Mining & Minerals

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MINING & MINERALS ALERT

Is your mining investment safe? What the Expropriation Act means for South Africa's mining sector

Important note:

Although the Expropriation Act 13 of 2024 was assented to by the President on 23 January 2025 and published in the Government Gazette on 24 January 2025, it has not yet come into effect. It will only become operational on a date to be determined by the President. Until that date is formally proclaimed, the Expropriation Act 63 of 1975 remains in force.

Understanding the new Expropriation Act

The Expropriation Act enables the South African Government to acquire property either for public purposes – such as roads, schools or utility infrastructure – or in the public interest, particularly for land reform. What sets this Act apart from its predecessor is its explicit provision for expropriation **without compensation** in exceptional cases. Examples include abandoned land, property not being used in a socially productive manner, or where the state has historically invested significantly in developing the property. These cases are, by design, narrow. The Act does not give the state carte blanche to seize property arbitrarily – nor does it negate compensation as a rule. Instead, it introduces a broader definition of justice, which takes into account the past as well as the present.

See our previous alert here for general key considerations for foreign investors in relation to the Expropriation Act and here for a brief analysis comparing the 1975 Act against the 2024 Expropriation Act.

Legal and constitutional safeguards still stand

The good news for investors is that the new Expropriation Act is firmly rooted in the Constitution of the Republic of South Africa, 1996 (Constitution) – which was not the case under the 1975 Act. Section 25, in particular, safeguards against arbitrary deprivation of property. Any expropriation must be accompanied by compensation that is just and equitable – meaning that the process must be fair, measured and legally sound. Even in cases where nil compensation is proposed, the decision must be justifiable under both the Constitution and the Expropriation Act itself.

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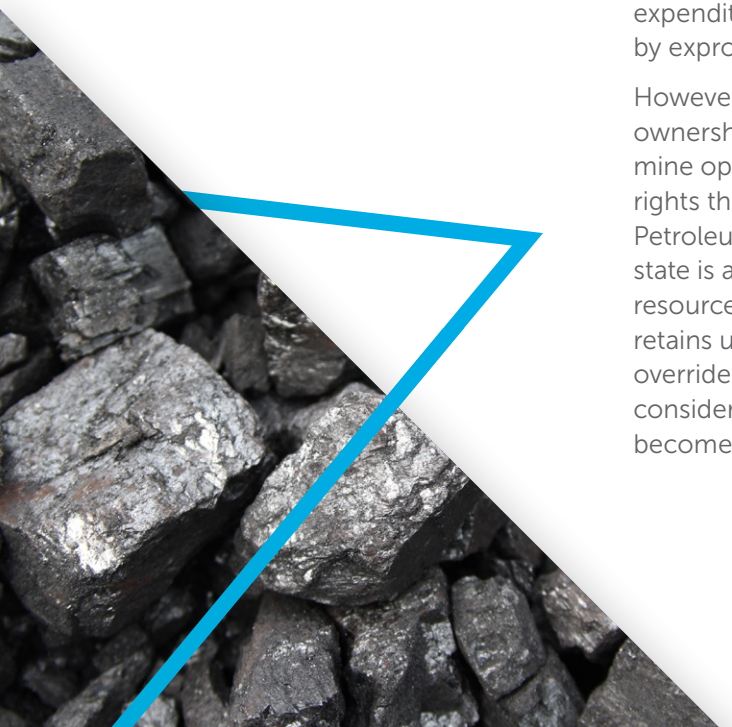

Additionally, the Act introduces a detailed and transparent process. Before the state can expropriate property, it must provide formal notice, initiate consultations with the property owner, allow time for objections, and undertake a valuation process that considers the current use of the land, the history of its acquisition and any improvements made.

Importantly, affected parties have the right to challenge both the expropriation and the proposed compensation in court. This judicial oversight is critical and provides investors with a layer of security against unfounded or politically driven actions.

Implications for mining operations

For mining companies, the most immediate concern is the security of tenure. Mining rights – granted by the Department of Mineral Resources and Energy – are often the product of years of exploration, permitting and capital expenditure. The notion that such rights could be affected by expropriation understandably causes discomfort.

However, there is a clear distinction between land ownership and mining rights. While the land on which a mine operates may be subject to expropriation, mining rights themselves are governed under the Mineral and Petroleum Resources Development Act 28 of 2002. The state is already the custodian of South Africa's mineral resources, which means it grants usage rights but retains ultimate control. The Expropriation Act does not override this custodianship – but it does introduce new considerations if land on which these rights are exercised becomes the subject of state interest.

What about prospecting and early-stage exploration?

The impact of the Expropriation Act is particularly relevant for companies engaged in prospecting. At this stage, investments are often intangible (such as data, drilling programmes, geological reports, etc.) and the land may not yet have been developed. The risk here is twofold: uncertainty about whether rights will be renewed, and fear that expropriation could undermine the ability to convert a prospecting right into a mining right. This is because the conversion process, for example, requires demonstrable access to and control over the land in question, alongside proof of feasibility, environmental compliance and financial readiness. If the land is expropriated before these conditions are met, the holder of the prospecting right may lose access or face delays in securing necessary permissions from the new landowner – undermining both regulatory approval and project bankability.

However, here again, procedural safeguards offer protection. Expropriation must be implemented for a public purpose or in the public interest. A government would need to demonstrate why prospecting land, particularly where mineral potential has already been verified, should be repurposed for something else.

Moreover, international investors are protected under various bilateral investment treaties and trade agreements, which prohibit expropriation without proper compensation and can trigger international legal recourse if breached.

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The role of surface rights and land use agreements

Mining companies often operate on land owned by third parties or under a lease. In this context, surface rights are crucial. Importantly, both the 1975 Act and the new Expropriation Act recognise that lessees – including holders of surface rights or land leases – may be entitled to compensation if their rights are affected. The Expropriation Act broadens this recognition by expressly including holders of unregistered rights, provided the loss is properly substantiated.

Where land is expropriated and subsequently transferred to a new owner, the question arises of whether existing lease or land use agreements survive the change in ownership. In general, if such agreements are registered against the title deed or constitute real rights, they may remain binding on the new landowner. However, unregistered or purely personal agreements may be at risk. Mining companies should therefore consider reinforcing their agreements with registration where possible, or at a minimum include clauses that require recognition of such agreements by any successor in title.

Mining operations also carry obligations under environmental law, particularly when it comes to rehabilitation. Expropriation does not absolve a company from these duties. If the land is taken while a mine is still active or not yet rehabilitated, the company remains responsible for compliance under the relevant environmental legislation.

Managing risk and moving forward

Rather than panic, mining companies and investors should approach the Expropriation Act with informed caution. There are steps that can be taken to mitigate risk:

- **Stay informed** and monitor developments in expropriation cases and government policy.
- **Keep detailed records** of all investments, agreements and compliance efforts.
- **Engage with local communities** to build goodwill, reduce conflict and make operations more resilient to political pressure.
- **Work with legal and financial advisors** to prepare for different scenarios and ensure that all contracts include clauses covering expropriation risk.

Conclusion

The Expropriation Act represents a new chapter in South Africa's efforts to rebalance property ownership and stimulate inclusive development. While it does create new risks, especially around surface land use and early-stage investments, the core legal protections for mining companies remain intact.

Constitutional safeguards, procedural rigour, international treaties and judicial oversight continue to offer a framework within which investors can operate with confidence. For those in the mining sector, the key will be to remain informed, legally prepared and actively engaged in shaping how these new rules play out on the ground.

Jaco Meyer

MINING & MINERALS ALERT

Digging for alignment: Africa's ESG crossroads

Environmental, social and governance (ESG) considerations have become central to the legal and commercial landscape of global mining, shaping investor risk appetite, regulatory compliance and community engagement. For Africa, home to vast reserves of critical minerals, the question is no longer whether to integrate ESG, but how, and under which legal framework.

Two dominant international initiatives, the 2006 Initiative for Responsible Mining Assurance (IRMA) and the International Council on Mining and Metals (ICMM), established in 2002, have served as some of the most used benchmarks for ESG in the mining sector. Their ethical sourcing criteria, measurable performance indicators and thirdparty verification mechanisms are widely recognised. The proposed merger of these standards into the Consolidated Mining Standard Initiative by 2026 seeks to simplify compliance and harmonize global expectations.

Yet, for African states and smaller mining houses, these frameworks are often viewed as externally imposed, with limited contextual sensitivity or participation by African stakeholders. This has led to questions about their suitability, enforceability and legitimacy on the continent.

The African Union introduced the Africa Mining Vision (AMV) in 2009, an indigenous policy blueprint seeking to consolidate the myriad of mining initiatives churned out since the 90s and to leverage Africa's mineral resources for inclusive development. Its operational arm, the African Minerals Governance Framework (AMGF), offers a more holistic, development driven approach to mining governance, covering six pillars, including contract transparency, environmental accountability and small scale mining inclusion.

Although there is overlap between the AMGF and global standards like IRMA and ICMM, the AMV is legally and politically distinct. It embeds the continent's values of sovereignty, equitable growth and resource nationalism. The AMV is also strategically aligned with the African Continental Free Trade Area, reinforcing its potential as a legal and economic cornerstone for Africa's trade integration and industrialisation agenda.

However, implementation remains a challenge. By 4 February 2025, 24 out of 54 African countries were in various stages of implementing the AMGF. Without widespread implementation, the framework risks being viewed as aspirational rather than authoritative. A perceived duplication with international standards could also explain this hesitancy. Yet this overlap may in fact ease adoption, especially where mining companies already subscribe to global ESG regimes.

Notably, African financial institutions are stepping up in ESG integration. The Absa Africa Financial Markets Index 2024 reveals ESG performance improvements in 23 African countries underpinned by regulatory reforms, disclosure mandates and sustainability linked financial instruments. These shifts are increasingly codified in national financial, environmental and corporate laws laying the groundwork for enforceable ESG obligations.

Digging for alignment: Africa's ESG crossroads

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Despite these advancements, global ESG momentum appears to be tumultuous, particularly in developed countries. Several multinationals have retreated from ESG obligations amid economic and political uncertainty.

This presents a dual challenge and opportunity for Africa. While global enthusiasm ebbs and flows, Africa has the opportunity to assert normative leadership. Legal professionals have a critical role to play in translating policy into binding obligations. This includes embedding ESG clauses into mining agreements, aligning domestic law with the AMV and ensuring meaningful enforcement through administrative and judicial channels.

Mining companies, too, must engage proactively. Transparent ESG practices reduce litigation risk, safeguard the social license to operate, and enhance access to climate and development finance. Whether through AMGF or global standards, adoption signals a commitment to accountability and resilience.

Ultimately, the continent's goal should not be mere compliance, but legal and normative leadership. The AMV offers a platform for Africa to shape, not just follow global ESG standards. But this will only be possible if stakeholders embrace it, ratify it, and give it life through law and practice.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
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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