Challenges to the South African mining industry in the wake of Marikana and Mangaung

Comments by Peter Leon to the Cape Town Press Club, Kelvin Grove Club, Newlands

8 February 2013

1. **Statistics: the South African mining industry**

- **Production losses**
  - A preliminary Statistics SA report from November 2012 states that, with the exception of an increase of 4.6 per cent in 2010, there has been a year-on-year decline in mining production over the past 5 years.¹ Mining production, according to the report, decreased by 4.5 per cent year-on-year in November 2012.²

  - The National Treasury estimated that strikes in South Africa's mining industry reduced exports by R12.5 billion and cut GDP by 0.5 percentage points in 2012.³

  - On 25 October 2012, the National Treasury also estimated that South Africa had lost R10.1 billion worth of production to strikes and stoppages in the platinum and gold mining sectors alone in 2012.⁴

- **Labour costs:**
  - PricewaterhouseCoopers ("PwC"), in its publication *SA Mine (2012)*, reports that the average increase in total employee costs in 2012 was 9.8 per cent. This was the case even though overall production decreased, indicating a significant decline in productivity in the industry.⁵ The publication also notes that, over the past five years, wage increases in the mining sector have not only been higher than the consumer

---

¹ Statistics SA, Mining: Production and sales (preliminary), November 2012, at 6, Table 2. The year-on-year decline for each year sequentially is as follows: -0.9 (2007); -5.6 (2008); -6.6 (2009); +4.8 (2010); -0.9 (2011).
² Ibid., at 3.
³ Bloomberg, South African Mine Strikes to Cut Exports by 12.5 Billion Rand, 6 November 2012
price index, but on average one to two percentage points higher than national average increases for all industries.\(^6\)

- FitchRatings estimate that labour costs for South African gold and platinum mining companies account for around 40% of total costs, compared to around 20% for coal and iron ore mines.\(^7\) The ratings agency states that this makes big wage hikes, such as the 22 per cent increase agreed between Lonmin and striking workers last year, harder for companies to absorb.\(^8\)

- **Utilities costs:**
  
  - PwC, in its publication *SA Mine (2012)*, records a 21 per cent increase in utility expenses for major mining companies in 2012. This increase was predominantly attributed to Eskom’s tariff increases.\(^9\) According to the Chamber of Mines, rising energy prices have already cost the platinum industry around R7 billion.\(^10\)

    - Eskom has also applied for a 16 per cent year-on-year electricity tariff increase for the period between April 2014 and March 2018 (energy prices will rise from 61c/kWh to 128c/kWh over the five year period).\(^11\) The Chamber of Mines has commented that these increases could contribute to further shaft closures and restructuring.\(^12\)

- **Job losses:**

  - Statistics South Africa's Quarterly Labour Force Survey for the third quarter of 2012 (from July to September) revealed a loss of 8 000 jobs overall in the mining industry.\(^13\) According to the survey for the fourth quarter (from October to December), however, the mining industry gained 8 000 jobs in that quarter (the

---


\(^7\) This disparity is due to the fact that gold and platinum mining in South Africa is more labour intensive than in many other countries, in part because of the depth at which these mining operations take place.


\(^12\) Business Day, *Chamber of Mines warns on electricity increases*, 01 February 2013.

survey does, however, disclaim that the industry statistics might not have been adequately captured by the survey sample).  

- The Minister of Mineral Resources ("the Minister"), Susan Shabangu, stated in response to a parliamentary question on 23 November 2012 that, from June to November 2012, 3 332 workers lost their jobs in the platinum mining sector alone.  

- Bheki Sibiya, the chief executive of the Chamber of Mines, has estimated that job losses could rise above 10 000 in the first quarter of 2013.

2. The ANC 53rd National Conference Resolutions

- The ANC 53rd National Conference Resolutions ("the Resolutions") propose greater state intervention in the mining sector and the economy in general.

- The Resolutions contain an exhaustive list of "strategic and important assets" from which "strategic minerals which require special public policy considerations" will be selected.

- The Resolutions state that "state intervention with a focus on beneficiation for industrialisation" is urgently required, and that "instruments are required to support [the] beneficiation and competitive pricing of these strategic resources". One "instrument" proposed to achieve this is the "targeted management of exports of minerals".

- The Resolutions state that the strengthening of the state mining company will be at the "forefront of state intervention" in the sector, and that the company "will capture a share of mineral resource rents and equity". The state mining company, it is envisaged, will, where

---

14 Statistics SA, Quarterly Labour Force Survey (QLFS), 4rd Quarter 2012, 5 February 2012, at vii. The survey states that "[m]ining is a very clustered industry, hence the industry might not have been adequately captured by the QLFS sample. For more robust mining estimates, please use the Quarterly Employment Statistics (QES)." The QES survey for the fourth quarter of 2012 has yet to be released.

15 Mining Weekly, Nine shafts closed, 3 300 jobs lost in the platinum sector, 5 December.


18 Ibid.
"appropriate", support "vertically integrated value chains that strengthen strategic industries" by ensuring they obtain adequate raw materials at affordable prices.\textsuperscript{19}

- The Resolutions also re-emphasise the issue of mining taxes, stating that "[t]he state must capture an equitable share of mineral resource rents through the tax system and deploy them in the interests of long-term economic growth, development and transformation."\textsuperscript{20} Enoch Godongwana, head of the ANC's economic transformation committee, has also confirmed that the ANC is considering a 'resource rent tax' or higher royalties to extract more revenue from the industry.\textsuperscript{21} Finance Minister, Pravin Gordhan, says, however, that there are no immediate plans to increase mining taxes.\textsuperscript{22} The Minister, Susan Shabangu, also recently stated that it was not a "given" that taxes would go up and that government has "an obligation to act in a responsible way".\textsuperscript{23} Deputy Finance Minister, Nhlanhla Nene, has also stated that the government will consult with the mining industry before changing the tax regime.\textsuperscript{24}

3. The Minister of Mineral Resource's recent comments regarding coal

- On 30 January 2012, the Minister, Susan Shabangu, stated at the McCloskey Coal Conference in Cape Town that coal would be declared a "strategic resource" in order to protect supplies for local power plants. The intention, according to the Minister, is "to… ensure there is a balance between security of supply locally… without losing the global markets".\textsuperscript{25}

- The Minister stated that the government has not decided how this will be achieved and whether it will be achieved through an export levy. According to the Minister, the

\begin{thebibliography}{9}
\bibitem{19} Ibid.
\bibitem{20} Ibid.
\bibitem{21} South Africa's ANC Rejects Mine Nationalization for Taxes, op cit. Error! Bookmark not defined.
\bibitem{22} Business Day, No plans for mining tax hikes, says Gordhan, 24 January 2013.
\bibitem{23} Bloomberg Businessweek, South Africa Hasn't Decided on Higher Mining Tax, Shabangu Says, 5 February 2013.
\bibitem{24} South Africa's ANC Rejects Mine Nationalization for Taxes, op cit. Error! Bookmark not defined.; 'Nationalisation dead', but mine taxes will rise, op cit. note Error! Bookmark not defined.
\bibitem{25} Reuters, UPDATE 1-S.Africa moves to secure coal for domestic power plants, 30 January 2013; Mail and Guardian, Shabangu calls on stakeholders to resolve coal supply issue, 1 February 2013.
\end{thebibliography}
government still has to debate what measures will be put in place to guarantee local supply.  

- The Minister did, however, suggest that measures to declare coal's strategic role would be implemented in accordance the Mineral and Petroleum Resources Development Act, 2002, ("MPRDA") and that the implementation of any measures would be defined in legislation. She stated that the government "is going through a public process to ensure that [the measures] become part of our legislative framework". This could possibly be construed as suggesting that the government will use the beneficiation section of the MPRDA (section 26) which is set to be amended by the draft Mineral and Petroleum Resources Development Amendment Bill ("the Bill") (see below for further details).

- The Minister did state that the government is "going to engage the coal industry and will not take any unilateral decisions".

- In considering measures which restrict coal exports, the National Development Plan ("NDP") cautions that overly aggressive restrictions could have unintended and unwanted consequences. For example, the NDP warns that a ban on exports of lower grade coal could potentially discourage investment in the new multi-product mines necessary for supplying future Eskom demand, which will depend on a balance of export earnings for their financial viability.

4. **The National Development Plan**

- The NDP states that South Africa has, over the past decade "failed to match the global growth trend in mineral exports" due to "poor infrastructure" and "regulatory and policy frameworks that hinder investment." It also cites uncertainty as regards property rights as

---

26 Ibid.
27 Mining Weekly, *Being strategic will not lose coal’s export market* - Shabangu, 30 January 2013; UPDATE 1-S.Africa moves to secure coal for domestic power plants, op cit. 25.
28 Ibid.
a "central constraint" on growth in the sector.\textsuperscript{31} To grow investment, outputs and employment in the mining sector, the NDP proposes interventions which include "ensuring certainty in respect of property rights [and] passing amendments to the [MPRDA] to ensure a predictable, competitive and stable mining regulatory framework."\textsuperscript{32}

- The NDP also warns that, while beneficiation is important, downstream beneficiation is not a fix-all solution to South Africa's growth and employment problems. The document warns that most beneficiation activities are energy intensive and that "[a]s long as electricity is scarce, there will be a trade-off between beneficiation and other more labour absorbing activities." It also notes that downstream beneficiation "is also usually capital intensive [and] contribu[tes] little to overall job creation."\textsuperscript{33} Accordingly, the NDP advises that South Africa should be "should be selective about the areas in which it intends to support first-stage beneficiation", and that "priority areas should include those where suitable capacity already exists, or where beneficiation is likely to lead to downstream manufacturing".\textsuperscript{34} It states that "]b]eneficiating all of the country’s minerals is neither feasible nor… essential for developing a larger manufacturing sector."\textsuperscript{35}

- Rather than focussing on downstream beneficiation, the NDP favours devoting more attention "to stimulating backward linkages or supplier industries (such as capital equipment, chemicals and engineering services)." The document notes that the "demand is certain" for these industries and that they are also "more labour-absorbing than typical downstream projects". The NDP also suggests that such projects "have the potential for servicing mining projects globally, which is an advantage should the commodity boom persist."\textsuperscript{36}

5. **The draft Mineral and Petroleum Resources Development Amendment Bill**

In skeleton, some of the notable issues in the Bill are:

\textsuperscript{31} Ibid. at 146.
\textsuperscript{32} Ibid. at 147.
\textsuperscript{33} Ibid., at 146.
\textsuperscript{34} Ibid., at 54. In a similar vein, the NDP notes (at 146) that downstream beneficiation can "raise the unit value of South African exports". However, it suggests that "resource-cluster development, including the identification of sophisticated resource-based products that South Africa can manufacture, will be critical."
\textsuperscript{35} Ibid., at 54.
\textsuperscript{36} Ibid., at 146-147.
• **Overbroad administrative discretion:**

  o The Bill is fraught with instances of vague and uncertain language, amplifying rather than eliminating the regulatory uncertainty created by the MPRDA. In many instances it, too, affords administrators an overly broad discretion, compounding the uncertainty. The Minister, for example, will be empowered by the Bill to regulate a number of important issues by publishing regulations by notice in the Government Gazette, bypassing the public process for the enactment of legislation. In a similar fashion, the Bill deletes a number of time periods specified for the completion of certain administrative functions, replacing these with a period "to be prescribed" by the Minister.

  o Not only are these provisions likely to deter investment, they are also potentially unconstitutional. The rule of law, a foundational constitutional principle, provides that laws must be stated in clear and unambiguous terms, and that they should appropriately restrain and guide the exercise of administrative discretion.\(^\text{37}\)

• **Mineral beneficiation and restrictions on export:**

  o The Bill also introduces new provisions regarding beneficiation, which exemplify the trend towards increased administrative discretion. The Bill allows the Minister, in her sole discretion, to prescribe the percentage per mineral commodity that must be sold to local industry for beneficiation, and the price at which it must be sold. Any person who wishes to export any “designated minerals” must obtain the Minister’s written consent prior to doing so, and must comply with any terms and conditions that she may choose to impose.\(^\text{38}\)

  o The beneficiation provision is likely to violate the prohibition on quantitative restrictions on exports contained in the General Agreement on Trade and Tariffs

---

\(^{37}\) Section 1 of the Constitution of the Republic of South Africa.

\(^{38}\) Clause 21 of the draft Mineral and Petroleum Resources Development Bill, 2012 ("the Bill") amending section 26 of the Mineral and Petroleum Resources Development Act, 2002 ("the MPRDA").
(GATT)\textsuperscript{39} and the Trade, Cooperation and Development Agreement between the South Africa and the European Union (the TDCA).\textsuperscript{40}

- **Free carried interest:** the Bill grants the State a right to a free carried interest in all new exploration and production rights in the petroleum industry, with an option for the State to acquire a further interest through a designated organ of state or a state-owned entity.\textsuperscript{41}

- Some of the other issues with the Bill, which are merely flagged, include provisions relating to:
  
  - the transferability and encumbrance of prospecting and mining rights;\textsuperscript{42}
  
  - the ownership of tailings created prior to the commencement of the MPRDA on 1 May 2004 (historic tailings);\textsuperscript{43}
  
  - order of processing applications;\textsuperscript{44}
  
  - environmental regulation;\textsuperscript{45}
  
  - penalties;\textsuperscript{46} and
  
  - concentration of rights.\textsuperscript{47}

\textsuperscript{39} See articles XI and XX.
\textsuperscript{40} See articles 19 and 27.
\textsuperscript{41} Clause 1(f) of the Bill amending section 1 of the MPRDA; and clauses 55(f) and 59(c) of the Bill inserting sections 80(7) and 84(6) into the MPRDA.
\textsuperscript{42} The Bill confirms that an applicant can hold a share in a mining right, but problematically requires consent for the transfer of any interest in a listed or unlisted company holding a mining right, creating a practical impossibility regarding listed companies.
\textsuperscript{43} The Bill brings historic tailings, which are currently under common law ownership, under the ambit of the MPRDA for the first time. These tailings will, it appears, be held by the state or will be granted to the person holding a mining right to the land underlying the tailings. It is possible that these provisions will result in an unconstitutional expropriation of property under section 25 of the Constitutions as the expropriation does not appear to be linked to a public purpose.
\textsuperscript{44} It is not clear whether the Bill intends to do away with the first-in-first-assessed ("\textbf{FIFA}\textsuperscript{9}") principle by virtue of its deletion of section 9 of the MPRDA. Changes affected by the Amendment Act to sections 16 and 22 of the MPRDA, however, appear to ensure that the remains in place.
\textsuperscript{45} The Bill will, if published in its present form, be in direct conflict with the National Environmental Management Act, 1998, in numerous respects.
\textsuperscript{46} The Bill provides extreme penalties with reference to annual turnover which are disproportionate to the offences they punish.
The Bill prohibits the Minister from granting a mining or prospecting right application if this would result in a concentration of rights held by the applicant. Despite providing that the concentration of rights will be determined in relation to a right holder’s “dominance” or “anti-competitive conduct”, the Bill does not define what is meant by these terms, nor does it provide any objective criteria against which dominance and anti-competitive conduct may be measured.