

**WRITTEN COMMENTS ON THE DRAFT ARTISANAL AND SMALL-SCALE  
MINING POLICY 2021**

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## **1. About the SARChI: Mineral Law in Africa (MLiA) Research Chair**

The Research Chair for Mineral Law in Africa (MLiA) is part of the South African Research Chairs Initiative (SARChI), established by the Department of Science and Technology (DST) and the National Research Foundation (NRF), who are its main funders. We are hosted by the University of Cape Town (UCT) within the Faculty of Law, Department of Private Law. Further information about MLiA, its objectives, projects and activities can be accessed from its official website.<sup>1</sup> Our research focus is generally on Mineral, Mining, and Oil & Gas Law development across Africa. MLiA produces independent and original research on matters concerning these, and related fields of expertise such as Energy and Natural Resources Law.

One of MLiA's objectives is to engage with mining policy frameworks in South Africa and the rest of the African continent. We make constructive contributions towards shaping the legislative framework across the continent. We do so to support the building of strong state capacity for the relevant institutions that coordinate governance in the mining sector.

Among the projects currently conducted by MLiA is a doctoral research project on artisanal and small-scale mining (ASM). This research intends to formulate proposals to enhance procedural integrity, improve transparency, accountability and meaningful engagement on ASM. It urges an awareness of best practices by encouraging comparison with other similarly situated jurisdictions, whilst being mindful of the local context and its unique features.

This submission is in the service of our intention to promote and protect the integrity and quality of South African law and policy on mining-related matters. It also is concerned with the vulnerability of Artisanal and Small-scale (ASM) miners across Africa.

## **2. Background and context**

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<sup>1</sup> This can be accessed at: <http://www.mlia.uct.ac.za/>.

On the 5<sup>th</sup> of May 2021, the Department of Mineral Resources and Energy (the “DMRE”) published a Draft Artisanal and Small-Scale Mining Policy 2021 (the “ASM Policy”) for public comment.<sup>2</sup> Accordingly, the Minister of Mineral Resources and Energy, Hon. Gwede Samson Mantashe, invited interested and affected parties, as well as other stakeholders to submit written comments on the Draft Guidelines by no later than 17 June 2021. Our written comments contained in this document respond to this invitation by the Honourable Minister. We wish to thank the DMRE for this timely opportunity to provide our comments on the Draft ASM policy.

The Draft ASM policy correctly asserts that S27 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which deals with the licensing regime for the ASM industry:

“has been seen largely as prohibitive to the development and growth of the sector. This is mainly because the Act does not define concepts. It does not cater for the Artisanal Mining industry. Small Scale Miners are virtually treated the same as Large Scale Miners in terms of the requirement for environmental management, water use, land use, health and safety and financial provisioning requirements. Furthermore, the Act has restrictions on the transferability and encumbrance of a mining permit, the area in extent is limited to 5 hectares and this impacts on the permit holder’s ability to obtain funding and overall sustainability of the operation. The mining permit applications are open for all and even some large players operate in this space. These factors, coupled with poor support mechanism from Government, in the form of funding and provision of extension services to the ASM industry, have contributed to the informality of the sector and constrained development.”<sup>3</sup>

The Draft ASM policy seeks to fill regulatory gaps and address these and other issues that have thus far contributed not only to uncertainty regarding the position of artisanal and small-scale operations, but also to the informality of the sector and constrained development. It strives to achieve these objectives through the introduction of policy and legislative reforms to formalise the ASM sector and integrate miners in this sector into South Africa’s regulatory regime. It intends:

“to foster the creation of a formalised Artisanal and Small-Scale Mining Industry that can operate optimally in a sustainable manner while contributing to the economy in the form of taxes and royalties and through job creation, and for the elimination of illegal ASM operations.”<sup>4</sup>

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<sup>2</sup> *Draft Artisanal and Small-Scale Mining Policy 2021. Notice 258 of 2021 (GG No. 44538, 05 May 2021). Available at [https://www.gov.za/sites/default/files/qcis\\_document/202105/44538gen258.pdf](https://www.gov.za/sites/default/files/qcis_document/202105/44538gen258.pdf).*

<sup>3</sup> Draft Artisanal and Small-Scale Mining Policy 2021, p 4.

<sup>4</sup> Draft Artisanal and Small-Scale Mining Policy 2021, p 6.

We acknowledge the commendable efforts made by the Department, as expressed in the Draft ASM policy, which are of great importance. The Draft policy however cannot be the silver bullet to all the woes and challenges facing the ASM sector; nor does it propose to be. It will, however, become directional in dealing with some of the vulnerabilities caused or exacerbated by the perception of ASM miners in South Africa as illegal miners (colloquially referred to as “Zamazamas”), owing to the lack of formalisation and recognition by the MPRDA.

Even so, we are concerned by the salient issues, striking day-to-day matters and policy aspects that, for whatever reason, were omitted from the Draft ASM policy. These issues relate to the content and political implications of the draft policy, arranged in the form of major themes, under which the various issues are canvassed. They include issues relating to the following: the structural and institutional framework, gender considerations, licensing regime and administration, fiscal considerations, support and accountability mechanisms, among others. We respectfully submit that there is ample room to improve the Draft ASM policy with respect to these issues, hence, we proceed to make the following submissions.

### **3. Matters Requiring Further Scrutiny**

Several policy issues, deserving, in our opinion, of being considered and dealt with in the Draft ASM policy, have been omitted. Below, these are addressed one after the other. Each identified issue is immediately followed by a recommendation(s).<sup>5</sup>

#### **3.1. Comparative Study Recommendations**

##### **3.1.1. Section 5(f): Designation of areas for the ASM industry**

In the last sentence of this provision, the Draft Policy refers to “other institutions”, without specifying which ones they are specifically.

**\*It is recommended that the policy be made clearer as to which “institutions” must “facilitate relevant information and data for the necessary authorisations (EIA’s and MHS plans)”. Such**

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<sup>5</sup> Recommendations are indicated by the use of Asterisks.

**clarity will ensure that those institutions are aware of their roles in the ASM policy and that the Minister knows from the outset which institutions to request/receive information from.**

### **3.1.2. Section 5(g): Limitation of ASM operations to surface mining**

The Draft ASM Policy suggests that ASM operations may be authorised in both surface mining and underground mining. Underground mining is a health hazard and the rehabilitation of environmental degradation there is very complex.

**\*We recommend that ASM operations be limited to surface mining. Limiting ASM operations to surface mining will help to ensure the safety of ASM miners and environmental protection. ASM miners do not have the requisite means to ensure their safety underground. Such means include for example ventilators and pillars to support overhead rocks.**

## **3.2. Differentiation of Concepts**

### **3.2.1. Section 6(a): Artisanal mining and small-scale mining**

In the definition of “Small Scale Mining” the following requires further clarity: “specialised prospecting, mechanised mining technologies, chemicals including mercury and cyanide”.

**\*It is recommended that from the outset, the types/list of specialised prospecting, mechanised mining technologies, and specific chemicals must be established. This could be done in a separate document attached as an annexure/s. Alternatively, such details could be provided in the MPRDA Regulations.**

### **3.2.2. Section 6(a): Artisanal mining and small-scale mining**

In its definition of “Artisanal Mining” and “Small-Scale Mining”, the Draft Policy does not distinguish the various types/ categories of ASM. The concept of ASM encompasses a wide variety of mining practices. The ASM sectors typically contain a variety of types of operations. These operations have different characteristics and present different risks, therefore the regulator (DMRE) should not apply a 1-size-fits-all strategy to address these risks. Instead, it should develop ASM management strategies that respond to the unique challenges of the types of ASM involved.

**\*It is recommended that the DMRE organises the ASM sector according to the types of operations, to reflect the variety of operations that comprise the ASM sector, i.e. by commodity, by degree of mechanisation, by scale, whether alluvial or hard rock, etc. Once the respective type is identified, the DMRE needs to prioritise the subcategories, based on the degree to which the government can expect to address, reduce or enhance the net impacts of the kind of mining involved.**

### **3.3. Licensing Regime and Administration**

#### **3.3.1. Section 7(b) Licensing Method**

Although the Draft Policy provides for the licensing regime, it does not take into account the fact that the cost of licence applications is likely to be the main barrier faced by ASM miners. It does acknowledge cost implications but does not suggest any means to address this issue, but instead, focuses on compliance with the requirement of having the licences/ permits. To gain a licence through the DMRE, miners must provide an environmental assessment and feasibility studies, both of which cost exorbitant amounts i.e. the costs of such fees may be out of reach for many ASM miners who are usually living in situations of poverty and taking part in ASM (which until this policy recognition, was regarded to be illegal mining) as a last resort due to high levels of unemployment, among other socio-economic difficulties.

**\*It is recommended that in order to alleviate the cost implications on ASM miners, licences and permits would have to become more affordable, bureaucracy streamlined, and a flexible approach be taken to accommodate the many kinds of artisanal miners in South Africa.**

**It is further recommended that the DMRE should investigate how licencing processes and procedures could be simplified, and how the processing times for applications could be shortened.**

#### **3.3.2. Section 7(c)(iv): *“Prioritize the interest of women and vulnerable groups who are involved in the ASM industry;”***

The Draft policy does not prescribe a specific plan for affirmative action for women and other vulnerable groups. It merely stipulates that licensing for ASM operations must prioritize the interest of women and vulnerable groups who are involved in the ASM industry. Although this is a positive development, considering the fact that women have often been excluded from fully participating in

economic industries, the Draft policy does not shed light on how women as vulnerable persons would be empowered in the ASM context. Interpreting equality in the Constitution as substantive equality opens the door to taking women's disadvantaged status into consideration during policy making.

**\* It is recommended that further revisions be made to the Draft Policy to incorporate specific plans for affirmative action for women and other vulnerable groups. Affirmative action programmes targeting women need to be developed as a corrective measure to equalise opportunities and access.**

### **3.3.3. Section 7(f): Duration of an ASM operation in years**

This section of the Draft ASM Policy provides for "duration of ASM permits", without indicating an exact duration.

**\*It is recommended that the Draft ASM Policy ought to provide a fixed duration for ASM permits, as this offers ASM miners a clear indication of the duration of their permits and certainty regarding the security of tenure thereof.**

### **3.3.4. Section 7 (i): Issuing permits to individuals or Co-operatives**

The Draft Policy stipulates that the government will prioritise the issuing of Artisanal Mining Permits and Small-Scale Mining Permits to co-operatives. This is commendable, as it is in recognition of the potential of co-operatives for a much wider impact to spread the economic benefits wider. However, the Draft Policy does not consider the challenges that co-operatives continue to face in South Africa, which show that it may not be a viable option to establish more co-operatives until such challenges are addressed.

According to the Preamble of the South African Co-operatives Act No. 14 of 2005, the government views co-operatives as effective initiatives to eradicate poverty, reduce unemployment and facilitate economic growth and development. Similarly, the government's National Development Plan (NDP) as well as its 2014-2019 Medium-Term Strategic Framework, emphasise the government's agenda since the advent of Constitutional democracy in the country, which has focussed on among others, encouraging the adoption and development of co-operatives across multiple economic sectors.

Pursuant to a 2014 study carried out in the Free State province of the country, it was found that there is a very low survival rate of co-operatives and little evidence of job creation. This finding is in line with earlier findings of an EU-funded study at the national level in 2010, which showed that only 2644 of the then 22619 registered co-operatives, were still functional.

The lack of business skills has been cited as a major reason for the lack of survival of co-operatives in South Africa. Many people in communities do not possess the requisite skills and knowledge to run and operate co-operatives. It is therefore imperative for the members to be taught/ trained about the values and principles of co-operatives before they are established, as well as issues such as: liability of members, withdrawal of membership, membership share structures, among other pertinent issues. Like other entrepreneurs, ASM miners need to have access to business development services to survive and grow their co-operatives.

Another major reason for the lack of survival of co-operatives is insufficient institutional support for co-operatives. Officials at all levels of government have a limited understanding of co-operatives as a form of business. Monitoring (by the Registrar or the Advisory Board, in terms of the Co-operatives Act) is important for the functioning of co-operatives. Also, it is necessary for the government stakeholders to engage with the co-operatives to ensure that skills and knowledge are transferred.

Additionally, as has been explained above, the emergence of co-operatives since 1994 is largely attributed to government efforts, rather than the result of the desires of communities to voluntarily form co-operatives to pursue specific business objectives. It is important for the members of the community to feel that they need co-operatives, instead of being coerced into one, hence the need to educate them on the importance of such institutions.

**\*It is recommended that the DMRE and other responsible government entities should urgently conduct a comprehensive review of the impact of the government's strategy to promote co-operatives in the country. This review would allow the government to devise strategies to tackle the myriad of challenges that have hitherto been faced by co-operatives in South Africa since 1994, before encouraging the establishment of new co-operatives.**

**It is further recommended that the DMRE ought to prioritise education and training of ASM miners within communities on the benefits of establishing co-operatives. Incentives could be provided for ASM miners to ensure that they see through their training and implement the skills therefrom. For example, the imposition of tax deductions to motivate individuals to use the knowledge derived from their training in practice.**

**Also, government officials, including those of the DMRE need to be trained on appropriate monitoring programmes and methods. Lastly, the DMRE also needs to inculcate the necessary entrepreneurial and other business skills for the proper running and operation of co-operatives.**

### **3.3.5. Section 7(k): Transferability and encumbrance**

The Draft ASM Policy provides that a right should be afforded to transfer or encumber, in part or whole, the ASM permit “subject to the Minister's consent”. However, the provision does not provide the criteria on which the Minister’s consent should be based. It is necessary for permit holders to obtain certainty of the criteria according to which the Minister may or may not consent to the transfer of their ASM Permits.

**\*It is recommended that the criteria for the Minister to exercise his/ her consent must be expressly provided. In the event that the said consent is left to the discretion of the Minister, there must be guidelines for the exercise of that discretion, to prevent it from being unfettered.**

**It is further recommended that from the outset, there must be a clear indication of why, how and when the Minister may or may not consent to the transfer of their ASM Permit. Such indication/criteria could be established in a separate document attached as an annexure. Alternatively, such details could be provided in the MPRDA Regulations.**

### **3.3.6. Section 7(l): Sale and trading in minerals**

The Draft ASM policy provides that “consideration should be made for the establishment of a regulated market or a central buying agency...”. The establishment of a buying agency is critical to ensure that ASM miners are able to trade mineral products legally and at the actual market value. This will contribute towards eliminating illegal trading in minerals in black markets or so-called “underground economies”, as well as associated crimes such as illegal mineral trafficking.

**\*It is recommended that a central buying agency should not only be considered, but should be designed and set up as soon as the Policy becomes operative as an Act of Parliament.**

### **3.3.7. Section 7(o): Access to Land**

The Draft policy highlights the fact that access to land remains a contentious issue that requires collaboration with responsible government departments. Although it notes that the framework must provide for safeguards in the form of meaningful consultation requirements, negotiation of compensation to landowners and lawful occupiers, resettlement or relocation and dispute resolution mechanisms, it does not prescribe an elaborate procedure in the event of disputes between the various stakeholders.

**\*It is recommended that a detailed step-by-step procedure for lodging and addressing grievances be expressly provided in the Draft Policy. The Draft Policy also needs to provide for alternative recourse and provisions allowing for parties to approach courts if other options are unsuccessful.**

### **3.4. Institutional And Support Mechanisms**

#### **3.4.1. Section 8(b): Formation of ASM Associations**

The Draft Policy provides for the establishment of ASM Associations at national and regional Levels. Affiliation to such Associations is a compulsory requirement and part of the licensing criteria. It is also a precondition to the granting of an artisanal mining permit or a small-scale mining permit. This is to ensure that ASM miners are organised and can therefore be regulated.

**\*It is recommended that in order to enhance the efficiency of these ASM Associations, they should be granted a degree of autonomy to self-regulate, to a certain extent.**

#### **3.4.2. Section 8(c): Formation of District Mining Committees**

The Draft Policy provides for the establishment of Multi-stakeholder District Mining Committees to be anchored within the ASM Associations. It however does not outline how the stakeholders of the Multi-stakeholder District Mining Committees are chosen and/or elected. There is also no stipulation of the relevant expertise required to become a member of the aforementioned Committee.

There appears to be uncertainty around the representation of stakeholders in the Committee. The Draft Policy is not clear on the following questions:

- (i) To what extent are these stakeholders represented in the composition of the Committee?,
- (ii) How much representation does each stakeholder get in the Committee?,
- (iii) Is there compelled representativity in terms of gender, race, education level etc.?

Lastly, the Draft Policy does not provide guidelines on the terms of reference and rules of engagement for the Committee. Key questions still need clarification. These include the following:

- (i) How does the Committee make its decisions/ resolutions?,
- (ii) Is a quorum needed (and, if so, of how many stakeholders)?,
- (iii) Do they vote? (if so, what happens when there is a deadlock)?

**\*It is recommended that the Draft Policy be revised to provide guidance on the recruitment of the Committee’s stakeholders, and outline the process of how they are to be elected. The Policy should also be revised to respond adequately to the above questions around the composition and internal operations of the Committee. Lastly, the rules and procedures on how the Committee makes its decisions/resolutions should be developed and annexed to the Draft Policy, as complementary guidelines.**

### **3.4.3. Section 8(f): Training, Skills development, and innovation**

The Draft ASM policy highlights the need to consider the “educational levels of artisanal and small-scale miners...as part of the licensing mechanism”. This provision is necessary because, to be able to effectively trade mineral products, ensure environmental protection and personal safety, miners should have a basic knowledge of environmental management, health and safety and business management.

**\*It is recommended that ASM miners be required to have at least basic training in environmental management, health and safety and business management skills. This is especially considering the fact that institutions such as the Mining and Qualifications Authority (MQA) as well as the ASM Mining School are available to assist in this regard.**

## **3.5. Fiscal Regime**

### **3.5.1. Section 9(b): Taxes**

The Draft Policy ensures that the Artisanal and Small-Scale mining industry is included in the obligation to pay taxes and royalties, thus contributing to the socio-economic growth of South Africa.

However, the approach to taxation of the ASM sector, unlike large-scale mining, must be viewed mainly through the perspective of an integrated rural economic and social development perspective- This would be in line with the African Union’s (AU) Africa Mining Vision of 2009. The Vision recognizes ASM as a key poverty-driven and poverty alleviating activity for many African rural

economies, with very few entry barriers and frames its development themes in the broader context of the Millennium Development Goals (MDGs). It further recommends that ASM should be integrated into local and regional economic development and land-use plans and strategies, especially the Poverty Reduction Strategies (PRS). The Vision also urges that the mining policies and laws of member States should be reviewed to incorporate a poverty reduction dimension in ASM strategies.

A major hurdle in making ASM sustainable is the lack of both the desire and the means to invest the gains from ASM in other forms of economic activity. The law should promote ASM as a catalyst and anchor for other productive activities to stimulate the development of complementary and alternative productive ventures necessary for sustainable poverty alleviation. This would in turn encourage ASM miners to contribute to taxes and to play a more developmental role.

**\*In light of the above, it is recommended that there should be innovative approaches to incentivise the ASM sector to contribute to formal taxes. This can be done by:**

**Allowing ASM miners to immediately reap the rewards of improved service delivery and infrastructure investments that is localised,**

**Ringfencing government revenue received from ASM and ploughing it back into communities where the resources are extracted is needed as an incentive to pay taxes- Such revenue must be invested in the communities in consultation with the taxpayers and even acknowledge the names of the contributors, just as is the norm with corporate social investments.**

### **3.6. Government's Policy Stance on Illegal Mining**

#### **3.6.1. Section 11: *“Government should establish a dedicated Minerals and Precious Metals Theft Unit (MPMTU) within the South Africa Police Service (SAPS).”***

The Draft ASM policy indicates the need for a dedicated Minerals and Precious Metals Theft Unit (MPMTU) within the South Africa Police Service (SAPS). Having a specialised Unit is important, as such a Unit will be trained on how to combat the theft of minerals and precious metals. However, by virtue of the MPMTU being established within the SAPS, this may raise questions of its independence to perform its functions independently without interference or undue influence from the SAPS.

**\*It is recommended that appropriate mechanisms must be put in place for the Minerals and Precious Metals Theft Unit (MPMTU) to be sufficiently independent to enable it to perform its functions effectively without interference or undue influence from the SAPS. It should be given**

**a similar status to the Directorate for Priority Crime Investigation (i.e. the Hawks) to empower it to focus strictly on minerals and precious metals theft.**

### **3.7. Policy Implementation, Enforcement, Monitoring and Evaluation**

#### **3.7.1. Section 13(b): Enforcement, monitoring and evaluation**

The Draft ASM policy provides for regular evaluation of the implementation of the Policy. This would be more effective if there are provisions of exact intervals within which such evaluation must be conducted and how the said progress should be measured. The Draft Policy should also prescribe sanctions for noncompliance, to ensure that its provisions are adhered to.

**\*It is recommended that the ASM policy should establish criteria on the basis of which the Policy's implementation should be evaluated i.e. the nature and effect of evaluation. Such criteria should include ease of enforcement and compliance. Once such criteria are established, the Policy should be able to set evaluation intervals, depending on the evaluation mode, which could be monitoring/ observation or request of written and or oral submissions, among others.**

**Furthermore, the Draft Policy ought to prescribe sanctions for non-compliance to ensure that its provisions are adhered to by the various stakeholders.**

## **4. Other Recommendations:**

### **4.1. Roles, Responsibilities, Liability and Accountability of stakeholders/ roleplayers:**

Although the Draft Policy lists the roles, responsibilities, liabilities and accountability of the different parties/ stakeholders or roleplayers, they ought to be more comprehensive.

**\*It is recommended that there should be a clear demarcation of roles, responsibilities, accountabilities and liabilities of each of the roleplayers provided for in the Draft Policy to avoid instances of overlap and to enhance accountability. The different stakeholders provided for in the Draft Policy include the following: ASM miners, mining companies, the various organs of state involved, Non-Governmental Organisations (NGOs), communities, and the local government.**

## **5. Concluding Remarks**

Any initiative to improve aspects of South Africa's mining policy and legal framework is readily welcomed. On behalf of the Chair, we would like to assure you that we are here to help and advise on the issues that the DMRE may be experiencing. MLiA remains committed to continue participating in this process. With our hard-working and experienced team, we also have the requisite capacity to consult with industry roleplayers in both the public and private sectors, as well as civil society organisations, on many issues, including reforming the legal framework for mining in South Africa. A lot of our work is geared towards policy makers, government officials and implementers of mining laws.

We do not serve any client, nor have any private interests or other agenda that we seek to advance through this submission. Our researchers are at the disposal of the DMRE for consultation in all the remaining stages towards the final consolidation of the Draft Artisanal and Small-scale Mining Policy 2021.