

SOUTH AFRICA

WERKSMANS ATTORNEYS



FIRM INFORMATION

Website address: www.werksmans.com

Languages spoken: English, Afrikaans, French, German, Zulu, Portuguese

Address: The Central, 96 Rivonia Road, Sandton, 2196, Johannesburg, South Africa

Contact: Chris Stevens

Telephone: +27 11 535 8467

Email: cstevens@werksmans.com

RELEVANT AUTHORITIES AND LEGISLATION

What laws regulate 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).

Which Government body/ies administer mining law?

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.

TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

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.

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. 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 land owners 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 5 years and are renewable once for period of up to 3 years. The holding of a prospecting right grants exclusivity to the holder in regard to an application for a mining right.

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 land owners. 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.

OIL AND GAS

What rights are required to conduct oil and gas exploration and production?

Exploration relates to searching for petroleum. Petroleum relates to liquid, solid hydrocarbons or combustible gas but excludes coal and bituminous shale. In regard to petroleum



an applicant has to apply for exploration rights in terms of the Petroleum Chapter of the MPRDA. In regard to production an applicant has to apply for a production right in terms of the Petroleum Chapter of the MPRDA.

INDIGENISATION REQUIREMENTS

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% 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 has been substituted by an amended mining charter in 2010. A new mining charter of 2018 has been published in September 2018 now requiring for new mining right applicants a 30% shareholding by Historically Disadvantaged South African including 5% carried interest in favour of employees and 5% carried interest in favour of local communities.

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 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.

State Equity

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%) and options to acquire further shareholding provided that such shareholding will be contributory. An Amendment Act of 2013 was approved by Parliament but has been sent back to Parliament for reconsideration because of several controversial aspects and it has yet to become force of law. The latest version of the Amendment Act provides for a 20% free carry in favour of the State with an option to acquire contributory interest of up to 100%.

PROCESSING AND BENEFICIATION

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 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 Act referred to 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.

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, 198 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 Act referred to in paragraph 4.3 above provides that no person other than a producer that has offered local beneficiators the prescribed percentage of its production of minerals may export designated minerals or mineral products without the Minister's prior written approval.

DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

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.

Are there restrictions on disposals of controlling interests in the entities holding exploration or mining projects?

There are change of control restrictions applicable. A 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 disposals of controlling interests is wide enough probably also to include the changes in controlling shareholding of ultimate holding companies even offshore. The Amendment Act referred to in 4.3 above provides for a 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 a disposal of a controlling interest in the case of a listed entity.



RIGHTS TO USE SURFACE OF LAND

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

The rights to use the surface of a holder of a right to conduct reconnaissance, prospecting 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 purposes of prospecting 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 prospecting or mining.

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

The holder of a reconnaissance right, prospecting 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. Where communities are involved the consultation obligations are more extensive as a result of recent court decisions which have held that the consent of the community must be obtained before mining can take place.

ENVIRONMENTAL

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.

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.

What are the closure obligations of the holder of a reconnaissance right, prospecting 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 closure.

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.

NATIVE TITLE AND LAND RIGHTS

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

Native title or other statutory surface use rights do not have a material impact upon reconnaissance, prospecting 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. The obligations on a mining right applicant or holder to consult with communities is more extensive than other landowners because of recent court decisions which have held that the consent of a community must be obtained before mining can commence.

HEALTH AND SAFETY

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.

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, inquest and enquiries.



ADMINISTRATIVE AND CONSTITUTIONAL ASPECTS

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.

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

There is a Constitution in South Africa of 1996 which has an impact upon rights to conduct reconnaissance, prospecting 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.

TAXES AND ROYALTIES

Are there any special rules applicable to taxation of prospecting 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.

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.

