



MOIRA MUKUKA

LEGAL PRACTITIONERS

**Beneficial Ownership to Come Under
Scrutiny for Mining Right Holders in Zambia**

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The Ministry of Mines and Minerals Development (the “Ministry of Mines”), on 23 February 2022, imposed a 30-day suspension on the issuance of mining rights. The suspension has now been extended by 14 days, after which there will be no further extension. According to a statement by the Minister of Mines and Minerals Development (the “Minister”), new issuance of mining rights will commence on 11 April 2022. The moratorium was introduced by Government to facilitate an audit of the Mining Cadastre Department, which is responsible for issuing and administering mining rights under the Mines and Minerals Development Act No. 11 of 2015 (the “Mines Act”).

The statement by the Minister raises several issues for both prospective and existing licence holders to consider:

- 1) DISCLOSURE OF BENEFICIAL OWNERSHIP**
- 2) LINKAGE OF THE MINING CADASTRE SYSTEM TO OTHER GOVERNMENT DATA BASES; AND**
- 3) INTRODUCTION OF RESTRICTIONS (THROUGH A STATUTORY INSTRUMENT) ON THE NUMBER OF ACTIVE MINING RIGHTS THAT CAN BE HELD BY A SINGLE BENEFICIAL OWNER.**

DISCLOSURE OF BENEFICIAL OWNERSHIP

To be eligible to hold a mining right under the Mines Act, an applicant must be registered or incorporated as a company in Zambia.

The Companies Act, No. 10 of 2017 (the “Companies Act”) requires shareholders to disclose and the company to maintain a register of beneficial ownership of shares. The register of beneficial ownership of shares must also be maintained with the Registrar of Companies at the Patents and Companies Registration Agency (“PACRA”), and the Registrar of Companies must be notified by the company of any subsequent changes in beneficial ownership.

Further, any changes in shareholding of a mining rights holder which amount to a change in control require consent of the Minister under the Mines Act, although this does not extend to changes in beneficial ownership. Therefore, one of the issues that the Minister may have

to consider, when granting or rejecting consent for a change of control in a mining right once the restrictions come into force, will be the number of mining rights the transferee beneficially holds, and whether they comply with the restrictions to be imposed by the Statutory Instrument. Prior to the 2017 Companies Act, there were no specific legal requirements regarding disclosure of beneficial ownership.

At present, the disclosure of beneficial ownership of a mining rights holder is made at the point of application for the mining right. An application for a mining right is accompanied by, a certified copy of the Application for Incorporation form (“Companies Form 3”), which for Companies incorporated after the 2017 Companies Act came into force, contains a list of the beneficial owners of the company at the time it was being incorporated.

However, any changes in the shareholding information, including beneficial ownership information, after incorporation is not reflected in Companies Form 3, which serves a more historic purpose. A more accurate representation of shareholding information may be found in the electronic printout obtainable from PACRA. While the information about a company available through the PACRA electronic data base is more up to date, it may not always be accurate, as updates to the electronic records are sometimes delayed, in which case the company may need to prompt PACRA.

Prospective and current licence holders will therefore have to ensure that the information regarding the beneficial ownership of the company is accurately recorded and disclosed in accordance with the requirements of the Companies Act.

THE PACRA DATA BASE AND BENEFICIAL OWNERSHIP TRANSPARENCY

The Mining Cadastre system is to be linked to other Government data bases to ensure that mining right holders are registered in Zambia. Linking the Mining Cadastre system to other Government data bases, such as PACRA will therefore introduce transparency in determining beneficial ownership of mining rights, as well as to ensure that applicants and holders of mining rights are incorporated in Zambia, as required by the Mines Act.

Stakeholders in the mining sector such as the Zambia Extractive Industries Transparency Initiative (ZEITI) have long been advocating for beneficial ownership transparency. While uncovering the real owners of mining rights brings many benefits for the country such as elimination of corruption in the mining right allocation process and speculation over mining rights at the expense of real investment in exploration, there will be need to put in place mechanisms to ensure accuracy and reliability of beneficial ownership data.

THE LANDS AND DEEDS REGISTRY DATA BASE

Other than PACRA, it will be interesting to see which other Government data bases will be linked to the Mining Cadastre system. An important data base that should be considered is the Lands and Deeds Registry data base, under which land rights are registered and recorded. Mining rights and surface or land rights are currently administered under separate legislation and systems. Therefore, at present, it is not possible for prospective license holders to determine the existence of surface rights over a mining rights area, and vice versa, using the Mining Cadastre system only or the Lands and Deeds Registry system only.

Currently, a prospective licence holder is faced with the burden of conducting searches under both systems as well as undertaking an on-site survey to determine the extent of land over which a mining right exists or should be created. Thus, integration of these two systems may improve efficiency and transparency in the identification of surface rights by both prospective and existing licence holders.

Linking the Mining Cadastre system to the Lands and Deeds data base or system, will also curb the vice of hoarding and speculation over surface rights that are the subject of mining rights.

LIMITATION ON THE NUMBER OF MINING RIGHTS THAT CAN BE HELD BY THE SAME BENEFICIAL OWNER.

While the Mines Act restricts the grant of mining rights to companies that are not incorporated in Zambia, it does not restrict the number of active mining rights a beneficial owner can hold at a given time. However, the Minister is empowered by the Mines Act to make regulations for the better carrying out of the provisions of the Mines Act. According to the Minister, the current trend of individuals holding or being beneficial owners of as many as 50 licences, is hindering effective investment in the mining sector. Many licences are believed to be

held by speculators who may have no intentions of making any real exploration expenditure over their licence areas.

ACCRUED RIGHTS

It is not clear at this point what the parameters for the restriction on the number of active mining rights a beneficial holder can hold will be with respect to existing mining rights, or whether affected beneficial owners in breach of the new restrictions will be given a transitional period to comply or divest their interests in the affected mining rights. Licence holders that are in good standing with the licence conditions may enjoy accrued rights under the Constitution and should not be affected by retrospective application of the new restrictions. However, it remains to be determined from the Statutory Instrument, once issued, how mining rights holders with licences that are in good standing but exceeding the prescribed number will be dealt with.

WHAT DOES THIS MEAN FOR HOLDERS OF EXISTING MINING RIGHTS

License holders can ensure that the beneficial ownership information is up to date and accurate. It is yet to be seen whether the restriction will apply retrospectively. If that will be the case, it would raise potential infringements of accrued property rights and may be open to challenge.

WHAT DOES THIS MEAN FOR PROSPECTIVE INVESTORS IN MINING RIGHTS

Prospective licence holders must ensure that they are registered or incorporated as a company in Zambia. The restrictions will mean that more areas will become available for investors as speculative holding of licences will be curbed.

Other options available to licence holders and prospective license holders and steps which they might take to protect their interests, should they be captured under the restrictions, will largely depend on the nature of the restrictions to be contained in the Statutory Instrument once issued.

Look out for more of our updates on the regulatory changes to come and industry opportunities in the mining sector in Zambia. Please contact Sharon Sakuwaha on sharon.sakuwaha@moiramukuka.com or Muchinda Muma on muchinda.muma@moiramukuka.com for more information.



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