

# Regulating the South African Mining Sector

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**T**he latest round of legislative changes affecting South Africa's mining industry has again created uncertainty among investors, both local and international. Yet this is by no means the first time in recent history that the industry has faced, and overcome, such challenges. Having repeatedly proven its resilience and ability to adapt, not to mention its importance to the economy, the country's mining sector is expected to continue to thrive.

Experience has shown that regulatory and legislative change must be approached with an open mind. The industry is facing a plethora of these changes at present including the new regulations accompanying the Mineral and Petroleum Resources Development Act (MPRDA), the Mining Charter, the most recently published Codes of Good Practice, and the Royalty Act.

Certain aspects of these laws and regulations are controversial and contradictory, and undoubtedly need to be debated further among all role-players and stakeholders. Indeed, the Minister of Minerals and Energy, Susan Shabangu, has publicly acknowledged the need for further discussion and clarification. Speaking at the 2010 Mining Indaba in Cape Town in early February, the Minister noted that there were concerns among stakeholders around amendments to the MPRDA, to which the President assented in April 2009. Of particular importance for deal makers and players in the mergers and acquisitions (M&As) field are the proposed amendments to s11. If these amendments come into effect in their current form, there will be further governmental involvement in transactions in the mining sector as well as more uncertainty and delays in the implementation of transactions.

## Industry transformation drives legislative change

As with most mining-related change in South Africa since 1994, the key driver of the latest amendments is the continued transformation of the mining industry. It is common knowledge that the Minister is disappointed with the pace and impact of transformation in the mining industry over the past 10 years. She has laid the blame for this at the door of fronting, as well as an over-emphasis in the industry on equity ownership.

Hence, the focus of the amendments in s11 of the MPRDA is on expanding the ambit of ministerial consent for transactions that will change the shareholding of mining companies holding prospecting or mining rights.

As s11 currently stands, the consent of the Minister of Minerals and Energy is required when disposing of a controlling interest in any unlisted

company or close corporation that holds prospecting or mining rights. The modified s11 seeks to broaden the scope of ministerial consent by bringing listed companies into the equation. If approved, the Minister's consent would be needed when any change of shareholding is envisaged, whether in a listed or un-listed entity holding mining or prospecting rights. In other words, the amendment means consent would be required for any change of shareholding in relation to private companies and a change of control in relation to public companies.

The main issue of concern to investors is that there appears to be no definitive time period within which the Minister must provide written consent. A corollary to this is that should no consent be given, the parties to the transaction may not proceed.

In essence, this means that most transactions in the mining sector would require s11 approval in addition to other regulatory approvals such as those relating to the Competition Act and exchange control. That in turn would have a profound impact on the industry, ultimately creating possible further backlogs in the commencement of prospecting activities and in developing new mining operations and, in general, slowing down M&A activity in the mining sector.

## Closer Alignment needed

More cause for concern for mining investors is the apparent contradictions between the most recently published Codes of Good Practice and the Mining Charter, particularly in regard to the scorecard on broad-based and black economic empowerment guidelines.

The Codes, issued in April 2009, are supposed to support, inform and elaborate on the Mining Charter and the MPRDA. Rather than being seen as a supporting document, however, the Codes appear to be an attempt to establish new and overriding legislation.

Again, this development can probably be attributed to the Minister's frustration over the perceived slow pace of transformation in mining. At the same time, industry's puzzlement over how the Codes and the Charter fit together is understandable. Fortunately, it seems that some light will soon be shed on the matter. At the time of writing, the industry was eager-



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ly awaiting the circulation for comment of the new Mining Charter, which has been revised following a 10-year review that the Ministry conducted during 2009. Though we will have to wait and see, the hope is that the Codes and the Charter will be more closely aligned to each other.

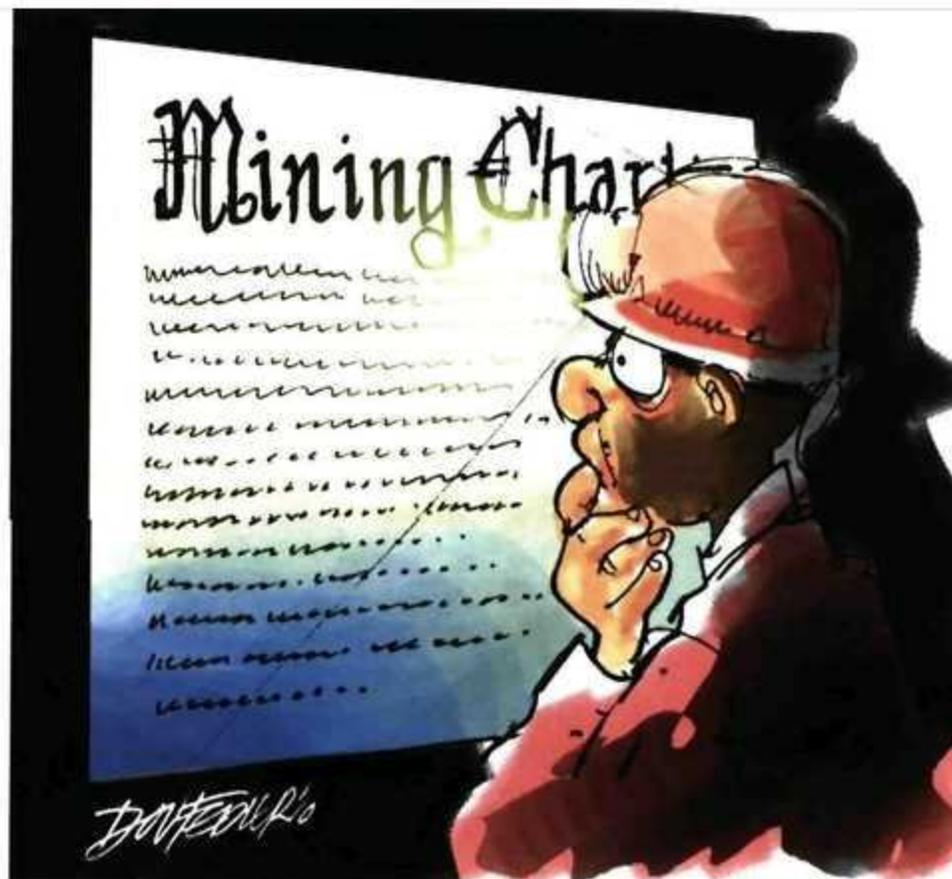
### Royalty Act set to be implemented

Yet another change looming large for the mining industry is the implementation of the Royalty Act. Certain portions of the Royalty Act were implemented in November 2009, with the remaining portions were due to be implemented in April 2010. In anticipation of this, mining companies have been busy with the required registration process.

The main impact of the Act is that holders of prospecting and mining rights are now required to pay royalties on these to the state. The key points for rights holders to note are:

- The royalty charge will depend on the gross revenue that the extractor of the minerals generates from the transferred minerals. To accommodate the development of junior mining operations, the Royalty Act makes provision for certain exclusions.
- A fixed formula will be used to calculate the percentage royalty that will apply. This formula will be based on the value of gross sales.
- A distinction will be made between refined and unrefined minerals, and each category will have a minimum and maximum rate.
- Royalties will be paid on a once-off basis, specifically on the first transfer of the minerals.

All in all, 2010 promises to be an important year in the evolution of South Africa's mining industry. The point to bear in mind is that despite the different perceptions and outlooks of the various role-players in government,



labour and industry, there is general consensus that the industry will remain a pillar of the South African economy for the foreseeable future. Hence, there is an underlying desire among stakeholders generally to see change in the mining sector taking place in a way that will ensure its continued growth and global competitiveness. ♦

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