

Filling the gaps: examining the procedure to amend a Mining Right under the Mineral and Petroleum, Resources Development Act 28 of 2002.

20 September 2023 10 min read

A significant portion of the transactions that land on the desks of commercial mining attorneys in the Republic of South Africa ("South Africa") are related to the sale and purchase of Mining Rights.[1] Occasionally, Mining Right Holders[2] ("**Seller**") wish to sell only a portion of its Mining Right ("**Seller Mining Right**") to another Mining Right Holder ("**Purchaser**") and not the entirety of the Seller Mining Right. In this article, we will (a) discuss the legislative lacuna in relation to the sale of a portion of a Mining Right from one party to another and (b) refer to the use of this terminology in conjunction with a Mining Right. As an aside, we note that the same principles also apply to a Prospecting Right.[3]

Firstly, it is important to understand that one of the purposes of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") is to promote equitable access to the South Africa's mineral and petroleum resources to all of the people in South Africa.

The MPRDA accordingly acknowledges that Mining Right Holders may, *inter alia*, sell, cede or dispose of its Mining Right to third parties from time to time, provided that the Minister of Mineral Resources and Energy ("**Minister**") has first consented to the sale, cession or disposal of the Mining Right in terms of section 11[4] of the MPRDA.

The MPRDA does not, however, contemplate the, *inter alia*, sale, cession or disposal of a portion of a Mining Right from one Mining Right Holder to another and accordingly a lacuna in the MPRDA exists.

One of the solutions to the lacuna in the MPRDA which allows for a Seller to, *inter alia*, sell, cede or dispose of a portion of the Seller Mining Right to a Purchaser is to use the process set out in section 102 of the MPRDA.

Section 102 of the MPRDA states the following –

"102. Amendment of rights, permits, programmes and plans

- *A reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit, reconnaissance permit, exploration right, production right, prospecting work programme, exploration work programme, production work programme, mining work programme environmental management programme or an environmental authorisation issued in terms of the National Environmental Management Act, 1998, as the case may be, may not be amended or varied (including by extension of the area covered by it or by the additional of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister."*

A Seller who (for example) enters into a sale agreement to sell a portion of the Seller Mining Right to a Purchaser whose Mining Right is adjacent to the Seller Mining Right ("**Purchaser Mining Right**"), will accordingly be required to invoke the provisions of section 102 of the MPRDA.

The sale agreement will be required to make provision for both the Seller and the Purchaser to lodge two separate section 102 MPRDA applications concurrently with the Minister.

The Seller's section 102 application would include an application to the Minister to abandon a portion of the Seller Mining Right ("**Seller Section 102 Application**") and the Purchaser's section 102 application would include an application to the Minister to include the portion of the Seller's Mining Right that is being abandoned in the Purchaser's Mining Right ("**Purchaser Section 102 Application**").

Both the Seller Section 102 Application and the Purchaser Section 102 Application must thereafter be lodged concurrently with one another with the Department of Mineral Resources and Energy ("**DMRE**") on the South African Mineral Resources Administration System (known colloquially as the 'SAMRAD System').

If the Minister grants both the Seller Section 102 Application and the Purchaser Section 102 Application, both the Seller Mining Right and the Purchaser Mining Right must be amended through –

- (i) the execution of a notarial deed of abandonment to abandon a portion of the Seller's Mining Right,
- (ii) a notarial deed of amendment to excise the portion of the Seller's Mining Right that was sold to the Purchaser from the Seller's Mining Right, and
- (iii) a notarial deed of amendment to incorporate the portion of the Seller's Mining Right that was sold to the Purchaser into the Purchaser's Mining Right, and which notarial deeds are thereafter lodged for registration in the Mineral and Petroleum Title's Registration Office.

In addition to the abovementioned notarial deeds, the Seller and the Purchaser must consider whether it is necessary to –

- (a) also amend its Mining Work Programme, Environmental Management Programme, Environmental Authorisation and Social and Labour Plan, and
- (b) consult with interested and affected parties about the proposed amendment that is to be the subject of the section 102 MPRDA application.

The process described above may also be used to exclude a particular mineral from the Seller Mining Right and include that Mineral in the Purchaser's Mining Right.

The use of section 102 of the MPRDA to facilitate the sale of a portion of a Mining Right, or a mineral contained in a Mining Right from one party to another does not appear to have been the intention of the Legislature when it originally drafted section 102 of the MPRDA.

The Legislature, when it published the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 ("**Amendment Act**") proposed to amend section 102 of the MPRDA by including a new subclause in section 102 of the MPRDA as follows –

*"102. (1) A reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit, reconnaissance permit, exploration right, **[and]** production right, prospecting work programme, exploration work programme, production work programme, mining work programme environmental management programme or an environmental authorisation issued in terms of the National Environmental Management Act, 1998, as the case may be, may not be amended or varied (including by extension of the area covered by it or by the additional of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister.*

- *The amendment or variations referred to in subsection (1), shall not be made if the effect of such amendment or variation is to—*
- *extend an area or portion of an area, or*

(b) add a share or shares of the mineralised body, unless the omission of such area or share was a result of the administrative error."^[5]

Under the Amendment Act, Sellers and Purchasers of portions of Mining Rights would no longer be able to use section 102 of the MPRDA to effect the sale of (a) a portion of a Mining Right or (b) a mineral in a Mining Right from one Mining Right Holder to another, and the earlier mentioned lacuna will effectively be closed.

The Amendment Act does not appear to provide any alternative provision for Sellers who wish to sell a portion of a Mining Right or a certain mineral in the Mining Right to a Purchaser, and similarly, the courts have also not provided any guidance on how the sale of a portion of a Mining Right, or a certain mineral in a Mining Right should occur.

The proposed amendment to subsection (2) of section 102 of the MPRDA was, by virtue of Proclamation 17 of 2013 in *Government Gazette* 36541 of 6 June 2013 excluded from coming into operation on 7 June 2014 by virtue of Proclamation 14 of 2013 in *Government Gazette* 36512 of 31 May 2013, and is currently not yet in operation.

The Mineral and Petroleum Resources Development Bill of 2013 (B 15D – 2013) ("**Amendment Bill**") acknowledges the limitations of section 102(2) of the Amendment Bill and proposes to amend section 102(2) of the Amendment Act by substituting section 102(2) of the Amendment Act with a new section 102(2) as follows –

"(2) The amendment or variation referred to in subsection (1), shall not be made if the effect of such amendment or variation is to—

- *extend an area or portion of an area with an area or portion of an area greater than the area for which the right has been granted for, except where the extension is to consolidate existing adjacent rights*^[1]; or
- *add a share or shares of the mineralised body, unless the omission of such area or share was a result of the administrative error*^[1]; or
- *addition of a mineral other than an associated mineral subject to subsection (3) and (4)."*

The Amendment Bill also proposes introducing two new subsections to section 102 of the MPRDA as follows –

"(3) Any right holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the right holder, but which must of necessity be mined with the first-mentioned mineral, provided that the right holder declares such associated mineral or any other mineral discovered in the mining process.

(4) The right holder contemplated in subsection (3) must within 60 days from the date of making the declaration apply for an amendment of its right to include the mineral so declared failing which a third party may apply in terms of section 16, 22, or 27 as the case may be for such associated mineral."

The new subsections of section 102 that are contemplated by the Amendment Bill will address the lacuna in the current version of section 102 of the MPRDA and clarifies that a Mining Right holder will have some flexibility to amend its Mining Rights to include or exclude certain portions of that Mining Right into another Mining Right, subject to the limitation that the area that is to be included in a Mining Right may not be greater than the size of the Mining Right itself.

The Amendment Bill nevertheless remains in Bill form^[6] and there is no indication as to when, or if the Amendment Bill will ever be passed and promulgated into law and therefore the original provisions of section 102 of the MPRDA remain of force and effect.

At present, the position remains the MPRDA allows for a Seller to, *inter alia*, sell, cede or dispose of a portion of the Seller Mining Right to another Purchaser by using the process set out in section 102 of the MPRDA.

[1] A 'mining right' is defined in section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") as "*a right to mine granted in terms of section 23(1)*;"

[2] 'Holder' is defined in section 1 of the MPRDA as "*in relation to a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit, means the person to whom such right or permit has been granted or such person's successor in title*;"

[3] A 'prospecting right' is defined in section 1 of the MPRDA as "*the right to granted in terms of section 17(2)*;"

[4] [Section 11 of the Mineral and Petroleum Resources Development Act](#)

[5] NOTE: the underlined words indicate the proposed new inclusions to section 102 of the MPRDA under the Amendment Act.

[6] NOTE: National Assembly Rule 333 (2): Bills lapse automatically when Parliament is dissolved. It's unclear whether the Mineral and Petroleum Resources Development Bill will still be revived at this stage given that we're at the tail-end of the Sixth Parliament and it was introduced during the Fourth Parliament, in 2013.



Kathleen Louw

Director

[View Profile](#)



Kyra South

Director

[View Profile](#)