

Mining

Contributing editors

Michael Bourassa and John Turner



2018

GETTING THE
DEAL THROUGH

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**Michael Bourassa and John Turner
Fasken**

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Preface

Mining 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Mining*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia and the Democratic Republic of the Congo.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael Bourassa and John Turner of Fasken, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
June 2018

South Africa

Peter Leon and Patrick Leyden

Herbert Smith Freehills South Africa LLP

Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry has historically been a key driver of the South African economy. Economic activity in modern-day South Africa has been centred on mining activities, their ancillary services and supplies. The country's stock exchange in Johannesburg was established in 1887, a decade after the first diamonds were discovered on the banks of the Orange River, and almost simultaneously with the gold rush on the world-famous Witwatersrand. Today, the South African mining sector employs approximately 490,000 workers (5 per cent of the South African workforce) and contributes to roughly 8 per cent of the country's gross domestic product.

Unsurprisingly, the country's mineral wealth is a valuable source of foreign direct investment. In spite of prevailing regulatory uncertainty the mining industry remains a key focus point of the government and the private sector, and continued efforts are being made to engage foreign investors to stimulate further growth.

2 What are the target minerals?

South Africa has the world's largest resources of platinum group metals, manganese, chromium, gold and alumino-silicates. The country accounts for over 40 per cent of the global production of ferro-chromium, platinum group metals, vanadium and alumino-silicates exports, and is one of the world's largest exporters of platinum group metals, gold and vanadium. In addition, South Africa has large deposits of copper, zinc, iron, coal and diamonds.

While South Africa is not endowed with any significant lithium deposits, it has approximately 80 per cent of the world's high-grade manganese ore reserves. Manganese, which is primarily used in steel production, is also a key element in the production of lithium-ion batteries. Increased global demand for manganese resulted in a 32 per cent year-on-year increase in manganese production in South Africa in 2017.

3 Which regions are most active?

Various underground geological formations are found in South Africa. These formations span across the country and as a consequence mining activities occur in most of its provinces.

Some significant examples of these geological formations include:

- the Witwatersrand Basin (gold, uranium, silver, pyrite and osmiridium deposits);
- the Bushveld Complex (platinum group metals and associated copper, nickel, cobalt, chromium and vanadium-bearing titanium-iron ore deposits);
- the Transvaal Supergroup (manganese and iron ore deposits);
- the Karoo Basin (bituminous coal and anthracite deposits); and
- the Phalaborwa Igneous Complex (copper, phosphate, titanium, vermiculite, feldspar and zirconium deposits).

Legal and regulatory structure

4 Is the legal system civil or common law-based?

South Africa has a mixed legal system. Its doctrines and concepts are influenced both by the civilian tradition (in an uncodified Roman-Dutch

form brought by early Dutch settlers) and by the common law tradition (introduced during the British colonial period).

The mineral resources sector is primarily regulated by statute and in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA). The common law will apply to the extent that the MPRDA does not regulate a specific issue but the provisions of the MPRDA will prevail to the extent of any inconsistency.

5 How is the mining industry regulated?

The mining industry is regulated at national level by the Department of Mineral Resources (DMR) which, through its regional offices, implements and administers the MPRDA.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The mining industry is primarily regulated under the MPRDA. There are currently amendments proposed to the MPRDA, under the MPRDA Amendment Bill 2013, which have, at the date of publication, not yet been passed into law.

Black economic empowerment in the mining industry is currently regulated under the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010 (the Mining Charter 2010). The Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining Industry (the Reviewed Mining Charter), which replaces the Mining Charter 2010 in its entirety, was published on 15 June 2017. However, the implementation of the Reviewed Mining Charter was suspended and is currently being renegotiated following intervention by the newly elected President Cyril Ramaphosa. A revised version of the Reviewed Mining Charter is expected to be published towards the latter half of the year.

The DMR, through its national and regional offices, is the executive body primarily tasked with regulating the mining industry. Other statutes relevant to the mining industry include:

- the National Environmental Management Act 1998 (NEMA);
- the Specific Environmental Management Acts, which were promulgated to operate in conjunction with NEMA and regulate matters such as waste, biodiversity, protected areas and air quality;
- the National Water Act 1998;
- the Labour Relations Act 1995; and
- the Mine Health and Safety Act 1996.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC) is used by the South African mining industry for reporting mineral resources and mineral reserves. The first revision of SAMREC was published in 2000 and was incorporated into the Listings Requirements of the Johannesburg Securities Exchange (JSE). A second edition of SAMREC was published in 2007 and amended in 2009. These previous editions have now been superseded by the current version of SAMREC, SAMREC 2016, which became mandatory with effect from 1 January 2017.

SAMREC stipulates minimum standards for the reporting of exploration results, mineral resources and mineral reserves. However, it does not specify the technical details relating to exploration results, mineral resource and mineral reserves. The interpretation of technical and geological data can be open to interpretation and may have an impact on project design and financial modelling. SAMREC provides guidelines on the interpretation and reporting of technical and geological data in order to ensure consistency.

SAMREC requires that mineral resources are classified, and must be reported, in order of increasing confidence in respect of geoscientific evidence, into inferred, indicated or measured categories. Any mineralisation that does not have demonstrated reasonable prospects for eventual economic extraction may not be included in a mineral resource.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

The state is the custodian of South Africa's mineral and petroleum resources and has a duty to administer these resources for the benefit of all South Africans. As a consequence, an owner of the surface rights has no claim to the minerals found in, on or under the surface of his or her land.

Any person (including the owner of the surface rights) who wishes to exploit mineral resources in South Africa is required to first apply for and obtain the appropriate right under the MPRDA. The Minister of Mineral Resources is authorised to grant or refuse applications for rights under the MPRDA. Provided that an applicant meets all the requirements relating to the right for which the applicant has applied, the Minister is obliged to grant the right.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

All rights granted in terms of the MPRDA are required to be registered in the Mineral and Petroleum Titles Registration Office (MPTRO). Members of the public do not have an automatic right of access to these records, but can, subject to the permission of the Director-General of Mineral Resources, gain access to these records. The application process is regulated under the Promotion of Access to Information Act 2000.

Applications for prospecting and mining rights are generally lodged through the DMR's online application portal (SAMRAD). Although only limited information is available via SAMRAD, it will inform prospective applicants whether there are existing rights over the areas concerned.

The holders of prospecting rights are required to submit progress reports and data relating to their prospecting operations to the DMR and the South African Council for Geoscience (CGS). No person may dispose of or destroy any record, borehole core data or core-log data except in accordance with the written direction of the DMR in consultation with the CGS. These records are not generally accessible to the public.

The CGS is a public entity and was established under the Geoscience Act 1993. It was created to 'develop and publish world-class geoscience knowledge products and to render geoscience-related services to the South African public and industry'. If a prospective applicant for a prospecting or mining right requires information on South Africa's mineral resources, such information is available from the CGS. This information includes data received from mining companies, universities and research institutions worldwide. It maintains several mineral databases, some of which are accessible at its library, such as the COREDATA and COAL databases.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Under the MPRDA, any person (natural or juristic, foreign or local) may apply for and be granted a prospecting right, a mining right, a retention permit or a mining permit.

A prospecting right entitles the holder to the exclusive right to prospect for prescribed minerals over a prescribed area of land. The holder of a prospecting right also has the exclusive right to apply for and be granted a mining right in relation to the minerals and land to which the prospecting right relates. The holder of a prospecting right must:

- lodge such right for registration at the MPTRO within 60 days after the right has become effective;
- commence with prospecting activities within 120 days from the date on which the prospecting right becomes effective;
- continuously and actively conduct prospecting operations in accordance with the prospecting work programme;
- comply with the terms and conditions of the prospecting right, relevant provisions of the MPRDA and any other relevant law;
- comply with the conditions of the environmental authorisation;
- pay the prescribed prospecting fees to the state;
- pay royalties to the state in respect of any minerals removed and disposed of; and
- submit progress reports and data of prospecting operations to the DMR and CGS.

A mining right entitles the holder to the exclusive right to mine for prescribed minerals over a prescribed area of land. The holder of a mining right must:

- lodge such right for registration at the MPTRO within 60 days after the right has become effective;
- commence with mining operations within one year from the date on which the mining right becomes effective;
- actively conduct mining operations in accordance with the mining work programme;
- comply with the terms and conditions of the mining right, relevant provisions of the MPRDA and any other relevant law;
- comply with the conditions of the environmental authorisation;
- comply with the requirements of the prescribed social and labour plan;
- pay royalties to the state; and
- submit the prescribed annual report, detailed the extent of the holders compliance with the Mining Charter 2010 and the social and labour plan.

A mining permit entitles the holder to the exclusive right to mine for prescribed minerals over a prescribed area of land. A mining permit relates to small scale mining operations and will only be granted if the mineral in question can be mined optimally within a period of two years and the mining area in question does not exceed five hectares in extent. The requirements and obligations imposed on a holder of a mining permit are less onerous than those imposed on the holder of a mining right. A retention permit may be granted under certain limited circumstances, the effect of which is to suspend the term of the prospecting right for the duration of the retention permit.

Currently, applications for these rights are considered on a first-come, first-served basis. However, if the MPRDA Amendment Bill 2013 is passed in its current form the application process may be changed to a dual process where applications will be considered both in terms of a first-come, first-served basis as well as a competitive bidding process.

11 What is the regime for the renewal and transfer of mineral licences?

The holder of a prospecting right, mining right, retention permit or mining permit has, subject to complying with certain requirements set out in the MPRDA, the exclusive right to apply for and be granted the renewal of such right in relation to the same mineral and same area of land:

- once for a period not exceeding three years, for a prospecting right;
- for further periods each of which may not exceed 30 years, for a mining right;

- for three periods, each of which may not exceed one year, for a mining permit; and
- once for a period not exceeding two years, for a retention permit.

The Minister has no discretion in relation to applications for renewals if the applicants have complied with the requirements set out in the MPRDA.

The Minister's prior written consent is required for a transfer of a prospecting or mining right by holder to a third party and the transfer of a controlling interest (both a direct and indirect interest) in a company that holds a mining or prospecting right. The transfer of any interest in a company listed on a recognised stock exchange is exempt from having to obtain the Minister's consent. The Minister's consent must be granted if the cessionary, transferee, lessee, sub-lessee or assignee is capable of carrying out and complying with the obligations and the terms and conditions of the right in question and satisfies the requirements for the initial granting of such right.

A mining permit and a retention permit are not capable of being transferred to a third party.

12 What is the typical duration of mining rights?

A prospecting right may be granted for an initial period of up to five years and a mining right may be granted for an initial period of up to 30 years. These rights may be renewed on terms and in accordance with the procedures discussed above.

The Minister may, subject to affording the holder of a right an opportunity to remedy any contravention, cancel or suspend a right, permission or permit if the holder:

- is conducting prospecting or mining operations in contravention of the MPRDA;
- breaches any term or condition of such right, permit or permission;
- is contravening any condition in the environmental authorisation; or
- has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under the MPRDA.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The MPRDA does not draw a distinction between local and foreign applicants. Irrespective of the nationality of the applicant, all applicants for mining rights are required to comply with the requirements of the MPRDA, which include compliance with the Mining Charter 2010.

In terms of the Mining Charter 2010, all mining companies (ie, companies that hold mining rights granted in terms of the MPRDA) were required to reach a minimum historically disadvantaged South African (HDSA) ownership of 26 per cent by 31 December 2014. Once promulgated, the revised version of the Reviewed Mining Charter will set new requirements for HDSA participation going forward.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Prospecting and mining rights vest a limited real right in the holder of the right in respect of the minerals to which the rights pertain and the land to which such right relates. In accordance with the Constitution of South Africa, holders of ownership rights may not be arbitrarily deprived of their rights and no person may unlawfully interfere with any entitlement that the rights holders may have in terms of the rights. There have been a number of recent judgments in the mining sector in which the courts have found against the state and which evidence the independence of the judiciary and its ability to uphold the rule of law.

South Africa is also a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) and, as a consequence, foreign arbitral awards are capable of being enforced through the South African courts.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

In terms of the MPRDA, the holder of a mining or prospecting right obtains a statutory right of access to land. The holder of a prospecting or mining right may enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery, or equipment and build, construct or lay down any surface, underground, or under sea infrastructure, that may be required for the purpose of mining.

Both the holder of the prospecting or mining right and the owner of the surface rights must exercise their rights with due regard for the rights and entitlements of the other party. The owner of the surface rights may not unlawfully refuse the holder of the prospecting or mining right access to the property or interfere with the holder's ability to carry on the prospecting or mining activity on the land.

Despite the mining or prospecting rights holder's statutory right of access to the property, it is common (although not a legal requirement) for mining companies to enter into access and compensation agreements with land owners. The reason for this is to mitigate the potential for disputes and disruptions to mining operations, particularly in circumstances where the land is owned or occupied by rural communities.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

There is no legal requirement for the state to participate in any mining projects nor are there any local listing requirements for mining companies. The African Exploration Mining and Finance Corporation is a state-owned mining company that has acquired its own portfolio of rights in terms of the MPRDA and is currently seeking to play a more active role in the industry.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Section 25 of the Constitution expressly provides that no one may be deprived of their property (including the expropriation of a limited real right) except in terms of a law of general application, for a public purpose or in the public interest. If the rights holder is deprived of its property the Constitution further provides that such a rights holder is entitled to compensation. The amount of compensation to be paid and the time and manner of payment is subject to what the rights holder and state agree to or what is determined by court. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Under the MPRDA, no prospecting right, mining right may be granted or mining permit be issued in respect of:

- land comprising a residential area;
- any public road, railway or cemetery;
- any land being used for public or government purposes or reserved in terms of any other law; or
- areas identified by the Minister because of national interest, the strategic nature of the mineral in question and the need to promote the sustainable development of the nation's mineral resources.

In addition, section 48 of the National Environmental Management: Protected Areas Act 2003 (NEMWA) specifically prohibits prospecting, mining, exploration, production or related activities in:

- special nature reserves, national parks or nature reserves;
- areas declared as 'protected environments';
- lake areas;
- world heritage sites;
- marine protected areas; and
- specially protected forest areas, forest nature reserves and forest wilderness areas declared in terms of the National Forests Act 1998.

Duties, royalties and taxes
19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The Mineral and Petroleum Resources Royalty Act 28 of 2008 (Royalty Act) sets out the revenue-based royalties payable on mineral resources that are extracted within South Africa and 'transferred'. The Royalty Act differentiates between refined and unrefined mineral resources. The mining royalty percentage is capped at 5 per cent for refined mineral resources and 7 per cent for unrefined mineral resources. The Royalty Act uses two variables to calculate the royalty liability: the value of the minerals and the royalty percentage rate, which is applied to the base. In addition to the payment of royalties, mining companies may also be subject to income tax capital gains tax, withholding tax, transaction taxes such as VAT, transfer duty and securities transfer tax.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

Gold mining companies are taxed in terms of a formula that, by and large, takes into account the profitability of the company and provides relief in cases where margins are below 5 per cent (often referred to as the tax tunnel). The gold mining formula was introduced to encourage gold mining investment and the mining of marginal ore deposits. Mining companies mining for minerals other than gold are taxed at the standard corporate tax rates.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The Royalty Act provides that the Minister of Finance may enter into binding fiscal stability agreements relating to mineral resource rights or in anticipation of such rights, guaranteeing the terms and conditions in respect of these rights apply for as long as the extractor holds the rights.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

The MPRDA makes no provision that entitles the government to a carried interest or free carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

In terms of capital gains, the Income Tax Act provides for capital gains tax (CGT) on any taxable capital gains in the taxable income of any person. In calculating the taxable income, a mine is entitled to claim expenditure against its mining income. Previously, the disposal of certain assets was exempt (for income tax purposes) as it was regarded 'capital' in nature. The position has now shifted and the disposal of specific mining-related assets (eg, land, surface rights, assets that qualify for wear and tear, mineral rights, prospecting rights and intellectual property rights, etc) will now be taxable in terms of the new CGT legislation.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Resident companies in South Africa are taxed based on their worldwide income and non-residents are taxed on South African sourced income subject to any applicable double taxation agreements that may be in force. Non-residents are, in addition, subject to the CGT legislation as detailed above. Foreign companies that conduct business in South Africa through a branch must also be registered as taxpayers and they are taxed at the standard corporate tax rate of 28 per cent.

Business structures
25 What are the principal business structures used by private parties carrying on mining activities?

Mining activities in South Africa are principally conducted using public or private limited liability companies. A private company may be incorporated by one person and generally needs only have one director. A public company may also be incorporated by one person but generally requires at least three directors. The essential difference between a

public and private company is that the shares of a public company are freely transferable while the constitutional document of a private company must limit the transferability of the company's shares. There is no requirement that the shareholder or directors of South African companies must be South African citizens or residents.

A foreign company may conduct business in South Africa through a branch office but is required to register an 'external company' with the Companies and Intellectual Property Commission (CIPC) within 20 business days of commencing business activities in South Africa. External companies are exempted from the majority of the provisions of the South African Companies Act 2008. External companies are, however, required to continually maintain at least one office in South Africa and to register their address or principal office with the CIPC and update this information in the event of a change of address.

Mining operations may also be conducted through a joint venture which may take the form of an incorporated or unincorporated joint venture.

26 Is there a requirement that a local entity be a party to the transaction?

Mining companies which hold mining rights granted in terms of the MPRDA, were required in terms of the Mining Charter 2010, to achieve a minimum target of 26 per cent ownership by HDSAs by 31 December 2014. The participation by HDSAs, whether in the form of an incorporated entity, trust or individual capacity, is usually structured such that the HDSAs hold shares directly in a South African operating entity that in turn holds the mining rights.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

South Africa concluded a host of bilateral investment treaties (BITs) following its readmission to the international stage in 1994. However, since 2012 South Africa has terminated its BITs with a number of European countries including Belgium, Denmark, Germany, Italy, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom. South Africa's BITs with China and Russia are, however, still in effect. The rationale behind the decision to terminate these BITs is that the protection offered to investors by the BITs will be replaced through domestic legislation in South Africa, under the Protection of Investment Act 22 of 2015 (Protection of Investment Act).

The Protection of Investment Act was assented to by the President in 2015 but is not yet in force. Government policy is seemingly to eventually terminate all of the remaining BITs in favour of the Protection of Investment Act. The Protection of Investment Act does not, however, offer investors the same level of protection as a BIT. Under the act, foreign investors will no longer be afforded greater legal protection than their domestic counterparts and are excluded from recourse to binding investor-state international arbitration (which has been criticised as lacking legitimacy, consistency and transparency). Instead of binding arbitration, foreign investors have the option to refer any investment dispute with the South African government to a mediation facilitated by the Department of Trade and Industry (in addition to their ordinary right of recourse to domestic courts and statutory bodies.) The act offers similar levels of compensation, in the event of recovery on expropriation, to the South African Constitution but not any protection against unfair or equitable treatment.

Financing
28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

South Africa has a sophisticated financial sector and a well-developed capital market, in the form of the JSE. Companies wishing to raise financing for mining activities are able to look to both domestic banks as well as various international financial institutions which have a presence in South Africa. The JSE plays an important role in financing the mining industry, and is a popular destination for foreign mining companies to raise capital through a secondary listing. The JSE Listings Requirements make provision for a fast-track secondary listings

process to enable companies which are already listed on an accredited foreign exchange, to establish a secondary listing on the main board or alternative exchange of the JSE. In order to qualify for the fast-track listings process, an international company must have been listed on an accredited foreign exchange for at least 18 months. Accredited foreign exchanges include the London Stock Exchange, the Australian Stock Exchange, the New York Stock Exchange and the Toronto Stock Exchange.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

The Public Investment Corporation (PIC), which is wholly owned by the South African government, invests funds on behalf of public sector entities (including the pension funds of government employees). The PIC is one of the largest investment managers in Africa and holds a stake in many of the top JSE-listed companies, including mining companies. The PIC aims to contribute towards the realisation of key developmental priorities of South African government and invests in projects that promote the broader social and economic development of South Africa. The PIC frequently invests in mining projects that fall within its social and economic development mandate.

The Industrial Development Corporation of South Africa (IDC) is a financial institution mandated to promote economic growth and industrial development in South Africa and is wholly owned by the South African government. The IDC aims to develop South Africa's industrial capacity and job creation through the funding it provides. Most of the IDC's funding is in the private sector, with a focus on broad-based and expanded black economic empowerment. The IDC is involved in funding operations across the mining industry and offers a wide range of financing options including debt, equity and quasi-equity, guarantees trade, finance and venture capital.

30 Describe the regime for taking security over mining interests.

It is common for lenders to take security over mining assets in South Africa. This security generally takes the form of share pledges, mortgages over the mining rights, and general and special notarial bonds over mining equipment. However, lenders should carefully consider the provisions of section 11 of the MPRDA before taking security over any mining assets. As mentioned above, the Minister's consent is required for a transfer of a prospecting or mining right by holder to a third party and the transfer of a controlling interest (both a direct and indirect interest) in a company that holds a mining or prospecting right. Accordingly, the Minister's consent will generally be required for lenders to perfect their security. Foreign lenders (ie, other than a bank as defined in the Banks Act 1990) may require the Minister's consent to both enter into the security arrangements and again before perfecting the security.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The importation of goods is not heavily regulated in South Africa. Duties and surcharges are levied under the Customs and Excise Act No. 91 of 1964 (and regulations published under the Act). Normally, the duties and taxes payable are calculated by exclusively considering the value of the imported good (free on board method), and only in a limited number of instances will the quantity of the goods also be taken into consideration. In exceptional circumstances, luxury or non-essential items may be subject to additional ad valorem duties, and some commodities may be subject to anti-dumping or countervailing duties.

One important exception to this regime is South Africa's free trade agreement with the European Union. Historically the relationship was governed under the Trade, Development and Cooperation Agreement, however South Africa concluded a new trade deal, the Economic Partnership Agreement (EPA), with the European Union (EU) under the SADC-EU EPA framework to replace the trade provisions of the TDCA. The EPA came into force on 10 October 2016. As with the TDCA, 86 per cent of South Africa's imports from the EU enter the country duty-free.

South Africa does not impose any duties or tariffs on the importation of services, although these are not liberalised under the EPA.

Subject to foreign workers securing the necessary work permits from the Department of Home Affairs, they are free to work in South Africa.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

There are no general agreements or standard conditions for the supply of equipment. Any agreement reached will be subject to the terms and conditions agreed to by the parties. During the negotiation process it is important that the parties ensure that the equipment to be supplied is accredited by an accreditation association or by the South African Bureau of Standards (SABS). The certification and assessment of the equipment is required to ensure that the regulatory, safety and reliability requirements of the South African labour laws and SABS standards are met.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

South Africa's trade with most parts of the world is characterised by the export of raw materials and the import of manufactured goods. In order to address the deficit created by the absence of a well-developed secondary sector, section 26 of the MPRDA provides that the Minister of Mineral Resources is entitled to initiate or promote the benefits of minerals in the country.

Historically, only the precious metal and diamond industries have been the subject of local beneficiation requirements in accordance with the obligations imposed by the Precious Metals Act 2005 and the Diamond Act 1986. Under both acts, the South African government is required to consider the extent to which the activities proposed by an applicant for a mining right will promote equitable access to and local beneficiation of the minerals. If the proposed mining activities do not promote local beneficiation, the Minister may refuse to grant the mining right.

If the amendments proposed by the MPRDA Amendment Bill 2013 are passed into law, the Minister will be obliged to designate minerals or mineral products for local beneficiation. In terms of the bill, every producer of designated minerals must offer local beneficiaries a prescribed percentage of its product, in the prescribed quantities, qualities and time frames at the mine gate price or agreed price. In addition, any person who intends to export any designated minerals mined in the Republic may only do so with the Minister's written consent, subject to such conditions as the Minister may determine. The President previously refused to sign the bill into law owing to reservations that these provisions of the bill may constitute a contravention of South Africa's obligations under the General Agreement on Tariffs and Trade and the EPA with the European Union. The bill is currently before Parliament.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

The flow of capital in and out of South Africa is primarily regulated by the Exchange Control Regulations 1961 (Excon Regulations). The consent of an authorised dealer is required for a non-resident to acquire and hold shares in a resident company. This consent is fairly easy to obtain and the non-resident generally only needs to show it is such and that it purchased the shares in a resident company. For private companies, the authorised dealer will endorse the share certificate as 'non-resident'. For listed companies, the fact that the holder is non-resident will be flagged on the STRATE (electronic trading) system. In terms of the Excon Regulations, for a non-resident shareholder to receive dividends from a resident company, it must show that its share certificate has been endorsed or flagged 'non-resident' (in accordance with the procedure set out above).

In terms of the Excon Regulations, approval is required for any loans by a non-resident to a resident. Similarly, approval is required for a loan by a resident to a non-resident. The approval for inward loans is usually obtained by the South African borrower's local bank. If the loan terms exceed the thresholds set by the South African Reserve Bank (SARB), an application will need to be submitted to the SARB for approval – which is generally a longer process.

Environment
35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

NEMA is the framework legislation regulating the environment. The DMR is the competent authority responsible for enforcing the NEMA insofar as it relates directly to prospecting and mining activities. The Minister of Environmental Affairs, however, is the authority responsible for creating regulations under NEMA (including regulations that the DMR must apply and enforce). The Minister of Environmental Affairs is also the ultimate authority in respect of appeals against environmental authorisations, compliance notices or directives issued by the DMR.

Other important environmental laws include the National Water Act 36 of 1998, the National Environmental Management: Waste Act 59 of 2008, the National Heritage Resources Act 25 of 1999, the National Environmental Management: Biodiversity Act 10 of 2004 and the National Environmental Management Air Quality Act 39 of 2004.

The DMR is the competent authority for approving environmental authorisations for prospecting and mining activities and activities directly associated therewith. The DMR is also responsible for enforcing the provisions of the NEMA or the environmental authorisation.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Applicants for a prospecting or mining right must apply for and obtain an environmental authorisation before the right is granted. Depending on the activities that the applicant will undertake, the applicant must conduct either a basic assessment or a scoping assessment and environmental impact assessment to investigate and assess the impacts of the activities on the environment. These processes must include a public participation process. The outcomes of the assessment, investigations and public participation process are included in a report and submitted to the DMR for consideration. If the DMR is satisfied with the report and the mitigation measures contained therein, an environmental authorisation may be issued. In terms of the One Environmental System, this process should take 300 days.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

An applicant or holder of a right or permit must determine and make financial provision to guarantee the availability of funds to undertake rehabilitation and remediation of the impacts arising from the prospecting or mining activities. The financial provision can be by way of financial bank guarantee, deposit into an account administered by the Minister of Mineral Resources, or a contribution to a trust fund.

The holder of a right is responsible for all environmental impacts arising from its activities and may (notwithstanding the issuing of a closure certificate) remain responsible.

38 What are the restrictions for building tailings or waste dams?

A waste management licence under the NEMWA is now required for the creation of residue stockpiles. Applicants for waste management licences must complete an environmental impact assessment process in accordance with NEMA. Registered engineers must design stockpiles. The MPRDA Regulations require that stockpiles are to be designed by 'competent persons'. This includes civil or mining engineers registered under the Engineering Profession of South Africa Act 114 of 1990. Stockpiles must comply with landfill requirements. Stockpiles must now also comply with the National Norms and Standards for the Assessment of Waste for Landfill Disposal 2013; and National Norms and Standards for Disposal of Waste to Landfill 2013.

Health and safety, and labour issues
39 What are the principal health and safety and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mine Health and Safety Act 29 of 1996 (MHSA) regulates health and safety in the mining industry. Inspectors have wide discretionary

powers to order the suspension of mining operations or issue fines in circumstances where they believe that mining companies have contravened the provisions of the MHSA or where the health and safety of employees is at risk. Mining companies (and their directors) may be subject to criminal prosecution under the MHSA.

Employment in South Africa is regulated by statute, common law and contract. Legislation, such as the Labour Relations Act of 1995, grants employees protection against unfair dismissal and unfair labour practices. It also regulates collective bargaining and the transfer of undertakings as a going concern. Other legislation relevant to employment includes the Employment Equity Act 1997 and the Unemployment Insurance Act 2011. These acts are regulated and enforced by the Department of Labour.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

A waste management licence (in accordance with the NEMWA and its regulations) must be obtained for the establishment or reclamation of a residue stockpile or deposits resulting from mining or prospecting activities. Residue stockpiles and residue deposits are not defined in the NEMWA but based on the definition contained in the MPRDA, the above requirement to obtain a waste management licence does not apply to historical residue stockpiles or residue deposits not governed by the MPRDA. These residue stockpiles and residue deposits will need to be assessed on a case-by-case basis to determine which entity has authority to explore and exploit them and what authorisations or licences may be required.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There are no restrictions or limitations imposed on the use of foreign employees provided that they hold the requisite work permits issued by the Department of Home Affairs, in accordance with the Immigration Act 2002.

Social and community issues
42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The MPRDA and the Mining Charter 2010 are the principal laws regulating community engagement and involvement of communities in the mining industry. One of the objects of the MPRDA is to promote employment and advance the social and economic welfare of all South Africans, promote economic growth and mineral and petroleum resources development in the Republic and ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating. Similarly, the Mining Charter 2010 aims to facilitate sustainable transformation, growth and development of the mining industry by requiring ownership by historically disadvantaged South Africans. The MPRDA and the Mining Charter 2010 are regulated and enforced by the DMR.

The submission and approval of a social and labour plan (SLP) is a pre-requisite for the granting of mining rights under the MPRDA. The SLP requires applicants for mining rights to develop and implement comprehensive Human Resources Development Programmes, a Mines Community development Plan, a Housing and Living Conditions plan, an Employment Equity Plan, and processes to save jobs and manage downscaling or closure, or both. A failure to adhere to the SLP will put the holder of a mining right in contravention of the MPRDA.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Mining companies are required to comply with the requirements of the Mining Charter 2010 for the purposes of being granted a right and in order to ensure the ongoing validity of the right.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

South Africa is a signatory to a number of conventions; however, many of these have not been enacted as domestic law.

Anti-bribery and corrupt practices**45 Describe any local legislation governing anti-bribery and corrupt practices.**

There are a number of statutes which prohibit corruption and bribery in South Africa. The primary legislation is the Prevention and Combatting of Corrupt Activities Act 2004, which creates the general offence of corruption with a very wide ambit. Broadly, any person who, directly or indirectly accepts or agrees to accept any gratification from any other person; or gives or agrees or offers to give any gratification to any other person; in order to act, personally or by influencing another person to so act, in a manner designed to achieve an unjustified result, is guilty of the offence of corruption. A person convicted of committing any of the statutory corruption offences may be liable to a fine and imprisonment up to a period of life.

Other anti-bribery and corruption legislation includes the Prevention of Organised Crimes Act of 1998, which is concerned with acts such as money laundering and racketeering, and the Financial Intelligence Centre Act of 2001, which is aimed at identifying unlawful activities and to combat money laundering and the financing of terrorists and related activities.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies operating in South Africa with listings on foreign stock exchanges will need to ensure compliance with the anti-bribery and foreign corrupt practices applicable to these exchanges. Examples include the UK Bribery Act for UK-listed companies and the Foreign Corrupt Practices Act for US-listed companies.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

South Africa is not a signatory of the EITI as the government is of the opinion that its domestic legislation is sufficient for the purposes of the prevention of corruption and creating transparency and accountability.

Foreign investment**48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?**

While there are no direct restrictions on foreign ownership in the mining industry, the provisions of the Mining Charter 2010 should be noted in relation to the minimum ownership requirements by HDSAs.

International treaties**49 What international treaties apply to the mining industry or an investment in the mining industry?**

South Africa is a member of the World Trade Organization (WTO) and in accordance with the membership requirements of the WTO, is a signatory to its agreements. In addition, the country is also a party to various BITs and multilateral agreements.

Some of the more salient examples of agreements concluded on a global and regional level include:

- The Economic Partnership Agreement between the European Union and the Southern African Development Community EPA Group;
- Treaty of the Southern African Development Community and its Protocols (SADC Treaty and Protocols), including the Protocol on Mining in the Southern African Development Community and SADC Protocol on Finance and Investment;
- Southern African Customs Agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (SACU);
- Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the People's Republic of China on promoting Bilateral Trade and Economic Co-operation;
- Treaty Establishing the African Economic Community/African Union;
- Free Trade Agreement between the European Free Trade Association States and SACU;
- Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part; and
- SADC Protocol on Finance and Investment 2016.

As mentioned in question 27, South Africa concluded a host of BITs following its readmission to the international stage in 1994. However, since 2012 South Africa has terminated its BITs with a number of European countries on the basis that the protection offered to investors under the BITs will be revised through domestic legislation, under the Protection of Investment Act. South Africa's BITs with China and Russia are, however, still in effect.



**HERBERT
SMITH
FREEHILLS**

**Peter Leon
Patrick Leyden**

**peter.leon@hsf.com
patrick.leyden@hsf.com**

Rosebank Towers, Fourth Floor
15 Biermann Avenue, Rosebank
Johannesburg 2196
South Africa

Tel: +27 10 500 2620
www.herbertsmithfreehills.com

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Real Estate
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Renewable Energy
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