

Mine dumps in South Africa: an ownership dilemma

 By [Jackwell Feris](#)

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The South African landscape is filled with mine dumps bearing testament to South Africa's rich mining heritage. In laymen's terms the phrase 'mine dump' refers to an area where excess material containing forms of mineral(s) were left (either valuable or of no value to the miner) by the person who won the minerals from the earth in accordance with his/her right or entitlement to mine.



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In terms of the Mineral and Petroleum Resources Development Act No. 28 of 2002 ("the MPRDA") which came into effect on 1 May 2004, 'mine dumps' are referred to as a residue stockpile, defined as "any debris, discard, tailing, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right."

When the MPRDA came into effect the regulatory framework in respect of minerals and petroleum rights or entitlements held by persons was fundamentally altered as the act introduced the principle that the state is the custodian of all minerals in the Republic of South Africa and that the Minister of Mineral Resources ("the Minister") is required to grant any person who complies with the prescribed requirements of the MPRDA, inter alia, with a mining right. In order to ensure security of tenure for all persons who held rights and/or entitlements to mine minerals, the MPRDA made provision for a transitional period within which the holders of so-called 'old order' or 'unused' prospecting or mining rights could apply to the Minister in order to secure tenure of their respective rights (converted rights) under the MPRDA regime.

Question of ownership

After the promulgation of the MPRDA the question of ownership of mine dumps created prior to the MPRDA regime became a contentious matter in South Africa. Although the MPRDA provides that at the termination of a mining right granted in terms thereof any right to mine any residue deposit (which specifically includes a residue stockpile) shall also terminate, the MPRDA does not regulate the ownership of mine dumps created prior to the promulgation of the MPRDA. The MPRDA accordingly had a lacuna as it failed to regulate the position of historical mine dumps created by holders of so-called 'old order' or 'converted' mining rights.

The majority of the mine dumps which still dominate the South African mining landscape today are dumps created prior to the promulgation of the MPRDA. From a mining regulatory point of view the Minister does not have any control over those mine dumps. What that also meant was that the common law position relating to the ownership of mine dumps, despite the other fundamental changes to the mining legislation, still prevailed. The common law position of ownership of mine dumps or residue stockpiles was that ownership of mine dumps vested with the person who "served the ... ore from the earth" and the material contained at mine dumps were deemed to be moveable property. This principle was however not considered as the general rule as each case had to be decided on its own merits in accordance with the South African property law principles (i.e. the manner of annexation to the immovable property and the intention of its owner in dumping it there).

Proposed amendments to Act

In order to rectify the position, the Department of Mineral Resources ("the DMR") has, first in terms of the Mineral and Petroleum Resources Amendment Act 49 of 2008 (of which certain sections came into effect on 7 June 2013) and now by means of the Mineral and Petroleum Resources Development Amendment Bill, 2013 proposed the following amendments to the MPRDA in order to ensure that the Minister, from a regulatory perspective, secures control over the historic mine dumps:

- amend the definition of residue stockpile with the phrase "including historic mines and dumps created before the implementation of this Act;"
- the creation of a new right titled "reclamation permit" in terms of the proposed new section 42A which would entitle the holder of such right to process, and/or reclaim any mineral at a residue stockpile;
- the creation of a transitional period of two years during which the holders of old order rights or converted rights to which the historic residue stockpiles or residue deposit relates has the exclusive right to apply for a reclamation permit;
- once the Minister grants the reclamation permit to either the holder of an old order right or converted right who applied within the two year transitional period or any other person after the expire of the two year transitional period, the permit:
 - is valid for the period specified in the permit, which may not exceed a period of four years, and may further only be renewed for one period which may not exceed two years; and
 - may not be transferred, ceded, let, sublet, alienated or disposed of, in any way whatsoever, but may be encumbered or mortgaged only for the purpose of funding or financing of the mining project in question with the Minister's consent.

The effect of the proposed amendments, should it be proclaimed as is, is significant on the current owners of historic mine dumps as it essentially obliges such owners to start reclaiming or processing the historic mine dumps within the time period the reclamation permit provides for or such renewal period the Minister grants. A reclamation permit will only be issued for a maximum period of six years (the initial period and renewal period). Should the holder of the reclamation permit fail to process or reclaim the material at the mine dumps within the initial period (maximum of four years) and subsequent renewal period (maximum of two years) no further renewal of such permit can be permit. This even if the holder would be able to demonstrate to the Minister that despite reclaiming from or processing the material at the mine dumps during the tenure of the reclamation permit there is still material at the mine dumps it intends to process or reclaim.

The Minister will not be able to grant any further renewal of the permit should the proposed amendment be passed in its current format. The limitation has the effect that even if the Minister wants to grant a further renewal in addition to first renewal period based on the information demonstrated to her, she would not be able to do so and would act ultra vires by doing so. For this reason it might be more practical to allow for a longer initial period within which the permit may be granted or at least grant the Minister the right to be able to grant a renewal of the reclamation permit for more than merely the once-off renewal currently contemplated by the proposed amendment. It is respectfully submitted that the provision regulating the maximum period a reclamation period may be grant for, be amended in order to grant the Minister more flexibility.

Form of expropriation

The obvious question which then comes to mind is whether the limitation imposed by this new right to be created by the proposed amendment to the MPRDA could be deemed as a form of expropriation. The reason being that the property right of the owners of the historic mine dumps are being limited in the following manner:

- Such owners will no longer be able to choose not to process or reclaim the material in the mine dumps (either due to market conditions for the sale of such minerals or other economic conditions specific to the company or market within which the company who owns the mine dump operate);
- Should such owner be unable to process or reclaim the material in the mine dumps within the time period prescribed

in the reclamation permit and any subsequent renewal thereof the right to reclaim will be forfeited and opens the opportunity for third parties to apply for a mining right in respect of such dumps which would constitute a residue deposit capable of being mined in terms of the MPRDA.

The limitation proposed to the ownership right over the historic mine dumps might be justifiable should the Minister be empowered with more flexibility on the period within which a reclamation permit may be granted or renewed taking into account the relevant circumstances of each applicant.

The proposed amendment could potentially also have an impact on the decision of proposed investors to investment in processing plants to process or reclaim historic mine dumps due to the limited period within which they would have to recoup the investment even if the material to be reclaimed from the mine dumps has a lifespan in excess of six years. The DMR must consider whether the restriction of the grant of a reclamation permit to a maximum of six years would not frustrate the reason the DMR wants control over the historic dumps. The DMR should expect to receive serious opposition from the mining sector to the proposed amended to now include historic mine dumps created prior to the promulgation of the MPRDA.

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