has made to implement the findings made by the SAHRC in their report relating to mine blasting. We submit that an amendment to the MHS Act provides an important opportunity to do so.

13. We also propose that the powers of the inspectors be expanded to include inspecting for hazards in communities which are related to mining (which would include blasting). As stated above, there is a clear need to ensure that protection extends to those that can be negatively affected by the impacts of mining. The lack of concrete direction to inspectors to conduct this work adversely affects the potential for mechanisms for addressing the negative impact resulting from mine blasting.

14. Although not proposed in the current amendment bill, we submit that there should be consideration to include a section that caters specifically to mine blasting in the purpose or objects of the Mine and Health Safety Act. There should be a clear notion of what objectives of the Act are and who it caters to, not only should it cover the safety and health of mine workers but include the safety and health of those that can be adversely affect by mining such as communities surrounding mines. We submit also that there is an imperative on the department to develop

predetermined and safety measures for mine affected communities and these should not have to be inferred from the Act but clearly stipulated.

Specific comments on the provisions of the Draft Mine Health and Safety Amendment Bill

15. Section 19

15.1. We commend the substitution of subsection (5) to the following subsection: *“The Chief Inspector of Mines may issue instruction or directives on any matter affection health and safety of employees at the mines or any persons who are not employees but who may be directly affected by the activities at the mines”*

16. Section 22

16.1. Section 54 of the principle Act is amended by the substitution in subsection (1) of the following subsection: *If an Inspector **[has reason to believe]** observes that any occurrence, practice or condition at a mine, endangers or may endanger the health and safety of any person at the mine , the Inspector may give any instruction necessary to protect the health and safety of any persons at the mine, including but not limited to”*

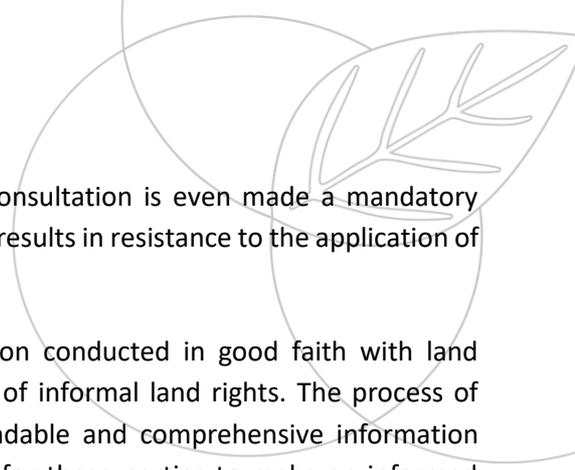
16.2. We suggest the addition of the following: *If an Inspector **[has reason to believe]** observes that any occurrence, practice or condition at a mine, endangers or may endanger the health and safety of any person at the mine or any persons who are not employees but who may be directly affected by the activities at the mines, the Inspector may give any instruction necessary to protect the health and safety of such persons ~~at the mine~~, including but not limited to:*

16.3. This is because mining-affected communities in South Africa are living in a social, economic and environmental crisis generated by the mining sector’s drive to generate profits at the expense of communities’ social, environmental and economic rights. Should the change in wording include observing this would ensure inspectors can operate outside of the ambit of what the Act currently covers. We note that given these consequences of mining, it is not surprising that communities living on previously unmined land are increasingly resisting the imposition of mining development and demanding respect for the right to consent to development that occurs on their land. We submit that there is a need to have a stable and predictable legal framework that addresses the impacts of blasting on communities.

17. Section 27

17.1. Section 75 of the principle Act is amended by the substitution for subsection (1) of the following subsection: *“The Minister may, by notice in the Gazette, **[may]** declare that an environmental condition or a substance present at a mine is a health hazard to employees who are or may be exposed to that condition or substance [.] if [.,—(a)] the Minister has consulted the Council on the issuing of the declaration. [and **(b)** **unless the Minister believes that the public interest requires the notice to be published immediately, the Minister has— (i) published a draft of the proposed notice at least three months previously; and (ii) at that time invited interested persons to submit comments and representations concerning the proposed notice within a specified period.”**]*

17.2. We submit that public consultation/ participation should be mandatory. In the past, issues around consultation have been problematic particularly in legislation that encompasses mining, in that there are no



clear guidelines on how consultation should be conducted or if consultation is even made a mandatory requirement. Failure to include consultation process with the public results in resistance to the application of the law in question.

17.3. By definition consultation should include public consultation conducted in good faith with land owners, lawful occupiers, interested and affected parties, holders of informal land rights. The process of consultation should provide them with clear, accurate, understandable and comprehensive information about all the impacts of the proposed extraction activity in order for these parties to make an informed decision.

17.4. The draft Bill does not make provision for consultation or the process for notification through the standard notification process, which is done by way of notice in a government gazette. It is our submission that the failure to ensure that public participation by communities or people who might be affected by mining and in particular blasting should be remedied. Communities need to have a say in matters that can directly or indirectly affect their health and safety. We submit that public participation is important as it ensures that information reaches a maximum number of people and they are afforded sufficient time to make comment, in order to ensure the process embodies the principles of fairness. In this instance consultation with Council is insufficient.

Recommendations

21. In addition to our proposed changes to the Amendment Bill above, we sincerely believe that further consideration needs to be given to the regulatory regime for mine blasting in South Africa and for the Mine Health and Safety Act to play an important role in this.

22. The DMRE and the CSIR have previously progressed this issue through several important developments:

22.1 The Council for Scientific and Industrial Research (CSIR) and the Mine Health and Safety Council (MHSC) conducted a number of studies and drafted various 'milestone reports' in 2016 culminating in a document that describes leading international and local practice for designing, executing and monitoring opencast blasts and dealing with nearby communities, and recommends practices, procedures and standards that take the South African situation into account. Milestone 6 in this series is a 285 page report dated 31 March 2016 titled "*Development of a South African Minimum Standard on Ground Vibration, Noise, Air-blast and Flyrock near Surface Structures to be Protected.*" This report acknowledges the harm caused by mine blasting to surrounding communities, notes the international standards relied on by South African mines including the USBM and recommends practices, procedures and standards that take the South African situation into account.

22.2 The Mining Regulations Advisory Committee (MRAC) established a Task Team to facilitate the development of a guidance note on Minimum Standards on Ground Vibration, Noise, Airblast and Flyrock.² A draft guidance note dated 12 February 2020 is available online. This draft Guidance Note is an important development in which the DMRE acknowledges that community members are dissatisfied with the current regime and the lack of mine blasting standards and experience damage to their houses as a result of the explosions.

² See <http://aspasa.co.za/wp-content/uploads/2020/03/Guidance-Note-on-Minimum-Standards-on-Ground-Vibration-Noise-Airblast-Flyrock.pdf>

23. The above developments show that the DMRE is aware of the difficulties which communities experience as a result of the current legal regime for mine blasting. We recommend that these developments be taken into account in giving consideration to an improved regime for mine blasting.
24. A final guidance note on minimum standards would be an important tool in assisting communities. The draft mentioned above provides that it will be reviewed on request based on emerging issues pertaining to ground vibration, noise, airblast and flyrock. Under the heading 'legal status' the draft guidance note provides that it seeks to align the mining industry with international best practice to ensure that the risk of ground vibration, noise, airblast and flyrock is effectively managed in order to improve the health and safety of communities, mine employees and surface structures. We submit that such a review should be conducted and a final guidance note published as a matter of urgency.

Concluding remarks

25. We submit that for the reasons detailed above, the Act in its current form as well as the proposed Amendment do not adequately provide for the protection of mining affected communities' Constitutional right to an environment that is not harmful to health and wellbeing specifically as a result of mine blasting impacts.
26. An amendment to the Act provides an important opportunity to implement the findings of the SAHRC on this issue towards providing adequate regulation and protection for mining affected communities.
27. We would welcome the opportunity to meet and discuss any of our recommendations on the regulation of mine blasting further.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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