



Mine dumps under the amended Mineral and Petroleum Resources Development Act 28 of 2002

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Synopsis

Mine dumps created in terms of the pre-MPRDA regime (old order mine dumps) are currently not regulated by the MPRDA, and the common law owners of such dumps are free to process them without the need to obtain the relevant rights. The MPRDA Amendment Act purports to change this position. However, the wording of the Amendment Act raises a number of problems which render the post-amendment position at best unclear and at worst absurd and unworkable. The primary concern with the Amendment Act is that, on one interpretation, material placed on the same dump at different times may be treated differently at law. Thus, parts of a dump may be subject to one person's right while others may be subject to another's right. Moreover, case law has generally regarded mine dumps as movable property and, by extending the MPRDA to apply to all mine dumps, the Legislature is extending the ambit of the Act to cover movable property, a scenario not contemplated by the wording of the Act (even after its amendment) in relation to applications for rights. The better interpretation of the amendments, which are not yet in force, is that they will not apply retrospectively to old order mine dumps.

Keywords

Mine dumps, tailings, amendment, conversion, old order, new order, residue stockpile, and residue deposit.

Introduction

Johannesburg's mine dumps serve as a reminder of the industry upon which the city was built. However, advances in processing technology are likely to lead to their disappearance from the South African skyline as mining companies increasingly process dumps to recover the valuable mineral resources in them. Proposed changes to the mining regulatory regime have seen South African mining law advisers having to grapple with numerous problematic consequences relating to the processing of mine dumps.

Currently, mine dumps created under common law mineral rights coupled with the relevant pre-2004 statutory authority (old order rights) are unregulated by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The owners of these dumps have been free to process them without the

need to obtain the relevant rights in terms of the MPRDA. Most importantly, the rights to exploit the mineral resources in dumps have been secured by the rights of ownership in such dumps. However, with the introduction of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (Amendment Act), Parliament has sought to bring all mine dumps within the mining regulatory framework. The consequences if the Amendment Act is signed into law, unfortunately, are at best unclear and at worst absurd and unworkable.

Prior to the MPRDA

A historical overview of the principles applicable to mine dumps is beyond the scope of the present topic. However, it is necessary to briefly examine the common law principles applicable to mine dumps before the MPRDA came into force in 2004 as these principles remain applicable to mine dumps in the current (as well as, possibly, under the amended) regulatory framework.

The South African courts have held mine dumps to be the movable property of the person who 'severed the...ore from the earth'. However, this is not a rule and the general principle is rather that each case must be decided on its own facts in accordance with property law rules. Thus, a mine dump may accede to the land on which it is situated if this was the intention of the person who created it. The dump would then become immovable property as part of the land. Nevertheless, judicial commentary has followed a trend of treating mine dumps as movable property. If a mine dump does remain movable property, ownership in it may pass to another person by

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acquisitive prescription or if it is abandoned and ownership is then taken up by another person with the requisite intention to become such owner.

Prior to the MPRDA, ownership of the minerals in a dump was determined by the common law read with the relevant statutory framework. Under the Mining Rights Act, 1967 the person with the common law mineral right to the minerals in the ground remained the owner of those minerals in the dump. Rights to mixed minerals were regulated by the common law in accordance with the Appellate Division case of *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A).

The position under the Minerals Act, 1991 was the same with respect to one's own minerals. However, section 5(3) of the Act regulated the rights to mixed minerals. In terms of that section, if A by necessity mined the minerals to which B had a right, A was given the right to dispose of B's minerals subject to B's right to compensation from A. The common law position under the *Trojan* case also allowed for compensation to B in that A was allowed to dispose of B's minerals where separation from A's minerals was not possible. However, in such circumstances A was required to account to B for the disposal of B's minerals.

From a licensing perspective, the Minerals Act regulated the processing of mine dumps and a prospecting permit or mining authorization was required to process dumps. This was so because the definition of 'mineral' included minerals 'occurring...in tailings' and the verb 'mine' referred to 'any mineral'. However, the Minerals Act did not affect the right of the common law mineral right owner to exploit its minerals. This in contrast with the MPRDA where such right to exploit was taken away from the common law right holder and placed under State custodianship available to prospective applicants for a right in terms of the MPRDA.

MPRDA prior to the Amendment Act

In 2004 the MPRDA came into force and departed significantly from the common law regime governing the ownership of rights to minerals in the ground. From 1 May 2004, the State is the custodian of all minerals (as defined) and the Minister of Mineral Resources is required in terms of the Act to grant any person who meets the requirements of the Act the right to exploit minerals and become the owner thereof.

The MPRDA distinguishes the mineral rights of old from the statutory rights granted in terms of its provisions by referring to 'old order rights'. Broadly, old order rights consist of the common law mineral right coupled with the relevant statutory authority to mine or prospect (where mining or prospecting activities were occurring on 30 April 2004), and in the case of an 'unused old order right', the common law mineral right with or without the relevant statutory authority to mine or prospect but where no such mining or prospecting activities were occurring on 30 April 2004.

The 'old order'/'new order' distinction serves to facilitate the transitional arrangements in Schedule II to the MPRDA. In terms of Item 6 the holder of an old order prospecting right had two years from 1 May 2004 to apply for conversion of such right to a new order prospecting right. Similarly, Item 7 granted the holder of an old order mining right a period of

five years within which to lodge such right for conversion. Regarding unused old order rights, Item 8 granted the holder of such right the exclusive right to apply for a new statutory right within one year from 1 May 2004.

The distinction between 'old order' and 'new order' rights has implications for the processing of mine dumps. Dumps created during operations in terms of old order rights (old order mine dumps) are, under the current regime, unregulated by the MPRDA. Section 5(4) of the MPRDA states that:

'No person may prospect for or remove, [or] mine...any mineral...or commence any work incidental thereto on any area without...a prospecting right, permission to remove, [or] mining right.'

Section 1 of the MPRDA defines a 'mining right' as 'a right to mine granted in terms of section 23(1)' of the MPRDA. The definition therefore refers exclusively to new order mining rights.

Likewise, the verb 'mine' is defined as follows:

'any operation or activity for the purposes of winning any mineral on, in or under the earth, water or residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto.'

Mine dumps under the MPRDA are included in the terms 'residue stockpile' and 'residue deposit'. A 'residue stockpile' is:

'any debris, discard, tailings, 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 or production right.'

A 'residue deposit' is defined as:

'any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right or production right.'

As is clear from the definition of 'mine', the Legislature included only residue deposits within the ambit of the prohibition under section 5(4). Thus, in terms of the MPRDA a prospecting or mining right is not required to prospect in or mine a dump which falls to be defined as a residue stockpile. The rationale behind this position is easily identified from the content of the definition of a residue stockpile. These are mine dumps which are created under an existing new order right. There is therefore no need for them to be additionally regulated by the Act.

Residue deposits, on the other hand, are dumps remaining at the 'termination, cancellation or expiry' of a (new order) right. The stockpile/deposit distinction ensures that the mineral resources in new order mine dumps become available to all prospective applicants once mining operations in respect of a particular mining area are completed.

The most important characteristic of the current regime is that the definitions of residue stockpile and residue deposit contemplate only dumps created in terms of new order rights. Dumps created during operations under old order rights are excluded from the definitions and therefore also from the definition of 'mine'. Processing such dumps is therefore not 'mining' and the common law principles are the primary rules

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for their regulation. Furthermore, the minerals in such mine dumps are not 'minerals' as defined in the MPRDA. However, this conclusion must be qualified by noting that despite the fact that the MPRDA does not regulate old order dumps, other legislative requirements (most notably environmental requirements) are applicable to operations in respect of such dumps.

The consequences of the current position are that the unregulated old order dumps are the movable property of the person who created them, unless they have acceded to the land on which they are situated or ownership in them has passed to another person by acquisitive prescription. The owner of the dumps retains its rights of ownership in respect of the minerals in them and may process the dump material without the need to apply for a right to do so in terms of the MPRDA.

These consequences are not of mere academic interest. Their importance is illustrated by the fact that there are numerous old order dumps which have remained for a long period without being processed. Their exclusion from the MPRDA regime means that one is not required to go through the burdensome rights application process set out in the Act in order to obtain the minerals in such dumps.

MPRDA post-amendment

Even though the Amendment Act has been signed by the State President, the date for its commencement has not been proclaimed and it is not clear when the amendments will take effect or if they will take effect in their current form. For all intents and purposes, the amendments appear to have been put on hold. This is possibly due to the controversy surrounding the amendments relating to mine dumps as well as other contentious amendments to the MPRDA contained in the Amendment Act.

According to the Parliamentary Monitoring Group a 'Mineral and Petroleum Resources Development Amendment Bill' is due to be introduced to Parliament in September 2010. As the Amendment Act has already been passed by Parliament and signed by the President, this Bill may contain amendments to the Amendment Act which may address concerns raised by the mining industry in respect of the Amendment Act. This is clearly speculative, however, and an analysis of the Amendment Act's implications remains important.

Many old order mine dumps contain valuable mineral resources. Furthermore, many such dumps sit idle without being processed or exploited. It is likely that the amendments are aimed at ensuring these resources are used and, more importantly, made available to all prospective applicants in much the same way as other mineral resources. The Amendment Act contains two changes which affect the status of old order dumps. The definition of 'residue stockpile' has been amended by section 1(u) of the Amendment Act as follows:

'any debris, discard, tailings, 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.'

The definition of 'residue deposit' is similarly amended to include residue stockpiles 'remaining at the termination, cancellation or expiry of...an old order right'. The Amendment Act therefore expands the ambit of the MPRDA to include old order mine dumps.

Consequences and problems

Difficulties arise from a literal interpretation of the amended definition of 'residue deposit'. Items 7(7) and (8) of Schedule II to the MPRDA set out the consequences of the conversion and registration of an old order mining right as well as the consequences arising from a failure to lodge an old order mining right for conversion. In both instances, the relevant old order mining right 'ceases to exist'. As set out above, a residue deposit will come into existence where a residue stockpile remains in existence at the 'termination, cancellation or expiry' of, inter alia, an old order right. It is possible that a literal interpretation of 'termination, cancellation or expiry' encompasses the situation where an old order mining right 'ceases to exist' by virtue of registration of its conversion or failure to lodge such old order mining right for conversion.

The difficulty which arises from this interpretation is that upon registration of a converted mining right, a mine dump created by the holder of an old order right will become a residue deposit in respect of which a third party may be able to apply for a mining right over the dump while the holder of the converted mining right will have a mining right over the mining area on which the dump is situated.

A further problem arises in respect of old order dumps onto which material extracted under a new order right is added. In this situation, the material extracted under the new order right and placed on the dump will constitute a residue stockpile whereas the part of the dump created under the old order right will constitute a residue deposit over which a third party may be able to acquire a mining right. This raises various practical concerns about how one distinguishes the residue stockpile from the residue deposit and consequently, with respect to any mining or prospecting work programme which will need to be submitted, how one drafts this document with these practical difficulties in mind.

The severity of these difficulties depends on whether one interprets the Amendment Act as having prospective or retrospective effect. A prospective interpretation limits the effects of the amendments to only those dumps created after entry into force of the Amendment Act. This interpretation significantly curtails the application of the Amendment Act. Thus, only old order mine dumps created after entry into force of the Amendment Act by the holder of an existing old order right will constitute a residue stockpile and will become a residue deposit upon such a right's 'termination, cancellation or expiry'.

A prospective interpretation is, however, contrary to the probable intention of the Legislature as it has the result that the Amendment Act will apply only in respect of current old order rights and then only until such rights are converted to

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new order rights. As the last date for lodgement for conversion of mining rights was 30 April 2009, the Amendment Act will apply only to mine dumps created under old order rights which are subject to pending conversion applications and, furthermore, will cease to have any effect once such rights have been converted.

Although in terms of the common law there is a rebuttable presumption against retrospective legislation, given the probable intention of the Legislature in passing the Amendment Act as well as the severe limitation which a prospective interpretation has, there is a possibility that a retrospective interpretation is more appropriate to the Amendment Act.

The consequence of both interpretations is that material added to a dump at different times is treated differently at law—some will be regarded as a residue stockpile whereas some material will be regarded as a residue deposit open to possible applications for MPRDA rights. A retrospective interpretation means that mine dumps created under any old order right fall to be defined as residue deposits upon the ‘cancellation, termination or expiry’ of the relevant right and will therefore have far wider implications. Such an interpretation may result in the expropriation from the owner of the rights of ownership of the minerals in a dump.

Finally, the Amendment Act does not and cannot change the nature of existing mine dumps from movable to immovable property. A retrospective interpretation will require rights applications in respect of all mine dumps. This will be inconsistent with section 22 of the MPRDA and the Regulations, which do not contemplate applications in respect of movable property, but in respect of (immovable) ‘land’.

Possible solutions

The difficulties and lack of clarity arising from the Amendment Act necessitate the consideration of possible solutions to mitigate against its problematic effects. A prospective interpretation of the Amendment Act is one such solution; however, the problems with this interpretation have been alluded to earlier. Furthermore, the limiting effects of such an interpretation are unlikely to find favour with the Department of Mineral Resources which, incidentally, appears to regard itself as having jurisdiction over many, if not all, mine dumps, even before the Amendment Act enters into force.

Four further solutions may be considered. First, on a cautious approach it may be advisable to establish new and separate dumping sites for material dumped after entry into force of the Amendment Act. This will avoid the complications arising from material deposited on the same dump at different times.

A second equally cautious approach may be to lodge applications for one’s own existing mine dumps to prevent third parties from doing so. A third possibility would be to lodge an application in terms of section 102 of the MPRDA to amend a right to include one’s mine dumps as part of the mining area. The problem with this option is that it is questionable whether one can incorporate movable property into the ambit of a mining right.

Finally, one could approach a court for a declaratory order as to the correct interpretation of the Amendment Act and argue for a purposive interpretation aimed at giving effect to the true intention of the Legislature. Such an argument would call for an interpretation that limits the effects of the Amendment Act to old order mine dumps where mining or processing activities have ceased and the old order dump has effectively been abandoned. This interpretation would accord with section 4(1) of the MPRDA, which provides that any reasonable interpretation consistent with the objects of the Act must be preferred over one which is inconsistent with those objects. An important object in this regard is security of tenure as set out in section 2(g) of the MPRDA.

Foreign jurisdictions

Although an examination of the position in other jurisdictions does not provide solutions to the problems encountered under the amended MPRDA, it illustrates that the intention of the Legislature is not a radical approach but has rather been implemented badly. In Australia mining regulation occurs at state level but all the states follow the principle that mineral rights vest in the Crown. In Victoria, for example, section 10 of the Mineral Resources (Sustainable Development) Act, 1990 makes tailings ‘part of the land on which they are situated and the minerals in them are owned by the Crown unless the property in them passes under section 11’. Section 11 in turn states that ownership of minerals passes to a licensee upon extraction in terms of a mining licence.

In Canada, a similar position is followed. Mining regulation generally falls within the provincial sphere of competency and the provinces follow the principle of Crown ownership of minerals. In Newfoundland, as an example, the Mineral Act, 1990 states that ownership of all minerals vests in the Crown and ‘minerals’ as defined includes minerals contained in tailings.

Conclusion

There is good reason to bring old order mine dumps, which have been sitting idle for many years, within the ambit of the MPRDA. An important object of the MPRDA is to ensure a right of access for all prospective applicants to the country’s mineral resources. This is why the right to exploit minerals was removed from a small minority of landowners and placed under the custodianship of the State. It may be argued that the same considerations apply to the mineral resources in old order mine dumps. The rationale is to ensure that the rights to exploit mineral resources are available to any person able to meet the requirements of the MPRDA as opposed to remaining an exclusive benefit of the mineral right holder.

However, the Legislature appears to have acted with too much haste in making the desired changes and the consequences will result, at best, in a large degree of uncertainty in the mining sector. The likelihood is that this uncertainty will be resolved only either by a further amendment to the MPRDA or by a court applying an interpretation that avoids the problems which have been highlighted. The difficulty with the latter is that it will involve a significant degree of judicial activism to move beyond the literal interpretation of the Amendment Act. ♦