

Recent Developments in the South African Mineral & Mining Law Regime

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The origins of South Africa's Mining Law Regime

- Prior to the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ("MPRDA") having taken effect on May 1, 2004 South Africa had a system of Mineral Rights which carried the right to prospect and mine
- That system was changed fundamentally by the MPRDA which provides for a system of State grant of the right to prospect and mine
- The origins of this system dates back to the ANC's Freedom Charter of 1955 which reflects the principle that mineral rights should vest in the State



The origins of South Africa's Mining Law Regime (cont'd)

- When Mr Nelson Mandela was released from prison during February 1990, South Africa negotiated a democratic constitution protecting amongst others, property rights
- After democratisation in 1994 the process started to provide a new mineral law regime for South Africa in line with ANC policy which culminated in the MPRDA
- In an attempt not to fall foul of the property clause in the constitution, the MPRDA provides that the mineral resources belong to nation with the state being the custodian thereof
- As custodian the state (acting through the minister) will grant, and regulate, rights to prospect and mine



The complexities – BEE & Social Development

- the MPRDA introduces Black Economic Empowerment (“BEE”) and social development as requirements for the grant of rights
 - 9 elements including 26% ownership by Historically disadvantaged South Africans
 - Minimum procurement requirements from BEE Entities
- Mining Charter sets out the detail – no clear requirements
- Different measurement requirements under different legislation
- Social Development in terms of Social and Labour Plan – no definitive requirements and DMR is empowered to refer SLP back for amendment



The complexities: Lacunas in the MPRDA

- Rights to “associated minerals” are not regulated in the MPRDA resulting in competing rights to different minerals in the same ore body
- Pre-MPRDA the holder of a right to mine the primary mineral also had the right to mine and dispose of associated minerals with an accounting obligation
- Old tailings not regulated - De Beers Judgement
- Complexities to protect mineral bearing stockpiles and tailings treatment operations
- Undivided shares not regulated resulting in Sishen Imperial Crown Trading court case



Complexities Sec 11

- Sec 11 requires Ministerial consent for the transfer of rights and transfer of a controlling interest in unlisted companies
- No consent required for encumbrance (pledge or mortgage)
- Exemption for certain encumbrances by mortgages
 - In favour of a bank registered in terms of the Banks Act
 - To fund a prospecting or mining project
- Rights lapse on liquidation of the holder save for rights encumbered by sec 11(3) mortgages
- Mortgage bonds to secure debts:
 - In favour of non- SA banks
 - Security SPV or parallel debt structure for syndicated lending or listed debt instruments
- No exemption and no protection against liquidation
- Time frames to obtain consent (12 months) inhibiting transactions
- Mogale Alloys judgement confirmed loss of control without acquiring requires sec 11 consent



Administrative Deficiencies

- No cadastral system for old or new order rights
- Numerous cases of double grants



Remedial Steps by the Ministry

- During August 2010 the Minister
 - expressed concern about SA's position in the Fraser Institute Survey and negative views about South Africa as an investment destination;
 - announced measures *"to bring stability to the South African Mining Industry"*
- The Minister cited the reasons as:
 - Ambiguities in the MPRDA
 - New Legislation; Lack of jurisprudence; Officials applying the letter of law as opposed to the spirit and intentions of the law
 - The lack of transparency in and access to licensing data
 - Administrative capacity problems
 - Increasing perceptions of corruption and/or incompetence.



The following plan of action was announced

- Amendments to the MPRDA
- Status of Applications for rights accessible on the website
- Development of an integrated process tracking system with public access
- 6 month moratorium on receiving of prospecting applications
- Measures to address capacity problems and “all cases of double granting will be resolved within the next 3 months”
- Allegations of abuse of office and/or corruption will be dealt with speedily and effectively.



Amended Mining Charter

On 13 September 2010 an Amended Mining Charter and Scorecard was released

- Retaining the 26% ownership requirement but unclear who must hold
- Introducing definitive requirements for:
 - procurement from BEE Entities
 - Employment equity
 - Human resource and skills development
- Introducing vague requirements for:
 - Beneficiation with an 11% offset against ownership
 - Mine community development
 - Housing and living conditions
- Introducing Sustainable Development (improvement of environmental rehabilitation and health and safety performance) as elements of the Charter
- Non compliance with the Charter = breach of the MPRD Act which may result in cancellation of rights



Minister at Mining Indaba 2011

- Press Conference at 2011 Mining Indaba the Minister
 - Acknowledged the timelines for applications previously announced were not achievable
 - 2011 will be the year of amendments to the MPRDA
 - Expressing again her views against nationalisation.
- South Africa has not seen
 - Improvements of timelines for procession applications
 - Amendments to the MPRDA
- Nationalisation debate continuing
 - ANC's nationalisation Task Team's draft report is concerning



SA Minister at Mining Indaba 2012

At this year's mining Indaba the Minister of Mineral Resources:

- Cited lack of progress in implementing Black Economic Empowerment (through fronting) as the reason for the nationalisation debate
- Welcomed the finding of the ANC task team that nationalisation is not a viable policy for SA
- Confirmed Government will ensure that tax regime remains competitive
- Stressed the importance of beneficiation; stating the object is to ensure availability of raw materials not to force mining companies to become manufacturers
- Delay in MPRDA amendments - due to pending court cases
- Expressed concern about health and safety in SA mining industry



Positives

- Acknowledging problems in SA's mineral law and its administration
- Active steps to address problems
- Definitive, measurable targets in the new Charter and Scorecard
- Sensitivity to investor's perceptions about SA as an investment destination
- Repeatedly expressed views against nationalisation
- Confirmed that SA's tax regime will remain competitive
- Strong emphasis by government on infrastructure development
 - Richards Bay coal line
 - Development of the Waterberg coalfield
- Improvement of ranking in Fraser Institute survey from 67 to 54 from 2011



Negatives

- Lack of essential amendments to the MPRD Act
- The Amended Mining Charter
 - Vague requirements – increased discretion
 - Sustainable development requirements misplaced in the Charter
 - Non-compliance constitutes ground to cancel rights
- The Nationalisation debate continues
- Disappointing Fraser Institute Survey result
 - 2011 SA slipped 30 positions in 5 years from 37 to 67
 - 2012 SA moved up to position 54 out of 93



Conclusion

- Positive about the future of mining in SA
- South Africa remains a serious option for resource investors
- The legal arena remains a challenging one
- Webber Wentzel's dedicated mining practice have been assisting mining companies and investors for more than 140 years
- Webber Wentzel has the resources to assist its clients in negotiating these challenges



Questions

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