22

MINING & MINERAL LAW

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Introduction

On 1 May 2004, the legislation governing the mineral and petroleum industry changed when the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (the MPRDA), came into operation.

The MPRDA extinguished private ownership of mineral rights. The State's role as custodian of South Africa's mineral and petroleum resources was entrenched in a system where the right to prospect and mine is granted by Government.

The Previous Legal Regime

The right to prospect and mine

Until 30 April 2004, the rights to prospect and to mine were primarily regulated by the Minerals Act, No. 50 of 1991 (the Minerals Act). The Minerals Act vested the right to mine a particular mineral in the holder of the mineral rights for that mineral in relation to the land in question.

Mineral rights constituted an element of land ownership

South African law recognised that mineral rights could be severed from land ownership. This could be done in respect of all minerals or in respect of specified minerals. Severance could take the form of a cession of mineral rights or the taking out of a certificate of mineral rights. Such cession or certificate was registered in the South African Deeds Registry, which rendered the rights held thereunder real rights (ie binding on the owner of the land and his or her or its successors-in-title).

South African law also developed the concept of mineral leases. A mineral lease is a contract whereby the holder of mineral rights grants the right to prospect and mine for a fixed or indefinite period to someone else, normally in exchange for periodic payments based on the quantity of minerals mined.

Mineral rights and mineral leases were, in the absence of prohibitions to the contrary, freely transferable. Such transfers were registrable in the Deeds Registry.

Before 1992, the right to mine for precious metals (gold, silver, platinum and platinum group metals) and precious stones (diamonds, rubies and sapphires) was vested in, and granted by, the State. The holders of those rights (which took the form of mining leases) were deemed to be the holders of mineral rights under the Minerals Act.

The right to prospect and mine as regulated by the State

Under these laws, the State, acting through the Department of Mineral Resources (DMR), regulated the way the rights to prospect and mine were exercised. This was done through a system of authorisations covering:

- the right to prospect: through the issue of prospecting permits;
- the right to mine: through the issue of mining permits (for short-term small-scale mining operations) or mining licences (for longer terms and bigger scale mining operations) – mining permits and mining licences were generically referred to as mining authorisations; and
- environment and rehabilitation: through the approval and enforcement of environmental management programmes in respect of prospecting and mining.

To obtain a prospecting permit or a mining authorisation, the applicant had to:

- be the holder or deemed holder of the mineral rights; or
- have the written consent of the mineral right holder to prospect or mine for his or her or its own benefit and account.

The MPRDA and the Amendment Act

The MPRDA consists of two parts: the Act itself and the Transitional Provisions contained in Schedule II. The MPRDA was amended by the Mineral and Petroleum Resources Development Amendment Act, No. 49 of 2008 (the Amendment Act), which came into effect on 7 June 2013, save for a transitional arrangement for the environmental provisions and certain sections specified in the amendment to the Proclamation of the Amendment Act.

Further amendments to the MPRDA were proposed by the Mineral and Petroleum Resources Development Bill, 2013. This Bill was rejected by the President and has been sent back to Parliament for further deliberation.

Section 2 of the MPRDA describes the objectives of that Act as to:

- recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within South Africa;
- give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
- promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
- substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
- promote economic growth and mineral and petroleum resources development in South Africa, particularly the development of downstream industries through the provision of feedstock and the development of mining and petroleum input industries;
- promote employment and advance the social and economic welfare of all South Africans;
- provide for security of tenure in respect of prospecting, exploration, mining and production operations;
- give effect to Section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social economic development; and
- ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

Custodianship of the nation's mineral and petroleum resources

Section 3 of the MPRDA provides that mineral and petroleum resources are the common heritage of all the people of South Africa and that the State is the custodian of these resources for the benefit of all South Africans. As custodian, the State, acting through the Minister of Mineral Resources (the Minister), may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.

Order of processing of applications

Section 9 of the MPRDA provides that multiple applications for a prospecting or a mining right in respect of the same mineral and land must be dealt with in the order of receipt. If such applications are received on the same day, then applications from previously disadvantaged persons must receive preference.

Transition from the Old to the New System

Provision for a transition from the old regime (in which the role of the State was regulatory in nature and in which the right to prospect and mine vested in the holder of the mineral rights) to the new regime (which provides for the State, acting through the Minister, to grant prospecting rights, mining permits and mining rights) has been made.

Schedule II to the MPRDA contains transitional provisions that provide for:

- the preservation of the validity of certain "old order rights", which were in force immediately before the MPRDA took effect, for limited periods after the commencement of the MPRDA (these periods have now expired);
- a preferential right to the holder of an "unused old order right" during the period of preserved validity to apply for a prospecting right or a mining right in accordance with the provisions of the MPRDA (this period expired on 30 April 2005);
- obtaining conversion of an old order prospecting right to a new order prospecting right – the holder was required to lodge certain documents within two years from the date of commencement of the MPRDA (this period expired on 30 April 2006);
- the holders of old order mining rights to apply for the conversion of those old order rights into new order mining rights in terms of the MPRDA, by lodging certain documents (this period expired on 30 April 2009); and
- pending applications (for prospecting permits; mining authorisations; consent to prospect and mine; and permission to remove and dispose of any mineral) lodged in terms of the Minerals Act but not finalised immediately before the commencement of the MPRDA, to be regarded as having been lodged in terms of the MPRDA.

Right to Use Land for Prospecting and Mining

Previous regime

Under the previous mineral law regime, the right to use land for prospecting and mining was regulated by statute, the common law and contract.

It was usual and customary to provide for contractual provisions to regulate the relationship between landowner and mineral right holder. This was often achieved through an instrument whereby mineral rights were severed from ownership of land (by way of limitations or express grant of rights to use land for prospecting and/or mining).

MPRDA

The transitional provisions contained in Schedule II to the MPRDA provide for the conversion of old order rights into prospecting or mining rights. Upon conversion, or failure to convert within the specified time periods, the old order rights will cease to exist. Any contractual provisions relating to the use of the surface of land for prospecting and/or mining will also terminate. Upon the old order right ceasing to exist, the right to use the surface of land will be regulated by the MPRDA and contracts concluded with the owner.

Section 5 of the MPRDA provides that, subject to the MPRDA, the holder of a prospecting right or mining right is entitled to, among other things:

- enter the land;
- bring plant, machinery and equipment onto the land;
- build;
- construct or lay down infrastructure which may be required for prospecting and mining;
- prospect and mine;
- use water and develop boreholes; and
- carry out incidental activities.

Section 5A prohibits the holder of a prospecting or mining right from conducting prospecting and mining without giving the landowner or lawful occupier of the land in question at least 21 days written notice.

Claims for Compensation

Section 54 of the MPRDA provides for payment of compensation for losses and damages suffered or likely to be suffered as a result of prospecting or mining on the land, by the holder of the right to the owner or lawful occupier of the land. If the owner or lawful occupier of land refuses to allow the holder of a prospecting right or mining right access to the land; places unreasonable demands in return for access; or cannot be found to apply for access, the holder must notify the regional manager.

An owner or lawful occupier of land on which prospecting or mining will be conducted, and who has or is likely to suffer loss or damage as a result of the prospecting and mining, may also notify the regional manager.

The regional manager may request the holder and owner or lawful occupier to negotiate to reach agreement on compensation for loss or damage suffered by the owner or lawful occupier. Failing agreement, compensation must be determined by arbitration or by a competent court. If the regional manager is of the opinion that a failure to reach agreement is due to the fault of the holder, he or she may prohibit prospecting or mining until the dispute has been resolved by arbitration or a court.

If the regional manager, after representations and a written recommendation by the Regional Mining Development and Environmental Committee, concludes that further negotiation may detrimentally affect the objects set out in Sections 2(c), (d), (f) or (g) he or she may recommend that the land be expropriated in terms of Section 55 of the MPRDA.

One Environmental System for the Mining Industry

Environmental regulation of the mining industry is transitioning to the 'One Environmental System', in terms of which environmental regulation of this industry will largely be removed from the MPRDA and included under the National Environmental Management Act No. 107 of 1998 (NEMA).

In 2007/ 2008, the Department of Environmental Affairs (DEA) and DMR agreed that environmental regulation of the mining industry would be removed from the purview of the MPRDA and would be wholly regulated under the NEMA. The structure of this transition has changed somewhat since the original agreement, but the 'One Environmental System' was largely given effect to when the National Environmental Management Laws Amendment Act, 25 of 2014 (NEM 2014 Laws Amendment Act) came into force on 3 September 2014.

Despite the coming into force of the NEM 2014 Laws Amendment Act, the DEA issued a statement on 4 September 2014 to state that the transition would only be effectively implemented from 8 December 2014. Further, the Office of the Chief State Law Adviser issued a legal opinion on the effect of the commencement of the NEM 2014 Laws Amendment Act which also confirms that the transition can only be effectively implemented once all the complementary laws and regulations have come into force.

The basis of the transition is as follows:

- that all environment-related aspects will be regulated through one environmental system which is the NEMA system and that all environmental provisions would be repealed from the MPRDA;
- that the Minister responsible for environmental affairs sets the regulatory framework and norms and standards, and that the Minister responsible for mineral resources will implement the provisions of NEMA and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;
- that the Minister responsible for mineral resources will issue environmental authorisations in terms of NEMA for prospecting, exploration, mining or operations, and that the Minister responsible for environmental affairs will be the appeal authority for these authorisations; and
- that the Minister, the Minister responsible for mineral resources and the Minster responsible for environmental affairs agree on fixed time frames for the consideration and issuing of the authorisations in their respective legislation and also agree to align the time frames and processes.

Where relevant to this chapter, we have set out the implications of the 'One Environmental System'.

Consultation with Interested and Affected Parties

Under the 'One Environmental System', an applicant for a prospecting right or mining right will need to fulfill the NEMA public participation process requirements which form part of the environmental authorisation process and which are set out in detail in the environmental impact assessment regulations published in terms of NEMA.

The Right to Prospect and Mine

Sections 16 to 21 of the MPRDA regulate the right to prospect. Sections 22 to 25 regulate the right to mine. These sections provide for:

Applying for a prospecting right or a mining right (Sections 16 and 22)

Any person who wishes to apply to the Minister for a prospecting or mining right must lodge an application at the office of the regional manager in whose region the land (which includes the surface of the land and the sea) is situated. This must be done in the prescribed manner and submitted with the prescribed non-refundable application fee. As of 8 December 2014, a NEMA environmental authorisation application must be made simultaneously with the application for the prospecting or mining right and submitted to the DMR for processing.

The regional manager must accept an application for the right if these requirements are met; no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and not yet granted or refused.

If the application does not comply with these requirements, the regional manager must notify the applicant in writing of that fact within 14 days of receiving the application.

If the regional manager accepts the prospecting/mining right application, he or she must (within 14 days), notify the applicant in writing to submit the relevant environmental reports required in respect of the environmental authorisation application within certain prescribed timeframes.

Once submitted the regional manager must forward the application to the Minister for consideration.

Grant of a prospecting right

Section 17(1) provides that the Minister must, within 30 days of receipt of the application from the regional manager, grant a prospecting right if the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation has been issued; and if the applicant:

- has access to financial resources;
- has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting works programme;
- has the ability to comply with the Mine Health and Safety Act, No. 29 of 1996 (MHSA);
- is not in contravention of any relevant provision of the MPRDA; and
- in respect of prescribed minerals the applicant has given effect to the object referred to in Section 2(d).

The Minister must within 30 days of receipt of the application from the regional manager refuse to grant a prospecting right if:

- all the requirements of Section 17(1) are not met; and
- the grant will result in concentration of the mineral resource in question under the control of the applicant and their associated companies with the possible limitation of equitable access to mineral resources.

Section 17(4A) provides that if the application 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, including conditions requiring the participation of the community.

Grant of a mining right

Section 23(1) provides that the Minister must grant a mining right if the:

- mineral can be mined optimally in accordance with the mining work programme;
- applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;
- financing plan is compatible with the intended mining operation and the duration thereof;
- mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation has been issued;
- applicant has provided for the prescribed social and labour plan;
- applicant has the ability to comply with the MHSA;
- applicant is not in contravention of any relevant provisions of the MPRDA; and
- grant of such right will further the objects set out in Section 2(d) dealing with black economic empowerment and (f) dealing with social development in accordance with the Broad-Based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry (Charter) and the prescribed social and labour plan.

Section 23 (2A) empowers the Minister to impose such conditions as are necessary to promote the rights and interests of the community which occupies land to which an application relates including conditions requiring the participation of the community.

Rights and obligations of the holder of a prospecting right (Section 19)

The holder of a prospecting right has, subject to the requirements of Section 18, the exclusive right to:

- apply for and be granted a renewal of a prospecting right in respect of the mineral and the area in question;
- apply for and be granted a mining right in respect of the mineral and the prospecting area in question; and
- subject to the permission referred to in Section 20, to remove and dispose of any mineral to which such right relates and which is found during the course of prospecting.

The holder of a prospecting right must:

- lodge such right for registration at the Mining Titles Office within 60 days of the date on which the right becomes effective or is renewed;
- commence with prospecting activities within 120 days from the date on which the prospecting right become effective or such extended period as the Minister may authorise;
- continuously and actively conduct prospecting operations in accordance with the prospecting work programme;
- comply with the terms and conditions of the prospecting right, relevant provision of the MPRDA and any other relevant law;
- comply with the requirements of the approved environmental management plan;
- pay the prescribed prospecting fees to the State; and
- pay the State royalties in respect of any mineral removed and disposed of during the course of prospecting operations.

The holder of a prospecting right may only remove and dispose of a mineral he or she finds in the course of prospecting operations in such quantities as may be required to conduct tests to identify or analyse it. He or she must cover the costs of doing so.

In addition, a holder of a prospecting right must obtain the Minister's written permission to remove and dispose of diamonds and bulk samples of any other minerals he or she finds in the course of prospecting operations.

Rights and obligations of the holder of a mining right (Section 25)

The holder of a mining right has the exclusive right to apply for, and be granted, a renewal of the mining right in respect of a specific mineral and mining area. The holder of the mining right must:

- lodge such right for registration at the Mining Titles Office within 60 calendar days of the date on which the right become effective;
- commence with mining operations within one year from the date on which the mining right becomes effective or such extended period that the Minister may authorise;
- actively conduct mining in accordance with the mining work programme;
- comply with the relevant provision of the MPRDA, any other relevant law and the terms and conditions of the mining right;
- comply with the requirements of the environmental authorisation;
- comply with the requirements of the prescribed social and labour plan;
- pay State royalties; and
- submit the prescribed annual report, detailing the extent of the holder's compliance with the provisions of Section 2(d) and (f), the Charter and the social and labour plan.

Renewal of prospecting and mining rights (Sections 18 and 24)

Any holder of a prospecting or mining right may apply to renew that right by lodging an application to that effect, but:

- a prospecting right may be renewed only once for a period not exceeding three years; and
- a mining right may be renewed for further periods, each of which may not exceed 30 years at a time.

A prospecting or mining right for which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused.

Duration of a prospecting right and a mining right

Sections 17(6) and 23(6) of the MPRDA stipulate that a prospecting right or mining right, when granted, is subject to the MPRDA, any other relevant law and the terms and conditions stipulated in the said right. Also that:

- a prospecting right is valid for the period specified in the right, which period may not exceed five years; and
- a mining right is valid for a period specified in the right, which period may not exceed 30 years.

The period for which the right will be granted must be justified by the prospecting or mining works programme submitted in support of the application.

Transferability and encumbrance of rights (Section 11)

A prospecting right or a mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of a controlling interest in listed companies.

This consent must be granted if the person to whom the right will be alienated or disposed of is capable of carrying out and complying with the obligations and the terms and conditions of the right in question and satisfies the requirements of the MPRDA.

Any transfer, cession, subletting, alienation, encumbrance by mortgage or variation of a prospecting right or mining right must be lodged for registration at the Mining Titles Registration Office within 30 days of the relevant action.

Cancellation and suspension of rights (Section 47)

The Minister may cancel or suspend any prospecting right, mining right or other authorisation under the MPRDA if the holder thereof is:

- conducting any reconnaissance, prospecting or mining operation in contravention of the MPRDA;
- breaches any material term or condition of such right, permit or permission;
- is contravening the approved environmental management plan or programme; 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.

The Minister must direct the holder of rights under the MPRDA to take specified measures to remedy any contravention, breach or failure. If the holder does not comply with a direction given, the Minister may cancel or suspend the right after having given the holder a reasonable opportunity to make representations and considering such representations.

Corrective measures (Section 51)

In terms of Section 51(1) the Minister may, on the recommendation of the Minerals and Mining Development Board (the Board) direct the holder of a mining right to take "corrective measures" if the Minister determines that the minerals are not being "mined optimally" or that the employment and general welfare objective is being "detrimentally affect[ed]".

If the holder fails to comply with the notice setting out the corrective measures it must take, or the Minister is convinced that any act or omission by the holder justifies the suspension or cancellation of the right, the Minister may, on the recommendation of the Board, suspend or cancel the mining right.

Zoning

On 12 April 2012, the Constitutional Court handed down judgments in the matters of *Maccsand v City of Cape Town* and others and Minister for Mineral Resources v Swartland Municipality and others.

It is now settled law that there is no conflict between provincial planning legislation (which is administered through local/provincial Government), and the MPRDA (which is administered nationally). The effect of these judgments is that all mining operations need to be conducted on land which is appropriately zoned for mining. This is a departure from the traditional view in which the MPRDA trumped planning legislation.

Environmental protection and assessment

Sections 16 and 22 provide that any person who applies for a prospecting right or mining right must simultaneously apply for an environmental authorisation in terms of NEMA.

The Amendment Act prescribes that an environmental authorisation in terms of Section 24 of NEMA has replaced the requirement for environmental management plans or programmes. In terms of Section 38A, an environmental authorisation will be a condition prior to the granting of a right in terms of the MPRDA.

The provisions relating to environmental management programmes in the MPRDA were deleted with effect from 7 June 2013. Despite this, the regulators provided that the status quo remained until the shift in environmental regulation was effectively implemented on 8 December 2014.

Section 12(4) of 2008 NEMA Amendment Act currently provides that environmental management programmes approved in terms of the MPRDA immediately before this Amendment Act came into operation (effectively 8 December 2014) must be regarded as having been approved in terms of NEMA.

Financial provision

Before an environmental authorisation can be approved, the applicant must make provision for the rehabilitation or management of negative environmental impacts in terms of Section 24P of NEMA. Currently, the quantum of the financial provision required is calculated in accordance with guideline documents published by the DMR. The financial provision must be assessed annually by the holder of a prospecting or mining right and updated in accordance with the holder's rehabilitation obligations.

Draft 'regulations pertaining to the financial provision for the rehabilitation, closure and post-closure of prospecting, exploration, mining and production operations' have been published for public comment. Such draft regulations provide for the determination and scope of financial provision, payment method, assessment, review and adjustment of financial provision, deemed closure and care and maintenance and confirm that the regulations apply to an existing holder of a prospecting and mining right in terms of the MPRDA, once finally published.

In terms of section 43 of the MPRDA, the holder of a mining right remains responsible for any environmental liability, pollution or ecological degradation associated with the mining right until the Minister has issued a closure certificate in respect of the mining operation. Further, the Minister may retain a portion of the financial provision made for rehabilitation to address any environmental degradation which may become known in the future. In terms of amendments proposed to the MPRDA, environmental liability will remain the responsibility of the holder mining right despite the issuing of a closure certificate.

Mine Health and Safety

Occupational health and safety in the South African mining industry is primarily regulated by the MHSA, the regulations to the MHSA and those regulations to the now repealed Minerals Act, which remain in force and effect in terms of schedule 4 to the MHSA.

The MHSA is enforced by the Mine Health and Safety Inspectorate, within the DMR, which has wide powers provided to it, in terms of the MHSA, in order to ensure compliance with the MHSA. A failure of an employer, or any person on a mine, to comply with the MHSA is a criminal offence for which persons may be prosecuted. In addition, the DMR has the power to issue instructions, halt part of, or all operations and/or impose administrative fines upon employers. Currently, the maximum administrative fine that may be imposed by the DMR is ZAR 1 million per offence.

The core objective of the MHSA is encapsulated in both the preamble and the objects, which provide among other things, that the MHSA was promulgated to provide for the protection of the health and safety of employees and other persons at mines.

To this end, the MHSA seeks to:

- establish a culture of health and safety and mechanisms for the enforcement of health and safety measures;
- provide for appropriate systems of employee, employer and Government participation in health and safety matters;
- establish representative tripartite institutions;
- promote health and enhance properly targeted research in this regard;
- provide for effective monitoring systems and inspections, investigations and inquiries to improve health and safety;
- promote training and human resources development; and
- regulate employers' and employees' duties in identifying hazards and eliminating, controlling and minimising the risk to health presented by such hazards.

Principal provisions

The MHSA applies to a "mine" or "works" as defined in the MHSA and requires that the employer, defined with reference to the entity which has been granted a right in terms of the MPRDA, ensures as far as reasonably practicable that the mine is:

- designed, constructed and equipped to provide conditions for safe operation and a healthy working environment; and
- commissioned and maintained in such a way that employees can perform their work without endangering the health and safety of employees or any other person.

Importantly, the holder of the right granted in terms of the MPRDA (and therefore the employer as contemplated in the MHSA) is ultimately responsible for the health and safety of all persons performing work on the mine (defined as employees in the MHSA) as well as all persons who are not employees but who may be affected by the activities at the mine (such as members of the public).

The overriding responsibility set out in Section 2 of the MHSA thus applies not only in respect of the holder's direct employees, but also in respect of independent contractors' personnel.

The responsibility of ensuring an employer's compliance with the MHSA rests with the chief executive officer (CEO) of the employer or the person designated by the board of directors to fulfill the function of the CEO for purposes of the MHSA. The principal obligations placed upon an employer include the identification, assessment and control of hazards, implementation and maintenance of appropriate codes of practice and safety work procedures, the provision of regular training and ensuring that work is performed under the guidance of appropriate and competent supervisors.

The CEO or designated person, in turn, appoints various people including a mine manager to be responsible for the day-to-day management and operations of the mine or works from a functional and health and safety perspective. Further statutory appointments contemplated in both the MHSA and regulations and compliance with them, remain very important for employers. The employer must have a system in place to ensure that all appointed persons are competent and that no work is allocated to an employer unless the training and capability of that person has been considered, to ensure that the work allocated can be performed safely.

Specific health and safety obligations are then placed on these legal appointments in terms of the relevant provisions of the MHSA and/or regulations.

The MHSA also places a duty on all employees (in other words, all persons working on a mine) to protect their own health and safety as well as the health and safety of other people working with them. Employees are specifically given the right to look after their own and others' health and safety and must be empowered to leave a dangerous working place.

Mine Health and Safety Inspectorate

The MHSA is regulated by the Mine Health and Safety Inspectorate, under the jurisdiction of the Minister. The Minister has appointed a chief inspector of mines who must:

- ensure compliance with the MHSA;
- compile and distribute health and safety information;
- advise the Minister on health and safety issues;
- appoint a medical inspector and inspectors of mines (which includes the power to authorise any competent independent person to perform all or any of the functions of an inspector); and
- distribute a yearly plan for the Mine Health and Safety Inspectorate and an annual report of health and safety at mines.

Various regional Mine Health and Safety Inspectorate offices have been established, each under the leadership of a regulation Principal Inspector of Mines. Inspectors of mines (including the Principal Inspectors of Mines) appointed by the chief inspector have three primary functions: conducting inspections; issuing instructions to deal with dangerous conditions at mines; and conducting investigations and inquiries into accidents and health-threatening occurrences.

Duties and rights

The functions of the Mine Health and Safety Inspectorate are broadly set out in Chapter 5 of the MHSA. Generally speaking, these functions relate to overseeing the health and safety systems in place at a mine; and the inspector's powers to enter a mine and inspect, to carry out investigations, and to issue compliance notices and stoppage orders.

The Mine Health and Safety Inspectorate is also empowered to convene investigations and inquiries into reportable accidents and impose fines on the employer. Inspectors have powers to deal with dangerous conditions as is deemed fit. In the event that an inspector of mines halts part, or all, of an operation this instruction will remain in place until the perceived dangerous condition has been adequately dealt with. This will often include the requirement that the employer, line management and trade union representatives attend at the regional offices of the DMR and present a presentation to the DMR on the remedial action taken to avoid a reoccurrence of the perceived dangerous occurrence.

An inspector of mines also has the power to recommend to the relevant Principal Inspector of Mines that an administrative fine be imposed on an employer. If such a recommendation is made, it must be served on the employer who then has 30 days to make written representations to the Principal Inspector of Mines. The Principal Inspector of Mines may then impose the fine, disregard the recommendation or refer the matter to the National Prosecuting Authority for a decision on whether the employer should be criminally charged.

Any decision of an inspector of mines that adversely affects any person, except a decision to impose an administrative fine, may be the subject of an internal appeal and thereafter an appeal to the Labour Court. A decision to impose an administrative fine may be challenged directly to the Labour Court, but such a challenge does not automatically suspend the obligation to pay the fine, which must be paid within 30 days after imposition.

Investigations and inquiries

Investigations may be carried out where an accident, incident, health-threatening occurrence or high potential incident occurs at a mine. In addition to this, an investigation may also be requested by a health and safety representative or the health and safety committee established at a particular mine. The relevant Inspector of Mines conducting an investigation must prepare a report setting out the causes of the accident and/or occurrence and/or breach, and will, in all probability, make a recommendation and/or issue a compliance notice in this regard. An investigation may be converted into an inquiry at any time.

Section 65 of the MHSA provides for an inquiry to be convened to inquire into an accident or occurrence at a mine that results in serious injury, illness or death of a person; an actual or suspected contravention of the MHSA; or any practice or occurrence concerning the health and safety of persons. An inquiry is a mandatory process when an accident or occurrence at a mine has resulted in the death of any person.

In certain instances, when an inquiry has been convened due to the death of any person at a mine, the inquiry may be held jointly with an inquest convened in terms of the Inquests Act, No. 58 of 1959.

Inquiries are held in public, although the presiding officer may exclude members of the public if deemed necessary. Any person with a material interest in the outcome of an inquiry, including the CEO, management, trade unions, employees and the families of the injured or deceased may participate in the inquiry.

It is the responsibility of the presiding officer appointed by the Mine Health and Safety Inspectorate to prepare a report on the findings of the inquiry. A copy of report must be submitted to the chief inspector and to the relevant health and safety representative, health and safety committee or registered trade union as well as to others with a material interest in the inquiry.

The presiding officer's report will set out findings on the causes of the accident or occurrence; any breaches of the MHSA; any recommendations in respect of remedial measures to be put in place by the employer; and sanctions, administrative fines or recommendations for prosecution. This report is furnished to the director of public prosecutions (DPP) once the chief inspector of mines is of the view that the report sets out sufficient grounds for recommending prosecution of appointed and/or other persons to the DPP.

Offences and penalties contemplated in the MHSA and regulations

An administrative fine may be imposed against an employer by the principal inspector of mines after considering a recommendation for the imposition of a fine made by an inspector. This decision will be made subsequent to receiving related representations filed by the employer.

An administrative fine can only be imposed where there has been a failure by the employer to comply with the MHSA. The maximum amount that may be imposed by the principal inspector as an administrative fine is ZAR 1 million. Once imposed, the administrative fine must be paid within 60 days of the date of it being imposed. The decision to impose the administrative fine may be challenged by the employer on review to a competent court.

In addition to the imposition of an administrative fine, an alleged breach of the MHSA or negligent conduct which resulted in the injury or death of a person at a mine may be referred to the DPP. The DPP may elect to prosecute the employer or any individual. The maximum penalty in the event of a successful prosecution for a breach of the MHSA is ZAR 3 million and/or a period of imprisonment not exceeding five years.

Conclusion

The South African Government is employing general and targeted measures to increase equitable access and economic growth in the mining industry. This includes broadening the participation of individuals or groups formerly excluded from participation in the mining sector. The State also endeavours to foster practices that promote ecological sustainability, health and safety, and the general welfare of the community in the area where a mine is operating.

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