

# CORPORATE & COMMERCIAL AND MINING & MINERALS

**ALERT**

1 FEBRUARY 2023



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INCORPORATING  
KIETI LAW LLP, KENYA

## IN THIS ISSUE

**Can further foreign direct investment be attracted by easing the limitations on mining exploration in South Africa?**

It is well documented that South Africa is rich in mineral resources such as gold, platinum-group metals, base metals and diamonds, however, exploration and prospecting to uncover the deposits of these and other unrealised minerals is seriously subdued.



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## Can further foreign direct investment be attracted by easing the limitations on mining exploration in South Africa?

It is well documented that South Africa is rich in mineral resources such as gold, platinum-group metals, base metals and diamonds, however, exploration and prospecting to uncover the deposits of these and other unrealised minerals is seriously subdued.

In response to this, the Department of Mineral Resources and Energy published the Exploration Implementation Plan, which was gazetted on 14 April 2022 (*Government Gazette Number 46246, Government Notice 2027*), and sets out to increase exploration activity in South Africa in order to revive its global exploration expenditure to a minimum of 5% over the next three to five years and bolster the mining sector's contribution to the GDP, in line with the South African Economic Reconstruction and Recovery Plan.

The Minister of Mineral Resources and Energy further stated that South Africa's mining sector has not only been a magnet for foreign investment into the country but has also been an anchor for the emergence and sustenance of a number of world-class industries in the country. However, has this been the case?

In the case of *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* [2022] (6) SA 589 (ECMk) (1 September 2022), an application was brought before the court to interdict the granting of an exploration right in terms of section 79 of the Mineral Petroleum Resources Development Act 28 of 2002 (MPRDA) to conduct a seismic survey and explore for oil and gas in the Transkei and Algoa exploration areas.

The application was brought before the court as the applicants claimed that the respondent did not meaningfully consult with them regarding the seismic surveys, which would impact upon their customary rights, including their customary fishing rights, and that the right to be meaningfully consulted about the seismic survey would reveal the nature and extent of the alleged impact upon their rights.



## Can further foreign direct investment be attracted by easing the limitations on mining exploration in South Africa?

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### Consultation

Section 79(4), read with Regulation 3, of the MPRDA sets out such a consultation process, which provides that:

*"If the designated agency accepts the application, the designated agency must, within 14 days of the receipt of the application, notify the applicant in writing to:*

- a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental report as required in terms of Chapter 5 of the National Environmental Management Act 107 of 1998 (NEMA); and*
- b) submit the relevant environmental reports required in terms of Chapter 5 of NEMA, within a period of 120 days from the date of the notice."*

Taking into consideration the public interest when balancing the rights of the parties, the court granted the interdict as it deemed that there would be irreparable harm caused to marine life and that seismic surveys would negatively impact on the livelihood of the fishing communities and cause cultural and spiritual harm, weighed against the anticipated financial loss suffered by the respondents in not being able to exploit the exploration right.

It is therefore important to note that before applying for or conducting any mining exploration activities, all requirements stipulated in the MPRDA have been met, specifically with regard to the consultations to be had with landowners, occupiers or other affected persons when applying for an exploration or prospecting right.

### Leave to appeal

It is to be noted that leave to appeal the judgment was granted on 13 December 2022 on the basis that an interpretation of Regulation 3 of the MPRDA and the interplay between sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 should be ventilated in the Supreme Court of Appeal.

**Sandile Shongwe** overseen by  
**Allan Reid**

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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