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Mining – benefits to the economy vs harm to communities and environment?

1.1 Benefits to the economy

The opportunities for South African mining from rare earth metals presented in this conference are intense and wide ranging.

They describe part of what the President envisaged when he has spoken of mining as a sunrise sector in the economy.

The first call here is to make the most of South Africa's mineral resources – for the benefit of all South Africans.

The second call is to draw on the technical competence and experience of the industry in the country. South African-based mining engineers, geologists, ventilation specialists and chemists have been responsible for innovations that have led the world mining industry. This expertise needs to be used to the maximum benefit now – and further developed for the future of rare earth metals by offering education and employment to young South Africans.

The mining industry has been described as the cornerstone of the economy of South Africa. It provides a firm and wide base that can be available to other sectors, to improve their competitiveness. Mining constructs and relies on infrastructure – often in remote rural areas – that can open possibilities for jobs, service provision and even manufacturing industries.

Sometimes mining is called the fly-wheel of the economy of South Africa. A fly-wheel is a heavy wheel that can provide energy even if you are not helping to turn it all the time. This is the R400-billion mining contributes to national economic wealth every year, because of all the people it employs, the services and goods it buys and the valuable minerals it produces – precious stones and metals; building materials, coal. And you can add to that the rare elements we are discussing today and how they are part and parcel of new technologies.

There is no doubt that mining provides many benefits to the economy.



1.2 Harm to communities and environment

I have been asked to reflect also on how mining may do harm to communities and environment.

In Parliament we receive regular briefings from experts and stakeholders on mining.

The job of the Parliamentary Portfolio Committee on Mineral Resources is to lead public oversight of the Minister of Mineral Resources and the Department. The questions we investigate are:

- Is the executive implementing the laws passed by Parliament – and the Mining Charter, which was negotiated with the industry in terms of legislation?
- Is the Department spending its budget voted by Parliament responsibly – in line with the requirements of the auditor general and the Treasury?

During the Parliamentary session that is about to end, for the final year of the Fifth Democratic Parliament, the Committee has considered two substantial independent reports on community socio-economic and environmental issues in mining. The reports paint what some would call a bleak picture. The challenges referred to are well known to the Committee. I will speak about these reports in a moment.

Last year, the committee itself visited former mining sites at Mintails near Krugersdorp in Gauteng and Shiva Uranium near Matlosana, in the North West Province, where the environment has been wrecked by irresponsible mining. On the other hand, it visited the Exxaro Leeupan coal mine near Delmas in Mpumalanga where it saw the results of ongoing rehabilitation and how a mining area has been returned to productive agriculture. Also in Richards Bay in KwaZulu Natal, Rio Tinto has acted to actually improve the environment after mining, by establishing impressive new dune forests, more than 20 years in the making.

The mining communities we have visited can show the same contrast between good performance and shattering neglect. Sometimes a mining right holder is involved. And the Committee questions the Department on its timelines for ensuring there is real compliance by the mine with its Social and Labour Plan. Sometimes it is a case of an abandoned and derelict “ownerless” mine, leaking acid water, that is a legacy of the feckless behaviour of our so-called great mining industry during the days of colonialism and apartheid. They mined the gold and coal and left the environmental devastation as a debt someone else should take care of. Sometimes, and increasingly, it is the cancer of illegal mining that harms communities – with criminality – and the environment when zama zamas dig around the cement plugs that are supposed to close old shafts.



The intention of the laws passed by Parliament, particularly the MPRDA of 2004, is to give real effect in mining to Section 24 of the Constitution. This states:

24. Environment

- ❖ Everyone has the right
 - to an environment that is not harmful to their health or well-being; and
 - to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - prevent pollution and ecological degradation;
 - promote conservation; and
 - secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The MPRDA section 2(h) states that an object of the Act is to “give effect to section 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development;”

South Africa is rich in natural resources that are not simply renewable. Once ore is mined, it is gone forever as a mineral deposit. Yet these assets in minerals contribute to human development. **Difficult decisions** have to be confronted every day on whether development of natural resources should be favoured at the expense of conservation, or whether there is a ‘middle road’ that can respect both objectives.

The Constitutional Court has made it clear that the DMR has to maintain its vigilance over mining at all times – Judge Ngcobo said “legislation imposes a continuing, and thus necessarily evolving, obligation to ensure the sustainability of the development and to protect the environment.”

There is no doubt that, on paper, South Africa has one of the leading legislative systems in the world when it comes to environmental responsibility. The National Environmental Management Act (NEMA) has applied to the mining sector since December 2014. This embodies the precautionary principle for new development and the principle that “the polluter must pay” for negative environmental impacts.

Two law professors state in an overview of the constitutional and legal framework for mining, oil and gas that:

“NEMAs environmental management principles provide limitless potential for decision-makers and the courts to develop a cohesive body of generally acceptable environmental management practices to give effect to sustainable development.”



The requirement for social and economic development of our mineral wealth to be “justifiable” is clearly written in the law. In the case of communities, the MPRDA mandates the DMR to

“ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating”.

The law also aims to

“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.”

These requirements are detailed in the Mining Charter, in the guidelines to the Mining Charter and also in the Social and Labour Plans (SLPs) that every right holder has to compile and implement as a legal requirement. All of these mine-level plans are subject to approval and review by the Department. This system has been in place since 2004.

Yet we know that many communities are unhappy with the mining industry.

My predecessor as chair of the Committee, Honourable Fred Gona, said in 2011:

“When we conduct oversights, we come back depressed. Because before you enter into a mine, you walk through a sea of poverty. ... In our own experience these Social and Labour Plans are indeed not implemented...Mining communities lament that here, within our area we extract the wealth of the country but there is no drop that comes back to us as the mining community.”

In one of the in depth public hearings on the Mining Charter, Honourable Gona addressed the mining company participants:

“The Portfolio Committee has had oversight visits across the country...where we would be overseeing the compliance on the mining laws but also the mining charter as well as the social and labour plans implementation. What we have found, which is in our reports that are in the public domain, is an appalling situation. Mining communities specifically are trapped in abject poverty. What we have seen is a picture that is not good at all. It does not auger well for the future of the country... Your words will not speak more than what we have seen in the actual situation”



What is concerning is that these words were spoken eight years ago. They could have been spoken again yesterday.

And now I come to the two independent reports.

1.2.1 SA Human Rights Commission Report

The first report, compiled in 2016, but only tabled in Parliament last year, was presented by the SA Human Rights Commission, a Chapter 9 institution, that reports to Parliament.

The document we considered is titled: *Report of the South African Human Rights Commission (SAHRC) on the National Hearings on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa held on 13 -14 September, 26 and 28 September and 3 November 2016*

It was based on input from stakeholders, including the DMR which came back three times to respond to questions from the Commissioners.

The report discusses the reasons behind socio-economic distress in mining affected communities. It identifies specific interventions needed by the relevant government departments. A key point, however, is that, by and large, there is no call for amendments of legislation. There are many features of present legislation for mining that DMR is simply not implementing and enforcing. The same goes for departments dealing with environmental affairs, water, rural development and local and provincial government.

Because of its powers as a Chapter 9 institution, the Human Rights Commission has issued directives to the DMR to implement the law. The new 6th Parliament will have continued engagement with the Commission on the way DMR is implementing the directives and recommendations and – as an oversight matter - whether the DMR is co-operating with Commission, as required by legal precedent and the Constitution. The Human Rights Commission hearings were initiated by the Commission itself in the wake of Marikana. The hearings provided evidence that that DMR is not enforcing the legislation provided by Parliament to share benefits from mining with all South Africans and to regulate environmental harm from mining.

It is disturbing that this is the same finding reached by the Committee in Parliament in 2011.

1.2.2 Report of the High Level Panel

The second report, tabled in Parliament in 2017, was that of the High Level Panel chaired by former President Kgalema Motlanthe.



The document is titled: *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*. It was requested by the Speakers Forum of South African Legislatures, to identify which legislation was working and which was not.

In respect of mining, public hearings in 2016 and 2017 found that DMR does not follow a particular act called IPILRA. The HLP report recommended amendments to the MPRDA, to compel DMR to follow this law. IPILRA is the Interim Protection of Informal Rights to Land Act. It was passed by Parliament in 1996 as a interim measure, and it has been renewed every year since. It applies only in former “homeland” areas where land is held under communal ownership. The key point of IPILRA is that full consent of a community is required before any of its rights to land are interfered with. DMR prefers to follow the 2004 MPRDA which does not require consent but “meaningful consultation”.

Before 2004, when our mining law was reformed, the consent of the owner of mineral rights was required before mining could begin. After 2004, mineral rights were abolished, and the rights to all minerals came under custodianship of the state. The meaning of “state custodianship” is not defined in the MPRDA and has not been defined by the courts – except to clarify that the state is not the owner of anything.¹ It just has the powers to grant right to minerals to an applicant who qualifies in terms of the MPRDA.

In 2017, the High Court in the Xolobeni matter found that community consent is required before the DMR may grant a mining or prospecting right. This aspect of the judgment is under appeal at present by the Minister.

The HLP Report included additional issues on the alleged theft of moneys that should have accrued to communities because of the mines on their land. In the North West, particularly, money was paid by mines as royalties into special provincial “Development Accounts”, known as D-Accounts. This money was never properly audited by the province – since 1994 – and money that was supposed to benefit communities just disappeared. The scandal is the subject of court inquiries and reports from the Public Protector. Another problem was that the DMR allowed mines to swap paying royalties for company shares. The royalty payments stopped and the shares, which were supposed to be for community benefit, often got absorbed into structures that were not under direct community control.

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1.2.3 Assessment: mining and gardening

- According to the SAHRC neither the environmental nor the community/public benefit aspects of the laws that apply to mines are being effectively enforced by government.
- According to the HLP report – as is confirmed by DMR – DMR does not abide by IPILRA’s slogan of Free Prior and Informed Consent when mining is considered on communal land. This is despite the fact that the MPRDA “requires that the granting of a mining right must take into account all applicable laws, including IPILRA.”
- The Public Protector – and the Baloyi Commission in the North West – have confirmed (or heard evidence under oath) that royalty and other resources that were supposed to accrue for mining community benefit have been mismanaged and are not accounted for.

There is plainly a lot that needs to be done to improve the way our mining, social and environmental laws are implemented for mining-affected communities.

This sort of improvement is what Parliament aims at, through the work of its Committees that shadow responsible Departments and Minister, and consider and recommend adjustments to policy and practice.

The Minerals Council of South Africa – formerly the Chamber of Mines – has a pithy slogan in one of its colourful new publications.

The slogan says: “If it’s not grown, it’s mined

But this is not all the story, because most things that are grown rely on a production chain that is intense with implements and machines that come from mining – from metal and plastic hoes, rakes and spades to combine harvesters, brewing tanks and decorticating machines.

Mining is essential to our way of life.

So I was taken aback when I read in the concept note for this event and I quote “that South Africa is faced with are the demise of mining as a reliable economic sector, in the context of the 4th Industrial Revolution.”

It is true that our mining industry is under threat as we look into the future. There is a need for more investment and new exploration. There are challenges with electricity supply, infrastructure and rising costs. And skills. And with transformation, so that more black people are involved in the mining sector, at its highest levels.



If we do not act carefully there could be a danger that the only mining we do in South Africa is quarrying for building materials – which are too heavy for regular trade.

If mining in South Africa is not defeated by these harsh economic and competitive realities, it will face the prospect of losing many less-skilled jobs as technology and the 4th Industrial Revolution take hold.

And mining will also be confronted by the pressures it places on communities and ecosystems. These pressures question ever more intensely what is meant by justifiable and sustainable economic development.

You cannot mine without creating waste and pollution – environmental damage.

South Africa has not yet managed to mine with “Zero Harm” when it comes to workers.

The mining industry does not share the benefits of mining with “all South Africans” in a way that is seen as fair and equitable.

Let me end by unpacking more from the slogan “If it’s not grown, it’s mined”.

When it comes to the soil – that is, the entirety of the natural resources locked away in the earth – the drive of mining is to extract, remove and deplete, rather than to cultivate, enhance and foster, like a careful farmer does.

Mining takes away more than it gives back. In that respect, it is not a good custodian of the future.

“The polluter must pay” is only half the obligation. A basic ethical principle of a gardener – or farmer – (which can be universalised to other areas) is that “you must give more to the soil than you take away”.

Life can only exist (sustainably, that is) where giving exceeds taking.

This is a challenge to the speakers who will follow, explaining how rare earth metals, if found in economic deposits, will indeed benefit all South Africans.