



ICLG

The International Comparative Legal Guide to:

Mining Law 2015

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A practical cross-border insight into mining law

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South Africa

Werksmans Attorneys

Christopher Ian Stevens



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

South African Mining Law is regulated by the Mineral and Petroleum Resources Development Act, 28 of 2002 (“MPRDA”) which is the predominant piece of legislation dealing with acquisitions or rights to conduct reconnaissance, prospecting and mining. The MPRDA became effective on 1 May 2004 and substitutes the erstwhile hybrid system of a common law system with statutory interference. There are several other pieces of legislation which deal with such ancillary issues such as royalties (the Mineral and Petroleum Resources Royalty Act, 2008), title registration (the Mining Titles Registration Act, 1967), and health and safety (the Mine Health and Safety Act, 1996).

1.2 Which Government body/ies administer the mining industry?

The mining industry in South Africa is administered by the Department of Mineral Resources, the head office of which is situated in Pretoria, South Africa, and each of the nine regions of South Africa have regional offices of the Department of Mineral Resources. There is also a mine health and safety inspectorate which falls under the auspices of the Department of Mineral Resources. In addition there is a Director-General and a Deputy Director-General both of whom have delegated powers down from the minister to take various decisions as delegatee of the minister.

1.3 Describe any other sources of law affecting the mining industry.

The mining industry in South Africa is also affected by the law of contract. The terms and conditions applicable to a prospecting right and a mining right are those agreed between the minister and the holder of the right in a notarially executed prospecting right and mining right. Furthermore, often, mining companies enter into surface use agreements with landowners and occupiers of land in regard to the use of surface for mining.

Mining law is also affected by the common law of South Africa, derived from Roman law principles through Roman Dutch law. These principles are often described and enunciated in case law, which case law also places judicial interpretation upon legislation such as the MPRDA.

The law of delict is also relevant in a mining law context. For example, downstream owners of land may have a claim in delict for damages suffered as a result of pollution of water by a mining company upstream.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance is defined in South African law as “any operation carried out for or in connection with the search for a mineral or petroleum by geological, geophysical and photo-geological surveys that includes any remote sensing techniques but does not include any prospecting operations other than acquisition and processing of new seismic data”. In order to conduct a reconnaissance, an applicant needs to apply for a reconnaissance permission to the DMR and demonstrate that the applicant has financial resources, technical ability and has lodged a reconnaissance work programme. Such rights are valid for one year and are not renewable or transferable. The holding of a reconnaissance permission does not grant any exclusivity to apply for, or be granted, a prospecting right or a mining right.

2.2 What rights are required to conduct exploration?

In South African law, there is a distinction between prospecting and exploration. Prospecting relates to searching for minerals other than petroleum and exploration relates to searching for petroleum. Petroleum relates to liquid, solid hydrocarbons or combustible gas but excludes coal and bituminous shale. In order to conduct prospecting for minerals (other than petroleum), an applicant has to apply for, and be granted, a prospecting right. In order to procure the grant, the applicant must apply for an environmental authorisation and consult with interested and affected parties, including landowners and lawful occupiers. The minister is obliged to grant the prospecting right if the applicant has access to financial resources and technical ability, can conduct the prospecting in accordance with the prospecting work programme, and if the prospecting will not result in unacceptable pollution, degradation or damage to the environment. Prospecting rights are granted for a maximum period of five years and are renewable once for a period of up to three years. The holding of a prospecting right grants exclusivity to the holder in regard to an application for a mining right. In regard to petroleum, an applicant has to apply for an exploration right in terms of the petroleum chapter of the MPRDA.

2.3 What rights are required to conduct mining?

A person wishing to conduct mining for minerals (other than petroleum) needs to apply for a mining right in terms of the MPRDA. In order for the application to be granted, the applicant has to lodge an application for an environmental authorisation and consult with interested and affected parties, including landowners. The minister must grant the right if the mineral can be mined optimally, the applicant has access to financial resources and technical ability and the mining will not result in unacceptable pollution, ecological degradation or damage to the environment. Furthermore, the applicant has to lodge a mining work programme and a detailed social and labour plan. A mining right is granted for a maximum period of 30 years provided that the holder is entitled to apply for renewal for periods not exceeding 30 years. In regard to petroleum, an applicant has to apply for a production right in terms of the petroleum chapter of the MPRDA.

2.4 Are different procedures applicable to different minerals?

Different procedures are not applicable to different minerals. Thus an application for a gold or platinum right, for example, has the same requirements as an application to prospect or mine for diamonds. The only distinction is in relation to petroleum as described above.

2.5 Are different procedures applicable to natural oil and gas?

Different procedures are applicable to natural oil and gas as described in questions 2.2 and 2.3 above.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 Are there special rules for foreign applicants?

There are no special rules in South Africa in regard to foreign applicants. They have to comply with exactly the same criteria for the grant of a right as an indigenous applicant. Prospecting rights and mining rights in South Africa can be held by foreign entities, whether natural or juristic. If a foreign company conducts business in South Africa it would have to register at least as an external company in terms of the Companies Act.

3.2 Are there any change of control restrictions applicable?

There are change of control restrictions applicable. The disposal of a controlling interest in a company holding a prospecting or mining right requires the prior consent of the minister. This does not apply to listed entities. The wording in the MPRDA regarding the disposal of controlling interests is probably wide enough to also include the changes in controlling shareholding of ultimate holding companies, even offshore. There is a recent amendment to the MPRDA which has been approved by Parliament but has not yet become force of law which will provide for the disposal of any interest in a company holding a prospecting right or mining right requiring the prior written consent of the minister provided that this restriction will only apply to the disposal of a controlling interest in the case of a listed entity.

3.3 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for foreign ownership by indigenous persons or entities in entities holding prospecting rights or mining rights in South Africa. However, there is a requirement that at least 26 per cent of the attributable units of production of prospecting or mining projects should be held by historically disadvantaged South Africans. A mining charter dealing with the transformation of the mining industry to assist the entrance of historically disadvantaged South Africans into the minerals and mining industry applies to all holders of prospecting rights and mining rights. A mining charter was published in 2004 when the MPRDA came into effect but was substituted by an amended mining charter in 2010.

3.4 Does the State have free carry rights or options to acquire shareholdings?

The State does not have free carry rights in relation to prospecting or mining projects, nor rights to acquire shareholdings. There is a State-owned mining company which itself applies for prospecting rights or mining rights in accordance with the MPRDA.

In the petroleum industry, it is common in exploration rights and prospecting rights for the parties to agree that the State shall have an entitlement of a free carry (up to 5 per cent) and options to acquire further shareholding provided that such shareholding will be contributory. The Amendment Bill referred to in question 3.2 above provides for a 20 per cent free carry in favour of the State with an option to acquire a contributory interest of up to 100 per cent.

3.5 Are there restrictions on the nature of a legal entity holding rights?

There are no restrictions on the nature of a legal entity holding rights. Thus, a natural person may hold rights as well as a juristic entity, including trusts and associations of person. Furthermore rights can be held in partnership and in joint ventures which may constitute partnerships or not.

4 Processing and Beneficiation

4.1 Are there special regulatory provisions relating to processing and further beneficiation of mined minerals?

The MPRDA provides that before any person intends to beneficiate any mineral mined in the Republic of South Africa outside the Republic, the holder may only do so after written notice and in consultation with the minister. The holder of a mining right is entitled to process minerals mined under the auspices of a mining right as the holder of a mining right. However, there are further statutory provisions that are applicable to the processing of precious metals and diamonds and these requirements are regulated by the Precious Metals Act, 2005 and the Diamonds Act, 1986 respectively.

The Amendment Bill referred to in question 3.2 above provides that every producer of designated minerals must offer to local beneficiators a prescribed percentage of its production of minerals or mineral products in prescribed quantities, qualities and timelines at the mine gate price or agreed price.

4.2 Are there restrictions on the export of minerals?

There are restrictions on the export of certain minerals, such as diamonds in terms of the Diamonds Act, 1956 and precious metals in terms of the Precious Metals Act, 2005. Precious metals include gold, silver and the platinum group metals. A permit is required to export, and export levies are imposed.

The Amendment Bill referred to in question 3.2 above provides that no person other than a producer that has offered local beneficiaries the prescribed percentage of its production of minerals may export designated minerals or mineral products without the minister's prior written approval.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The MPRDA contains restrictions on the ability to transfer reconnaissance rights, prospecting rights, mining rights, exploration rights and production rights. The transfer of these or any interest in these through any method of disposal requires the prior written consent of the Minister of Mineral Resources. The minister is obliged to grant such consent if the transferee satisfies the criteria for the grant of a right in the first place. Disposals are given effect to by cessions of rights which are capable of being registered in the Mining Titles Office.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged to raise finance?

Reconnaissance licences may not be bonded, but exploration, production, prospecting and mining rights are all capable of being bonded. If the bond holder is not a bank or financial institution, prior written consent from the minister is required. If the mortgagee is a bank or financial institution and the money is used for purposes of the project, then the consent of the minister is not required to bond the right, although, upon foreclosure, under the bond any transfer to a third party by the bond holder would require the consent of the minister. The bonds are registered in the Mining Titles Office and constitute real security giving preference security to the holder of the bond. If the holder of a right goes into liquidation the right lapses and does not fall into the liquidator's hands. This lapsing provision does not apply in the case of a bond which is held by a bank or financial institution in which event the right continues to exist upon liquidation.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Reconnaissance rights may not be sub-divided. Production, prospecting rights and mining rights are capable of being sub-divided provided the requisite consent of the minister is obtained in terms of the MPRDA. Any such sub-division may have to be accompanied by consultation with interested and affected parties prior to the grant of the consent, amendments to environmental

management plans or programmes, amendments to work programmes and amendments to social and labour plans.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Rights to conduct reconnaissance, exploration and mining are capable of being held in undivided shares which shareholding is recognised in the MPRDA and in terms of the Mining Titles Registration Act, 1967. This situation often arises in joint ventures or partnerships in the mining industry where rights are held in undivided shares. Under the erstwhile common law system, rights were often held in undivided shares and such undivided shareholders had the right to convert their rights into new rights in terms of the MPRDA and thus the holding of rights in undivided shares is common in South African mining law.

6.3 Is the holder of a primary mineral entitled to explore or mine for secondary minerals?

The holder of a primary mineral is not entitled to explore or mine for secondary minerals in respect of which the primary mineral right holder is not the holder of the rights thereto. The holder of the primary minerals would have to either leave the minerals underground or stockpile such minerals on the surface without the entitlement to dispose thereof. It is common in such scenarios where there is not a third party holding the rights to the secondary minerals, for the holder of the primary right to apply to the minister to amend the primary right to include the right to mine for secondary minerals. The Amendment Bill referred to in question 3.2 above provides for a declaration by the holder of a primary mineral that an associated mineral (being a mineral which occurs in mineralogical association with, and in the same core deposit as, the primary mineral) be mined.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a prospecting right or mining right has no entitlement to residues which existed on the land concerned prior to the holder obtaining the prospecting right or mining right. However, any residues created by the holder of the mining right would be considered to be residue stockpiles. Residue stockpiles are capable of being processed by the holder of the mining right. Upon lapse of the mining right, the relevant residues would become residue deposits and third parties could apply for rights to prospect or mine thereover. The Amendment Bill referred to in question 3.2 above provides for owners of residue stockpiles and residue deposits located outside the ambit of the mining area to apply for mining rights or mining permits to the State within a period of two years from the Amendment Bill taking effect.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules in relation to the sea as defined in the MPRDA. "Sea" is defined as the bed of the sea and the sub-soil thereof below the low water mark and within the territorial waters, the exclusive economic zone and the continental shelf. If the relevant mineral is classified as petroleum, then the petroleum chapter of the MPRDA will apply to exploration or production of petroleum offshore.

7 Rights to Use Surface of Land

7.1 What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land?

The rights to use the surface of land by a holder of a right to conduct reconnaissance, exploration or mining in terms of the MPRDA, are extensive. The holder may:

- enter the land to which such right relates, bring his or her employees onto the land and bring any plant, machinery or equipment or build or construction or lay down any surface, underground or undersea infrastructure which may be required for the purposes of exploration or mining;
- prospect or mine for his own account;
- remove and dispose of such mineral;
- use water in relation to prospecting or mining activities; and
- carry out any other activity incidental to exploration or mining.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

The holder of a reconnaissance right, exploration right or mining right has duties towards the landowner or lawful occupier in terms of consultation, and the holder of a prospecting right or mining right has to compensate the landowner for loss or damage suffered as a result of the conduct of prospecting or mining activities. It is not necessary for the holder of a prospecting right or mining right to purchase land or even enter into an agreement to use the land with the surface owner.

7.3 What rights of expropriation exist?

There are rights of expropriation vested in the DMR to expropriate land or an interest in land if it is in the national interest and for the promotion of the objectives of the MPRDA.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Currently the holder of a prospecting right or mining right is required to have an approved environmental authorisation, prior to the conducting of the relevant activities. In addition, the right to use water is governed by the National Water Act, 1998.

8.2 What provisions need to be made for the closure of mines?

The holder of a prospecting right or mining right must furnish, during all stages of the project, sufficient pecuniary provision for rehabilitation which is reassessed on an annual basis. This is done in terms of a deposit with the DMR, bank guarantee or a trust deed. The principle of pecuniary provision is that there must be sufficient funds at all times in the hands of the DMR apart from the mining company to attend to rehabilitation if there is a premature closure of the mine.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The holder of a prospecting right or mining right must apply for a closure certificate within 180 days of ceasing the relevant operation and lodge a closure plan. Furthermore, the holder of a prospecting or mining right must comply with all aspects of the environmental authorisation approved in relation to the prospecting right or mining right in regard to the closure.

8.4 Are there any zoning requirements applicable?

Zoning requirements may be applicable and required to be obtained over, and above, the prospecting right or mining right if there are zoning restrictions in the applicable area. There may be a town planning scheme having application over the relevant area which restricts prospecting or mining without a rezoning application.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Native title or other statutory surface use rights do not have a material impact upon reconnaissance, exploration or mining operations. Holders of such rights would be in the same position as any landowner or lawful occupier in regard to consultation by applicants and holders of prospecting rights or mining rights and the right to receive compensation in the case of damage or loss. Communities owning land do have preferent rights to apply for rights to prospect or mine. Furthermore, if any application for a mining right relates to land occupied by a community the minister may impose such conditions as are necessary to promote the rights and interests of the community.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

There is a separate piece of legislation dealing with health and safety in mining, namely the Mine Health and Safety Act, 1996. Previously, mine health and safety was dealt with in the same ambit as the relevant mining law, namely the Minerals Act, 50 of 1991 but it was removed and placed in a separate piece of legislation as the purpose of the two pieces of legislation is often in conflict.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

There are extensive obligations imposed upon owners, employers, managers and employees in relation to health and safety, including in relation to statutory appointments, liability, committees, inquests and enquiries.

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is a central titles registration office in Pretoria which registers prospecting rights, mining rights, cessions thereof, bonds thereover

and amendments thereto, amongst others. There is an obligation upon holders of rights to lodge for registration of the rights within certain prescribed time limits.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

There is a system of appeals against administrative decisions in terms of the relevant mining legislation. One has to exhaust the internal remedies before going to court to set aside an administrative decision on review in terms of the High Court rules. Appeals have to be brought within 30 days of gaining knowledge of the relevant decision.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

There is a Constitution in South Africa of 1996 which has an impact upon rights to conduct reconnaissance, exploration and mining. Section 25 of the Constitution protects property from being expropriated without just and equitable compensation; property would include prospecting rights or mining rights and is not limited to land. The law must be of the general application and there should be no arbitrary deprivation. It must also be for a public purpose or public interest.

12.2 Are there any State investment treaties which are applicable?

There are bilateral State investment agreements or treaties. For example, there is a treaty between the Republic of South Africa and the United Kingdom dated 20 September 1994 for the promotion and protection of investments. It is provided that investments of nationals or companies in the UK may not be nationalised, expropriated or subject to measures having an effect equivalent to nationalisation or expropriation except for a public purpose and against prompt, adequate and effective compensation. However, South Africa has recently cancelled some of its bilateral investment treaties.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are extensive special rules applicable to taxation of prospecting and mining companies including in relation to capital expenditure deductions. To qualify as a mining company, one has to hold a prospecting right or a mining right granted in terms of the MPRDA.

13.2 Are there royalties payable to the State over and above any taxes?

There are royalties payable to the State over and above taxes in terms of the Mineral and Petroleum Resources Royalty Act based on an "earnings before interest" and tax formulation.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

All exploration and mining companies need to comply with local provincial or municipal laws to the extent that they are not overridden by National Legislation. Thus, for example, there may well be zoning requirements imposed in terms of provincial ordinances or for example municipal by-laws regarding smoke emissions which need to be complied with by the holder of a prospecting right or a mining right.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are rules relating to the SADEC Region, which govern exemptions from import duties, custom restrictions, repatriation dividends and the like which may assist companies operating in South Africa in regard to activities conducted outside South Africa but within the SADEC Region.

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