

Botswana

Mining Law 2016

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1.1 What regulates mining law?

Mining law in Botswana is primarily governed by the Mines and Minerals Act, CAP 66:01 of the Laws of Botswana (the “MMA”) and the subsidiary legislation made pursuant to this Act. Other relevant legislation includes the Mines, Quarries, Works and Machineries Act, CAP 44:02 of the Laws of Botswana (which relates to the health and safety of employees involved in prospecting, mining and quarrying operations), and the Environmental Assessment Act, CAP 65:07 of the Laws of Botswana (which relates to the environmental impact assessment of prospecting and mining activities). Prospecting and mining activities that result in discoveries of precious and semi-precious stones are subject to the provisions of the Precious and Semi-Precious Stones (Protection) Act, CAP 66:03.

Petroleum exploration is dealt with separately under the Petroleum (Exploration and Production) Act, CAP 67:01 of the Laws of Botswana. (Note: the remainder of this chapter will not concern petroleum exploration or production, save where the question specifically relates to oil and gas.)

1.2 Which Government body/ies administer the mining industry?

The Ministry of Minerals, Energy and Water Resources has primary responsibility for the mining industry. Prospecting licences are administered by the Department of Geological Surveys and retention licences are administered by both the Department of Geological Surveys and the Department of Mines, whilst mining licences are administered by the Department of Mines.

1.3 Describe any other sources of law affecting the mining industry.

The mining industry in Botswana is also subject to the wider corpus of laws affecting companies that do business in Botswana. This includes, but is not limited to, the Companies Act, CAP 42:01 of the Laws of Botswana, the Competition Act, CAP 46:09 of the Laws of Botswana, and the Employment Act, CAP 47:01 of the Laws of Botswana, and the

common law in these areas. Other laws that affect the mining industry are those relating to land tenure and the creation of security interests.

2 Mechanics of Acquisition of Rights

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2.1 What rights are required to conduct reconnaissance?

The MMA does not deal with “reconnaissance” directly; it only recognises three types of mineral concessions: a prospecting licence; a retention licence; and a mining licence. The word “prospect” is defined widely as: “means to intentionally search for minerals and includes determining their extent and economic value”.

2.2 What rights are required to conduct exploration?

With respect to prospecting for minerals, a mineral concession in the form of a prospecting licence is required from the Minister, pursuant to the MMA. A prospecting licence grants the right to apply for a mining licence, subject, *inter alia*, to the submission of a bankable feasibility study to the Minister. A prospecting licence is usually granted for three years and, subject to certain conditions being met, may be renewed for up to two further terms.

2.3 What rights are required to conduct mining?

With respect to the construction of a mine, and mining activities, a mining concession (commonly referred to in Botswana as a “mining licence”) is required from the Minister pursuant to the MMA. Mining licences can be granted for a period of up to 25 years, which can be renewed for up to a further 25 years if the holder is not in breach of licence obligations. Under the MMA, it is not possible for a mining licence to be granted for an initial period in excess of 25 years.

2.4 Are different procedures applicable to different minerals and on different types of land?

The above procedures relate to all minerals in the country,

notwithstanding the type of land (see section 7 for more detail on land).

2.5 Are different procedures applicable to natural oil and gas?

Yes, petroleum exploration is dealt with under an entirely separate legislative regime, the Petroleum (Exploration and Production) Act, CAP 67:01 of the Laws of Botswana (the “PEPA”). The PEPA recognises two types of licences: exploration and development.

In terms of the PEPA, a petroleum exploration licence is required to conduct exploration for petroleum. The PEPA regime divides the areas to be subject to licences into “blocks”. The PEPA further provides that an exploration licence shall be in such form as the Minister may determine and shall:

- (a) include the terms and conditions on which it is granted;
- (b) include a description and place of the exploration area; and
- (c) state the period for which it is granted.

There shall be appended to an exploration licence a programme of exploration operations. Furthermore, there may be included in an exploration licence a condition requiring the applicant to agree to the Government or a person nominated on its behalf, on such terms as may be agreed, acquiring or having an interest in any venture to explore for, or recover, petroleum which may be carried out in any block in the licensed area. The term of an exploration licence is generally four years, with three further renewal periods being allowed subject to certain conditions being met and where the first renewal is for a period of four years and any subsequent renewals for a term of three years. Different periods and conditions apply to exploration licence renewals with respect to areas where petroleum has already been discovered.

A registered holder of an exploration licence whose licence is in force in respect of blocks which constitute a location in terms of the PEPA (i.e. the block where petroleum has been discovered and all the blocks that are immediately adjacent to it) may, within two years immediately following the date on which the blocks were declared to be a location, or

such further period as the Minister may allow, make an application for the grant of a development licence in respect of such of the blocks which the holder satisfies the Minister contain a petroleum reservoir or part of a petroleum reservoir.

Notwithstanding the above, a registered holder of an exploration licence may, during the term of the licence, make an application for the grant of a development licence in respect of any block which does not constitute a location within the exploration area if he satisfies the Minister that the block contains a petroleum reservoir or part of a petroleum reservoir.

In addition, any person who is not the registered holder of an exploration licence in respect of a block may make an application for the grant of a development licence in respect of a block if he satisfies the Minister that the block contains a petroleum reservoir or part of a petroleum reservoir, and the block is not a block in respect of which an exploration licence or a development licence is in force at the time of the application. Development licences are granted for a period not exceeding 25 years and may be renewed for further terms subject to certain criteria being met.

Subject to the provisions of the PEPA and the conditions specified in the licence, a development licence shall confer on the registered holder thereof exclusive rights:

- (a) to carry on exploration and development operations in the development area;
- (b) to sell or otherwise dispose of the petroleum recovered; and
- (c) to carry on such operations and execute such work in the development area as may be considered necessary for the exploration and development operations.

In respect of mining for minerals, the terms of the MMA provide that no individual may hold a mineral concession unless they are a citizen of Botswana or have been resident in Botswana for at least four years.

In the case of a company that holds a mineral concession, it must have established a registered address in Botswana. Special provisions apply to a company that seeks to hold a mining licence, this must be a company incorporated in Botswana and which intends to carry on only the business of mining under that mining licence. Therefore, foreign applicants must incorporate a Botswana company before they can apply for a mining licence.

3.2 Are there any change of control restrictions applicable?

Yes, in terms of the MMA, any transfer of a prospecting licence, or any interest therein including a controlling interest, must be notified to the Minister at least 30 days before the purported transfer and can only proceed with the Minister's approval of the transferee.

No retention or mining licence or any interest therein (where "interest" means in the case of a private company, a controlling interest) may be transferred without the Minister first approving the transferee.

3.3 Are there requirements for ownership by indigenous persons or entities?

There are no such requirements.

3.4 Does the State have free carry rights or options to acquire shareholdings?

Yes, in terms of the MMA, on the issue of a mining licence only, the Government shall have the option of acquiring up to a 15 per cent working interest participation in the proposed mine in the following manner:

(a) upon exercise of its option, the Government shall be issued a single BWP1.00 special share at par, which shall carry the right to appoint up to two directors, with alternates, and to receive all dividends

or other distributions in respect of its working interest percentage; and

(b) the Government shall be obliged, in the same manner as other shareholders, to contribute its working interest percentage of:

(i) all audited arm's length expenditure incurred by the company to which the licence was issued that is directly attributable to the acquisition of the licence, including relevant prospecting expenditure; and

(ii) all expenditure on the mine incurred subsequent to the issue of the mining licence.

The Government shall, on issuing the licence, inform the applicant as to whether or not it is exercising its option, and of the working interest percentage it wishes to take.

The above relates to all mining licences except those relating to diamonds. Where diamonds are concerned, any application for the issue, renewal, transfer or amendment of a licence to mine diamonds shall initiate a negotiating process, in good faith, between the Government and the applicant covering all technical, financial and commercial aspects of the proposed project, including Government participation.

Although the Government has the above rights, it does not always seek to acquire shareholdings in companies which are granted mining licences.

3.5 Are there restrictions on the nature of a legal entity holding rights?

Individuals, partnerships, parties bound by a contractual joint venture and companies may apply for prospecting and retention licences in respect of minerals. However, only a company incorporated in Botswana can apply for a mining licence.

4.1 Are there special regulatory provisions relating to processing and further beneficiation of mined minerals?

Yes, there are provisions that regulate the cutting, sawing, cleaving and polishing of rough and uncut diamonds in the Diamond Cutting Act, CAP 66:04 and provisions that provide for the protection of the precious stones industry and regulation of dealings in precious stones and semi-precious stones in the Precious and Semi-Precious Stones Act, Cap 66:03.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

There are no restrictions that are specific to the export of minerals. In respect of precious and semi-precious stones, all dealings in these must be through licensed dealers and in accordance with the provisions on dealing specified in the Precious and Semi-Precious Stones Act.

5 Transfer and Encumbrance

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5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Please see the answer to question 3.2 above.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged to raise finance?

In terms of the MMA, the rights under a retention and/or mining licence are capable of being mortgaged to raise finance, subject to the approval of the Minister.

6 Dealing in Rights by Means of Transferring Subdivisions Ceding Undivided Shares and Mining of Mixed Minerals

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6.1 Are rights to conduct reconnaissance, exploration and

mining capable of being subdivided?

There is no specific provision in the MMA on subdivision of rights granted under a mineral concession, however a holder of a mineral concession may surrender part of the area covered by the concession by giving notice to the Minister and complying with provisions on rehabilitation that may apply. Another party may then apply for a concession in the surrendered area. This applies to prospecting, retention and mining licences.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Prospecting and retention licences may be held by a partnership or joint venture in undivided shares, however a mining licence can only be held by a limited company.

6.3 Is the holder of a primary mineral entitled to explore or mine for secondary minerals?

The holder of a mining licence may only mine the mineral to which the licence relates, however the holder may prospect within the area of the mining licence for the mineral for which the mining licence has been granted and any other mineral. On discovery of additional deposits or other minerals, the holder may apply to the Minister to have the mining of such deposit included in the mining licence. Where diamonds are concerned, this is subject to the negotiation process outlined in the answer to question 3.4 above.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a prospecting licence will have to notify the Minister of any amendments to the programme of prospecting operations for which the licence was granted. The Minister has two months to reject any amendment, and in the absence of a rejection, the licence will be deemed to include the amended programme.

The holder of a retention licence requires the consent of the Director of Mines to any amendment to the intended work programme.

The position with respect to mining licences is outlined in the answer to question 6.3 above.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no such rules.

7 Rights to Use Surface of Land

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7.1 What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land?

1. The holder of the prospecting licence may, in the exercise of his rights thereunder, and subject to the permissions and authorisations required in certain specific instances outlined in the MMA where the land that is the subject to the concession is in or near protected land, buildings, dwellings or land of national importance such as roads and railways, enter upon any land to which his prospecting licence relates together with his employees and agents and may:

1.1 prospect thereon for the mineral to which his prospecting licence relates;

1.2 drill boreholes and make such excavations as may be necessary; and

1.3 erect camps and put up temporary buildings for machinery necessary for a prospecting licence.

2. In addition, the holder of a retention licence, mining licence or minerals permit may, if he requires the exclusive use of the whole or any part of the retention area or mining area or minerals permit area, and shall, if requested by the owner or lawful occupier of any part of such area, obtain a lease thereof or other rights to use the same upon such

terms as to the rents to be paid therefor, the duration thereof or the extent or area of the land to which such lease relates as may be agreed between such holder and such owner or lawful occupier, or, failing such agreement, as may be determined by arbitration.

3. A mining licence does not automatically grant access or title to the land which is the subject of the concession. The holder of a mining licence may, in the exercise of his rights thereunder, enter upon any land to which his mining licence relates with his employees and agents and may:

3.1 take all reasonable measures on, or under, the surface to mine the mineral to which his mining licence relates;

3.2 erect the necessary equipment, plant and buildings for the purposes of mining, transporting, dressing, treating, smelting or refining minerals recovered by him during mining operations;

3.3 dispose of any mineral product recovered;

3.4 prospect within his mining area for the mineral for which he holds a mining licence and for any other mineral; and

3.5 stack or dump any mineral or waste product in a manner approved by the Director of Mines,

subject to the same permissions and authorisations as may be required to conduct prospecting activity as outlined above.

In practice, the holder of a mining licence usually enters into a long-term lease with the lawful owner of the land and thus obtains the exclusive use of the area in respect of the mining licence.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

The landowner retains the right to graze stock or cultivate land provided this does not interfere with the prospecting or mining activities and the

landowner may not erect any building without the consent of the concession holder. The holder of the mineral concession is to exercise his rights with as few infringement as possible over the rights of the landowner and, in particular, is not to create unprotected pits, hazardous waste dumps or other hazards such as to be likely to endanger the stock, crops or other lawful activity of the owner or lawful occupier of the land covered by such mineral concession.

Where no lease has been entered into by the holder of the mineral concession, the lawful owner or occupier of the land is entitled to fair and reasonable compensation for any disturbance of the rights of such owner or occupier and for any damage done to the surface of the land or to any crops, trees, buildings or works damaged during the course of such operations. The holder of the mineral concession must pay compensation for such damage on demand subject to further conditions.

In practice, the holder of a mining licence usually enters into a long-term lease with the lawful owner of the land and thus obtains exclusive use of the area in respect of the mining licence.

7.3 What rights of expropriation exist?

Where the President considers that any land is required to secure the development or utilisation of the mineral resources of Botswana, he may compulsorily acquire such land. Such an acquisition of land shall be deemed to be for a public purpose in terms of the provisions of the Acquisition of Property Act, CAP 32:10. Compensation is either as agreed between the party and the State or in terms of the Act.

Thus, only the State has the right to expropriate land. Where it has been deemed necessary, the holder of a mineral concession may then lease this land from the State.

8.1 What environmental authorisations are required in order to

conduct reconnaissance, exploration and mining operations?

Any application for a prospecting licence must include a proposed programme of prospecting operations that includes provision for environmental protection; only if this is deemed adequate will the prospecting licence be granted.

The MMA provides that the applicant for a mining licence, or a retention licence, or any renewal of either must prepare and submit a comprehensive Environmental Impact Assessment as part of the Project Feasibility Study Report submitted with any application.

In addition, in terms of the Environmental Assessment Act, CAP 65:07 an environmental statement is required for the following activities:

- (a) prospecting and exploration for oil, coal bed methane, and natural gas, heavy metals and radioactive minerals;
- (b) operations for the extraction of pit sand, river sand, gravel and clay;
- (c) mining within a river system or wetland regardless of the size of the mining project;
- (d) exploration for minerals where drilling and blasting is involved;
- (e) exploitation of minerals, including quarrying;
- (f) exploration for, and extraction and processing of, hydrocarbons;
- (g) mineral processing;
- (h) metallurgical and chemical plants associated with mining, including cement and lime kiln manufacturing; and
- (i) foundries.

Such a statement must be approved by the Department of Environmental Affairs and must be prepared in accordance with the

provisions of the Act. Where the Department of Environmental affairs deems that a proposed activity is likely to have a significant adverse environmental impact it may require a full Environmental Impact Assessment, prepared in accordance with this Act. As seen above, the MMA already requires this for retention and mining licence applications and renewals.

8.2 What provisions need to be made for the closure of mines?

The Minister may make reasonable arrangements to secure that the holders of mineral concessions comply with the provisions of the MMA and this may include provisions that require or accept guarantees, whether from shareholders or otherwise, in respect of such compliance. This broad-ranging provision may be extended to provisions for closure.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The MMA provides that the holder of a mineral concession shall ensure that his concession area is rehabilitated from time to time and ultimately reclaimed in so far as is practicable in a manner acceptable to the Director of Mines, and during, and at the end of, operations in any mine, excavation, waste dump or pond, the holder of a mineral concession shall take such measures as are required from time to time to maintain and restore the top soil of affected areas and otherwise to restore the land substantially to the condition in which it was prior to the commencement of operations.

8.4 Are there any zoning requirements applicable?

Apart from the permissions and authorisations referred to in the answer to question 7.1 above in respect of prospecting or mining near certain types of protected land, there are no other zoning requirements.

9 Native Title and Land Rights

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9.1 Does the holding of native title or other statutory surface

use rights have an impact upon reconnaissance, exploration or mining operations?

In terms of the Mineral Rights in Tribal Territories Act, CAP 66:02 there was a deemed transfer to the President of Botswana on behalf of the Republic of Botswana of all the right, title and interest of each relevant tribe and the tribal authority to minerals within that tribe's territory. The Republic of Botswana is, therefore, the beneficial owner of all mineral rights in Botswana including with respect to minerals situated in tribal territory.

Where the holder of a mineral concession wants exclusive use of the land subject to that concession, and the land is tribal land, any rent payable in respect of such land must be paid directly to the Land Board concerned and not to any holder of a grant of land from the Land Board.

10 Health and Safety

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10.1 What legislation governs health and safety in mining?

The Mines, Quarries, Works and Machineries Act, CAP 44:02 of the Laws of Botswana (the "MQWM") relates to the health and safety of employees involved in prospecting, mining and quarrying operations.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Yes, the MQWM, and the regulations made thereunder, place obligations on the holders of the concessions, the owners of the mines, and the agents of such holders and owners.

11 Administrative Aspects

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11.1 Is there a central titles registration office?

The MMA provides that the Ministry of Minerals, Energy and Water

Resources shall maintain records of all mineral concessions granted, and that records showing the name of the holder of the mineral concession; the area subject to the mineral concession; the date of issue and duration of the mineral concession; and the mineral for which the concession is granted shall be open to the public to search.

In practice, the public has no direct access to records, the Department of Geological Surveys will respond to queries from holders of concessions and their agents and the Department of Mines will only do so where the company holding the concession has authorised an individual to make inquiries on the concessions held by that entity. General inquiries or searches of concessions held by other entities are not entertained.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Within the terms of the MMA, by appealing to the Minister, and only thereafter, the general system of approaching the High Court for review of an administrative decision. This latter process is a review process and not an appeals process, in that the Court can only order that an administrative decision should be reviewed and cannot make an order which changes the decision.

12 Constitutional Law

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12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

There is a Constitution, and while it does not directly affect rights granted under mineral concessions, it does provide for general protections, such as the right not to be deprived of one's property without due process and compensation.

12.2 Are there any State investment treaties which are applicable?

Botswana is a party to a range of Bilateral Investment Treaties and Multilateral Investment Treaties, which provide standards of protection for foreign investors and have bearing upon topics such as protection from unlawful expropriation and fair and equitable treatment. A full list of Bilateral Investment Treaties compiled by the United Nations Conference on Trade and Development (“UNCTAD”) indicates that the Republic of Botswana has entered into such treaties with Germany, China, Belgium and Luxembourg, Ghana, Malaysia, Mauritius, Switzerland and Zimbabwe.

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Taxes and Royalties

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13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Yes, in addition to the usual taxation provisions there is also the Mineral Rights Tax Act, which imposes a tax on mineral rights

13.2 Are there royalties payable to the State over and above any taxes?

Yes, under the provisions of the MMA, the holder of a mineral concession shall be liable to pay royalties to the Government on any mineral obtained by him in the course of the exercise of his rights thereunder at the rates and in the manner prescribed under this section.

The royalties payable are the following percentages of gross market value of the mineral in question:

Mineral type	Percentage
Precious stones	10%

Precious metals	5%
Other minerals or mineral products	3%

14 Regional and Local Rules and Laws

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14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, there are no such rules.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Only in respect of international treaties. Some of these issues are outlined in question 12.2 and simply provide for protections that already exist in national law or prohibitions on unfair treatment.

15 Cancellation, Abandonment and Relinquishment

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15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The MMA has provisions for the surrender of the whole or part of a mineral concession, subject to a notice period and certain other conditions.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Not outside of the time limits in respect of which a concession has been granted, or where there is no compliance with the conditions of the concession.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The MMA provides that the Minister has a right to cancel a mining concession for non-compliance with the conditions of the concession and/or contravention of the MMA, death (where the holder is an individual) or insolvency. Notice is first given of the intention of cancellation, and where applicable the holder has a period in which to remedy the act giving rise to cancellation before it takes effect.

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