

# NAMIBIA

## KOEP & PARTNERS



### FIRM INFORMATION

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### RELEVANT AUTHORITIES AND LEGISLATION

#### What laws regulate mining?

In terms of article 100 of the Constitution of the Republic of Namibia, 1990, all natural resources (including minerals) below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state, unless they are otherwise lawfully owned. This includes mineral resources as well.

Mining in Namibia is regulated by the Minerals (Prospecting and Mining) Act 33 of 1992 ("Minerals Act"). Section 2 of this Act vests all rights in respect of minerals in the state. This Act furthermore provides for the administration of the minerals industry and access to mineral resources through various types of authorisations.

Health and safety aspects relating to the minerals industry were passed in terms of the previous Mines, Works and Minerals Ordinance 20 of 1968. These regulations are still in force in terms of the Minerals Act and will remain in force until they are repealed. New regulations have been drafted some time ago but are not yet in force. The general health and safety regulations passed in terms of the Labour Act 6 of 1992 (which are still applicable under the Labour Act 11 of 2007) apply also to all employment relationships in Namibia, including those in the minerals industry.

The exploitation of minerals is also affected largely by the Environmental Management Act 7 of 2007 ("EMA") and the Environmental Impact Assessment Regulations passed in terms of this Act. In terms of this Act, no person may undertake a listed activity without an environmental clearance certificate. Listed activities include mining and quarrying activities. The minister of mines and energy may not issue a mineral licence before the applicant has obtained an environmental clearance certificate.

Various other laws might be applicable to the mining industry. These include the Diamond Act 13 of 1999, Minerals Development Fund of Namibia Act 19 of 1996, Namibia Investment Promotion Act 9 of 2016, Soil Conservation Act 76 of 1969, the Hazardous Substance Ordinance 14 of 1974, the Atmospheric Pollution Prevention Ordinance 11 of 1976, the Prevention and Combating of Pollution of the Sea by Oil Act 6

of 1981, the Forest Act 12 of 2001, and the Atomic Energy and Radiation Protection Act 5 of 2005.

#### Which Government Bodies administer mining law?

The minerals industry falls under the auspices of the Ministry of Mines and Energy and its line minister, the Minister of Mines and Energy. The Minister is assisted by the Mining Commissioner. The Minerals Act also provides for a Minerals Board of Namibia. The Minerals Act prescribed the function of the Mining Commissioner and the Minerals Board.

Environmental issues are regulated by the Minister of Environment and Tourism. This Minister is assisted by the Environmental Commissioner, whose functions are prescribed by the EMA.

### TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

#### What rights are granted to conduct reconnaissance, exploration and mining operations?

To search for minerals, a person may apply for several authorisations. These are a non-exclusive prospecting licence, exclusive prospecting licence or reconnaissance licence.

Reconnaissance licences authorise the holder thereof to conduct reconnaissance operations, which are operations carried on in a general search for any mineral or group of minerals by means of aerial sensing techniques, including geophysical surveys, photogeological mapping or imagery carried out from the air. It is valid for a maximum period of six months and may not be renewed. It may, however, be extended once for a period of six months. The Act provides for exclusive reconnaissance licences, but these are no longer issued in practice.

Prospecting operations are conducted in terms of non-exclusive and exclusive prospecting licences. "Prospecting" means intentionally searching, whether by way of excavations or otherwise, for any mineral or group of minerals with a view to delineating or evaluating deposits or concentrations of any such mineral or group of minerals. A non-exclusive prospecting



licence is valid for a period of one year and is not renewable. It is not granted over a specific area. An exclusive prospecting licence, on the other hand, is valid for a period of three years and may be renewed twice for a period of two years per renewal. Further renewals are possible only if the Minister deems it desirable in the interests of the development of the mineral resources of Namibia. It is granted over a specific area.

Mining operations may be conducted in terms of a mining claim or a mining licence. The holder of a non-exclusive prospecting licence may peg a mining claim, which may not be bigger than three hundred metres by six hundred metres. This claim is then registered with the Ministry, which entitles the holder to conduct mining operations on the mining claim. A claim is valid for three years and may be renewed for two years at a time. On the other hand, the holder of an exclusive prospecting licence may apply for a mining licence over the prospecting area. A mining licence is valid for a period of twenty-five years and may be renewed for further periods of fifteen years per renewal.

## OIL AND GAS

### What rights are granted to conduct oil and gas exploration and production?

The upstream petroleum industry in Namibia is primarily regulated by the Petroleum (Exploration and Production) Act 1991 (Act 2 of 1991) ("Petroleum Act"). The Petroleum Act provides for the reconnaissance, exploration, production and disposal of petroleum as well as the control over petroleum. It provides that all rights in respect of petroleum vest in the State notwithstanding any right regarding the ownership of the land where the petroleum is found. No person may carry on any operations in respect of petroleum without the necessary licence issued by the Ministry of Mines and Energy. The Act also provides for the payment of petroleum royalties. The Petroleum Act is administered by the Minister of Mines and Energy. The Minister must appoint a Commissioner of Petroleum Affairs and a Chief Inspector of Petroleum Affairs. These two officers exercise or perform the powers, duties and functions conferred or imposed upon them by, or under, the provisions of the Petroleum Act and such other functions as may be imposed upon them by the Minister. The Commissioner and Chief Inspector are assisted by such other officers as may be designated by the Permanent Secretary: Mines and Energy for such purpose. The Petroleum Ancillary Rights Commission is also established under the Act. This Commission principally deals with disputes between licence-holders and landowners.

## INDIGENISATION REQUIREMENTS

### Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples?

The Minerals Act does not provide for rights of indigenous people.

### Are there any special rules or restrictions applicable to foreign applicants?

The Foreign Investment Act, 1990 (Act 27 of 1990) and the Foreign Investment Amendment Act, 1993 (Act 24 of 1993) have been repealed by the Namibia Investment Promotion Act 9 of 2016. ("Investment Promotion Act")

In terms of the Investment Promotion Act an investor or investment in the natural resource sector or in any other sector which is above the threshold may not-

- Change the ownership or control of investment; or
- Transfer any licence, permit, authorisation or concession owned by the investor or investment, to a foreign investor through any form of merger, acquisition, direct sale or transfer without the approval of the Minister.

Furthermore, an investor or investment in Namibia who wishes-

- To change ownership or control of the investment in favour of a foreign investor; or
- To transfer any license, permit, authorisation or concession owned by the investor or investment to a foreign investor through any form of merger, acquisition, direct sale or other disposal,

must, subject to the requirements of the Competition Act, 2003 (Act 2 of 2003), apply to the Minister in the prescribed form and manner for approval of such proposed change or transfer at least 60 days before the date of intended change or transfer or any earlier date as the Minister may allow in any particular circumstances.

A foreign investor seeking to make an investment in Namibia must apply to the Minister for approval of the proposed investment in the prescribed form and manner.

In considering the application for approval of investment and in addition to any other provisions of Act, the Minister must consider the net benefit for Namibia, taking into account-

- The contribution of the investment to the national development, economic growth, public policy and national security objectives of Namibia;
- The contribution of the investment to the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices;
- The contribution of the investment to the implementation of programmes and policies aimed at redressing social and economic imbalances in Namibia, including gender-based imbalances;
- The contribution of the investment towards increasing employment creation in Namibia;
- The contribution of the investment to the advancement of the development of a geographical area of a low social and economic development;
- The contribution of the investment to the transfer of technological and managerial skills, knowledge and innovation;
- The contribution of the investment to value addition to the natural resources and manufacturing sector of Namibia;
- The extent to which the investment will procure goods and services from the SME sector and Namibian suppliers in general; and
- The impact on the environment and contribution to environmental benefits and any other factors the Minister may prescribe.



Furthermore, in terms of the Minerals Act, the Minister may grant a licence, or the renewal of a licence, subject to such terms and conditions as he may deem necessary. In the light hereof, licences are often granted subject to the condition that there must be some local ownership (which can include joint holding with Epangelo Mining (Pty) Ltd (Epangelo).

, the state-owned mining company). All mining rights in respect of uranium, gold, copper, coal, diamonds, and rare earth metals are vested in Epangelo.

There are certain restrictions on foreigners pegging a mining claim. In terms of the Minerals Act, a mining claim may only be pegged by a Namibian citizen or Namibian owned company. We are of the view, however, that the Minerals Act does not exclude foreign-owned close corporations from pegging a claim.

#### **Identify any rights that the State may have. Does the State have any rights to equity in mining projects?**

All rights in respect of mineral resources vest in the state, who may grant these rights to applicants. In general, the state does not have any rights to equity in mining projects, save possibly for the right of Epangelo to be a joint holder in a mining project.

### **PROCESSING AND BENEFICIATION**

#### **Are there any requirements to beneficiate minerals mined?**

There are at this stage no requirements to beneficiate minerals locally. However, new royalties have been introduced and one of them appears to be a type of penalty royalty where the holder fails to beneficiate locally. These new royalties are not yet applied in Namibia yet.

#### **Are there any restrictions on the export of minerals?**

Certain limitations exist on the export of source material. No person may, except with the written permission of the Minister, export any source material from Namibia. The exportation of diamonds are also strictly regulated in terms of the Diamonds Act 13 of 1999 and the Regulations passed in terms of this Act.

### **DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS**

#### **Are there any statutory consents required to dispose of rights to explore and mine**

Reconnaissance licences and non-exclusive prospecting licences are not transferable and not disposable. On the other hand, mining claims, exclusive prospecting licences and mining licences (collectively referred to as "mineral licences") may not be transferred without the consent of the Minister. Furthermore, no interest in a mineral licence may be granted, ceded or assigned and no person may be joined as a joint holder of a mineral licence without the consent of the Minister.

#### **Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights?**

In terms of the Minerals Act, there is no restriction on the disposal of a controlling interest in entities holding exploration or mining rights. There is, however, an obligation to notify the Mining Commission or any change of more than five per cent beneficial shareholding in the holder. In practice the Minister has interpreted "interest in a mineral licence" to include a controlling interest in the holder of a mineral licence as well.

### **USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES**

#### **What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation?**

In terms of the common law, the holder of a licence may exercise any rights granted to him reasonably (*civilliter modo*) and in such manner that the rights and interests of the owner of any land to which such licence relates are not adversely affected, except to the extent to which such owner is compensated. This was confirmed by the High Court of Namibia in *Hoffman v Maier* 1994 NR 61 (HC).

Furthermore, before entering any private land and exercising any rights on private land, the holder must enter into an agreement with the owner of the land which must provide for compensation to be paid by the holder to the owner for the use of the land. This is generally referred to as a surface agreement or access agreement.

### **ENVIRONMENTAL**

#### **What legislation governs environmental protection of exploration and mining sites?**

In terms of the EMA, the Minister of Mines and Energy may not issue a mineral licence until the applicant has been furnished with an environmental clearance certificate. A person wishing to apply for an environmental clearance certificate must lodge an application with the Minister of Mines and Energy, who is designated as the competent authority in terms of the EMA. The applicant must then hold public consultation, draft a scoping report, and give interested and affected parties an opportunity to comment. The results of the public consultation, scoping report, a management plan and all comments and replies thereto must then be lodged with the minister of mines and energy, who must then forward this to the environmental commissioner. The environmental commissioner can then either issue the environmental clearance certificate or request the applicant to conduct an environmental impact assessment before the clearance certificate is issued.

In terms of the Minerals Act, an environmental impact assessment study must be furnished to the Ministry of Environment before a mining project can proceed. In terms of the regulations to the Environmental Management Act, where an assessment is required in terms of any other law, and that other law or policy requires that information must be submitted, or processes must be carried out that are substantially similar to information or processes required in terms of these regulations of the EMA, the Minister of Environment and Tourism must take steps to enter into a written agreement with the authority responsible for administering the law or policy (such as the Minister of Mines and Energy) in respect of the coordination of the requirements of the law, policy and regulations passed in terms of the Environmental Management Act to avoid duplication in the submission of such information or the carrying out of such processes. As far as we know, no such agreement has been entered into.



## NATIVE TITLE AND LAND RIGHTS

### Is there any native title which has any implication for the exploration and mining industry?

The Minerals Act does not recognise native title.

## HEALTH AND SAFETY

### What legislation governs health and safety in mining?

The health and safety regulations passed in terms of the Labour Act 6 of 1992 (which are still applicable under the Labour Act 11 of 2007) apply in general. Furthermore, mine health and safety regulations were passed in terms of the previous Mines, Works and Minerals Ordinance 20 of 1968. These regulations are still in force in terms of the Minerals Act and will remain in force until they are repealed. New regulations have been drafted but are not yet in force. The new regulations have been in circulation for several years and its future is uncertain.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

### Is there a constitution which has an impact upon rights to prospect and mine?

In terms of article 100 of the Constitution of the Republic of Namibia, 1990, all natural resources (including minerals) below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state, unless they are otherwise lawfully owned. Other provisions of the Constitution which may be applicable include the right to property (which extends to mining title as well), the right to be treated fairly, the right to just administrative action and the right to have disputes determined by a court or independent and impartial tribunal.

### Are there administrative appeals in the mining law?

Any person who feels aggrieved with any action or decision taken or made by the Commissioner in terms of any provision of the Minerals Act, may, within 30 days from the date on which such action or decision was made known to such person, lodge an appeal against any such action or decision, and thereupon the Minister may confirm, set aside, or amend any such action or decision.

The right to fair and reasonable administrative justice is guaranteed in terms of Article 18 of the Constitution of the Republic of Namibia, 1990. The Commissioner and the Minister are administrative bodies and any decision taken by them may be taken on review to the High Court of Namibia. Any aggrieved person may therefore take a decision by them on review to the High Court of Namibia. Where the decision was taken by the Commissioner, however, the High Court may suspend any application until the internal appeal has been exhausted.

## ROYALTIES AND TAXES

### Are there special rules applicable to taxation of exploration and mining companies?

#### Taxation

Namibia's mineral policy aims to create an environment that attracts both foreign and local investment and thus contribute

to socio-economic development. The Mineral rights are vested in the state and the industry is primarily regulated by the Minerals (Prospecting and Mining) Act of 1992.

The table below shows the mining taxes of Namibia which reflect the key elements of most mining fiscal regimes. Namibia uses the royalty system combined with corporate income tax to capture revenue which distributes the risk of mining between states and companies.

TAX PAYABLE	NAMIBIA
Mineral Royalty Rates	Diamond mining: 10%  Rossing Uranium: 6%  Dimension Stone: 5% on all unprocessed stone blocks  Precious stones, base & rare: 3%  Nuclear fuel minerals: 3%  Semi-precious stones, industrial & non-nuclear fuel minerals: 2%
Corporate Income Tax	Diamond mining: 55%  Other Minerals: 37.5%  Non-mining activities: 40%
Dividend withholding tax	Dividends: 10% paid to non-residents and certain foreign residents  Royalties: 10.5% on distribution to non-residents
Import Duty	Uplift – 10% - subject to SACU standards
Value Added Tax	15%

The Corporate Income Tax in Namibia is fixed at a minimum of 25% for minerals but the average tax is 37.5%. Diamond Mining has a special tax rate of 55%. Furthermore, Mining companies are taxed 40% for non-mining activities.

The diamond industry is given special tax treatment in Namibia. This is due to the diamond industry's strong role in the Namibian economy i.e. the government has a 50-50 joint venture with De Beers Century AG.

Namibia's average rate of 37.5% is high compared to international standards i.e. most countries impose an average of 30% (Chile: 15%) (Argentina: 35%) (Ghana 35%). This high rate can result in the early closure of marginal mines and loss of employment. Nonetheless it is to be noted that Namibia does provide generous incentives which will be discussed further below.

#### Withholding taxes

Withholding Tax in Namibia is applied to both dividends (10%) and royalties (10.5%). Namibians taxes total 25.5% withholding



tax, which is arguably higher than the considerable range amongst developing countries.

### Stabilization

There are no specific tax stabilisation arrangements currently in Namibia. Tax stabilisation provisions could be put in place under an investment agreement, however from experience the Government of Namibia is very reluctant to enter into such stabilisation schemes by way of an agreement.

### Tax incentives

Tax allowances demonstrate the extent to which government is sharing in the investment risks. Their main purpose is to provide a means for a company to decrease their tax liability by taking into consideration the costs and losses. Allowances are an important aspect of the project evaluation and thus 'the nature and size of the tax allowances can make or break a fiscal regime'.

Namibia offers a range of tax allowances. All preproduction exploration expenditure is fully deductible in the first year of production. In addition, initial and subsequent development cost including start-up capital and loan finance, are fully deductible in equal instalments over a period of three years. Losses are carried forward indefinitely and, subsequent exploration expenditure is not ring fenced and is fully deductible in the year. The absence of the ring fence is a strong financial incentive for investors. Furthermore, Namibia has signed double-taxation treaties with the United Kingdom, the Republic of South Africa, Mauritius, Sweden, France, India, the Russian Federation, Romania, and Germany.

Pursuant to section 18 of Tax Income Act, there are specific capital expenditure amounts that can be deducted from taxable income arising because of mining operations. Such capital expenditure amounts are explained in section 36 of the Tax Income Act, which states firstly that the capital deductions that are available relate to either exploration expenditure or development expenditure (or both), incurred during the current year of assessment. Any development expenditure incurred in the year of assessment will be deductible as follows: (i) one third deductible in the current year of assessment; (ii) the second third deductible in the year after the current year of assessment; and (iii) the final third deductible in the second year after the current year of assessment.

### Transfer of mineral rights

The Income Tax Act was amended by the Income Tax Amendment Act 13 of 2015, which amended the definition of "gross income" to include any amount received or accrued, whether in money or in kind, as consideration (or payment of like nature) or the open market value by way of a sale, donation, expropriation, cession, grant or other alienation or transfer of ownership of a mineral licence, or right to mine minerals in Namibia, and includes a sale, donation, expropriation, cession, grant or any other alienation or transfer of ownership of any share or member's interest in a company that holds a mineral licence or mineral right whether directly, or indirectly, less the acquisition cost of the mineral licence or mineral right, but the acquisition cost of the licence or right may not create a loss.

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

Mineral royalty tax is unique to the natural industries. Namibia imposes ad valorem royalties which is based on the value of

the mineral produced. In its simplest form, an ad valorem royalty consists of a uniform percentage (the rate) of the value (the base) of the mineral(s) in the products sold by the miner.

In Namibia, 10% royalty payment is imposed on diamonds and 5% on all unprocessed dimension stone. The tax on the unprocessed is meant to encourage local processing. In 2006, Namibia introduced royalty tax on other minerals. It imposed a 6% royalty payment on the Rossing uranium mine, predominately owned by Rio Tinto and other stakeholders. Furthermore, Namibia levies a 3% royalty payment on precious stones and 3% on precious metals and other metals.

The calculation of value-based royalty varies hence the percentages should not be viewed at face value. For instance, Namibia's royalty value is based on sales revenue minus some costs. In addition, alternative royalty rate can be negotiated.

It is evident that Namibia has higher royalty rates in comparison to other countries. However, it is also important to note that the absence of a royalty rate doesn't automatically make a fiscal regime competitive for foreign investment. Competitiveness is based on a combination of factors.

The Minister is further granted a wide discretion to levy royalties in respect of minerals mined. Pursuant to section 114 of the Minerals Act, the holder of any mineral licence may be required to pay to the Mining Commissioner, for the benefit of the State Revenue Fund:

- For any rough and uncut mineral of the precious stone group, a 10% royalty on the market value.
- For any rough or unprocessed minerals of the dimension stone group, a 5% royalty on the market value.
- For any other mineral, a royalty that is determined by the Minister. Currently the royalties on precious metal are at 3%, base and rare metals are also at 3%, semi-precious stones are at 2%, nuclear fuel minerals are at 3%, industrial minerals are at 2% and non-nuclear fuels are levied at 2%. All these royalties are levied on the market value of the minerals.

The Minerals Amendment Act (the Amendment Act) introduced a so-called windfall royalty. The Minister can levy a royalty on any material if the Minister is satisfied that: a) there has been such an increase in market prices obtainable that the operations have become significantly more profitable; or b) the development in technology or any unforeseen circumstances have caused the operations to become significantly more profitable. The power of the Minister is restricted, by requiring him to inform the holder in writing of the intention to impose such a windfall royalty and he must afford such a holder the opportunity to make presentations and proposals regarding the intention of imposing the windfall royalty within a reasonable time and such representations are taken into account.

There is furthermore an additional royalty that can be levied at the discretion of the Minister. It applies to minerals excluding precious and dimension stone. However, the nature of this royalty is unclear, but would lend itself to a kind of penalty royalty. The Minister decides the rate of this royalty.

