

A CRITICAL EVALUATION OF RIGHTS TO MINERALS WITHIN THE SADC REGION

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1 Introduction

Mining is an important activity in Africa. Mining companies operate across borders and South African citizens can theoretically hold interests in the mining sector in different states within the Southern African Development Community¹ region. Due to the fact that South African citizens can acquire rights that relate to mining in SADC states, it is necessary to determine the legal nature of rights to minerals in the different member states. In order to deal with these rights in the estates of South African citizens, the nature and content of the rights should be established.

It should further be noted that SADC provides the underlying principles and objectives regarding mining in the region in the Mining Protocol of 1997.² The Mining Protocol places immense importance on mining in the SADC region and emphasises the need for a harmonised minerals industry in the region, in addition to the promotion of economic empowerment of the historically disadvantaged.³ The process of the harmonisation of the mineral industry in the region will benefit from a study that highlights the differences and similarities regarding the nature of rights to minerals between the different member states. In a study of this nature it is imperative to take cognisance of the fact that the different states within the SADC region have different legal foundations due to the different colonial backgrounds. One can think of the Democratic Republic of

¹ Hereafter SADC.

² South Africa is a member of SADC.

³ Art 2 states that it is an aim of the Protocol to ensure the development of mineral resources in order to improve the living standards in the SADC region. Maponga *Harmonization* 3; Chanda "Mining Investment Promotion" 2-4, also provides that SADC's objectives includes, *inter alia*, the sustainable development of mineral resources within a framework of national environmental policy, norms and standards whilst promoting economic and social development.

the Congo with its Belgian roots,⁴ and South Africa with its Roman-Dutch roots.⁵ Other legal systems such as the English⁶ and Portuguese⁷ systems also underlie the legal systems of some of the member states. Therefore, even though the SADC principles and objectives apply to all the member states, the manner in which the different member states give effect to the SADC principles may differ in various instances, conditional on the legal foundation subsisting in the particular member state. For the purpose of this study, with its aim of comparing the nature of rights to minerals in the SADC region, the focus will fall on a member state with Roman-Dutch heritage, namely South Africa, one with English heritage, namely Tanzania, and one with Portuguese heritage, namely Mozambique.

In order to determine the legal nature of rights to minerals, and focus on the content of the different rights, within the above mentioned member states, the focus will initially fall on the different legal foundations underlying South Africa's, Tanzania's and Mozambique's mineral law dispensations respectively. Thereafter, the differences and similarities regarding the nature of rights to minerals between the different member states will be compared and analysed. In conclusion, the consequences that accrue in respect of the nature of the rights to minerals will be discussed in line with the effect it has in the estates of South African citizens.

⁴ The Democratic Republic of Congo (DRC) was ruled by the Belgian colony from 1908 to 1960. During this time it was known as the Belgian Congo. DRC won independence in 1960. See Middleton and Miller *New Encyclopedia of Africa* 494; Fetter *Colonial Rule in Africa* 79-80.

⁵ Van der Schyff *Mineral and Petroleum Resources Development Act* 9, 24-25, and 98.

⁶ Tanzania was subject to British colonialism. See Bakari 1991 *African Journal of International and Comparative Law* 545.

⁷ In Jourdan *The Mining Sector* 3, it is stated that the Portuguese colonies ruled in Angola and Mozambique. The Portuguese legal codes were applied in Mozambique prior to Mozambique's independence. See Sachs and Welch *Liberating the Law* 3.

2 South African mineral law legislation

2.1. *The Mineral and Petroleum Resources Development Act 28 of 2002*

The *Mineral and Petroleum Resources Development Act 28 of 2002*,⁸ which came into effect in 2004, is the prevailing authority with regards to mining and mineral law in South Africa.⁹ This Act changed the position regarding mineral law in South Africa by endowing the State with custodianship of the nation's mineral resources.¹⁰ The *Mining Titles Registration Act*,¹¹ as amended,¹² regulates the registration of mineral titles and other rights since the implementation of the *MPRDA*.

The Minister of Minerals and Energy acting on behalf of the State, is, in accordance with the *MPRDA*, assigned the duty to ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards whilst promoting economic and social development.¹³ This objective is in line with SADC's objectives, including the Mining Protocol. The basis of the *MPRDA* is enunciated in section 3 of the Act which provides new notions in the field of mineral law.

Before the implementation of the *MPRDA* the common law was followed. This permitted mineral rights to be privately held.¹⁴ The common law system of private ownership was based on Roman-Dutch principles.¹⁵ Roman-Dutch civil law provided that minerals belonged to the landowner, and that the *dominium* of the

⁸ *Mineral and Petroleum Resources Development Act 28 of 2002* (Hereafter the Act, or *MPRDA*).

⁹ Badenhorst, Pienaar and Mostert *Law of Property* 669-670; Badenhorst 2005 *Obiter* 505.

¹⁰ S 3(1) of the Act; Badenhorst, Pienaar and Mostert *Law of Property* 670.

¹¹ *Mining Titles Registration Act 16 of 1957* (Hereafter the MTRA).

¹² *Mining Titles Registration Amendment Act 24 of 2003*.

¹³ S 3(3); Badenhorst, Pienaar and Mostert *Law of Property* 675.

¹⁴ Franklin and Kaplan *Mining and Mineral Laws* 5-6.

¹⁵ Van der Schyff *Mineral and Petroleum Resources Development Act* in the Abstract; Franklin and Kaplan *Mining and Mineral Laws* 6.

minerals vested in the registered owner of the land.¹⁶ Once registered as such, mineral rights were regarded to be *ius in re aliena*,¹⁷ limited real rights in property. Despite unsevered minerals being regarded as being part and parcel of the land, the separation of rights relating to minerals from the *dominium* of the land was, nevertheless, possible.¹⁸ Thus, in accordance with Roman-Dutch principles, minerals were regarded as part of the land before their separation there from, but became independent legal objects after separation.¹⁹ Roman-Dutch principles had to, however, be adapted to suit South Africa's unique conditions and vivacious mining industry sufficiently,²⁰ and the *MPRDA* was accordingly promulgated. The common law was consequently rescinded insofar as it is inconsistent with the abovementioned Act.²¹ It is vital to note that the prevailing notion that "mineral resources are the common heritage of all the people of South Africa", as provided in section 3(1) of the *MPRDA*, was unknown in South Africa's pre-1994 common law heritage.²²

The state,²³ as custodian of the nation's mineral resources, now has the authority, in terms of section 3(2)(a), to grant, issue, refuse, control, administer and manage the following rights to minerals: (a) prospecting rights; (b) mining rights; (c) reconnaissance permissions; (d) mining permits; (e) retention permits; and (f) permission to remove minerals during prospecting.²⁴ The position relating to the distribution of these rights is thus regulated by the Act, and not the common law. The Act, in addition, prescribes formalities pertaining to these rights as regards their acquisition, content, transferability, termination and capability to

¹⁶ Van der Schyff *Mineral and Petroleum Resources Development Act* 21; Franklin and Kaplan *Mining and Mineral Laws* 4-5.

¹⁷ Van der Schyff *Mineral and Petroleum Resources Development Act* 26-27.

¹⁸ Van der Schyff *Mineral and Petroleum Resources Development Act* 22; Dale *Historical and Comparative Study* 75; Franklin and Kaplan *Mining and Mineral Laws* 6-8.

¹⁹ Van der Schyff *Mineral and Petroleum Resources Development Act* 22; Franklin and Kaplan *Mining and Mineral Laws* 7-8.

²⁰ Van der Schyff *Mineral and Petroleum Resources Development Act* 25; Dale *Historical and Comparative Study* 73.

²¹ S 4(2); Badenhorst 2005 *Obiter* 505 and 507.

²² Van der Schyff *Mineral and Petroleum Resources Development Act* 103.

²³ As previously mentioned, the State acts through the Minister of Minerals and Energy.

²⁴ S 3(2)(a) of the Act; Badenhorst, Pienaar and Mostert *Law of Property* 674.

be mortgaged.²⁵ Interested parties will have to apply for the above mentioned rights in the prescribed manner, as determined by regulation 2(1) of the Act.²⁶ Interested and affected persons should, furthermore, be given the prescribed notice and be consulted with, in accordance with section 5(4)(c)²⁷ and regulation 3 of the *MPRDA*.²⁸

It is thus clear that even though the State is endowed with all the authority to deal with and regulate the rights to minerals by the new mineral law regime the rights of individual stakeholders and interested parties are nevertheless protected to a certain extent.

²⁵ Badenhorst, Pienaar and Mostert *Law of Property* 675.

²⁶ Badenhorst, Pienaar and Mostert *Law of Property* 675; Badenhorst 2005 *Obiter* 509.

²⁷ S 5(4)(c) provides that "No person may prospect for or remove, mine, conduct...reconnaissance operations, explore for and produce any mineral...or commence with any work incidental thereto on any area without *notifying and consulting with the landowner or lawful occupier of the land in question* (Own emphasis). See fn 28 for a further discourse with regard to notification and consultation in terms of s 5(4)(c).

²⁸ In *Meepo v Kotze and others* 2008 (1) SA 104 (NC), the Court held at 114A-B:

"that it was the intention of the legislature to make provision in the *MPRDA* for a rational balance between, *inter alia*, the rights of a holder of a prospecting right on the one hand and the property rights of a landowner on the other hand".

The Court then went on to say, at 114C-E, that:

"since the granting of a prospective right as a necessary consequence results in serious inroads being made on the property rights of a landowner, it is not surprising that the legislature has attempted to alleviate these consequences by providing for due consultations between a landowner and the holder of or an applicant for a prospecting right" and that "consultation is the only prescribed means whereby a landowner is to be apprised of the impact prospecting activities may have on his land".

The Court held in conclusion that "proper notice of the intention to enter the land for purposes of prospecting should be given to the landowner, followed by a consultative process" (at 116G-H), and that "access for the aforesaid purpose is not authorised without prior consultation with the landowner" (at 117H-118B). It may thus be derived from the *Meepo v Kotze*-case that the applicant for a prospecting right is obliged to give proper notice to and consult with the affected landowner before he or she may conduct the necessary operations.

2.2 The legal nature and content of the right to minerals provided for in the MPRDA

2.2.1 Introductory remarks

Before engaging in a discussion relating to the relevance and implication of the legal nature of rights relating to minerals, it is important to take cognisance of the fact that while the *MPRDA* categorically determines the nature of prospecting and mining rights, it remains silent on the issue regarding the remainder of the rights relating to minerals.

The legal nature of prospecting rights and mining rights, and the rights of the holders thereof are dealt with in section 5(1) of the *MPRDA*. This section specifically states that a prospecting right and mining right granted in terms of the Act is a limited real right in respect of the mineral and the land to which the right relates.²⁹ It is imperative that such rights are registered in the Mineral and Petroleum Titles Registration Office, in accordance with sections 19(2)(a) and 25(2)(a) of the Act.³⁰ The remainder of the rights, namely reconnaissance permissions; mining permits; retention permits and permission to remove minerals during prospecting are not limited real rights according to the Act, due to the fact that the Act, in section 5(1), does not expressly classify the remaining rights as such.³¹ Section 5(1)(v) of the *MTRA* makes provision for the recording of such permission and permits, whereas section 5(1)(c) generally makes provision for the registration of all rights that are granted in terms of the *MPRDA*.³²

²⁹ Badenhorst, Pienaar and Mostert *Law of Property* 13-19; Badenhorst 2005 *Obiter* 517; Dale *South African Mineral and Petroleum Law* 133-134.

³⁰ See further Badenhorst and Mostert *Mineral and Petroleum Law* 13-19 – 13-23; Badenhorst, Pienaar and Mostert *Law of Property* 713; Badenhorst 2005 *Obiter* 518.

³¹ Badenhorst, Pienaar and Mostert *Law of Property* 714; Badenhorst 2005 *Obiter* 518; Dale *South African Mineral and Petroleum Law* 133-134.

³² Dale *South African Mineral and Petroleum Law* 135.

There thus remains uncertainty as to the precise nature of the remainder of the rights to minerals.³³ It has already been established with certainty by the *MPRDA* in section 5(1) that prospecting rights and mining rights are limited real rights. The nature of the remainder of the rights has, however, not been expressly provided for, neither as personal rights nor as limited real rights. There are accordingly differing views in respect hereof. Badenhorst and Mostert³⁴ suggest that reconnaissance permissions, retention permits and mining permits constitute personal rights, irrespective of their recording or registration in the Mineral and Petroleum Titles Registration Office. Badenhorst,³⁵ in a separate discussion, on the other hand states that limited real rights may or may not be created when these authorisations are registered or recorded. Van der Schyff³⁶ submits that in determining the nature of the remaining rights it should be kept in mind that there is no closed system of limited real rights in South African law, and that new limited real rights may in all probability be recognised.³⁷ Nevertheless, unless it is otherwise judicially determined, an inference will be drawn that the remainder of the rights are personal in nature, whether registered or recorded.³⁸

³³ Thus, whether the remainder of the rights constitutes limited real rights or personal rights.

³⁴ Badenhorst and Mostert *Mineral and Petroleum Law* 13-13 and 14-5.

³⁵ Badenhorst 2005 *Obiter* 518.

³⁶ Van der Schyff *Mineral and Petroleum Resources Development Act* 260.

³⁷ Van der Schyff *Mineral and Petroleum Resources Development Act* 260-261. Van der Schyff *Mineral and Petroleum Resources Development Act* 260-261 further submits that if the remaining rights satisfy the requirements of the "subtraction from the *dominium* test" the essential requirements to constitute limited real rights will have been met. The "subtraction from the *dominium* test" is based on the reasoning that a limited real right diminishes the owner's *dominium* over the property to such an extent that the owner is personally bound, as well as the construct of ownership. Van der Schyff *Mineral and Petroleum Resources Development Act* 261, further opines that an essential prerequisite for the creation of a limited real right is, however, the registration of the particular right and that it may thus be argued that the remaining rights which cannot be registered but only recorded in terms of the *MTRA* would not satisfy this prerequisite, and accordingly cannot be regarded as a limited real right even though it may have met the requirements of the subtraction from the *dominium* test.

³⁸ Badenhorst, Pienaar and Mostert *Law of Property* 714; Badenhorst and Mostert *Mineral and Petroleum Law* 13-20; 13-22 – 13-23; Badenhorst 2005 *Obiter* 518; Dale *South African Mineral and Petroleum Law* 135. In Badenhorst and Mostert *Mineral and Petroleum Law* 13-21 - 13-22, it is submitted that diverse interpretations are, however, possible should section 5(1) of the *MPRDA* and section 5(1) of the *MTRA* be read together. The first possible interpretation entails that section 5(1) of the *MPRDA* brings forth an *ex lege* creation of real rights once the Minister has granted the particular right; whilst the remainder of the rights may be interpreted as the *ex lege* creation of personal rights once the minister has granted

The legal nature and content of the above mentioned rights to minerals will now be discussed individually.

2.2.2 Focusing on individual rights

2.2.2.1 Prospecting rights

A prospecting right may be defined as a statutory right, granted by the Minister of Minerals and Energy in terms of section 17(1) to an applicant, which will entitle the holder, or prospector, thereof to: (a) conduct prospecting operations on land; (b) apply to the Minister for approval to remove and dispose of bulk samples found during prospecting; (c) dispose of minerals in order to test, identify or analyse it; (d) apply for the renewal of a prospecting right; and (e) apply for a mining right to minerals.³⁹

the rights. The second interpretation comprises the view that in the instance where the Minister grants a right to the holder, in terms of the *MPRDA*, such act must be seen as an agreement. In *Meepo v Kotze and others* (fn 28), at 125D-G, the Court confirmed that the act in terms whereof a prospecting right is granted to an applicant, is contractual by nature, as the right can only be granted once the terms and conditions has been determined and communicated to an applicant for his acceptance, and the applicant consequently agrees thereupon or consents thereto. The granting of the right in the latter instance ought to be deemed as the creation of a personal right between the holder and the Minister, whereas a real right will only be created upon the registration thereof (the view that a real right is created upon registration complies with the traditional notion of registering rights). It is submitted that the Government merely intends the grant of security of tenure by providing for the premature (and erroneous) classification of the rights mentioned in s 5(1)(d) of the *MPRDA* as real. A third interpretation comprises the view that embraces the combination of both the first and second interpretation. The preferred interpretation in respect of the combined reading of section 5(1) of the *MPRDA* and section 5(1) of the *MTRA*, entails that a prospecting right or mining right will be deemed to be real right once it is granted in terms of the *MPRDA* and has been registered in the Mineral and Petroleum Registration Office. In respect of the remainder of the rights it will remain to be assumed that they are personal rights even though they are consequently recorded in the Mineral and Petroleum Registration Office.

³⁹ Badenhorst, Pienaar and Mostert *Law of Property* 677; Badenhorst 2005 *Obiter* 510.

Section 5(1) of the *MPRDA* stipulates that a prospecting right is a limited real right in respect of the mineral and the land to which such right relates.⁴⁰ Registration of the prospecting right will render it binding on third parties in terms of section 2(4) of the *MTRA* as amended by the *MTRAA*.⁴¹ Section 5(2) additionally provides that a holder of a prospecting right is entitled to other rights that may be granted to, acquired by or conferred upon such holder under the *MPRDA* or any other law.⁴²

Section 5(3) provides that the prerogative to prospect for a mineral entails that the holder, or prospector, may: (a) enter the land for purposes of prospecting; (b) prospect for his or her own account on or under that land for the mineral for which such right has been granted; (c) remove and dispose of any such mineral found during the course of prospecting; (d) use water from, or flowing through, such land or from any excavation previously made and used for prospecting purposes, or sink a well or borehole required for use relating to prospecting on such land, subject to the *National Water Act 36* of 1998; and (e) carry out any other activity incidental to prospecting.

⁴⁰ Badenhorst, Pienaar and Mostert *Law of Property* 678; Badenhorst and Mostert *Mineral and Petroleum Law* 15-9; Badenhorst 2005 *Obiter* 512; Dale *South African Mineral and Petroleum Law* 133-134. Van der Schyff *Mineral and Petroleum Resources Development Act* 240-241, opines that the content of s 5(1) specifies that the legislature differentiates between unsevered minerals and land, and that unsevered minerals are recognised as independent legal objects in the instance where a limited real right is recognised in respect of the unsevered mineral. Dale *South African Mineral and Petroleum Law* 134, also opines that the real right extends to the minerals themselves. Van der Schyff *Mineral and Petroleum Resources Development Act* 240 at fn 10, states that s 5(1) is, however, open to another interpretation, such interpretation entailing that the “and” which binds the “mineral” and the “land” could entail an inclusive meaning which combines the mineral and land in one concept. In *Meepo v Kotze and others* (fn 28) 110E-I, the Court held that the *MPRDA* introduced a number of fundamental changes to the statutory regulation of the mineral resources of South Africa, one of which is the fact that, in accordance with ss 5(1) and 19(2)(a), “the holder of a prospecting or mining right now has a limited real right in the land which is the subject-matter of the right, and this right must be registered (Own emphasis).”

⁴¹ Badenhorst, Pienaar and Mostert *Law of Property* 678; Badenhorst and Mostert *Mineral and Petroleum Law* 15-9; Badenhorst 2005 *Obiter* 512; Dale *South African Mineral and Petroleum Law* 134-135.

⁴² Badenhorst, Pienaar and Mostert *Law of Property* 679; Badenhorst 2005 *Obiter* 511; Badenhorst and Mostert *Mineral and Petroleum Law* 13-24 and 15-10A.

A prospecting right must be implemented subject to its prescribed terms and the Act.⁴³ Section 20(1) of the *MPRDA* stipulates that:

The holder of a prospecting right may only remove and dispose for his or her own account any mineral found by such holder in the course of prospecting operations conducted pursuant to such prospecting right in such quantities as may be required to conduct tests on it or to identify or analyse it.

A prospecting right is, in addition, only valid for a specified period, which period may not exceed five years⁴⁴ and it may be renewed once, for a period not exceeding three years.⁴⁵

As to the transferability of a prospecting right or an interest in any such right, or a controlling interest in a company or close corporation, section 11(1) of the *MPRDA* provides that it may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.⁴⁶ Section 11(2), however, stipulates that the consent of the Minister must be granted if the cessionary, transferee, lessee, sub-lessee, assignee or the person to whom the right will be alienated or disposed of meets the necessary prerequisites.⁴⁷ It is clear from the aforementioned that the holder is limited in his or her independence of choice as to the transferability of the right held.

Thus, emphasis should clearly fall on the word “limited” in the phrase “limited real rights”, in respect of a prospecting right, as the holder is limited immensely in order for the state to exercise its duties as custodian, and protect the common heritage of the nation. The state as a consequence protects the nation’s common

⁴³ S 17(6); Badenhorst, Pienaar and Mostert *Law of Property* 679; Badenhorst 2005 *Obiter* 511.

⁴⁴ S 17(6); Badenhorst, Pienaar and Mostert *Law of Property* 679; Badenhorst 2005 *Obiter* 511.

⁴⁵ S 18(4); Badenhorst 2005 *Obiter* 511.

⁴⁶ See further Badenhorst, Pienaar and Mostert *Law of Property* 680-681; Badenhorst 2005 *Obiter* 511-512; and Badenhorst and Mostert *Mineral and Petroleum Law* 15-10.

⁴⁷ Badenhorst, Pienaar and Mostert *Law of Property* 680-681; Badenhorst 2005 *Obiter* 511-512; and Badenhorst and Mostert *Mineral and Petroleum Law* 15-10. See ss 11(2)(a) and (b) for the required prerequisites.

heritage by placing the statutory limitations on the holder, such as: the specified time frame within which a right may be held; or the stringent obligations conferred on the holder; as well as the requirement that the Minister's written consent first be obtained before the holder may dispose of the right in any determined manner.⁴⁸ By making provision for the attainment of written consent by the Minister before any disposition takes place, might possibly also be a means whereby the state can keep records as to whom will be acquiring the right, and also a means whereby the state can effectively ensure economic empowerment of the historically disadvantaged.

The aspects provided in sections 11(1) and (2), as above mentioned, are accordingly of importance for estate planning. The holder of a prospecting right will consequently have to make adequate provision for the instance where the beneficiary to whom the holder intends bequeathing this right does not receive the required consent from the Minister.

2.2.2.2 Permission to remove minerals during prospecting

Permission to remove minerals during prospecting operations may be defined as a statutory right, granted by the Minister of Minerals and Energy to an applicant, which will entitle the holder thereof to remove and dispose of bulk samples of prospected minerals for his or her own account.⁴⁹ The holder of a prospecting right is only permitted to remove and dispose of minerals found during prospecting in such quantities as is necessitated for testing, identification or analyses thereof.⁵⁰ The Minister's, or the Deputy Director-General's written permission must, however, be acquired if the holder of a prospecting right wishes

⁴⁸ Van der Schyff *Mineral and Petroleum Resources Development Act* 256-257.

⁴⁹ S 20. Badenhorst, Pienaar and Mostert *Law of Property* 681; Badenhorst 2005 *Obiter* 512.

⁵⁰ S 20(1). Badenhorst, Pienaar and Mostert *Law of Property* 681; Badenhorst 2005 *Obiter* 512; and Badenhorst and Mostert *Mineral and Petroleum Law* 15-16.

to remove and dispose of bulk samples of minerals found by him during prospecting operations, for such holder's own account.⁵¹

A permission to remove minerals during prospecting is not recognised as a limited real right in section 5(1) of the *MPRDA*, and it is accordingly regarded as a personal right, notwithstanding that it has been recorded or registered in the Mineral and Petroleum Titles Registration Office.⁵² A permission to remove minerals thus provides a measure of security and continuity of tenure for the holder of the right.⁵³

Although a permission to remove minerals during prospecting operations is not *per se* relevant for estate planning purposes as it is not transferable or capable of being mortgaged, it may possibly be relevant for estate planning on tax considerations.⁵⁴ Due to the limited scope of the work, the tax considerations will, however, not be discussed in any further detail.

2.2.2.3 Mining rights

A mining right is acquired according to the *MPRDA*, and is granted by the Minister of Minerals and Energy in terms of section 23(1) to an applicant, which

⁵¹ S 20(2). Badenhorst, Pienaar and Mostert *Law of Property* 681; Badenhorst 2005 *Obiter* 512; and Badenhorst and Mostert *Mineral and Petroleum Law* 15-16 – 15-17.

⁵² Badenhorst, Pienaar and Mostert *Law of Property* 681; Badenhorst 2005 *Obiter* 512; Van der Schyff *Mineral and Petroleum Resources Development Act* 260.

It will provide a measure of security and continuity of tenure in the instance where it is recorded or registered. See further fn 37; Van der Schyff *Mineral and Petroleum Resources Development Act* 265.

⁵⁴ S 1 of the *Transfer Duty Act* 40 of 1949 includes in its definition of "property" any right to minerals (including any right to mine for minerals) and a lease or sublease of such a right. S 9(1)(cA) of the *Income Tax Act* 58 of 1962 includes, as taxable income, amounts which accrue from sources within the Republic in respect of rights to minerals granted in terms of the *MPRDA*. Ss 10, 11 and 15 of the *Income Tax Act* also provides for certain exemptions and deductions in respect of mining operations. In terms of the *Estate Duty Act* 45 of 1955, "property" for estate duty purposes means all property of a person ordinarily resident in South Africa at the date of death, irrespective of where such property is situated.

will entitle the holder thereof to: (a) conduct prospecting operations; (b) conduct mining operations for minerals; and (c) apply for a renewal of the mining right.⁵⁵

Section 5(1) of the *MPRDA* stipulates that a mining right is a limited real right in respect of the mineral and the land to which such right relates.⁵⁶ Registration of the mining right will render it binding on third parties in terms of section 2(4) of the *MTRA* as amended by the *MTRAA*.⁵⁷

Section 5(3) provides that the prerogative to mine for a mineral entails that the holder of a mining right may: (a) enter the land for purposes of prospecting and mining; (b) mine for his or her own account on or under that land for the mineral for which such right has been granted; (c) remove and dispose of any such mineral found during the course of prospecting or mining; (d) use water from, or flowing through, such land or from any excavation previously made and used for prospecting or mining purposes, or sink a well or borehole required for use relating to prospecting or mining on such land, subject to the *National Water Act* 36 of 1998; and (e) carry out any other activity incidental to mining operations.⁵⁸ Section 5(2) provides that a holder of a prospecting right is, additionally, entitled to other rights that may be granted to, acquired by or conferred upon such holder under the *MPRDA* or any other law.⁵⁹

⁵⁵ Badenhorst, Pienaar and Mostert *Law of Property* 685; Badenhorst 2005 *Obiter* 514; Dale *South African Mineral and Petroleum Law* 133.

⁵⁶ Badenhorst, Pienaar and Mostert *Law of Property* 686-687; Badenhorst and Mostert *Mineral and Petroleum Law* 16-7; Badenhorst 2005 *Obiter* 515-516; Dale *South African Mineral and Petroleum Law* 133-134. In *Meepo v Kotze* (fn 28) 110E-I, it was held that, due to the *MPRDA*, the holder of a prospecting or mining right now has a *limited real right* in the land which is the subject-matter of the right, and that this right must be registered (Own emphasis).

⁵⁷ Badenhorst, Pienaar and Mostert *Law of Property* 686-687; Badenhorst and Mostert *Mineral and Petroleum Law* 16-7; Badenhorst 2005 *Obiter* 515-516; Dale *South African Mineral and Petroleum Law* 134-135.

⁵⁸ Badenhorst, Pienaar and Mostert *Law of Property* 687; Badenhorst 2005 *Obiter* 515; Dale *South African Mineral and Petroleum Law* 140-144; Badenhorst and Mostert *Mineral and Petroleum Law* 16-19.

⁵⁹ Badenhorst, Pienaar and Mostert *Law of Property* 687; Badenhorst 2005 *Obiter* 514-515.

A mining right must be implemented subject to its prescribed terms and the Act.⁶⁰ A mining right is valid for a specified period, which period may not exceed thirty years, and it may be renewed for further periods, each of which may not exceed thirty years at a time.⁶¹ Section 25(1) of the *MPRDA* specifies that a holder of a mining right has the exclusive right to apply for and be granted, subject to the prerequisites provided for in section 24 of the said Act, a renewal of the mining right in respect of the mineral and mining area in question.⁶²

As to the transferability of a mining right or an interest in any such right, or a controlling interest in a company or close corporation, section 11(1) of the *MPRDA* provides that it may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.⁶³ Section 11(2), however, stipulates that the consent of the Minister must be granted if the cessionary, transferee, lessee, sub-lessee, assignee or the person to whom the right will be alienated or disposed of meets the necessary prerequisites.⁶⁴

Once again, the emphasis must fall on the word “limited” in the phrase “limited real rights”, in respect of a mining right, as the holder is limited in order for the state to exercise its duties as custodian, and protect the common heritage of the nation. The nation’s common heritage is subsequently protected by the statutory limitations placed upon the holder of a mining right.⁶⁵ By making provision for the

⁶⁰ S 23(6). Badenhorst, Pienaar and Mostert *Law of Property* 687; Badenhorst 2005 *Obiter* 515.

⁶¹ S 23(6) and s 24(4); Badenhorst, Pienaar and Mostert *Law of Property* 687-688; Badenhorst 2005 *Obiter* 515.

⁶² Badenhorst, Pienaar and Mostert *Law of Property* 687-688; Badenhorst 2005 *Obiter* 515.

⁶³ See further Badenhorst, Pienaar and Mostert *Law of Property* 689; Badenhorst 2005 *Obiter* 515; and Badenhorst and Mostert *Mineral and Petroleum Law* 16-7 – 16-8.

⁶⁴ Badenhorst, Pienaar and Mostert *Law of Property* 689; Badenhorst 2005 *Obiter* 515; and Badenhorst and Mostert *Mineral and Petroleum Law* 16-7 – 16-8. See ss 11(2)(a) and (b) for the required prerequisites.

⁶⁵ According to Van der Schyff *Mineral and Petroleum Resources Development Act* 256-257, these statutory limitations include: the specified time frame within which a right may be held; or the stringent obligations conferred on the holder; as well as the requirement that the

attainment of written consent by the Minister before any disposition takes place, might possibly also be a means whereby the state can keep records as to whom will be acquiring the right, and also a means whereby the state can effectively ensure economic empowerment of the historically disadvantaged.

The aspects provided in sections 11(1) and (2) of the *MPRDA*, in relation to the transferability or disposal of a mining right, are thus of importance for estate planning. The planner, whom is a holder of a mining right, should ensure that adequate provision is made in the event that the beneficiary of his choice is unable to receive the required consent.

2.2.2.4 Reconnaissance permissions

A reconnaissance permission to minerals is acquired in accordance with the *MPRDA*, and is granted by the Minister of Minerals and Energy in terms of section 14(1) to an applicant. This will entitle the holder thereof, after fulfilling specified requirements, to enter the land for the purposes of conducting reconnaissance operations.⁶⁶ According to section 1 of the Act, a reconnaissance operation entails any operation conducted for or relating to the search for a mineral by geological, geophysical, and photo geological surveys and remote sensing techniques. It does not, however, entail prospecting for minerals.⁶⁷ Section 15(2) further provides that a reconnaissance permission does not permit the holder of such right to conduct any prospecting or mining operations for any mineral in the particular land, and it, in addition, does not sanction the holder to any exclusive right to apply for or be granted a prospecting right or mining right.

Minister's written consent first be obtained before the holder may dispose of the right in any determined manner.

⁶⁶ S 15(1); Badenhorst, Pienaar and Mostert *Law of Property* 675; Badenhorst 2005 *Obiter* 509; and Badenhorst and Mostert *Mineral and Petroleum Law* 14-5.

⁶⁷ S 1, definition of a "reconnaissance operation".

The *MPRDA* makes no mention of the nature of a reconnaissance permission, and it is consequently submitted that it comprises a personal right, irrespective of whether it was recorded or registered.⁶⁸ A reconnaissance permission will, however, provide a measure of security for the holder of the right.⁶⁹ The protection endowed by this particular permission entails that the state may not interfere with the holder's right without legal justification. The state's ability to deal with the rights granted in respect of the permission is limited whilst the holder has a valid legal title thereto.

A reconnaissance permission is valid for two years and is non-renewable.⁷⁰ It may, moreover, not be transferred, ceded, let, sublet, alienated, disposed of or encumbered by mortgage.⁷¹ As such it is not important for estate planning in respect of "death-planning", but it may nevertheless be relevant for estate planning purposes in respect of tax considerations.⁷²

2.2.2.5 Mining permits

A mining permit may be defined as a statutory right which enables the holder thereof to mine for minerals on a small-scale. The latter requiring that the mineral be mined optimally within two years and that the mining area may not exceed 1.5 hectares in extent.⁷³ A mining permit may be renewed for three periods each of which may not exceed one year.⁷⁴ The holder of a mining permit may, in accordance with section 27(7) of the *MPRDA*: (a) enter the land to which such permit relates; (b) use water or sink a well or borehole required for use relating to

⁶⁸ S 5(1) only provides that a prospecting right or mining right is a limited real right. Badenhorst, Pienaar and Mostert *Law of Property* 676; Badenhorst 2005 *Obiter* 510; Badenhorst and Mostert *Mineral and Petroleum Law* 14-5; and Dale *South African Mineral and Petroleum Law* 133-134.

⁶⁹ Van der Schyff *Mineral and Petroleum Resources Development Act* 265.

⁷⁰ S 14(4).

⁷¹ S 14(5).

⁷² See fn 54.

⁷³ S 27(1) provides that small-scale mining requires that the mineral can be mined optimally within two years, and the mining area does not exceed 1.5 hectares in extent.

⁷⁴ S 27(8)(a).

prospecting or mining, subject to the *National Water Act* 36 of 1998; and (c) mine for his or her own account on or under that mining area for the mineral for which such permit relates. The holder is in essence granted similar rights to those granted under a mining right.⁷⁵

The *MPRDA* does not expressly provide for the nature of a mining permit, and it is consequently submitted that it comprises a personal right, irrespective of whether it was recorded or registered.⁷⁶ A mining right may not be transferred in any manner, but it may be encumbered or mortgaged for the purpose of funding or financing the mining project in question, with the Minister's consent only.⁷⁷ The fact that the permit entitles the holder thereof to mortgage the right is relevant for estate planning as it will consequently form part of one's estate. In particular, it will place a claim against the estate, if such debts have not been fully recovered by the applicable creditor. Even though the permit will not be relevant in respect of "death planning" as it is non-transferable, it will be relevant for estate planning in respect of tax considerations.⁷⁸

2.2.2.6 Retention permits

A retention permit to minerals is a permit issued in terms of the *MPRDA*, which entitles the holder thereof to: (a) the suspension of the terms of his or her prospecting right;⁷⁹ (b) apply for renewal of the retention permit;⁸⁰ or (c) apply for a mining right.⁸¹ A retention permit suspends a prospecting right whilst it assists

⁷⁵ Van der Schyff *Mineral and Petroleum Resources Development Act* 267.

⁷⁶ S 5(1) only provides that a prospecting right or mining right is a limited real right. Badenhorst, Pienaar and Mostert *Law of Property* 684; Badenhorst 2005 *Obiter* 514; and Badenhorst and Mostert *Mineral and Petroleum Law* 16-19.

⁷⁷ S 27(8)(b). Badenhorst, Pienaar and Mostert *Law of Property* 685; Badenhorst 2005 *Obiter* 514; and Badenhorst and Mostert *Mineral and Petroleum Law* 16-19.

⁷⁸ See fn 54.

⁷⁹ S 32(2).

⁸⁰ S 34.

⁸¹ S 35. Badenhorst, Pienaar and Mostert *Law of Property* 681; Badenhorst 2005 *Obiter* 512.

the holder in obtaining a mining right in respect of the mineral, and may thus be recognised as an intermediate, amid prospecting for and mining of minerals.⁸²

The *MPRDA* makes no mention of the nature of a retention permit, and it is consequently submitted that it comprises a personal right, irrespective of whether it was recorded or registered.⁸³ Section 35(1) provides that the holder of a retention permit, upon compliance with section 35(2), has the exclusive right to be granted a mining right in respect of the particular retention area.⁸⁴

A retention permit is, in terms of section 32(4), valid for the period specified in the permit, which may not exceed a period of three years.⁸⁵ It is also possible to renew a retention permit by conforming to the prescribed requirements provided in section 34. A retention permit may, however, only be renewed once, which period may not exceed two years.⁸⁶ It may, moreover, not be transferred, ceded, let, sublet, alienated, disposed of or encumbered by a mortgage bond.⁸⁷ Notwithstanding the latter, a retention permit, nevertheless, provides a measure of security and continuity of tenure for the holder of the particular right due to the fact that it enables the holder to acquire a mining right in respect of the particular mineral, and prevents the holder from losing any benefits of the prospecting expenditure already incurred.⁸⁸ A retention permit additionally burdens the mineral and diminishes the state's ability to deal with it, as the state is proscribed to deal with the mineral in any way that could negatively affect the rights of the

⁸² Badenhorst, Pienaar and Mostert *Law of Property* 681; Badenhorst 2005 *Obiter* 513; and Badenhorst and Mostert *Mineral and Petroleum Law* 15-18.

⁸³ S 5(1) only provides that a prospecting right or mining right is a limited real right. Badenhorst, Pienaar and Mostert *Law of Property* 682; Badenhorst 2005 *Obiter* 513; Badenhorst and Mostert *Mineral and Petroleum Law* 15-20; and Dale *South African Mineral and Petroleum Law* 133-134.

⁸⁴ Badenhorst, Pienaar and Mostert *Law of Property* 683; Badenhorst 2005 *Obiter* 513.

⁸⁵ Badenhorst, Pienaar and Mostert *Law of Property* 682; Badenhorst 2005 *Obiter* 513.

⁸⁶ S 34(3). Badenhorst, Pienaar and Mostert *Law of Property* 682; Badenhorst 2005 *Obiter* 513.

⁸⁷ S 36. Badenhorst, Pienaar and Mostert *Law of Property* 682; Badenhorst 2005 *Obiter* 513; and Badenhorst and Mostert *Mineral and Petroleum Law* 15-20.

⁸⁸ Van der Schyff *Mineral and Petroleum Resources Development Act* 265.

holder.⁸⁹ The state's ability to deal with minerals subject to a retention permit is consequently suspended. The state may not award to third parties any other authorisations or rights in relation to the minerals subject to a retention permit.

The aforementioned may be relevant for estate planning as the permit will form part of the planner's estate until the termination thereof. Even though it may not be essential for estate planning in respect of "death-planning", it may nevertheless be relevant for estate planning purposes in respect of tax considerations as a retention permit is a taxable asset.⁹⁰

2.2.2.7 Summary

In considering the nature of the rights granted in terms of the *MPRDA* it is evident that certain rights may not be relevant for estate planning purposes with regard to administering a deceased's estate, due to the fact that that these rights are not transferable or disposable, or even capable of being encumbered by a mortgage bond. It may nevertheless be relevant in respect of estate planning with regard to the value it places on the estate and any tax considerations which accrue as a result of the value it holds or the income derived there from.⁹¹ These rights include: retention permits, reconnaissance permissions, and a permission to remove minerals during prospecting operations.

Another right granted in terms of the *MPRDA* which may not be transferred, but which is nevertheless capable of being mortgaged includes the mining permit.⁹² As derived from above, it is evident that this right is relevant for estate planning in the sense that the mortgage bond will place a claim against the deceased's estate if the particular debt has not been fully recovered by the applicable creditor at the time of the holder's death. Due to the fact that a mining permit is

⁸⁹ S 35(1). *Van der Schyff Mineral and Petroleum Resources Development Act* 265.

⁹⁰ See fn 54.

⁹¹ See fn 54, and paras 2.2.2.2; 2.2.2.4; 2.2.2.6.

⁹² See par 2.2.2.5.

not transferable it may consequently not be relevant in respect of “death-planning” as such, but it may indeed be relevant for estate planning in respect of tax considerations.⁹³

Rights granted in terms of the *MPRDA* which are unquestionably relevant for estate planning purposes include the mining right and prospecting right. These rights are limited real rights which are transferable and disposable, subject to the Minister’s consent. A mining right or prospecting right will effectively form part of one’s estate. It is, however, important that the holder makes sufficient provision where the Minister’s consent in terms of sections 11(1) and (2) of the Act is not obtained by the heir or successor of the testator’s choice.⁹⁴

It is also relevant to take note of the fact that the rights that fall into the holder’s estate will need to be valued, but due to the limited scope of the work the valuation of the rights will not be discussed here. The same applies to the tax consequences which may accrue in respect of the various rights.

The legal nature of the various rights’ to minerals in South Africa has been addressed. It will now be necessary to consider the legal nature and content of the rights to minerals within Tanzania which is relevant for a South African citizen’s estate planning considerations. The legal foundation underlying Tanzania’s mineral law dispensation will shortly be addressed, and thereafter focus will fall on Tanzanian mining law.

3 Tanzanian mineral law legislation

In the colonial era foreign companies exercised control over mining. After the attainment of independence in 1961, policies of state intervention, trading monopolies and nationalisation of foreign interests prevented the continuation of

⁹³ See par 2.2.2.5.

⁹⁴ See paras 2.2.2.1 and 2.2.2.3.

foreign investment, due to the support of the “African socialism” vision.⁹⁵ The country was, however, compelled to adopt economic liberalisation as a consequence of a severe economic crisis at the turn of the 1980s.⁹⁶ In order to attain economic and political transformation, Tanzania consequently recognised the need to solicit greater public involvement in policy decisions and to mainstream social and environmental issues in macroeconomic reforms so as to achieve the goal of social development.⁹⁷ As a result of the overall restructuring of the country’s economy, the *Mining Act*⁹⁸ was enacted and the previous 1979 Act was repealed.⁹⁹ The government, furthermore, recognised the need to shift economic policy from public sector-led development to private sector-led development.

The *Mining Act* and associated regulations are the prevailing authority in respect of mining activities and activities relating to minerals in Tanzania.¹⁰⁰ Tanzania is endowed with an abundant wealth of mineral resources that is attractive for both large-scale and small-scale mining, namely: precious metals; gemstones; diamonds; base metals and the platinum group of metals; coal; agro-minerals; chemical minerals; and industrial minerals.¹⁰¹ The Act endows the State with the entire mineral property and control over all the minerals in the country.¹⁰² The Act, furthermore, provides that persons may only prospect for minerals or carry on mining operations with the authority granted in respect of the provisions of the Act.¹⁰³

⁹⁵ Ellis and Mdoe 2003 *World Development* 1369; Fisher 2008 *Development Southern Africa* 201.

⁹⁶ Ellis and Mdoe 2003 *World Development* 1370.

⁹⁷ Kulindwa 2002 *Development Southern Africa* 389.

⁹⁸ *Mining Act* 5 of 1998 (Hereafter the Act or *Mining Act*).

⁹⁹ Mutagabwa 2006 *Journal of Cleaner Production* 397.

⁹⁹ S 5.

¹⁰⁰ Mutagabwa 2006 *Journal of Cleaner Production* 397.

¹⁰¹ Fisher 2008 *Development Southern Africa* 201; Kitula 2006 *Journal of Cleaner Production* 405.

¹⁰² S 5.

¹⁰³ S 6(1).

In determining whether minerals are connected to land it is necessary to take cognisance of the fact that in Tanzania, the government is disinclined to transfer full property rights to their citizens. The president holds all rights to land "in the name of the citizens", to be held in trust for them.¹⁰⁴ Long term use rights may, however, be held by rural and urban dwellers, which can be registered and titled, and subsequently traded.¹⁰⁵ The *Land Act*, which was enacted a year after the *Mining Act*, defines "land" as:

The surface of the earth and the earth below the surface and all substances *other than minerals* and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land.¹⁰⁶

In the definition of "land" as aforementioned, it is evident that the holder of a right to land, in accordance with the *Land Act*, will not be regarded as the holder of any mineral right as defined in the *Mining Act*. The exclusion provided for in the aforementioned definition was provided with the intention to circumvent inconsistencies and conflicts between the two Acts. Overlapping of the rights pertaining to the administration of land and minerals is, however, inevitable. All land in Tanzania is divided into three categories, in accordance with the *Land Act*, namely: (a) General land; (b) Village land; and (c) Reserved land.¹⁰⁷ The *Mining Act* also attempts to prevent overlapping where it makes provision for the restriction of rights of entry of the holder of a mineral right.¹⁰⁸ It states in section 95 that the holder of a mineral right may not exercise any of his rights under his licence or under the Act, except with the written consent of the responsible Minister, in respect of certain specified land.¹⁰⁹ It also provides that the licence holder may not exercise any of his rights under his licence or under the Act, unless he obtains the written consent of the lawful occupier thereof, in respect of

¹⁰⁴ S 1(1)(a) of the *Land Act* 4 of 1999 (Hereafter the *Land Act*).

¹⁰⁵ Toulmin 2008 *Land Use Policy* 13. It is important to note that in Hernandez "Mining Cadastre" 5, it is stated that rights of occupancy and leaseholds, which are granted for a maximum of 99 years, are the only rights to land that can be registered.

¹⁰⁶ S 2 of the *Land Act* (Own emphasis).

¹⁰⁷ S 1(4)(a)-(c) of the *Land Act*.

¹⁰⁸ See s 95(1)(a)-(d) for the various areas provided for.

¹⁰⁹ See further s 95(1)(a)(a)-(vi).

the specific land.¹¹⁰ With regard to the latter provision, however, the Act provides that the Minister may direct that the consent of the lawful occupier should be dispensed with, if the Minister decides that consent is being unreasonably withheld.¹¹¹ Where overlapping rights' disputes come to the fore, in practice, they are usually solved by private agreements and negotiations where the respective Governmental Office acts as arbitrator, or they are solved by agreement on compensation negotiated directly between the miner and the holder of the land right.¹¹²

In essence, therefore, the prevailing position is that mineral rights are unconnected to land.

In accordance with the *Mining Act*, the following mineral rights can be acquired through application to the licensing authority: (a) a prospecting licence; (b) a retention licence; (c) a special mining licence; (d) a mining licence; (e) a gemstone mining licence; (f) a primary prospecting licence; and (g) a primary mining licence.¹¹³ It is necessary to take cognisance at this point of the fact that section 9 of the *Mining Act* makes provision for the transferability, or non-transferability, of mineral rights. Of importance is section 9(1) which provides that the holder (or holders) of a mineral right may, subject to section 9(2), assign the mineral right or an undivided proportionate part thereof to another person. Section 9(2), on the other hand, provides that a special mining licence and mining licence may not be transferred without the written consent of the relevant licensing authority.¹¹⁴ However, section 9(5) provides that mineral rights may not be transferred to persons who are not entitled to the particular right in terms of the *Mining Act*. Section 8 specifically provides that mineral rights will not be

¹¹⁰ S 95(1)(b)(i)-(iv).

¹¹¹ S 95(1)(b).

¹¹² Hernandez "Mining Cadastre" 7.

¹¹³ S 7. Mutagabwa 2006 *Journal of Cleaner Production* 398.

¹¹⁴ S 9(3) provides for the instances where consent in terms of s 9(2) may be dispensed with. Section 9(4), in addition, provides that the consent may not be unreasonably withheld or delayed.

granted to an individual who is under the age of eighteen years, or who is an undischarged bankrupt.¹¹⁵ The section further provides that mineral rights may not be granted to a body corporate which is in liquidation; a body corporate in respect of which a court order was made as to its winding up or dissolution; or a body corporate who has made a composition or arrangement with its creditors.¹¹⁶

A primary mining licence¹¹⁷ and a primary prospecting licence¹¹⁸ may only be granted to Tanzanian citizens.¹¹⁹ Due to the limited scope of this work, only mineral rights pertaining to the estates of South African citizens will be addressed. The legal nature of the various mineral rights granted under the Act, which may be relevant for a South African citizen's estate planning considerations, will now be addressed.

3.1 Prospecting licence

The holder of a prospecting licence is conferred the exclusive right to carry on prospecting operations in the specified prospecting area, for the minerals to which the licence applies.¹²⁰ An application may be made for a prospecting licence in the following three instances: (a) for all minerals, exclusive of building

¹¹⁵ S 8(1)(a)(i) and (ii).

¹¹⁶ S 8(1)(b)(i)-(iii).

¹¹⁷ S 68(3) endows the holder of primary mining licence with an exclusive right to carry on mining operations in the mining area. In terms of s 71(1) the holder of one or more primary mining licences may apply to the Commissioner, subject to certain conditions being met, to convert the licence (or licences) to a mining licence or a gemstone mining licence.

¹¹⁸ S 65(5) authorises the holder of a primary prospecting licence to prospect for minerals in any area located in the zone for which the zonal mines office has responsibility. A primary prospecting licence, in terms of s 65(8), does not automatically entitle the holder thereof to an exclusive right to search for minerals, nor does it ascertain any priority in respect of a primary mining licence grant.

¹¹⁹ S 8(2)(a)-(c) of the *Mining Act* provides that primary mining and primary prospecting licences will not be granted to any individual, partnership or body corporate unless the following ensues: (a) the individual is a citizen of Tanzania; (b) the partnership is composed exclusively of citizens of Tanzania; and (c) the corporate body is a company and: (i) its membership is composed exclusively of citizens, or (ii) its directors are all citizens of Tanzania, and control over the company is exercised from within Tanzania by citizens of Tanzania.

¹²⁰ S 32 (1) of the *Mining Act*.

materials and gemstones; or (b) for building materials autonomously; or (c) for gemstones autonomously.¹²¹

In exercising the rights conferred in respect of a prospecting licence, the holder (or his employees or agent) is entitled to: enter upon the prospecting area; erect camps and temporary buildings; and erect installation in respect of any water that forms part of the specified area.¹²² The holder of a prospecting licence is, furthermore, compelled to adhere to the following prescribed obligations: (a) commence prospecting operations within three months, or a further period determined by the licensing authority, from the date of the grant of the licence; (b) notify the licensing authority of discovery of any mineral deposit with a potential commercial value; and (c) expend on prospecting operations not less than the minimum amount prescribed.¹²³

The holders of a prospecting licence for minerals, exclusive of building materials and gemstones, may investigate and assess deposits of gemstones found in a natural state and deposits of non-gemstone minerals, within the area subject to the licence.¹²⁴ Holders of prospecting licences for gemstones, who in the course of conducting prospecting operations recover gemstones, may dispose of the gemstones by sale to a licensed dealer.¹²⁵ In the latter instance the holder will be deemed to be an authorised miner.¹²⁶

The applicant for the grant of a prospecting licence for all minerals exclusive of building materials and gemstones may, in addition, apply for the grant of a prospecting licence covering a preliminary reconnaissance period, which does not exceed two years.¹²⁷ The latter grant is thus valid for a period not exceeding

¹²¹ S 24(1)(a)-(c) of the *Mining Act*.

¹²² S 32(2) of the *Mining Act*.

¹²³ S 33(a)-(c) of the *Mining Act*.

¹²⁴ S 32(1)(a) of the *Mining Act*.

¹²⁵ S 32(3) of the *Mining Act*.

¹²⁶ S 32(4) of the *Mining Act*.

¹²⁷ S 25 of the *Mining Act*.

two years.¹²⁸ The exclusive rights granted to an applicant who has applied for such a preliminary reconnaissance period, in respect of an area exceeding one thousand square kilometres, may not extend to any minerals not authorised in the prospecting licence.¹²⁹

An initial prospecting period will not exceed a period of three years.¹³⁰ The prospecting licence is renewable, upon application, for two successive periods, each period of which may not exceed two years.¹³¹ An additional renewal may be granted if it is required, subject to certain prerequisites being met.¹³² However, a prospecting licence for gemstones is valid for two years only, from the date of the grant, and is not renewable. The holder of a prospecting licence may, in accordance and compliance with section 9 of the Act, transfer the mineral right or an undivided proportionate share thereof to another.

A prospecting licence may be relevant to a South African citizen in the sense that it will form part of his or her estate, as it adds value to the estate due to the fact that gemstones found may be sold, and the income received will accordingly be taxable.¹³³ It will also be relevant for “death-planning” as it is transferable in

¹²⁸ S 29(1)(a) of the *Mining Act*.

¹²⁹ S 32(1)(b) of the *Mining Act*.

¹³⁰ S 29(1)(b) of the *Mining Act*.

¹³¹ S 29(1)(c) of the *Mining Act*.

¹³² S 29(1)(d) of the *Mining Act*.

¹³³ In Huxham and Haupt *South African Income Tax* 395, it is elucidated that s 25D of the *Income Tax Act* 58 of 1962 provides that a South African resident who carries on a business outside the country as a sole proprietor is taxable on the income derived from such trade; whilst s 9A of the *Income Tax Act* provides that the income will not be taxed in South Africa if such income may not be remitted to the Republic in terms of the law of the country in which the income was received or accrues. In addition, s 6quat of the *Income Tax Act* gives a credit against South African tax for foreign tax paid on foreign income which is included in a person's taxable income, in order to avoid the payment of double tax. The credit given is called a “rebate” and is limited to the South African tax on the foreign income. In regard to the latter, see Huxham and Haupt *South African Income Tax* 438. S 108 of the *Income Tax Act* also makes provision for the relief from double tax, which entails that the taxpayer will not pay the same amount of tax in South Africa and the other country. See Huxham and Haupt *South African Income Tax* 438-440. According to Bowman Gilfillan Attorneys “Doing Business in South Africa 2009” 55, at <http://www.bowman.co.za/onlineservices/Documents/>, the tax considerations pertaining to Tanzania will in all probability not be taxable in South Africa, due to the double taxation agreement South Africa has with the country.

accordance with section 9 of the *Mining Act*. The estate planner should, however, ensure that the person to whom the right is assigned is able to acquire the right in accordance with the provisions of the Act.¹³⁴

3.2 Retention licence

The holder of a prospecting licence for minerals, exclusive of building materials and gemstones, may apply to the Minister for the grant of a retention licence on the grounds that he has identified a mineral deposit within the prospecting area which is potentially of commercial significance.¹³⁵ The applicant for the retention licence will have to prove, by means of studies and assessments by appropriate experts or consultants, that the mineral deposit cannot be developed immediately by reason of technical constraints, adverse market conditions or other economic factors which are, or may be, of temporary character.¹³⁶ The Minister may subsequently grant the retention licence to the applicant over the particular part of the prospecting area, where the commercial development of the deposit may be feasible within a period of ten years.¹³⁷ A retention licence also entitles the holder thereof to apply for a special mining licence within the area for which the retention licence has been granted.¹³⁸

A retention licence may be granted for a period not exceeding five years. The licence may also be granted subject to certain conditions, to facilitate the preservation of the mineral deposit and the protection of the environment.¹³⁹ In the instance where the commercial development is not presently feasible, a retention licence may, on application, be renewed for a single period of five years.¹⁴⁰ The holder of a retention licence may, in accordance and in compliance

¹³⁴ Thus, the transfer must not be contrary to ss 8 and 9(5) of the *Mining Act*.

¹³⁵ S 34(1)(a) of the *Mining Act*.

¹³⁶ S 34(1)(b) and s 34(2) of the *Mining Act*.

¹³⁷ S 35(1).

¹³⁸ S 35(2).

¹³⁹ S 35(3).

¹⁴⁰ S 35(4).

with section 9 of the Act, transfer the mineral right subject to the licence, or an undivided proportionate share thereof, to another.

The retention permit will accordingly be relevant with regard to estate planning where it places value on the estate of the South African citizen or where it may bring forth tax considerations. It will also be relevant for estate planning, in the sense that the holder must make adequate provision in respect of its transferability. The holder must thus ensure that his or her beneficiary of choice is capable of being granted the mineral right in terms of the Act.¹⁴¹

3.3 Special mining licence

The holder of a prospecting licence or a retention licence is entitled, on application to the Minister and in compliance with the provisions provided for the application procedure,¹⁴² to the grant of a special mining licence.¹⁴³ The special mining licence bestows on the holder of the right, the exclusive right to mine the minerals within the prospecting area or the retention area to which the respective licences apply.¹⁴⁴ In addition, it entails that the holder (or his employees and agents) are entitled to: (a) enter the mining area and take all reasonable measures on or under the surface, necessary for the mining operations; (b) erect the necessary equipment, plant and buildings; (c) dispose of recovered minerals, subject to the payment of royalties; (d) stack or dump any mineral or waste products as provided for in the environmental management plan; and (e) prospect within the mining area for any mineral, excluding gemstones other than gemstones specifically stipulated in the licence.¹⁴⁵

¹⁴¹ See ss 8 and 9(5).

¹⁴² The provisions for the application for a special mining licence are provided for in s 38 of the *Mining Act*.

¹⁴³ S 36(1)(a).

¹⁴⁴ Ss 36(1) and 43.

¹⁴⁵ S 43.

Any person may apply to the Minister for the grant of a special mining licence, to mine minerals, with the exception of gemstones and building materials, in any vacant area which is not part of a reserved area or in an area which is subject only to a prospecting licence for building materials or gemstones.¹⁴⁶ Holders of prospecting licences or retention licences are deemed to be “entitled applicants” to this particular licence, in terms of section 36(1) of the *Mining Act*. The Act, however, provides that non-entitled applicants may also apply for this licence.¹⁴⁷ The Minister will, however, have the discretion to decide whether or not to grant the application for the mining of a mineral to a non-entitled applicant.¹⁴⁸ The Minister also has the discretion in this instance to decide for which minerals it will grant a licence, and the conditions on which the licence will be granted.¹⁴⁹

A special mining licence may be granted if various provisions have been fulfilled, for instance, *inter alia*: (a) it has been established, or may be reasonably inferred, that there are sufficient deposits or reserves of minerals proposed to be mined to justify their commercial exploitation; (b) the area of land over which the licence is sought is not in excess of the area reasonably required to carry out the mining operations; (c) efficient and beneficial use of the resources is ensured; (d) proper provision has been made for environmental preservation; and (e) adequate provision has been made for the employment and training of Tanzanian citizens.¹⁵⁰ The holder of the right is also compelled to adhere to the following prescribed obligations, namely to: (a) develop the mining area and carry on mining operations in substantial compliance with the programme of mining operations and the environmental management plan; (b) employ and train citizens of Tanzania; (c) demarcate and keep demarcated the mining area; and (d) provide for the posting of a rehabilitation bond to finance the costs of

¹⁴⁶ Ss 36(2)(a) and 39(1).

¹⁴⁷ S 36(3).

¹⁴⁸ S 39(4).

¹⁴⁹ S 39(4).

¹⁵⁰ S 39(1)(a)-(f).

rehabilitating and restoring the safety of the mining area on termination of the mining operations, should the holder fail to meet his obligations in this respect.¹⁵¹

In respect of an entitled applicant, a special mining licence will be granted for a period not exceeding twenty-five years, or for the approximated life span of the ore body which the applicant has proposed to mine, whichever is the shorter.¹⁵² As regards a non-entitled applicant, the duration of a special mining licence will be determined by the Minister, but it may not exceed a period of twenty-five years.¹⁵³ A special mining licence may be renewed on application by the holder thereof to the Minister at any time, but no later than one year before the expiry of the particular licence.¹⁵⁴ The renewal may not exceed a period of twenty-five years, and the Minister may, in addition, vary the conditions of the licence, subject to certain conditions.¹⁵⁵ A special mining licence, or any undivided proportionate part, may be assigned (or transferred) to a third person subject to the attainment of the written consent of the relevant licensing authority.¹⁵⁶

The effect of a special mining licence on the estate of a South African will, therefore, entail those consequences which accrue in respect of taxable income,¹⁵⁷ and the factors which need to be given due regard in respect of the transferability of the right during the administration of the estate. As with all the other mineral rights granted under the Act, the holder of the particular right must ensure that the person to whom the right is being transferred is capable of acquiring the right under section 8 of the Act.¹⁵⁸

¹⁵¹ S 44(a)-(d).

¹⁵² S 40(a).

¹⁵³ S 40(b).

¹⁵⁴ S 42(1).

¹⁵⁵ S 42(4). The Minister must give consideration to any relevant development agreement and consult with the applicant.

¹⁵⁶ S 9(2). See further s 9(3) for the instances where the consent may be dispensed with, and s 9(4) which provides that the consent may not be unreasonably withheld or delayed.

¹⁵⁷ See fn 133.

¹⁵⁸ S 9(5).

3.4 Mining licence

The holder of a prospecting licence or a retention licence is entitled, on application to the Minister and in compliance with the provisions provided for the application procedure,¹⁵⁹ to the grant of a mining licence.¹⁶⁰ The mining licence entails that the holder of the right is entitled to mine the specified minerals (minerals other than gemstones) within the prospecting area or the retention area to which the respective licences apply.¹⁶¹ The holder (or his employees and agents) are, furthermore, entitled to: (a) enter the mining area and take all reasonable measures on or under the surface, pertinent to the mining operations; (b) erect the necessary equipment, plant and buildings; (c) dispose of mineral products recovered, subject to the payment of royalties; (d) stack or dump any mineral or waste product in the specified manner; and (e) prospect within the mining area for any minerals other than gemstones.¹⁶²

The holder of the right is compelled to adhere to the following prescribed obligations, namely to: (a) develop the mining area and carry on mining operations in substantial compliance with the programme of mining operations; (b) demarcate and keep demarcated the mining area; (c) take all appropriate measures for the protection of the environment; and (d) provide for the posting of a rehabilitation bond to finance the costs of rehabilitating and restoring the safety of the mining area on termination of the mining operations, should the holder fail to meet his obligations in this respect.¹⁶³

Any person may apply to the Minister for the grant of a mining licence, to mine for minerals other than gemstones in any vacant area which is not part of a reserved area or in an area which is subject only to a prospecting licence for building

¹⁵⁹ The provisions for the application for a special mining licence are provided for in s 47 of the *Mining Act*.

¹⁶⁰ S 36(1)(b).

¹⁶¹ Ss 36(1) and 49(1).

¹⁶² S 49(1)(a)-(d).

¹⁶³ S 49(2)(a)-(d).

materials or gemstones.¹⁶⁴ Holders of prospecting licences or retention licences are deemed to be “entitled applicants” to this particular licence, in terms of section 36(1) of the *Mining Act*. The Act, however, provides that non-entitled applicants may also apply for this licence.¹⁶⁵

The Minister will grant a mining licence provided the application has been properly made.¹⁶⁶ A mining licence will not be granted to an applicant who is an individual under the age of eighteen years, or is an unrehabilitated insolvent.¹⁶⁷ A mining licence will, furthermore, be refused to a body corporate which is in liquidation, has been given an order to wind up or dissolve, or which has made a composition or arrangement with its creditors.¹⁶⁸ Further reasons for the refusal of the grant of a mining licence comprise the following, *inter alia*: (a) the area in respect of which the licence is sought exceeds the necessary area required to mine the deposits; (b) the applicant was or is in default in respect of any other mineral right, and has neglected to rectify the fault; and (c) the applicant is not an entitled applicant and the area of land for which application has been made is subject to another mineral right or is not available to the present applicant for various reasons.¹⁶⁹

The initial period for which a mining licence may be granted is ten years, and it is renewable for a further period not exceeding ten years.¹⁷⁰ A mining licence, or any undivided proportionate part, may be assigned (or transferred) to a third person subject to the attainment of the written consent of the relevant licensing authority.¹⁷¹

¹⁶⁴ Ss 36(2)(b) and 46(1).

¹⁶⁵ S 36(3).

¹⁶⁶ S 48. An application for a mining licence for minerals other than gemstones must comply with s 47 of the *Mining Act*, whilst an application for a mining licence or gemstone mining licence must comply with s 62 of the same Act.

¹⁶⁷ Ss 8(1)(a) and 48(a).

¹⁶⁸ Ss 8(1)(b) and 48(a).

¹⁶⁹ See 48(b) - (e).

¹⁷⁰ Ss 46(3) and 50(2).

¹⁷¹ S 9(2). See further s 9(3) for the instances where the consent may be dispensed with, and s 9(4) which provides that the consent may not be unreasonably withheld or delayed.

Once again, the significance of this particular licence, or right, in the estate of a South African citizen relates to the relevant tax considerations.¹⁷² This right is transferable, and it will consequently also be relevant in light of estate planning considerations at the death of the holder of this right. The holder of a mining licence must ensure that the person to whom the right is being transferred is competent to attain the right under section 8 of the Act.¹⁷³

3.5 Gemstone mining licence

The holder of a prospecting licence or a retention licence is entitled, on application to the Minister and in compliance with the provisions provided for the application procedure,¹⁷⁴ to the grant of a gemstone mining licence.¹⁷⁵ The gemstone mining licence entails that the holder of the right is entitled to mine the particular minerals within the prospecting area or the retention area to which the respective licences apply.¹⁷⁶ A gemstone mining licence also entitles the holder thereof (or his employees and agents) to: a) enter the mining area and take all reasonable measures on or under the surface, pertinent to the mining operations; (b) erect the necessary equipment, plant and buildings; (c) dispose of mineral products recovered, subject to the payment of royalties; (d) stack or dump any mineral or waste product in the specified manner; and (e) prospect within the mining area for gemstones.¹⁷⁷ A gemstone mining licence also confers on its holder particular obligations, namely: (a) develop the mining area and carry on mining operations in substantial compliance with the programme of mining

¹⁷² See fn 133.

¹⁷³ S 9(5).

¹⁷⁴ The provisions for the application for a special mining licence are provided for in s 51 of the *Mining Act*.

¹⁷⁵ S 36(1)(a).

¹⁷⁶ Ss 36(1) and 53(1).

¹⁷⁷ S 53(1)(a)-(d).

operations; (b) demarcate and keep demarcated the mining area; (c) take all appropriate measures for the protection of the environment.¹⁷⁸

Section 8(3) of the *Mining Act* provides that a gemstone mining licence may not be granted to a non-citizen, unless the licence is held by such person in undivided participating shares with a citizen or citizens, whose undivided participating shares do not amount to less than twenty five percent, either alone or in aggregate.¹⁷⁹ Any person, subject to section 8(3) of the *Mining Act*, may apply to the Minister for the grant of a gemstone mining licence in any vacant area which is not part of a reserved area or in an area which is subject only to a prospecting licence for building materials or gemstones.¹⁸⁰ Holders of prospecting licences or retention licences are deemed to be "entitled applicants" to this particular licence, in terms of section 36(1) of the *Mining Act*. The Act, however, provides that non-entitled applicants may also apply for this licence.¹⁸¹

The Minister will grant a mining licence, provided the application has been properly made.¹⁸² A mining licence will not be granted to an applicant who is an individual under the age of eighteen years, or is an unrehabilitated insolvent.¹⁸³ A mining licence will, furthermore, be refused to a body corporate which is in liquidation, has been given an order to wind up or dissolve, or which has made a composition or arrangement with its creditors.¹⁸⁴ Further reasons for the refusal of the grant of a mining licence comprise the following, *inter alia*: (a) the applicant is or was in default in respect of any other mineral right and has failed to rectify the fault; (b) the area of land applicable to the application is subject to another mineral right, or is reserved for prospecting and mining operations by holders of

¹⁷⁸ S 53(2)(a)-(c).

¹⁷⁹ S 8(3).

¹⁸⁰ S 36(2)(c).

¹⁸¹ S 36(3).

¹⁸² S 52(1). An application for a gemstone mining licence must comply with s 51 of the *Mining Act*, and a successful application for a gemstone mining licence must comply with ss 54(5) and 62 of the same Act.

¹⁸³ Ss 8(1)(a) and 48(a).

¹⁸⁴ Ss 8(1)(b) and 48(a).

primary mining licences; and (c) the area of land for which the application has been made covers or includes an area of land for which application has been made by another person who has priority over the applicant in terms of section 12 of the *Mining Act*.¹⁸⁵

The gemstone licence may be granted for a period not exceeding ten years, and is also, on application, renewable for a period not exceeding ten years.¹⁸⁶

A gemstone mining licence may be relevant to a South African citizen in the sense that it will form part of his or her estate, as it adds value to the estate due to the fact that gemstones found may be sold, and the income received may accordingly be taxable.¹⁸⁷ It will additionally be relevant for “death-planning” as it is transferable in terms of section 9(1) of the *Mining Act*. Sufficient provision should be made, in terms of section 9(5), for the instance where the beneficiary of choice is incapable of being granted the particular mineral right.

3.6 Summary

The Tanzanian mineral rights discussed above are transferable and, therefore, they will be of relevance for a South African citizen with regard to “death-planning”.¹⁸⁸ The holder of the relevant right must accordingly, in terms of sections 8 and 9 of the *Mining Act*, make sufficient provision for the instance where his or her selected beneficiary to the right is incapable of being granted the right. As may be derived from above, it is clear that in respect of estate planning what may be of additional relevance for a South African citizen, is the tax consequences which may accrue from the value of the right held or the income derived from the particular right. The tax considerations are, however,

¹⁸⁵ S 52(1)(a)-(g).

¹⁸⁶ S 51(3)(a), and ss 55(1)-55(3) respectively.

¹⁸⁷ See fn 133 with regard to the taxability of foreign income.

¹⁸⁸ See paras 3.1 – 3.5.

dependent on whether or not the foreign income is taxable in South Africa.¹⁸⁹ Due to the limited scope of this work, the tax consequences will not be considered in any further detail.

The legal nature of the various rights' to minerals granted by the Tanzanian *Mining Act*, relevant for a South African citizen has accordingly been addressed. It will now be necessary to consider the legal nature and content of the rights to minerals within Mozambique, which may be of importance for a South African citizen's estate planning considerations. The legal foundation underlying Mozambique's mineral law dispensation will shortly be addressed, and thereafter focus will fall on the country's mining law.

4 Mozambique mineral law legislation

The Portuguese arrived in Mozambique in the late fifteenth century; whereafter Mozambique's legal system was entirely dominated by Portuguese laws.¹⁹⁰ During the colonial period, mining reached an industrial scale and provided employment for local people. However, mining activity in Mozambique largely ceased during the civil war (1979-1992), as people took refuge in neighbouring countries or more secure areas.¹⁹¹ With the instauration of peace after ten years of warfare, and the prevalence of independence, Mozambique sought to completely discard the legal system derived from the colonial domination, and replace it with an entirely new legal system.¹⁹² However, the Portuguese legal tradition was restored when the country began to settle in the early 1990's.¹⁹³

¹⁸⁹ See paras 3.1 – 3.5.

¹⁹⁰ Sachs and Welch *Liberating the Law* 3; Dondeyne *et al* 2009 *Resources Policy* 45-46; George "Recent History" 792.

¹⁹¹ Dondeyne *et al* 2009 *Resources Policy* 45-46.

¹⁹² Sachs and Welch *Liberating the Law* 1; Dondeyne *et al* 2009 *Resources Policy* 45-46. In Sachs and Welch *Liberating the Law* 1, it is stated that, in the act of proclaiming independence in 1975, Mozambique promulgated the *Constitution of the People's Republic of Mozambique*, 1990, which provided in respect of land and state property, that "the land and natural resources situated in the soil and in the subsoil, in the territorial waters, and in the continental shelf of Mozambique, are the property of the State' – of the workers' and peasants' State". The recovery of the land by the people (which was an integral part of the

Due to the recognition that mineral resources constitute an important factor for social and economic development for Mozambique, and in accordance with article 135(1) of the *Constitution of the Republic of Mozambique*,¹⁹⁴ the *Mining Law*¹⁹⁵ was enacted. The *Mining Law* regulates mining and mineral law in Mozambique,¹⁹⁶ whilst the *Mining Law Regulations*¹⁹⁷ establish the rules that regulate mining activity under the Act.¹⁹⁸ In accordance with the Act, the ownership of mineral resources is the property of the State.¹⁹⁹

The Ministry of Mineral Resources and Energy, acting on behalf of the State, is in terms of the Act, assigned the duty to ensure that the right to the use of mineral resources is exercised in accordance with optimum mining practices and legally established patterns of environmental quality, whilst striving toward sustainable development.²⁰⁰ The Act, furthermore, recognises that mineral resources constitute an important factor for social and economic development. By obtaining these objectives the Act recognises the need for, *inter alia*, reconnaissance; exploration; mining; treatment and processing; and trade.²⁰¹ These objectives are clearly in line with SADC's objectives and the Mining Protocol.

The Act prescribes the formalities pertaining to the various rights as regards their acquisition, content, transferability and termination. Interested persons' are

process of the Mozambican revolution) was thus a signification of the final abolition of private ownership of land. The consequence hereof is that the State of the worker and peasant alliance becomes the sole owner of the land, which in turn becomes the patrimony of all the people. See Sachs and Welch *Liberating the Law* 30-32.

¹⁹³ Rainha 2008 <http://www.nyulawglobal.org/globalex/Mozambique.htm>

¹⁹⁴ *Constitution of the Republic of Mozambique*, 2004. As with the 1990 *Constitution*, the 2004 *Constitution* similarly provides in art 98(1) that the "natural resources in the soil and subsoil..." are the property of the State (see fn 190). Art 98(2)(h) furthermore provides that the public domain of the State includes mineral deposits.

¹⁹⁵ *Mining Law* 14 of 2002. (Hereafter the Act or the *Mining Law*).

¹⁹⁶ Art 1 of the Act.

¹⁹⁷ *Mining Law Regulations* 28 of 2003. (Hereafter the Regulations).

¹⁹⁸ Art 2 of the Regulations.

¹⁹⁹ Art 4 of the Act. This is in compliance with art 98 of the *Constitution of the Republic of Mozambique*. See fn 192 in regard to the latter.

²⁰⁰ Art 2 of the Act.

²⁰¹ Art 2 of the Act.

capable, subject to certain conditions, of acquiring mineral rights.²⁰² Mineral rights that were held prior to the implementation of the present Act will be governed by the provisions of the *Mining Law*, and the holders of such rights are required by the Act to regularise such rights within a specified timeframe and in accordance with specified prerequisites.²⁰³ In accordance with the prevailing Act, the right for reconnaissance, prospecting, and exploration and exploitation of mineral resources is acquired once the following mining titles and permits are obtained: (a) a reconnaissance licence; (b) an exploration licence; (c) a mining concession; (d) a mining certificate; and (e) a mining pass.²⁰⁴ In compliance with the Regulations,²⁰⁵ mining titles and permits are granted on the basis of “first come first served” priority, taking into consideration the date of receipt of the respective application.²⁰⁶

In terms of article 3 of the Regulations, the Minister is authorised to grant the reconnaissance licence, exploration licence, and mining concession.²⁰⁷ The said article further provides that the National Director of Mines is authorised to grant the mining certificate, and the Provincial Director of Mining is authorised to grant mining passes in the designated areas under his jurisdiction.²⁰⁸

Due to the scope of this work a mining concession,²⁰⁹ mining certificate²¹⁰ and mining pass²¹¹ will not be discussed in any further detail, as they are irrelevant

²⁰² See art 6 of the Act.

²⁰³ See art 47 and 48 of the Act; and art 113 and 114 of the Regulations.

²⁰⁴ Art 5(1)(a)-(e) of the Act.

²⁰⁵ See in particular art's 8-11.

²⁰⁶ Art 5(2) of the Act.

²⁰⁷ Art 3(1) of the Regulations.

²⁰⁸ Art 3(2) of the Regulations.

²⁰⁹ In terms of art 6(2) and 13(1) of the Act, a mining concession may only be granted to a collective person or company established and registered in Mozambique.

²¹⁰ A mining certificate authorises the small-scale exploitation of mineral resources. In terms of art 6(3), a mining certificate will be granted to any person with domicile in Mozambique and with juridical capacity, capable of carrying out mining operations. It may be granted to a national or foreigner in this regard, but due to the fact that we are dealing with the estate of a South African citizen, it will be irrelevant where a person has domicile in Mozambique. Such person's "property" in Mozambique will not be dealt with in South Africa, and will accordingly be dealt with in Mozambique. See further Abrie *et al Deceased estates* 195-196; Jordaan *et*

for estate planning purposes with regard to the estate of an individual South African citizen.

The rights to minerals which are of relevance in the estate of a South African citizen, namely a reconnaissance licence and exploration licence will now be discussed individually in order to determine the legal nature thereof.

4.1 Reconnaissance licence

A reconnaissance licence may be defined as a mining title granted in accordance with the Act, which allows the reconnaissance of mineral resources. The reconnaissance of mineral resources entails activities undertaken with the aim of identifying mineral resources through geo-scientific methods. A reconnaissance licence will be granted to any person,²¹² with juridical capacity, with the intention of undertaking mining operations,²¹³ and who, in addition, complies with the necessary requirements and pays the respective fee.²¹⁴

In terms of article 8 of the Act, the reconnaissance licence will entitle the holder thereof to: (a) access, enter or fly-over the applicable area, without exclusivity; (b) obtain and remove samples; (c) occupy land and erect temporary structures necessary for the undertaking of reconnaissance operations, subject to the laws

al Silke 42-43 and 489; Huxham and Haupt *South African Income Tax* 438-440. These sources indicate that an "ordinarily resident" person's estate will consist of all his or her property, irrespective of where it is situated. However, due to s 108 of the *Income Tax Act* provision is made for the relief from double tax, which entails that the taxpayer will not pay the same amount of tax in South Africa and the other participating country. According to Bowman Gilfillan Attorneys "Doing Business in South Africa 2009" 55, at <http://www.bowman.co.za/onlineservices/Documents/>, South Africa has a double taxation agreement with Mozambique.

²¹¹ Art 72(1) of the Regulations defines a mining pass as a permit granted in accordance with the Act, which authorises small-scale mining activities in designated areas. In terms of art 6(4), a mining pass can only be acquired by a Mozambican individual and is thus of no relevance in the estate of a South African citizen.

²¹² Including a singular or collective person, national or foreigner.

²¹³ Art 6(1). Mining operations include works undertaken in the context of any mining activity.

²¹⁴ Art 7(1).

in force; and (d) use water, timber and other required materials, subject to the laws in force.

The holder of a reconnaissance licence is further compelled to adhere to prescribed obligations, in particular to, *inter alia*: (a) carry out reconnaissance activities in the respective area;²¹⁵ (b) compensate the land users for damage caused to their land or property resulting from the reconnaissance activities;²¹⁶ (c) perform their activities in accordance with good mining practices and restore the land in case of any damage, in compliance with the applicable environmental standards;²¹⁷ and (d) only drill or excavate in accordance with the article 25 of the Regulations.²¹⁸

The reconnaissance licence may lapse through its caducity, abandonment of the area, its revocation in terms of article 9(3) of the Act, and its cancellation where the applicant fails to collect the licence within a specified period, as provided for in article 22(4) of the Regulations. The maximum term of the reconnaissance licence is two years, and it is non-renewable.²¹⁹ The Act additionally provides that the reconnaissance licence is personal and non-transferable.²²⁰

Due to its personal nature and the fact that it is non-renewable and non-transferable, entails that it is irrelevant for death-planning, but may nevertheless be relevant for tax considerations in the estate of a South African citizen.²²¹

²¹⁵ Art 9(1)(a) of the Act.

²¹⁶ Art 9(1)(c) of the Act.

²¹⁷ Art 9(1)(d) of the Act.

²¹⁸ Art 9(2) of the Act.

²¹⁹ Art 7(5) of the Act.

²²⁰ Art 7(6) of the Act.

²²¹ In *Huxham and Haupt South African Income Tax* 395, it is elucidated that s 25D of the *Income Tax Act* 58 of 1962 provides that a South African resident who carries on a business outside the country as a sole proprietor is taxable on the income derived from such trade; whilst s 9A of the *Income Tax Act* provides that the income will not be taxed in South Africa if such income may not be remitted to the Republic in terms of the law of the country in which the income was received or accrues. In addition, in *Huxham and Haupt South African Income Tax* 438, it is explained that s 6quat of the *Income Tax Act* gives a credit against South African tax for foreign tax paid on foreign income which is included in a person's

4.2 Exploration licence

An exploration licence may be defined as a mining title granted in accordance with the Act, which allows the exploration of mineral resources. The exploration of mineral resources entails activities undertaken with the aim of discovering, identifying, determining characteristics and assessing the economic value of mineral resources. An exploration licence will be granted to any person²²² with juridical capacity, intending to undertake mining operations,²²³ and who, in addition, complies with the necessary requirements and pays the respective fee.²²⁴

Article 11 of the Act, entitles the holder of an exploration licence to, *inter alia*: (a) access the area specified; (b) exclusively explore the mineral resources specified in the licence and undertake operations and works necessary for such purpose; (c) explore associated minerals that may subsist in the area; (d) collect, remove and export specified amounts of samples and specimens; (e) conduct sampling and trial processing of the ore; and (e) sell, subject to authorisation, specimens and samples obtained for exploration or for sampling and trial processing purposes.²²⁵ In addition to the rights, the title holder has to adhere to prescribed obligations, such as: paying taxes and fiscal bills where such holder sells

taxable income, in order to avoid the payment of double tax. The credit given is called a "rebate" and is limited to the South African tax on the foreign income. Section 108 of the *Income Tax Act* also makes provision for the relief from double tax, which entails that the taxpayer will not pay the same amount of tax in South Africa and the other participating country. See Huxham and Haupt *South African Income Tax* 438-440. According to Bowman Gilfillan Attorneys "Doing Business in South Africa 2009" 55, at <http://www.bowman.co.za/onlineservices/Documents/>, the tax considerations pertaining to Mozambique will in all probability not be taxable in South Africa, due to the double taxation agreement South Africa has with the country.

²²² Including a singular or collective person, national or foreigner.

²²³ Art 6(1). Mining operations includes works undertaken in the context of any mining activity.

²²⁴ Art 10(1).

²²⁵ See art 11(a)-(i) for a full list of the various rights afforded to a holder of an exploration licence.

specimens and samples; and ensure the compliance with any term or condition defined in a regulation or specified in the Mining Contract.²²⁶

An exploration licence may lapse through its caducity, abandonment of the area, its revocation,²²⁷ and its cancellation where the applicant fails to collect the licence within a specified period, as provided for in article 31(5) of the Regulations. An exploration licence is transferable²²⁸ and it is valid for five years.²²⁹ It may be renewed for a maximum of an additional five years.²³⁰

An exploration licence is transferable, subject to prior approval and prerequisites being met. It is thus important for the purposes of estate planning, as the holder of the right will have to make adequate provision for its transferability at his or death. Due to the fact that specimens and samples may be sold subject to the payment of tax also proves to be of relevance in the estate of a South African citizen in respect of: the taxability of the income received or which accrues to the individual, a possible "rebate" or deduction.²³¹

4.3 Summary

It is thus clear that in taking regard of the rights granted in terms of Mozambique's *Mining Law* in light of estate planning considerations for South African citizens, the following ensues: (a) a reconnaissance licence will only be relevant for a South African citizen's estate plan in respect of tax considerations, should there be any; and (b) an exploration licence is transferable and will be important for the purposes of estate planning in the estate of a South African

²²⁶ Art 12(1) and 12(2) of the Act, respectively.

²²⁷ In terms of article 12(2) and 24 of the Act and article 37(2) of the Regulations.

²²⁸ In terms of art 23 of the Act, an exploration licence may only be transferred subject to prior approval and in accordance with art 103 and 104 of the Regulations. The transfer of a mining title, furthermore, implies the transfer of the respective land use title, under land legislation.

²²⁹ Art 10(5) and 10(4), respectively.

²³⁰ Art 10(4) of the Act; art 32(2) of the Regulations.

²³¹ See fn 221 for a brief explanation in this regard.

citizen, as the holder of the right will have to make adequate provision for its transferability at his or death. Due to the fact that specimens and samples found under an exploration licence may be sold subject to the payment of tax also proves to be of relevance in the estate of a South African citizen in respect of the taxability of the income received or which accrues to the person, or a possible "rebate" which may be available.²³²

The rights' that are granted which are entirely irrelevant in the estate of a South African citizen are: a mining concession; a mining certificate; and a mining pass.²³³

Mozambique's mining law and the legal nature and content of the rights to minerals within Mozambique has consequently been discussed. This study will now focus on the differences and similarities pertaining to the mineral law regimes in the three SADC member states discussed above, namely, South Africa, Tanzania and Mozambique.

5 Differences and Similarities

As aforementioned, it is imperative to take cognisance of the fact that the different states' within the SADC region have different legal foundations.²³⁴ It is also evident that SADC's objectives apply to the member states discussed. The manner in which the different member states' give effect to SADC's objectives differs in various instances, conditional on the legal foundation subsisting in the particular member state. The focal point of this discussion pertained to South Africa with its Roman-Dutch heritage, Tanzania with its English heritage, and Mozambique with its Portuguese heritage. All three member states discussed have a different colonial background, and thus a different legal foundation.²³⁵

²³² See paras 4.1 and 4.2.

²³³ See par 4.

²³⁴ See par 1.

²³⁵ See par 1.

However, the SADC objectives prove to have a significant influence on the present legal foundations in the sense that all three member states now have a common aim, namely that the best interest of the people of the country must be given due regard by: alleviating poverty, improving the standard and quality of life and contributing to economic development.²³⁶ Due to the fact that different legal foundations subsist in the member states', but that they nevertheless adhere to SADC's objectives, there will be differences and similarities in respect of the different member states' mineral or mining legislation.

The differences and similarities pertaining to each of the three member states will now be taken into consideration.

As regards the three countries' mining legislation, the following similarities ensue. The legislation in each country governing mining and mineral law²³⁷ is the prevailing authority in respect thereof. The legislation endows the State with the ownership, or control, over the respective nations' mineral resources. The State, is, in accordance with the respective Acts,²³⁸ assigned the duty to ensure the sustainable development of the countries' mineral resources within a framework of national environmental policy, norms and standards whilst promoting economic and social development. The latter objective is in line with SADC's objectives. The States are endowed with the authority to grant, issue, refuse, control, administer and manage the various rights to minerals. The Acts, in addition, prescribe the formalities pertaining to the rights as regards their acquisition, content, transferability, termination and capability to be mortgaged.²³⁹

The differences which ensue relate to the transferability of the rights and the nature of the various rights granted under each mineral law dispensation.

²³⁶ Maponga *Harmonization* 3; Chanda "Mining Investment Promotion" 2-4. See par 1.

²³⁷ In South Africa, the *MPRDA* 28 of 2002; in Tanzania, the *Mining Act* 5 of 1998; and Mozambique, the *Mining Law* 14 of 2002.

²³⁸ See fn 237.

²³⁹ See paras 2, 3 and 4.

In South Africa there still exists uncertainty as to whether the expressly stated limited real rights, namely prospecting rights and mining rights, are connected to the land they form part of.²⁴⁰ In Tanzania, as aforementioned, mineral rights are not connected to the land.²⁴¹ Whilst in Mozambique, the *Mining Law* expressly provides in article 23 that the transfer of a mining title implies the transfer of the respective land use title under land legislation, which in all probability implies that mineral rights are indeed connected to the land they form part of.²⁴²

Differences, furthermore, exist regarding the transferability, disposal or encumbrance of the rights in the respective countries.

In South Africa, the only rights which are transferable or disposable are prospecting rights and mining rights. A mining permit is not transferable, but it may be encumbered. The remaining rights, namely: a permission to remove minerals during prospecting; reconnaissance permissions; or retention permits, may not be transferred, encumbered or disposed of in any manner. Another unresolved issue in respect of the South African mineral rights relates to the remaining rights not expressly provided for in Act as being limited real rights.²⁴³

In Tanzania, all rights of relevance in the estate of a South African are transferable subject to the provisions of the country's *Mining Act*.²⁴⁴ In Mozambique, the only mineral rights granted which are relevant for South Africans are the reconnaissance licence and exploration licence. The former is personal and non-transferable, whilst the latter is transferable. The former thus not being of much importance for death-planning as such.²⁴⁵

²⁴⁰ See par 2.2.1.

²⁴¹ See par 3.

²⁴² See par 4.

²⁴³ See par 2.2.1.

²⁴⁴ Namely a prospecting licence; retention licence; special mining licence; mining licence; and gemstone mining licence. See par 3.

²⁴⁵ See par 4.

6 Conclusion

An integral aim of this study was to determine the legal nature of rights to minerals in the selected SADC member states, and the effect it had in the estates of South African citizens.²⁴⁶ This study recognised that the various SADC member states have different legal foundations due to their colonial backgrounds. As a result, it was decided upon to focus, firstly, on a member state with Roman-Dutch heritage, namely South Africa; secondly, on a state with an English heritage, namely Tanzania; and thirdly, on a state with a Portuguese heritage, namely Mozambique.²⁴⁷

As regards the legal nature of rights to minerals granted in South Africa, in terms of the *MPRDA*, it is evident that certain rights may not be relevant for estate planning purposes with regard to the administration of a deceased's estate, due to the fact that that these rights are not transferable or disposable, or even capable of being encumbered by a mortgage bond. It may nevertheless be relevant in respect of estate planning with regard to the value it places on the estate and any tax considerations which accrue as a result of the value it holds or the income derived there from. These rights include: retention permits, reconnaissance permissions, and a permission to remove minerals during prospecting operations.²⁴⁸

Another right granted in terms of the *MPRDA* which may not be transferred, but which is nevertheless capable of being mortgaged includes the mining permit. As derived from above, it is evident that this right is relevant for estate planning in the sense that the mortgage bond will place a claim against the deceased's estate if the particular debt has not been fully recovered by the applicable

²⁴⁶ See par 1.

²⁴⁷ See par 1.

²⁴⁸ See paras 2.2.2.2; 2.2.2.4; and 2.2.2.6.

creditor at the time of the holder's death. Due to the fact that a mining permit is not transferable it may consequently not be relevant in respect of "death-planning" as such, but it may indeed be relevant for estate planning in respect of tax considerations.²⁴⁹

Rights granted in terms of the *MPRDA* which are unquestionably relevant for estate planning purposes include the mining right and prospecting right. These rights are limited real rights which are transferable and disposable, subject to the Minister's consent. A mining right or prospecting right will effectively form part of one's estate. It is, however, important that the holder make sufficient provision where the Minister's consent in terms of sections 11(1) and (2) of the Act is not obtained by the heir or successor of the testator's choice.²⁵⁰

As regards Tanzanian mineral rights, it will be relevant for the death-planning of a South African citizen, as the various rights are indeed transferable.²⁵¹ The planner should, therefore, ensure that the person to whom the particular right has been assigned will be capable of acquiring the right in terms of the Act. As may be derived from above it is clear that in respect of estate planning, what may also be of relevance for a South African citizen, is the tax consequences which may accrue from the value of the right held or the income derived from the particular right.²⁵²

In respect of Mozambique's *Mining Law*, it was evident that the only relevant considerations with regard to estate planning for South African citizens pertained to a reconnaissance licence and an exploration licence. A reconnaissance licence will, however, only be relevant for a South African citizen's estate plan in respect of tax considerations, should there be any.²⁵³ An exploration licence is

²⁴⁹ See par 2.2.2.5.

²⁵⁰ See paras 2.2.2.1 and 2.2.2.3.

²⁵¹ Subject to ss 8 and 9 of the *Mining Act*.

²⁵² See paras 3.1 – 3.6.

²⁵³ See par 4.1.

transferable and will be important for the purposes of estate planning in the estate of a South African citizen, as the holder of the right will have to make adequate provision for its transferability at his or death. Due to the fact that specimens and samples found under an exploration licence may be sold subject to the payment of tax, also proves to be of relevance in the estate of a South African citizen in respect of the taxability of the income received or which accrues, or a possible "rebate" which may be available.²⁵⁴ It was also determined that the rights' which are granted, in terms of Mozambique's *Mining Law*, which are entirely irrelevant in the estate of a South African citizen are a mining concession; a mining certificate; and a mining pass.²⁵⁵

In respect of the tax considerations pertaining to Tanzania and Mozambique, it was established that it will in all probability not be taxable in South Africa, due to the double taxation agreements South Africa has with both countries.²⁵⁶ In respect of the tax considerations pertaining to South Africa, it may also be of relevance to note that the holder of a mineral right in South Africa will soon be required to pay a royalty to the State in terms of the *Mineral and Petroleum Resources Royalty Act 2008*, which is set to come into effect in March 2010.²⁵⁷ Due to the limited scope of this work, however, the tax consequences were not considered in any further detail.

In respect of estate planning, in relation to rights to minerals granted, it will also be necessary to take note of the fact that the rights granted under any of the countries mining legislation which fall into the holder's estate will need to be valued, but this issue was not discussed due to the limited scope of the work. A further difficulty which may be encountered relates to the different internal

²⁵⁴ See par 4.2.

²⁵⁵ See par 4.

²⁵⁶ See paras 3.1, 3.3 - 3.5; and paras 4.1 - 4.2. Bowman Gilfillan Attorneys "Doing Business in South Africa 2009" 55, at <http://www.bowman.co.za/onlineservices/Documents/>

²⁵⁷ Bowman Gilfillan Attorneys "Doing Business in South Africa 2009" 81, at <http://www.bowman.co.za/onlineservices/Documents/>

procedures pursued during the administration of deceased estates' in the different countries'. This aspect would also require an essential further study. Although these issues are of relevance and should be given due consideration in the estate planning process, it is a topic with immense scope, and can unfortunately not be incorporated in this work.

Consequently, the relevance of this study for estate planners is the recognition and clarification of the differences and similarities which pertain to the different mineral law dispensations. It is evident that it will prove beneficial to an estate planner to take sufficient cognisance of local and foreign legislation pertaining to mining, minerals and the taxability of the interests held.

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LIST OF ABBREVIATIONS

Art: Article

MPRDA: *Mineral and Petroleum Resources Development Act 28 of 2002*

MTRA: *Mining Titles Registration Act 16 of 1967*

MTRAA: *Mining Titles Registration Amendment Act 24 of 2003*

SADC: Southern African Development Community