



ROYAL BAFOKEN

SPLUMB/15/2012

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BY E-MAIL

The Portfolio Committee on Rural Development and Land Reform
Attention: Ms Phumla Nyanza
Email address: panyamza@parliament.gov.za

10 August 2012

Dear Madam

ROYAL BAFOKENG NATION REPRESENTATIONS IN RELATION TO THE SPATIAL PLANNING AND LAND USE MANAGEMENT BILL 2012

1. INTRODUCTION

- 1.1 The Royal Bafokeng Nation ("**RBN**") understands that the Minister of Rural Development has given notice of an intention to introduce the draft Spatial Planning and Land Use Management Bill (**the "Bill"**) to the National Council of Provinces. In this regard, the Portfolio Committee on Rural Development and Land Reform will hold public hearings on the Bill from 21 to 22 August 2012. The RBN welcomes the opportunity to make submissions in relation to the Bill.
- 1.2 The RBN wishes to highlight concerns it has with various provisions of the Bill. In addition, the RBN has recently had sight of the Chamber of Mines' draft submissions on the Bill and wishes to make observations in respect of the Chamber of Mines' draft submissions.
- 1.3 The RBN is a *universitas personarum* and a traditional community as defined in the Traditional Leadership and Governance Framework Act, 41 of 2003. The RBN comprises of approximately 300 000 members.
- 1.4 The RBN and its subsidiaries are the owners of approximately 1200 square kilometres of land in the North West Province of South Africa. In relation to the land which it owns and administrates, the RBN has developed Vision 2035 and the related Master Plan, through which Vision 2035 is to be implemented. Copies of Vision 2035 and the Master Plan are publicly available.
- 1.5 The RBN has established a Master Plan, which originated from Kgosi Leruo Molotlegi's vision to diversify from traditional mining activities and enter a new phase of physical and infrastructure development that will create sustainable growth and prosperity for the community. The Master Plan envisages, *inter alia*, that certain portions of land, dependant on how the land has been zoned, will be used for specific development projects. The RBN and the Rustenburg Local Municipality are currently working together to implement the Master Plan.

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- 1.6 The Rustenburg Land Use Management Scheme 2005, ("**RLUMS**") which was promulgated by virtue of the Local Authority Notice 221 in the North West Provincial Gazette number 6202 dated 30 August 2005 under the Town Planning and Township Ordinance 15 of 1986, applies to the entire area of jurisdiction of the Rustenburg Local Municipality, which includes the land owned by the RBN.
 - 1.7 As mentioned above, the RBN is currently working together with the Rustenburg Local Municipality to identify certain portions of land to implement the Master Plan. In this regard, to date, the RBN has continuously been required to identify how certain portions of land have been zoned, and further, if the need arose, to apply to have the land rezoned.

2. **RBN'S CONCERNS IN RELATION TO CERTAIN PROVISIONS OF THE BILL**

- 2.1 While the preamble of the Bill recognises that many people in South Africa continue to live and work in places defined and influenced by past spatial planning and that the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities, it is concerning that the Bill does not seem to provide for adequate measures of public participation in the decision making processes. This is particularly so in the case of land owned by a traditional communities. In short, we propose that the Bill should provide more powers to a traditional community which owns land to determine the use to which such community's land is put. Further, and more generally, we propose that further provision should be made for public participation in respect of any land use discussions, and in particular in respect of the land owner's rights which may be affected.
- 2.2 Clause 23(2) of the Bill provides that a traditional council may, subject to the provisions of section 81 of the Local Government: Municipal Structures Act, 1998 and the Traditional Leadership and Governance Act, 2003 participate in the development, preparation and adoption or amendment of a land use scheme by a municipality.
- 2.3 Although the RBN welcomes the provisions for participation by a traditional council in the development, preparation and adoption or amendment of a land use scheme by a municipality, we are concerned that traditional communities which own land may only *participate* in the decision making process concerning their land.
- 2.4 It is not clear what level of participation is envisaged by the Bill. Where the relevant community is the owner of the relevant land, we submit that the relevant community should have a right to determine the use to which that community's land is put, and should have a power of veto in respect of a use other than that desired by the relevant traditional council. As discussed above, the RBN already has in force and effect, in line with the Rustenburg Local Municipality and the RLUMS, the Master Plan. The Master Plan's implementation goes far beyond mere participation in the decision making process concerning their land.
- 2.5 The RBN is concerned that the Bill does not address communal land and/or tribal land. The RBN proposes that special consideration must be given to communal land belong to communities. Provision must be made in the Bill for rural communities on communal land to meaningfully participate in the decision making process concerning the development and use of its land, particularly in relation to mining operations that will impact on their land.

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- 2.6 Clause 51 of the Bill provides that a person whose rights are affected by a decision taken by a Municipal Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision. The section further states that the appeal authority must consider the appeal and confirm, vary or revoke the decision, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.
- 2.7 Although the right to appeal a decision is welcomed, such right is of no substantive value if variation or revocation of the decision on appeal will not diminish any rights that may have accrued as a result of the decision.
- 2.8 We submit that the underlined words should be deleted from the Bill.

3 RBN'S RESPONSE TO THE CHAMBER OF MINES' DRAFT SUBMISSION

- 3.1 In its draft submissions the Chamber of Mines proposes, *inter alia*, that a new clause be inserted in the Bill so as to deal expressly with issues pertaining to the mining industry. The proposed clause reads as follows:

"Mineral operations are exempted from the provisions of this Act and from development frameworks, land use schemes, and legislation, envisaged therein, and nothing contained therein shall be construed as prohibiting or restricting the conduct of mineral operations on any land.

No development framework and no land use scheme shall be prepared or approved in respect of land:

- (a) which is the subject of a mineral authorisation, or*
- (b) on which a mineral operation is being carried out.*

No development framework and no land use scheme shall be prepared or approved save with the written consent of:

- (a) the Minister of Mineral Resources acting on behalf of the State as custodian of the nation's mineral and petroleum resources in terms of the MPRDA, and*
- (b) any mineral holder;*

provided however that should any mineral holder unreasonably withhold such consent or seek to impose unreasonable terms for the granting of such consent, the Minister of Mineral Resources may expropriate the relevant mineral authorisation, and to which expropriation the provisions of s55 of the MPRDA shall apply with the necessary changes."

- 3.2 The Constitution of the Republic of South Africa, 1996 ("**Constitution**") enables each sphere of government to manage its affairs with a degree of autonomy. Municipal Planning is a function assigned to municipalities in terms of section 155 of the Constitution read with Part B of Schedule 4 of the Constitution in terms of which municipalities have both executive authority and the right to administer to the extent set out in section 156 of the Constitution.
- 3.3 The term "municipal planning" is not defined in the Constitution. In the case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*¹, the Constitutional Court stated that:

"planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of

¹ (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC) (18 June 2010)



townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land".

- 3.4 In terms of section 41(1) of the Constitution all spheres of government and all organs of state within each sphere must, *inter alia*, respect the constitutional status, institutions, powers and functions of government in the other spheres.
- 3.5 Further, section 151 of the Constitution provides that the national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.
- 3.6 The Bill has been developed to provide a national framework for land use management. The proposal by the Chamber of Mines to exempt all mining operations from the provisions of the Bill clearly impedes municipalities' ability or right to exercise its powers or perform its functions to determine land use within its jurisdiction.
- 3.7 Although all three spheres of government have responsibilities in planning, the impact of the Chamber of Mines' proposal is felt directly in the local government sphere.
- 3.8 The Chamber of Mines further suggests that each and every land use development application in relation to mining will necessarily need to be elevated to ministerial level. The Chamber of Mines supports this proposal on the basis that clause 52 of the Bill makes provision for land development applications to be referred to the Minister of Rural Development and Land Reform where such application materially impacts on matters within functional areas of national government.
- 3.9 Although mining is an exclusive competence of the national sphere of government and the Minerals and Petroleum Resources Development Act, 2002 ("MPRDA") is national legislation concerned with mining, municipal planning is a functional area which the Constitution allocates to the provincial and/or local sphere of government. Municipal planning includes zoning of land. To simply exempt all mining operations from the provisions of the Bill, will amount to national and provincial spheres of government giving themselves, by legislation, the power to exercise municipal powers and the right to administer municipal affairs.
- 3.10 Each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise. The RBN submits that the Chamber of Mines' proposal that land development applications in relating to mining should be submitted to the Minister of Mineral Resources is unconstitutional because it elevates to the national sphere of government the power to exercise executive municipal powers and the right to administer executive municipal affairs.
- 3.11 Further, the preamble of the MPRDA recognises the need to promote local and rural development and social upliftment of communities affected by mining. Historically, mining has had a substantial effect on communities. It is imperative that communities have reasonable and meaningful involvement in the decision making process relating to whether land use can be altered for mining use. Exempting all mining operations from the provisions of the Bill will make it extremely difficult to address the historical hardships caused by mining as such communities will not be involved in the land use process. In addition, an exemption of all mining operations will result in a blanket removal of land owners

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rights in respect of *inter alia*, proposed; which may potentially be used for mining by anyone other than the land owner.

- 3.12 Under the RLUMS any land which is being used for any activity other than that for which it is currently zoned under the RLUMS needs to be rezoned in order for such use to be lawful. As stated above, the RBN, together with the Rustenburg Local Municipality, is in a process of identifying how certain portions of land have been zoned, and further, if the need arose, to apply to have the land rezoned so as to proceed with the implementation of the Master Plan.
- 3.13 The challenge that the RBN faces in this regard, is that prospecting and/or mining rights on RBN land are granted to mining companies by the Department of Mineral Resources on land that the RBN has earmarked for projects and developments, even though such land is not zoned for mining. If the Chamber of Mines' proposal to exempt all mining operations from the provisions of the Bill is implemented, this will have the negative effect of allowing such mining operations to continue on land not zoned for such purpose. In this regard, the RBN will be extremely prejudiced in its attempt to implement the Master Plan.
- 3.14 The proposal by the Chamber of Mines' will allow mining companies to circumvent the requirement that mining companies obtain the appropriate authorisation of their local municipality before they may commence (or continue) with mining operations where that land is not currently zoned for mining, as held by the Constitutional Court in the case of *Maccsand (Pty) Ltd v City of Cape Town and Others*².

4 CONCLUSION

- 4.1 In our view, national land use management legislation should afford landowners (particularly traditional communities which own land, such as the RBN) a greater ability to determine the use to which land owned by them is put, (in consultation and discussion with the relevant provincial and municipal authorities).
- 4.2 The above submissions are important to the RBN, as well as the implementation of its Master Plan. The RBN requests that these submissions be considered in relation to any further changes to the proposed Bill.
- 4.3 The RBN trusts that their submissions will receive a positive response and looks forward to contributing positively during further discussion on this issue.

Yours faithfully

Adv. Modisaotsile Mokate
Royal Bafokeng Nation
[sent electronically without signature]

² (CCT103/11) [2012] ZACC 7 (12 April 2012)

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