Energy & Natural Resources - South Africa

Mineral and Petroleum Resources Development Amendment Bill 2013 approved

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May 12 2014

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Introduction

On March 27 2014 the National Assembly and the National Council of Provinces approved the Mineral and Petroleum Resources Development Amendment Bill 2013.

The bill will be sent to the president to sign. Once the bill is signed, its commencement date will be published in the *Government Gazette*.

This update discusses some of the key changes introduced by the bill that affect the mining sector and commercial mining companies and transactions. It does not deal with the changes introduced by the bill with respect to the petroleum sector.

Transfer of mining or prospecting rights and consent for change of control

Currently, listed mining companies that are in the chain of control of mining rights holders are exempt from the need to obtain ministerial consent if the listed company undergoes a change in control. However, the bill will require listed mining companies to obtain ministerial consent if there is a change in control.

In addition, non-listed companies that hold mining rights or are in the chain of control of such rights holders currently require ministerial consent only when they go through a change of control. However, the bill will require ministerial consent for any change in the shareholding of non-listed companies.

The bill has inserted a narrow definition of 'controlling interest':

- in relation to a company, the majority of the voting rights attached to all classes of shares in the company; or
- in relation to any business other than a company, any interest which enables the rights holder to exercise directly or indirectly any control whatsoever over the activities or assets of the business. As such, only a 51% change seems to be covered for listed companies.

There is still an outstanding question as to whether the bill, in the case of both listed and non-listed companies, intends to limit the Section 11 consent requirement to direct holders of mining rights, and not to regulate an indirect change in shareholding. Given the serious impact of not obtaining consent where it is required, it is premature to advocate anything other than a conservative approach, pending further clarification of this matter from the Department of Mineral Resources.

In this regard, transactions that are completed contrary to Section 11 will be void in terms of Section 11(5) of the Mineral and Petroleum Resources Development Act (28/2002, as amended) and also place the prospecting or mining right at risk of being cancelled or suspended by the minister.

Order of processing applications

The bill removes the parts of Section 9 that deal with the 'first come, first served' principle in processing prospecting or mining right applications. The current position is

that applications can be made at any time in respect of land that a private party identifies and has an interest in. Applications must be processed in the order of receipt. If two or more applications are received on the same day, the minister must give preference to applications from historically disadvantaged persons.

The bill replace this regime and provides that the minister must, by notice in the *Government Gazette*, invite applications for, among other things, prospecting or mining in respect of any area of land. In addition, the minister may prescribe in the notice the period within which any application may be lodged with the regional manager and the procedures that must apply in respect of a lodgement.

The bill allows any person – after identifying an area of land and the type of mineral in or on such area – to request the minister to invite applications in the area of land. However, the minister is not obliged to do this. When processing applications, the minister must give preference to the person that first requested that its invitation be published in the *Gazette.* It is unclear whether there is a time limit on this protection.

An invitation to apply for rights in terms of the bill must not include any mineral or land to which another person holds a right, permit or an application for a right or permit that has been lodged before the invitation and remains to be granted or refused.

Applications for mining rights and community occupants

The bill provides that where a mining right application relates to land occupied by a community, the minister may impose conditions to promote the rights and interests of that community.

This is, to some extent, a response to the *Bengwenyama* Constitutional Court judgment. The issue of community rights in a mining context, and in respect of land that communities occupy, is a difficult consideration for mining companies.

The bill allows the minister to enact regulations regarding the manner and form in which interested and affected persons must be informed of an application for a right in terms of the bill, and the manner and form of consultation required with interested and affected persons.

It is hoped that the regulations will create a clear framework for engaging with communities regarding prospecting or mining right applications in order to avoid disputes that sometimes arise between mining companies and communities.

Beneficiation

A great deal of uncertainty remains regarding the controversial beneficiation provisions in the bill. These give the minister wide discretion to determine what percentage of specified minerals must be made available to local beneficiators, as well as specifying the minerals to which this is applicable. Furthermore, the minister's consent will be required to export such minerals. The detailed provisions specify that in order to regulate the mining industry, meet national development imperatives and bring optimal benefit to South Africa, the minister must initiate or promote the beneficiation of mineral resources in South Africa:

- to ensure transformation of the mining and other sectors involved in the beneficiation of minerals;
- to ensure sustainability for the supply of minerals in the nation's interest; and
- to develop capacity.

In consultation with a minister of the relevant national departments, the minister must designate any mineral for local beneficiation, after taking into consideration the national development imperatives (eg, macro-economic stability, energy security, industrialisation, food security and infrastructure development). In addition, after considering the council's advice – as contemplated in the bill – the minster must publish the conditions required to ensure security of supply for local beneficiation in the prescribed manner.

In terms of the bill, 'beneficiation' is defined as the transformation, value addition or downstream beneficiation of a mineral and petroleum resource (or a combination of minerals) to a higher-value product – over baselines to be determined by the minister – which can either be consumed locally or exported.

All producers of designated minerals will be required to offer local beneficiators a prescribed percentage of their production of minerals in prescribed quantities, qualities and timelines at the mine gate price or agreed price. The bill defines 'mine gate price' as the fair value price (excluding value-added tax) of the mineral at the time that the mineral leaves the mine. The mine gate price excludes transport and delivery charges from the mine to the local beneficiator.

Only a producer (or an associated company of such producer) – in respect of its own

production and which has complied with the above paragraph – may export designated minerals without the minister's prior written approval. 'Designated minerals' are defined as minerals that constitute input into local beneficiation programmes in line with the national development imperative.

The provisions that have been inserted in relation to beneficiation aim to take forward government policy (which has been pushed for some time) regarding local production and beneficiation. However, the provisions remain unclear and need a clear regulatory framework in order to create certainty for mining companies.

Mine dumps

Case law has found that mine dumps that were created before the enactment of the Mineral and Petroleum Resources Development Act (ie, before May 1 2004) fell outside of its ambit (and so outside the ambit of the Department of Mineral Resources (DMR)). This meant that the owners of these historic mine dumps did not need to obtain mining permits or prospecting or mining rights issued in terms of the bill in order to process the dumps, even though the DMR held a contrary view.

The bill brings these historic dumps within the ambit of the Mineral and Petroleum Resources Development Act. The bill provides that, in order to promote orderly and optimal development of mineral resources and guarantee the security of tenure, all historic mine dumps not regulated under the act belong to the owners. This is a restatement of the existing position. This position shall continue for a period of two years from the date on which the bill is promulgated.

The bill gives the owners of these historic dumps an exclusive right for this two-year period to apply, in terms of the Mineral and Petroleum Resources Development Act, for a new right or an extension of an existing right in order to include the mining of the historic dump. This is a similar approach to the conversion of old order to new order rights that the act provided for when it was initially enacted.

This is an improvement on the DRM's initial proposal (which did not include the conversion process), but requires serious consideration by all that consider themselves to be an 'owner' of a historic mine dump, as it is a fundamental change in the current position.

Amending prospecting or mining rights

Section 102 of the Mineral and Petroleum Resources Development Act has also been amended. The bill provides that the following may not be amended or varied without the minister's written consent:

- reconnaissance permissions;
- prospecting rights;
- mining rights;
- mining permits;
- retention permits;
- technical cooperation permits;
- reconnaissance permits;
- exploration rights;
- production rights;
- prospecting work programmes;
- exploration work programmes;
- production work programmes;
- mining work programmes;
- approved social and labour plans; or
- environmental authorisations issued in terms of the National Environmental Management Act.

The bill now lists certain instances in which amendments cannot be made. These include:

- extending an area or portion of an area with an area or portion of an area greater than that for which the right has been granted, except where the extension is to consolidate existing adjacent rights;
- adding a share or shares of the mineralised body, unless the omission of such area or share was the result of an administrative error; or
- adding a mineral (subject to the exception discussed below in respect of 'associated minerals').

The bill defines 'associated mineral' as any mineral that occurs in mineralogical association with, and in the same core deposit as, the primary mineral being mined in

terms of a mining right, where it is physically impossible to mine the primary mineral without also mining the mineral associated therewith.

The new Sections 102(3) and (4) of the bill provide that any rights holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the rights holder, but which must be mined with the mineral the rights holder has a right to mine, provided that the rights holder declares such associated mineral or any other mineral discovered in the mining process.

In addition, the rights holder must, within 60 days of the date of declaration, apply for an amendment of its right to include the mineral so declared. If it does not, the minister may grant such right to the associated mineral to a third party.

Comment

These are only a few of the changes made to the Mineral and Petroleum Resources evelopment Act. It is hoped that, once the minister enacts the necessary regulations, these will clarify the amendments further.

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