

South Africa

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Mining industry

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

South Africa is renowned for being a mineral treasure trove with an abundance of resources. It owns and produces a significant proportion of the world's minerals: nearly 90 per cent of platinum metals, 80 per cent of manganese, 73 per cent of chrome, 45 per cent of vanadium and 41 per cent of gold are located in South Africa. A substantial variety of other minerals are extracted, including iron ore, copper, nickel, diamonds, coal, building materials and other non-metallic metals.

South Africa's wealth has been built on its vast resources and mining as an industry is therefore crucial. Based on 2011 statistics, while gold export earnings have declined, contributing only 5.7 per cent to South Africa's GDP, precious metals account for 65 per cent of the country's mineral export earnings and 30 per cent of total goods exports. The mining industry contributed 5.2 per cent to South Africa's GDP in 2011.

The mining industry is also South Africa's biggest employer, with over 510,000 employees and another 400,000 employed by suppliers of goods and services to the industry. South Africa's mining industry is probably the world's most highly developed. With a strong background as a major mining country, its strengths include high levels of technical and production expertise, as well as comprehensive research and development activities.

The country has some of the most highly developed primary processing facilities worldwide, covering the carbon steel, stainless steel, and aluminium industries, in addition to gold and platinum. It is also a world leader of new technologies.

The industry suffers, however, from price fluctuations due to shifts in world demand for mining products and, presently, the absence of mineral beneficiation before export.

- 2** What are the target minerals?

Several minerals are mined in South Africa, including platinum metals, manganese, chrome, vanadium, gold, coal, diamonds, iron ore, copper, nickel, building materials and other non-metallic metals.

- 3** Which regions are most active?

Mining occurs throughout South Africa, particularly in the Mpumalanga Province, North West Province, KwaZulu Natal Province, Limpopo Province and Northern Province.

Legal and regulatory structure

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

Mineral resource exploitation in South Africa is regulated by both statute and common law. The Mineral and Petroleum Resources

Development Act 28 of 2002 (the MPRDA) is the primary regulatory framework legislation. The MPRDA specifically directs that where there is a conflict between the MPRDA and common law, the MPRDA will prevail. However, the MPRDA does not nullify the common law. Accordingly, the common law principles must be considered in interpreting the MPRDA where there is no conflict between the MPRDA and common law. The principles must especially be considered where the MPRDA does not contain provisions on mineral resource issues.

- 5** How is the mining industry regulated?

The MPRDA established the state as the custodian of all mineral resources in South Africa, through the minister of mining. The mining industry is regulated by the MPRDA, through the national and regional offices of the Department of Mineral Resources (DMR).

- 6** What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws?

The principal law that regulates the mining industry is the MPRDA.

Other related environmental legislation includes: the National Environmental Management Act 107 of 1998 (NEMA); National Water Act 36 of 1998; National Environmental Management: Air Quality Act 39 of 2004; and National Environmental Management: Waste Act 59 of 2008.

The DMR is the principal regulatory body in the mining industry.

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

The South African Code for Reporting of Mineral Resources and Mineral Reserves (the SAMREC Code) sets out the classification system for reporting mineral resources' and mineral reserves' required minimum standards, recommendations and guidelines for public reporting of exploration results, mineral resources and mineral reserves in South Africa.

Public reports are prepared to inform investors or potential investors and their advisers according to the Code. They include but are not limited to company annual reports, quarterly reports and other reports incorporated in JSE circulars, or as required by the Companies Act. In certain instances the Code also applies to environmental statements, information memoranda, expert reports, technical papers, website postings and public presentations.

SAMREC was established in 1998 and modelled its Code on the Australasian Code for Reporting of Mineral Resources and ore Reserves (the JORC Code).

The Code has been adopted by SAIMM, GSSA, SACNASP, ECSA and PLATO and is binding on members of these organisations.

It is also incorporated in the JSE Rules regarding listing requirements and continuing obligations.

The Code classifies mineral resources into three subdivisions in order of increasing confidence of geoscientific evidence: inferred, indicated and measured resources. Mineral reserves are a modified subset of the indicated and measured mineral resources. Public reports must use one of the terms in respect of proved or probable mineral reserves; measured, indicated and inferred mineral resources; and exploration results.

These terms are defined in the 2007 edition (as amended, July 2009) of the Code, as follows:

- mineral resource – a concentration or occurrence of material of economic interest in or on the earth's crust in such form, quality and quantity that there are reasonable and realistic prospects for eventual economic extraction. The location, quantity, grade, continuity and other geological characteristics of a mineral resource are known, or estimated from specific geological evidence, sampling and knowledge, interpreted from an appropriately constrained and portrayed geological model;
- inferred mineral resource – that part of a mineral resource for which volume or tonnage (or both), grade and mineral content can be estimated with a low level of confidence. It is inferred from geological evidence and sampling, and assumed but not verified geologically or through analysis of grade continuity. It is based on information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes that may be limited in scope or of uncertain quality and reliability;
- indicated mineral resource – that part of a mineral resource for which tonnage, densities, shape, physical characteristics, grade and mineral content can be estimated with a reasonable level of confidence. It is based on exploration, sampling and testing information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes. The locations are too widely or inappropriately spaced to confirm geological or grade continuity but spaced closely enough for continuity to be assumed;
- probable mineral reserve – the economically mineable material derived from a measured or indicated mineral resource or both, which is estimated with a lower level of confidence than a proved mineral reserve. It includes diluting and contaminating materials and allows for losses expected to occur when the material is mined. Appropriate assessments to a minimum of a pre-feasibility study for a project, or a life-of-mine plan for an operation, must have been carried out, including consideration of, and modification by, realistically assumed mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors. Such modifying factors must be disclosed;
- proved mineral reserve – the economically mineable material derived from a measured mineral resource that is estimated with a high level of confidence. It includes diluting and contaminating materials and allows for losses expected to occur when the material is mined. Appropriate assessments to a minimum of a pre-feasibility study for a project, or a life-of-mine plan for an operation, must have been carried out, including consideration of, and modification by, realistically assumed mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors. Such modifying factors must be disclosed; and
- measured mineral resource: that part of a mineral resource for which tonnage, densities, shape, physical characteristics, grade and mineral content can be estimated with a high level of confidence. It is based on detailed and reliable exploration, sampling and testing information gathered through appropriate techniques from material at locations such as outcrops, trenches, pits, workings and drill holes. The locations are spaced closely enough to confirm geological and grade continuity.

Modifying factors will include considerations of mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors.

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?

As the custodian of mineral rights, only the state can authorise exploitation of mineral resources and grant these rights through the minister.

The minister has the right to cancel or suspend a mineral right in specified circumstances. These include: contravening the MPRDA while conducting mining related operations; breaching any material term or condition of a mineral right; contravening an approved environmental management programme (EMP); or submitting inaccurate or misleading information to the DMR. The minister must however first give written notice to the holder, indicating the intention to suspend or cancel the mineral right and giving reasons. The holder must also be given a reasonable opportunity to show why the right should not be suspended or cancelled.

Owners of surface rights do not hold the mineral rights, unless they make application to the state for such rights.

Mineral rights are commonly granted to private parties. A mineral right is a limited real right with various related rights attaching to it. A holder and its employees may:

- enter the land to which a right relates;
- bring onto such land any equipment and construct any infrastructure required for the operations;
- prospect, mine, explore or produce for its own account on or under the land for the mineral for which a right has been granted;
- remove and dispose of any mineral found during operations;
- subject to the National Water Act 36 of 1998, use water on the land; and
- carry out any other activity incidental to the operations, if it does not contravene the MPRDA's provisions.

The MPRDA provides that the minister may refuse to grant a prospecting right if the granting of such right will result in an exclusionary act; prevent fair competition; or result in the concentration of a mineral resources under the control of an applicant. This provision may therefore be used to prevent one private entity holding a monopoly over rights to a specific mineral across large areas. Some private entities have however acquired mineral rights over large areas prior to the MPRDA's commencement, such as the De Beers Namaqualand Mine on the West Coast of South Africa.

Third parties cannot obtain mineral rights in the same area where rights have already been granted to another party for the same minerals. Nothing, however, precludes a third party from submitting an application for a right to a different mineral that is not included in a holder's existing right.

- 9** What information and data is 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?

The Mineral and Petroleum Titles Registration office, which is regulated by the Mining Titles Registration Act, is the office for the regis-

tration of all mineral and petroleum titles and all other related rights, deeds and documents. Documents that are registered at this office are not publicly available and an application to access them must be made under the Promotion of Access to Information Act 2 of 2000 (PAIA). Under the PAIA a person requesting public documents does not need to furnish reasons for their disclosure.

The MPRDA contains obligations for mineral rights holders to submit reports to the DMR, although these are not generally available to the public.

The Council for Geoscience (CGS) is a public entity that collects geoscience data (particularly geological, geophysical, mineral, geochemical and engineering-geological) in maps and documents. 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. The South African Mineral Deposits Database (SAMINDABA) is an online database (www.geoscience.org.za). Access to information not publicly available is subject to the PAIA and the Geoscience Act 100 of 1993, which regulates the functions of the GCS.

- 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 to a preferential right acquire a mining licence?

A private party may acquire a permit for reconnaissance, technical cooperation, mining and retention. Rights for prospecting, exploration and mining may also be acquired.

The application procedure to acquire mineral rights from the state is set out in the MPRDA. The minister can grant, issue, refuse, control, manage or administer any of these rights.

Rights are acquired on a first-come, first-served basis. An application for a prospecting right, mining right or mining permit must be accepted where no other person holds such right for the same mineral and land.

The minister may also publish invitations for applications for prospecting and mining rights and set out the terms and conditions on which these rights will be granted.

Holders of prospecting or retention rights have the exclusive right to be granted a mining right for the land in question. Similarly, holders of an exploration right have the exclusive right to be granted a production right for the petroleum and exploration area in question. Prospecting, mining and exploration rightholders have an exclusive right to be granted a renewal of their respective rights. A reconnaissance permit holder does not have any exclusive right to be granted a prospecting right or mining right and is also not automatically entitled to conduct any prospecting or mining operations.

Various limitations on the periods for exploitation of mineral resources are provided in the MPRDA for the different mineral rights. Limitations on the number of renewals are also specified.

The rights holder's obligations depend on the nature of the right or permit. The extent of the activities that the holder of a right or permit is entitled to undertake is clearly set out in the MPRDA. The obligations include rehabilitation obligations, obligations to employees, obligations to the surrounding community, etc.

In terms of the MPRDA the rights holder has an obligation to ensure optimal exploitation of the mineral resource. A person is only entitled to a mining, prospecting, exploration or production right to the extent that they actively exploit these rights. Holders of such rights therefore have an obligation to continuously conduct their operations within the period of the right.

A retention permit may only be issued if the applicant has completed prospecting activities and market studies have revealed that mining of the mineral will be uneconomical due to prevailing market conditions.

To ensure optimal exploitation a planned mining, prospecting, exploration or production work programme must be followed. There are specified periods for rights holders to commence such operations. Corrective measures may be taken against a holder if minerals are not mined optimally.

A mineral rights holder is obliged to consult with interested and affected parties, landowners and lawful occupiers in respect of their operations and activities.

Any person other than the mining right holder only has the right to mine as a contractor or service provider, by agreement with the holder.

Mining permits and mining, prospecting, exploration and production rights may only be transferred, ceded, let, sublet, alienated, disposed of, or encumbered by mortgage with ministerial consent and on just cause. Consent to both the transfer of a right and substitution of the holder should be requested for the purposes of the MPRDA.

The person to whom the right will be alienated or disposed must show that they are capable of complying with the obligations, terms and conditions of the right in question and satisfy the requirements of an applicant.

A contravention or failure to comply with the MPRDA is an offence, for which penalties are stipulated in the Act.

- 11** 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?

There are no restrictions in the MPRDA or in practice on a foreign party acquiring mining rights in South Africa.

Due to legislation providing for advancement of historically disadvantaged people, however, there are benefits in a domestic partner having some form of interest in the foreign party's mining activities. The foreign party should give careful consideration to the most appropriate business entity utilised to acquire mining rights and take note of South Africa's exchange control restrictions.

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

A mining right is a limited real right that may be enforced against third parties and once granted the state has a limited power to interfere in the right. Failure to respect a right could give rise to criminal liability, a civil claim for damages or an administrative justice action.

When a party's rights or legitimate expectations have been materially and adversely affected or that party has been aggrieved by any administrative decision taken under the MPRDA, the MPRDA allows for an appeal against such decision.

Once the person has exhausted the remedies provided for by the MPRDA, they may apply to the High Court for a review of the administrative decision, according to the provisions of the Promotion of Administrative Justice Act 3 of 2000.

Foreign arbitration awards are enforceable in South Africa, provided that local requirements for enforcement are met.

- 13** What surface rights may private parties acquire? How are these rights acquired?

Any mining rights holder may seek to purchase the surface rights and South Africa has a free market in such property purchases.

If the surface rights are not purchased, the MPRDA grants a limited real right to the mineral rights holder over the land as well as the minerals. In accordance with common law, the landowner is bound to allow the holder to do whatever is reasonably necessary for the proper exercise of the holder's rights. The mineral rights holder must, however, exercise his or her rights with due regard to the landowner's

rights and interests and with the least possible inconvenience to the property and its owner.

The mineral rights holder is not specifically required to conclude an agreement with the landowner or land occupier regarding the surface use.

Any person who intends to use the land surface in any way that may be contrary to the MPRDA's objectives must apply for ministerial approval. The minister may also investigate allegations that a person is using their property in a manner that may detrimentally affect a mining operation. A rectification notice can then be served and enforced.

The DMR will investigate a conflict between a mineral rights holder and a landowner. The parties may be requested to conclude an agreement for payment of compensation for the landowner's loss or damage. If no agreement is reached, the compensation will be determined by arbitration or a competent court. Alternatively, the DMR can recommend expropriation to the minister, in accordance with the relevant legislation, should it further the MPRDA objectives.

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

There is certain national and provincial legislation, under which properties may be declared a particular protected status.

The MPRDA stipulates that no mineral rights may be issued over any land 'reserved under any other law'. This section is not an absolute restriction and mineral rights may be issued in a protected area if the minister is satisfied that a specified exclusion applies.

If these exclusions are not applicable, the MPRDA prohibits the issuing of mineral rights over land that is reserved under another law, which includes legislation declaring land a particular protected status. But the condition 'in terms of any other law' requires that the legislation, either national or provincial, which forms the basis for properties being given a particular protected status, be considered, to establish what restrictions are contained for such protected areas. For example, the National Environmental Management Protected Areas Act 57 of 2003 does not prohibit the grant of mineral rights over a protected area, but only the actual prospecting and mining on the area.

Duties, royalties and taxes

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

The Minerals and Petroleum Resources Royalty Act 28 of 2008 (Royalty Act) commenced on 1 March 2010. In terms of the Royalty Act, royalties are imposed for any mineral resource recovered or won in South Africa.

Royalties are calculated by a formula; for refined minerals (such as gold) the formula is $0.5 + [\text{earnings before interest and taxes} \div (\text{annual gross sales in respect of refined mineral resources} \times 12.5)] \times 100$. The formula is the same for unrefined minerals (including diamonds, gas and oil); however annual gross sales are multiplied by an amount of 9. Relief will be given to small businesses.

In addition, taxes imposed in South Africa include income tax (corporate and individual); capital gains tax (CGT); and certain individual taxes such as value-added tax (VAT) and transfer duty.

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

Gold mining companies are taxed according to a formula. Capital allowances are provided for gold mines due to the high capital investments incurred. Diamond and other non-gold mining companies are taxed at the same rate of normal taxes applying to other companies.

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

Income tax is payable by any natural person who is not resident but present in South Africa for a prescribed period.

Foreign residents and non-resident companies (foreign parties) are taxed on income from a source in or deemed to be in South Africa. They are also taxed on capital gains arising from their disposal of the following:

- immovable property situated in South Africa, held by the foreign party;
- any interest in a South African company, trust or other entity owning immovable property situated in South Africa; and
- any asset that is attributable to a permanent establishment of that foreign party in South Africa.

Dividends paid by companies registered in South Africa are exempt from income tax in the shareholders hands. By contrast, South African shareholders of foreign companies are taxed on dividends received from foreign countries. This will change with effect from 1 April 2012, however, when the new dividends withholding tax comes into effect. Any dividend paid by a South African company to its shareholders (both resident and non-resident) will then be subject to a withholding tax of 10 per cent. The rate of 10 per cent may be reduced by a double taxation agreement (DTA) between South Africa and the non-resident shareholder's country of residence, if one exists.

Interest received by non-residents is currently exempt from income tax, subject to certain requirements. There are proposed amendments to the Income Tax Act 58 of 1962 that will give South Africa the right to tax interest paid to non-residents. The amendments will come into effect on 1 January 2013 and will impose a 10 per cent withholding tax on any interest accruing to a non-resident on or after the effective date. Similarly to the dividends withholding tax, the rate of interest may be reduced by a DTA.

South Africa imposes a withholding tax of 12 per cent on royalties payable to non-residents. Agreements by South African companies to pay royalties to non-residents require the approval of the Exchange Control Department of the South African Reserve Bank and the Department of Trade and Industry (DTI).

Foreign companies carrying on business in South Africa through a branch must be registered as 'external companies' and as taxpayers. The branch is not a separate legal entity and is taxed at 33 per cent. There are no withholding taxes on the remittance of branch profits.

A subsidiary company registered in South Africa will be treated as a separate legal entity and subject to the same tax provisions as domestic companies.

Business structures

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

South African law provides for two kinds of companies, which are the most common business vehicles for all private-party business. Both a public limited liability company and a private limited liability company must have at least one shareholder. The restrictions in the previous Companies Act that a public limited liability company must have a minimum of seven shareholders and a private limited company a maximum of 50 shareholders are no longer applicable. There is no requirement that either shareholders or directors be South African citizens or residents.

A branch office may be set up by the investor. Any time that a foreign company carries on a range of listed business activities in South Africa, including as a branch office, it qualifies as an external company and must be registered as an external company with the South African Companies Commission. Branch offices do not have a separate legal personality from the head office. However, for

taxation and exchange control regulation purposes, an external company is treated as having a separate personality. Further, under the Companies Act, only certain specified sections of the Companies Act apply to external companies, including, for example, the obligation to maintain at least one office in South Africa and the duty to file an annual return in the prescribed form. This varies from the previous Companies Act, which applied in its entirety generally to every company including external companies.

A joint venture can be formed with a South African entity, either through a South African subsidiary or directly in partnership; this is commonly used in the mining sector.

If a black economic empowerment (BEE) partner is to be taken into the South African business the most appropriate business entity would be a South African company, as this would allow the South African operations to be ring-fenced.

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

There is no requirement that either shareholders or directors in a company registered in South Africa are South African citizens or residents. Under the MPRDA there is, however, a requirement that a mining right holder must have 26 per cent BEE ownership by 2014. South African entities and parties will therefore need to be involved in any company that holds mining rights.

20 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 has favourable bilateral investment treaties and tax treaties with other countries, through which foreign entities can structure their operations.

The most common jurisdictions through which foreign entities structure their operations are Mauritius, Luxembourg and the Netherlands, dependant on the type of structure of the foreign entities' operations.

Financing

21 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 well-developed financial infrastructure, including active money, capital and financial markets. There are many well-established commercial, merchant and investment banks, both domestic and international.

Financial assistance may be obtained by non-residents in South Africa for bona fide foreign direct investments into South Africa, without restrictions.

For BEE participation in a foreign business venture, there are several governmental and non-governmental organisations that assist HDI new business establishments. These include the International Development Corporation, Small Business Development Corporation, the Development Bank of Southern Africa and the National Business Initiative.

Non-resident companies can be listed on the Johannesburg Stock Exchange (JSE). The South African financial market is therefore open to foreign companies to raise capital. South African residents are entitled to invest, without restriction, in inward listed investments on the JSE. South African institutions are permitted to invest in such listing using their existing foreign investment allowances plus an additional 5 per cent of their total retail assets in African inward-listed equity and debt securities. The Bond Exchange of South Africa no longer exists, as it was acquired by the JSE.

Restrictions

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

Imports into South Africa are comparatively unrestricted and currency is generally available to pay for imports. The International Trade Administration Act 71 of 2002 (ITAC Act) controls importation, through the International Trade Administration Commission (ITAC).

The Customs and Excise Act 91 of 1964 governs the imposition of customs and excise duties, as well as various other charges imposed by the state on goods imported into the country. These charges are contained in the schedules to the Act. Part 1 of the schedule has been constructed in accordance with the Harmonised Commodity Description and Coding System, developed by the World Customs Organisation (WCO). South Africa has substantially reduced its import tariff levels, pursuant to WCO commitments, cutting back from 80 different levels to six different levels. All quantitative control and formula duties have been replaced with ad valorem duties.

There are no restrictions on the importation of services, provided an appropriate visa is obtained by the foreign contractor or employee.

23 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 actively encourages exports and few restrictions are imposed.

The government has, however, committed to promotion of local beneficiation through legislation, to ensure equitable access to the country's mineral resources and, in turn, create employment. The MPRDA includes provisions that the minister must promote initiatives for the establishment of secondary and tertiary mineral-based industries, aimed at adding maximum value to mineral raw materials, where economically justifiable. In this regard, a policy document: 'A Beneficiation Strategy for South Africa' (June 2011) has recently been approved by Cabinet.

Should any party intend to beneficiate any mineral mined in South Africa outside its borders it must first furnish written notice and consult with the minister.

The Mining Charter (which has recently been amended) and Mining Code specifically stipulate that mining companies will be able to offset up to 11 per cent of their HDSA ownership requirements against the value of their beneficiation activities from 2012.

Amendments to the Diamonds Act 56 of 1996 facilitated the beneficiation of diamonds in South Africa, by making diamonds more accessible for local cutters and polishers. The South African Diamond and Precious Metals Regulator was established to issue authorisations for dealing, beneficiation, trading and possessing, selling, exporting or importing unpolished diamonds. When considering applications, the Regulator must consider the promotion of equitable access to and local beneficiation of South Africa's diamonds. South Africa also has a State Diamond Trader, whose functions are to maintain a client base of local diamond beneficiators. The objectives of the Trader are similarly to promote equitable access to and local beneficiation of South Africa's diamonds. The Regulator has established a Diamond Exchange and Export Centre. All unpolished diamonds intended for export purposes must first be offered for sale to this centre as an export condition of unpolished diamonds.

The Draft Precious Metals Beneficiation Bill also proposes changes to facilitate growth in value addition, through increased access to unrefined and partially refined precious metals by local beneficiation, for both platinum and gold.

Restrictions are imposed on the export of individual minerals in legislation. For example, the ITAC Act requires an export permit for the export of certain minerals. The export of gold, certain precious metals and diamonds is regulated and approval is required. There is no restriction per se on the export of commodities such as coal; although rail transport and port allocation may be required, which imposes restrictions on the capacity of the commodity transported. This indirectly affects the possible export quotas for such commodities.

- 24** 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?

There are no restrictions on the import of funds for mining activities.

Any income, such as dividend or interest, derived from South African shares or assets is freely transferable by non-residents and may be remitted into any foreign currency at the applicable exchange rates. Access to foreign exchange is not subject to export performance. Where a non-resident sells any South African asset, the sale proceeds can be transferred on the same basis. Any rand balance held by a non-resident in a South African bank is not subject to exchange control and may be used in South Africa or transferred into any foreign currency.

If shares are transferred in South Africa to a non-resident, the share certificate must be endorsed with the words 'non-resident'. The endorsement ensures that the sale proceeds can be transferred abroad. Listed shares are freely tradable.

Environment

- 25** What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The DMR presently regulates environmental management in prospecting, mining and operations. Legislative amendments are in place, which provide that the Department of Environmental Affairs will become the regulating authority. The date of commencement of these amendments into law is uncertain.

The National Environmental Management Act 107 of 1998 (NEMA) is the framework environmental legislation. All organs of state must, at all times, have regard for the principles of NEMA in the interpretation, implementation and administration of NEMA or any legislation relating to the environment. NEMA applies to all mineral operations, however the MPRDA is presently the primary source of environmental impact assessment requirements and environmental rehabilitation obligations in the mining sector. In terms of the MPRDA, a mineral rights holder must give effect to integrated environmental management objectives. The holder is obliged to consider, investigate, assess and communicate the effects of the environmental impact of a mining activity to the DMR. All environmental impacts must be managed. As far as reasonably possible, the environment must be rehabilitated after the operation to its natural state or a land use conforming to accepted principles of sustainable development.

A mineral rights holder is responsible for any environmental damage, pollution or ecological degradation and the management thereof as a result of his operations until the minister has issued a closure certificate to the holder concerned. Directors or members of a company or close corporation are jointly or severally liable for any negative environmental impacts caused by the legal entity they represent, or even previously represented.

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

Every person who has applied for a mining right must conduct an environmental impact assessment and submit an environmental management plan (EMP) within 180 days of receiving notice to do so. An EMP must be submitted in applications for a reconnaissance permission, prospecting right or mining permit.

In any application for a mining or related right, the applicant must make the prescribed financial provision for rehabilitation or management of negative environmental impacts before the EMP will be approved.

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

A mining rights holder has an obligation to rehabilitate or manage negative environmental impacts. If the mining rights holder does not comply with this obligation, the minister may use all or part of the financial provision made by the mining rights holder to undertake such rehabilitation. The mining rights holder must annually assess his environmental liability and increase his financial provision, with ministerial approval.

A closure certificate is made on application to the minister. The requirement to maintain the financial provision remains in force until a closure certificate has been issued. The minister may retain a portion of the financial provision to rehabilitate any latent or residual environmental effects from the closed mine.

The mineral rights holder remains responsible for any environmental liability, pollution or ecological degradation until the minister has issued a closure certificate.

Closure certificates are notoriously difficult to obtain in South Africa and no time frames on this can be given.

Health & safety, and labour issues

- 28** 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) is the principal health and safety legislation applicable to the mining industry. The Mine Health and Safety Council regulates matters relating to the MHSA.

Employment in South Africa is regulated by statute, common law and contract. Legislation, such as the Labour Relations Act 1995 (LRA), grants employees protection against unfair dismissal and unfair labour practices. It also regulates collective bargaining and the transfer of undertakings as a going concern.

Most contracts of employment are subject to the Basic Conditions of Employment Act 1997 (BCEA). Parties can agree different terms to those set out in the BCEA, provided these are not less favourable to the employee than what the BCEA provides. The BCEA regulates working hours, leave, payment of remuneration, and notice and payments on termination of employment.

The Employment Equity Act 1998 prohibits unfair discrimination in any employment policy or practice on grounds such as race, gender, sex, age and religion and regulates the implementation of affirmative action measures (ie, measures which ensure that employees from specific demographic groups have equal employment opportunities and are equitably represented in the workplace).

The Unemployment Insurance Act 2001 establishes the Unemployment Insurance Fund (UIF). The Unemployment Contributions Act 2002 requires employers and their employees to make contributions to the UIF. In the event of job loss, an employee is entitled to benefits from the UIF.

Update and trends

With its diverse abundance of resources, entities from across the globe continue to invest in the South African mining sector. This sector remains one of South Africa's main sources of GDP and export earnings.

The commencement of the new Companies Act has introduced substantial changes. When establishing business structures in South Africa, investors should therefore ensure that comprehensive legal advice is sought.

The publication of the Amended Mining Charter and Codes of Good Practice for the Mining Industry has further amplified the MPRDA's objectives for the upliftment of historically disadvantaged persons and employees. The Amended Mining Charter includes clearer definitions of BEE ownership in a mining company. An amended scorecard is also included, with a clearer 'scoring' system for compliance with the Amended Mining Charter. These documents also further enhance corporate social responsibility for mining companies, with issues such as housing and living conditions, procurement and enterprise development, employment equity, human resource development, mine and community development, sustainable growth and development being addressed.

The publication and approval by the Cabinet of the policy document: 'A Beneficiation Strategy for South Africa' (June 2011) is a further development, bringing South Africa closer to the formulation of legislation to implement more fully the MPRDA's objectives on beneficiation. The Amended Mining Charter has also further developed beneficiation requirements by explicitly stating that mining companies will be able to offset up to 11 per cent of their HDSA ownership requirements against the value of their beneficiation activities from 2012.

The Department of Water and Environment Affairs (DWEA) has been extremely active recently in instituting enforcement proceedings against mining companies that do not comply with the environmental legislation, including obtaining water-use licences or polluting the environment. Mining companies should ensure that it is in compliance with environmental legislation, particularly as the DWEA can issue a stop order where there is non-compliance and directors of a company are jointly or severally liable for any negative environmental impacts caused by the legal entity they represent or previously represented.

In respect of obtaining environmental authorisations under NEMA from the DWEA, there has historically been ongoing debate as to whether they must be obtained for activities ancillary to mining, in addition to the approval of an EMP or Environmental Management Plan by the DMR. The DWEA's enforcement proceedings against mining companies have included instances where environmental authorisations for such activities have not been obtained.

In addition, in the recent case of the *City of Cape Town v Maccsand (Pty) Ltd 4217/09* (unreported) the High Court held that environmental authorisations for activities in a mining area, related to the operations and listed under NEMA, are required in addition to the mining authorisation. The mineral right in question was a mining permit. It held that, as no environmental impact assessments are required under the MPRDA before mining permits are granted, authorisation under NEMA must also be obtained. Because of the focus in the case on mining permits, the question of whether environmental authorisations are also required for activities, for which an EIA is undertaken during the mining right application, is arguably still an open question.

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

No foreign person may enter South Africa, on a temporary or permanent basis, without the necessary permit. The Immigration Act 13 of 2002 provides for the issuing of the following categories of temporary residence permits to foreign nationals:

- business permits – a foreign national must intend to establish or invest in a business in South Africa in which he or she may be employed. This permit is subject to the foreign national investing a prescribed minimum capital contribution in the business. The permit holder may only conduct work in South Africa related to the business for which the permit has been issued;
- work permits, in the form of:
 - quota work permits – a foreign national must fall within a category determined annually by the minister of home affairs. This is subject to the number of work permits issued not exceeding the determined quota;
 - general work permits – provided that the prospective employer satisfies the Department of Home Affairs that, despite a diligent search, the employer has been unable to employ a person in South Africa with the equivalent skills or qualifications. These permits may be issued to a foreign national not falling within the quota categories;
 - exceptional skills transfer work permit – should an individual have exceptional skills or qualifications, as determined in the Department of Home Affairs's discretion; and
 - intra-company transfer work permit – if a foreign national is employed abroad by a business operating in South Africa in a branch, subsidiary, or affiliate entity and who by reason of employment is required to conduct work in South Africa for a period not exceeding two years; and
- corporate permits – these may be issued to a corporate applicant to employ foreign nationals who are required to perform work for the applicant. The Department of Home Affairs, in conjunction with the DTI, will determine the maximum number of foreigners who can be employed with such work permit.

Domestic employees should be employed in accordance with BEE requirements.

Social and community issues

30 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 has detailed requirements for social responsibility that are imposed on mining companies. The DMR regulates these provisions of the MPRDA.

The MPRDA's objectives include promoting employment and advancing the socio-economic welfare of all South Africans; and ensuring mining rights holders contribute towards the socio-economic development of the areas in which they are operating.

As part of an application for a mining right an applicant must submit a Social and Labour Plan for approval by the DMR. Mining right holders must undertake to invest sizeable amounts in various programmes and projects for the upliftment of its employees and the local community. These include:

- a human resources development programme (which must include plans for skills development; career progression; mentorship; and internships and bursaries);
- a local economic development programme (which must include, inter alia, infrastructure and poverty eradication projects; measures to address housing; nutrition and living conditions of employees);
- a procurement progression plan and its implementation for HDSA companies (in terms of capital goods, services and consumables); and
- processes for managing downscaling and retrenchment.

The Codes of Good Practice for the Mining Industry has also recently been published under the MPRDA, to enhance the Mining Charter's implementation. It has provisions relating to human resource development and housing and living conditions of employees.

The Mining Charter also expressly recognises that BEE ownership can be in the form of economic participation by employees and the community.

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

Compliance with BEE requirements is essential when acquiring mineral rights. The MPRDA's objectives include substantially and meaningfully expanding opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and benefit from the exploitation of South Africa's mineral and petroleum resources.

The Mining Charter specifies that ownership is indicated by both 'meaningful economic participation' of 26 per cent and 'full shareholder rights' of 26 per cent. 'Effective ownership' is defined as meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining entities. Based on past practice of the DMR, management control is generally used to distinguish HDSA investors who are active in business rather than institutional investors, broad-based and employee participants.

Most mining rights are endorsed with an obligation to adhere to the BEE structure contained in the mining right application. Should the BEE structure be varied, an amendment to the mining right would be required.

The MPRDA further provides that if two applications for mineral rights are received on the same day, preference will be given to applications from historically disadvantaged persons.

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

South Africa is a signatory to certain relevant international conventions, none of which are directly domesticated in its law.

These issues are regulated in extensively in South African domestic legislation, as set out in question 30.

International treaties

- 33** 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 is a signatory to all the WTO agreements dealing with a range of specific trade issues.

In 2000 South Africa and the European Union concluded the South Africa–EU Free Trade Agreement, which aims to promote trade and cooperation. The bilateral treaty affords favourable treatment to South African exports to EU countries. It is structured to lower tariffs to zero on 85 per cent of imports from the EU by 2012. The agreement equally provides for the abolition of EU import tariffs on a large majority of South African imports, within the same period but at an accelerated rate.

South Africa has signed 42 bilateral investment protection treaties with various countries.

The Safety and Health in Mines Convention was ratified by South Africa in 1995.

South Africa was one of the initiating countries and is an active participant of the Kimberly Process Certification Scheme. This scheme aims to combat the link between illicit international trade in rough diamonds and armed conflict.

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