LAND REFORM

Communities in the centre of the mining revolution: Land issues dog inclusive mining

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Marking its 30th anniversary of the Investing in Mining Indaba in Cape Town, which incidentally coincides with South Africa's 30 years as a democracy, common themes were raised in both South Africa's President Cyril Ramaphosa's keynote address, along with that of Minister of Minerals Gwede Mantashe's speech.

The challenges surrounding backlogs in our rail, port and road networks, along with the energy crisis, remain at the core of major challenges facing mining companies, together with low commodity prices and geopolitical issues are well known. Mining companies are often left to bear the brunt of high transportation costs in an already volatile environment. What also continues to linger, is the historical legacy of careless mining, that has led to a plethora of former mineworkers undertaking illegal mining activities, which has resulted in sophisticated regional criminal syndicates that operate in abandoned mines.

Mining law practices across the country are dominated by matters involving litigation over overlapping grants of mineral rights to various parties over the same piece of land by the Department of Minerals. Lack of transparency in the application and grant of mineral licences, arises mainly from the fact that South Africa does not have a reliable cadastral system that is transparent, effective and efficient. Grants of mineral rights is undertaken by the DMRE. Both the President and the Minister indicated that a preferred bidder to implement a transparent, efficient and effective cadastral system has been appointed, following a rigorous process that involved investigating what would constitute best practice from neighbouring countries.

With major mining companies having taken advantage of decarbonisation and securing their own renewable energy projects, a renewed opportunity has been created to place surrounding mining communities in the centre of benefitting directly and meaningfully. The African continent is at a precipice: with rare earth metals and PGMs lying below its surface, belies a possibility for the continent to drive new industries and beneficiation, on its own terms. The latter begs the question. A critical factor that serves to assist communities in mining, is the question of whether or not our mining regulatory framework as it stands, serves to meet the objectives of an inclusive, mining industry.

Section 104 of the MPRDA provides for communities who wish to prospect or mine on land that is registered or to be registered in the name of the community. This section exempts communities from submitting a social and labour plan and from compliance from the Mining Charter. However, section 104 does not come without its shortfalls. At the first instance, section 104 envisages its beneficiaries to be land owners that have been registered under a formal cadastral system. This is notwithstanding the fact that 60% of South Africans hold land rights that are not registered under the formal deeds registry system. This position is in direct conflict with what section 1 of the MPRDA defines as a "community", which expressly provides that it is historically disadvantaged persons with interest or rights in land, who are either formal or informal. This definition aligns with persons who ought to be consulted prior to a mining right being granted to third parties. This conflict has the unintended consequences of being exclusionary to the very communities which are intended from benefitting from section 104. Additionally, onerous provisions that require communities to have sufficient mining technical know-how along with financial and business capabilities, result in section 104 provisions continuing to be elusive concepts. As a mitigating factor, government must consider a cap on the percentage that external funders are able to acquire from funding community-led mining operations.

A real opportunity lies in government directly assisting communities on communal land, with the setting up of workable, legally sound Community Trusts that will alleviate the challenge of creating secure land tenure and land ownership rights for communities. The latter requires a focused approach and possible reforms within the MPRDA in favour of a more robust and workable opportunity for communities to have a real stake in the mining revolution that is progressive and inclusive.

In light of this, in order to ensure that section 104 lives to its true potential in the spirit of inclusive growth within the mining sector, and if communities are not to be left behind, government is well advised to consider setting up a bespoke fund that seeks to invigorate and to promote the objectives of section 104 which will enable communities, particularly on communal land to satisfy requirements necessary to conduct technical studies and financial capability without seeking the assistance of external funders. In turn, these communities will pay "royalties" back to the fund which will enable government to continue realising the true goal of section 104.

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