DE BEERS
A DIAMOND IS FOREVER

# DE BEERS CONSOLIDATED MINES LIMITED

## Comments to the Parliamentary Portfolio Committee on the Mining Titles Registration Amendment Bill, B24-2003

May 2003

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**TO**

**THE PARLIAMENTARY PORTFOLIO COMMITTEE**

**ON**

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## LIST OF ABBREVIATIONS

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|---|---|---|
| The Bill | : | The Mining Titles Registration Amendment Bill, B24-2003 |
| DRA | : | Deeds Registries Act, 1937 |
| LSA | : | Land Survey Act, 1997 |
| MA | : | Minerals Act, 1991 |
| MPRDA | : | Mineral and Petroleum Resources Development Act, 2002 |
| MRA | : | Mining Rights Act, 1967 |
| MTRA | : | Mining Titles Registration Act, 1967 |
| PSA | : | Precious Stones Act, 1964 |

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## 1. INTRODUCTION

De Beers thanks the Parliamentary Portfolio Committee for having afforded it the opportunity to comment on the above Bill (*"the Bill"*). De Beers' comments will take the form of raising matters of principle which are concern to it. It commented to the Department on the draft Bill and to the Portfolio Committee on the draft Bill published on 31 March 2003. The present comments are made in response to the invitation published on 9 May 2003 and are an updated version of the previous comments, taking into account the changes which appear in the Bill.

## 2. NON-DEREGISTRATION AND CONTINUED ABILITY TO CONDUCT REGISTRATIONS AT THE MINING TITLES OFFICE AND THE DEEDS OFFICE DURING THE TRANSITIONAL PERIOD PROVIDED FOR IN SCHEDULE II TO THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT, 2002

The issue which caused concern both in the Parliamentary Portfolio Committee

itself and in the press when the draft Bill was introduced by the Department to the Committee was that the intention seemed to be that the Bill would commence operation immediately on commencement of MPRDA and would not be subject to the transitional arrangements in schedule II MPRDA. That would have the effect that no registrable dealings (such as transfers, cessions, leases, bonds and so on) could be concluded after commencement of the Bill (once enacted). Concerns were also raised that due to the founding provisions in MTRA being repealed by the Bill, the effect would be to bring about an immediate deregistration of old order rights, notwithstanding that in terms of schedule II such deregistrations are to occur only on conversions occurring in terms of schedule II. Those concerns also now apply in respect of the proposed repeal of the founding provisions of DRA in clause 52 read with the schedule in the Bill. Similarly, in the comments submitted by the Chief Registrar of Deeds to the Parliamentary Portfolio Committee prior to enactment of MPRDA, he said :

*"... the relevant sections of the Deeds Registries Act constitute the legal basis for the existence of ... old order rights"*.

and

*"... it must be pointed out that the Bill does not spell out what, from a Deeds Office point of view, the implications of the envisaged Act would be in relation to dealings with rights that are registered in the Deeds Office"*.

De Beers notes with regret that its comments in the above regard have not resulted

in positive amendments in the Bill. Clause 12, which proposes to amend s12 MTRA, still indicates that the existing registers will remain in use only until the new registers necessary for the implementation of MPRDA are opened. Such opening will need to occur immediately on commencement of MPRDA so that the old registers would not remain in use beyond such commencement. Due to the transitional arrangements in schedule II MPRDA, the old and the new registers will need to remain in use concurrently during the transitional period. Clause 53 still indicates that the Bill (once enacted) will commence operation simultaneously with commencement of operation of MPRDA, and does not contain wording such as that in s110 MPRDA, that such commencement is subject to schedule II MPRDA. In fact, the Bill goes further than did the previous drafts in that regard, in now in clause 52 read with the schedule in the Bill, proposing that the founding provisions in DRA which deal with registrations of mineral rights, mineral leases and prospecting contracts in deeds offices, also be repealed immediately on commencement of operation of the Bill (once enacted), namely by virtue of clause 53, on commencement of operation of MPRDA. Again, unlike s110 MPRDA, clause 52 is not subject to schedule II MPRDA. This would have the effect that registrations of mineral rights and related transactions provided for in DRA would also cease immediately on commencement of MPRDA. That is not consistent with the transitional arrangements in schedule II MPRDA. Notably in terms of schedule II, old order rights will continue in force for specified periods of up to five years from commencement of MPRDA, subject to the terms and conditions under which they were granted. Such terms and conditions insofar as both common law and statutory old order rights are

concerned, in the vast majority of cases include continued registration and registrability, transferability, and the other registrable dealings such as by way of prospecting contracts, mineral leases and tributing agreements.

De Beers points out that cessation of ability immediately after commencement of the Bill (once enacted) to procure registrations is contrary to the objects of MPRDA. For example, De Beers has been concluding empowerment transactions in accordance with such objects. These transactions require to be implemented by registrations at the Mining Titles Office and at the Deeds Offices, and will need to continue during the transitional period until De Beers' existing rights are ultimately converted into new rights. De Beers' endeavours to promote mineral development and hence advance and indeed maintain employment and welfare, in accordance with the objects of MPRDA, will also be impeded in that it will not be able to conclude or implement the day to day transactions, such as purchase and sale of prospecting and mining operations, and acquisitions and disposals of prospecting, mining and mineral rights, which are an integral ongoing part of the process of mineral development. De Beers is also of the view that due to the above consequences of the Bill, the Bill does not give effect to the objects in s2(g) and in item 2(a) in schedule II, MPRDA, of providing for security of tenure in respect of prospecting and mining operations; or to the object in item 2(b) in schedule II MPRDA of giving holders of existing rights the opportunity to comply with MPRDA.

Among the precious stones rights which will be adversely affected by the Bill's

proposals are De Beers' common law prospecting, mining and mineral rights relating to precious stones, and the forms of statutory mining rights referred to in s5(2) and 56 MTRA (both read with ss21, 72, 74 and 121, PSA), and which relate to mining leases in respect of precious stones in the sea or in alluvial on State land, mining leases relating to non-alluvial precious stones mines, leases of the State's interest in non-alluvial precious stones mines, and to owner's and discoverer's certificates.

**De Beers accordingly urges that clauses 12, 52 (read with the schedule) and 53 in the Bill be amended to avoid immediate deregistration of old order rights and to permit registrations of existing old order rights and of transactions relating thereto to continue during the transitional period.**

## 3. REGISTRATION OF PROSPECTING RIGHTS AND MINING RIGHTS

De Beers supports the provisions in MPRDA (such as those in ss5(1), 11, 19(2)(a) and 25(2)(a) and in items 6(5) and (6) and 7(5) and (6) in schedule II) that prospecting rights and mining rights are real rights capable of registration. It is of the view that of cardinal importance in the Bill is therefore the registrability of prospecting rights and mining rights in themselves. This is dealt with in general terms in clause 2 of the Bill (which proposes to bring about necessary amendments to s2 MTRA). However, insofar as the substantive legislation (such as PSA and MRA) did not sufficiently provide the detail in regard to the relevant registrations, this needed to be done in MTRA. So for example, PSA did not

comprehensively deal with aspects of registration and in fact in s121 PSA contemplated that registrations would occur in the manner provided by any applicable law. Accordingly in various parts of MTRA (such as ss5(1)(v), 5(2), and 56) MTRA, special provisions were made relating to the registration of certain rights in respect of precious stones. Those rights were prospecting leases and prospecting and digging agreements, mining leases in respect of precious stones in the sea and in alluvial on State land, mining leases relating to non-alluvial precious stones mines, leases of the State's interest in non-alluvial precious stones mines, and owner's and discoverer's certificates.

**De Beers submits that because MPRDA similarly does not contain detailed provisions in regard to how registrations of prospecting rights and mining rights are to occur, it is necessary for such detailed provisions to appear in MTRA. De Beers submits that since the new forms of mining right bear similarity to existing mining leases, a provision along the lines of s49 MTRA, which relates to mining leases, should be inserted into MTRA by the Bill, and which provision could deal not only with mining rights but also with prospecting rights. Since prospecting rights and mining rights are of such cardinal importance in MPRDA, De Beers submits that the detail of registrations in regard to them should appear in MTRA itself and not be left to regulations.**

4. **DIAGRAMS AND PLANS**

In clause 1 of the Bill, definitions of *"diagram"* and of *"plan"* are provided. The definitions which are now in the Bill have been adjusted from those which appeared in the draft Bill and De Beers thanks the Department for having given effect to its comments in that regard. The definition of *"diagram"* now accords with that in LSA and refers to registration of real rights. The definition of *"plan"* refers to prescribed sketch plans or locality plans defining the area for *inter alia* prospecting, reconnaissance and retention.

De Beers supports the Bill's proposals that the area granted under mining right should need to be depicted on a diagram as contemplated in LSA, as was the case in terms of ss63, 64 and 65 PSA in regard to proclaimed non-alluvial precious stones mines and proclaimed mining areas, and agrees that that is preferable to the requirement of mere sketch plans as were required in terms of ss13(3) and (6), 14(3) and (4), 23, and 37(1) and (2) PSA in respect of alluvial claims and proclaimed alluvial diggings read with the dispute resolution mechanism in s48 PSA and with the pegging and beaconing regulation in chapters III and IV of the Regulations which were made in terms of s125(1)(f) to (j) PSA.

However, due to the lack of substantive registration provisions in MPRDA and also in the Bill as described in 3 above, the manner of and requirements for use of diagrams for mining rights and transactions (such as subdivisions, leases, subleases, contracts and servitudes) relating thereto, and the manner of and requirements for use of plans for prospecting rights, reconnaissance permits,

retention permits and mining permits, and transactions (such as partial abandonments and in the case of prospecting rights such as subdivisions, leases, subleases, contracts and servitudes) relating thereto, are not evident from the Bill.

**Although these aspects could be dealt with in Regulations, the draft Regulations have not been made available by the Department so that De Beers cannot but comment that in the Bill itself, provision is not made for these aspects. In any event, insofar as prospecting rights and mining rights are concerned, these aspects are of such importance that De Beers submits they should be in MTRA itself and not merely in the Regulations.**

**Furthermore, since the definition of *"plan"* includes reference to prospecting, the definition of diagrams, which refers to *"real rights"* (which term by virtue of s5(1) MPRDA includes prospecting rights) should be amended expressly to exclude prospecting rights .**

It seems to De Beers that LSA will also need to be amended to provide for the diagrams envisaged in the Bill. De Beers points out that ss46 and 47 of the repealed Land Survey Act, 1927 made reference to diagrams necessitated by mining legislation and that the diagrams envisaged in the abovementioned ss63, 64 and 65 PSA in regard to proclaimed non-alluvial precious stones mines and proclaimed mining areas fell within those provisions. No provisions similar to ss46 and 47 of the repealed Land Survey Act, 1927 however appear in the current LSA. De Beers also in that regard notes that, understandably, in terms of schedule

I MPRDA, all the relevant provisions in LSA which relate to mineral rights, will be repealed, although such repeal will in terms of s110 MPRDA occur subject to the transitional arrangements in schedule II MPRDA. However, this again gives impetus to De Beers' suggestion that **LSA will need to be amended to insert new provisions in place of these repealed provisions.**

5. **LEASES OF STATE'S INTEREST IN PRECIOUS STONES MINES**

Item 9(7) in schedule II, MPRDA provides that any lease of the State's interest in a mine in terms of s74 PSA which was in force in terms of s47(1)(a)(iii) MA immediately before MPRDA takes effect continues in force subject to the terms and conditions contained in the document under which it was granted or entered into. Such leases normally contained a condition whereby they could be ceded or transferred either in whole or in part or mortgaged, with Ministerial approval. Such leases and transactions relating thereto are in terms of ss 5(2) and 56(3) MTRA, registrable at the Mining Titles Office.

However, in terms of clauses 5(j) and 39 of the Bill, ss5(2) and s56 MTRA are proposed to be repealed, and there are no specific provisions in the Bill which will replace them. De Beers submits that the more general provisions (such as the amended s2 MTRA which refers to mineral titles, and such as the amended s46 which relates to leases of rights) are not appropriate or sufficient to deal with leases of the State's interest and were not intended for that purposes.

**De Beers suggests that this omission be remedied by the insertion of a definition of such leases in s1 MTRA, by a reference to such leases in the substantive parts of MTRA as proposed to be amended in terms of the Bill, and by retaining ss5(2) and 56(2) and (3) MTRA insofar as they refer to such leases.**

6. **SURFACE RESERVATIONS, PERMISSIONS AND RIGHTS**

In terms of items 9(1), (2) and (3) in schedule II, MPRDA, certain old forms of surface use reservations, permissions and rights will remain in force and they and transactions relating thereto will be registered at the Mining Titles Office. Item 9(1)(b) refers to such reservations, permissions or rights granted or acquired or deemed to have been granted or acquired in terms of s126(2) PSA. Section 126(2) PSA refers to rights acquired under prior laws being deemed to have been granted under PSA. As mentioned in the submissions both of De Beers and by the Chamber of Mines of South Africa on the bill which preceded MPRDA, reference should additionally have been made to the sections within chapters VII and VIII PSA which deal with surface use, such as ss55, 56, 58, 64, as well as s116 PSA. **At least therefore for purposes of the surface reservations, permissions or rights which remain in force by virtue of the reference to s126(2) PSA, De Beers suggests that in implementation of the provisions of items 9(1), (2) and (3), the Bill should, possibly in clause 50, provide for such registrations.** In fact, the converse seems to be implied by the proposed repeal or amendment in clause 1 of the Bill, of the definitions in s1 MTRA of *"certificate of reservation of*

*a trading site"*, *"holder"*, *"right"*, *"stand title"* and *"surface right permit"*, and by the proposed repeal in clause 5(a) of the Bill of references to stand titles, trading sites, machinery sites and surface right permits, in s5(1)(c) MTRA. It would assist if the proposed version of s5(1)(c) MTRA which appears in clause 5(a) of the Bill were amended to refer to rights granted *"or which remain in force"* in terms of MPRDA, but De Beers suggests that this topic is really one which should be dealt with separately and expressly in MTRA as amended by the Bill, in similar fashion as in item 9 in schedule II MPRDA. Also in terms of clause 39 of the Bill, s52 MTRA, which relates to stands, will be repealed. Moreover there is no provision in the Bill dealing with sites contemplated in ss56 and 64 PSA.

7. **DESTRUCTION OF OLD RECORDS**

In terms of clause 5(a) of the Bill it is proposed to amend s5(1)(a) MTRA in certain respects insofar as it relates to destruction of records of the Mining Titles Office. Section 5(1)(a) is currently subject to a proviso that the Director-General *"may with due regard to any regulations made under section 10(1)(k)"* destroy or dispose of any record which has been cancelled. Clause 5(a) of the Bill would delete the aforementioned quoted wording. The relevant current regulation is Regulation 8 in chapter VIII of the Regulations.

Regulation 8 in chapter VIII of the Regulations currently provides that any document evidencing title to any right which has been cancelled or abandoned

may be destroyed or disposed of by the Director-General whenever in his opinion and after consultation with the Director of the Archives the retention of such document is no longer necessary, provided that no diagram may be destroyed which has not been cancelled by the Surveyor-General. Due to the aforementioned deletion of the quoted words in s5(1)(a) MTRA, Regulation 8 will presumably be revoked.

The amendments proposed by the Bill will pave the way for destruction or disposal of the titles to old order rights which have ceased to exist and have been deregistered in terms of schedule II, MPRDA.

**De Beers urges that the retention of old titles is essential for resolution of disputes. For example, conversions and applications in terms of items 6, 7 and 8 in schedule II, MPRDA are dependent upon the validity of the old order right. Such validity may therefore be disputed in years to come. Also for purposes of claims for compensation in terms of item 12, recourse will have to be had to the old titles.** Furthermore, simply for reasons of history and heritage, De Beers itself retains old documents and titles which have no current validity but because they have become Africana and are worthy of preservation as such. It has recently spent large sums of money restoring a set of old photographs housed at the McGregor Museum in Kimberley for this reason. Destruction or disposal of old titles is not consistent with the objects of the National Heritage Resources Act, 1999. The titles housed at the Mining Titles Office are part of South Africa's history and heritage, and De Beers urges that they be retained as

such. De Beers therefore suggests that the Bill provide for the deletion of the proviso to s5(1)(a) and of s10(1)(k), and that Reg 8 in chapter VIII in the Regulations be revoked.

8. **MARITAL STATUS**

The Bill proposes to repeal existing provisions (such as s16 dealing with registrations of rights in the name of married persons, s18 dealing with transfers and cessions from joint estates, s28 dealing with transfers or cessions from joint estates by endorsement, s29 dealing with endorsement of deeds on divorce, division of joint estates, or change of matrimonial property system, and s30 dealing with endorsements to reflect change of marital status) requiring recital of marital status. In clause 17 of the Bill, it is proposed to amend s16(1) MTRA to provide that registrations of rights will occur only in the name of the holder *"even when such holder is married"*. **De Beers anticipates that it will be concluding empowerment transactions with natural persons. It therefore queries the advisability of not referring to marital status since this could lead to persons without contractual capacity in terms of the Matrimonial Property Act, 1984, concluding what would be invalid transactions. This will lead to uncertainty in regard to validity of registration. De Beers submits that the requirements in regard to recital of marital status be retained. This would accord with the abstract theory of registrations whereby registrations must reflect the actual legal situation, namely that like all other assets, rights granted under MPRDA will be governed by South Africa's matrimonial laws.**

9. **PARTNERSHIPS**

In terms of clause 23 of the Bill it is proposed to repeal *inter alia* s22 MTRA (and as a consequence and by virtue of clause 30(c) of the Bill, the proviso to s39(5)), which regulates how registrations affecting partnerships are to occur. De Beers anticipates that it will be concluding empowerment transactions which will take the form of joint ventures, some of which may take the nature of partnerships. De Beers understands that partnerships are in South African law not legal entities, and that because of this, special registration provisions (such as in s22 MTRA and s24bis DRA) have been designed to cater especially for them and for the legal consequences, for example on dissolution, attaching to them.

**De Beers therefore submits that it will not accord with the empowerment imperatives in MPRDA, if the registration requirements relating to partnerships were to be repealed. Such requirements provide the necessary certainty and security in regard to the identity and capacity of the partners in accordance with the law relating to partnerships. De Beers suggests that not only should s22 MTRA not be repealed, but that consideration should be given to expanding it to relate also to unincorporated joint ventures which are not partnerships.**

10. **HARMONISATION WITH THE DEEDS REGISTRIES ACT, 1937**

De Beers frequently also procures the registration of land and rights in land at

Deeds Offices pursuant to DRA. Many of the current provisions in MTRA are almost identical to, and at very least similar to, and resonate with, the corresponding provisions in DRA. The Bill will have the effect that provisions in MTRA are proposed to be repealed while similar provisions relating to land and rights in land will remain applicable in terms of DRA, and that in wording and in substance, the provisions of MTRA will drift apart from those in DRA. **De Beers submits that this would not be desirable and that the existing harmonisation between MTRA and DRA should be retained insofar as this is consistent with MPRDA.**

## 11. ACCESS TO MINING TITLES OFFICE

Clause 8 of the Bill proposes to amend s8(1) MTRA to provide that the Director-General *"may"* permit inspection of the public records at the Mining Titles Office, make copies or extracts, and obtain information. Currently, both s8(1) MTRA and the corresponding s7(1) DRA use the word *"shall"*. De Beers submits that the word *"shall"* should be retained since it is the right of public access which confers constructive knowledge of registered rights on third parties and hence confers the status of real rights on rights which are so registered.

## 12. CONCLUSION

De Beers should be grateful if the Committee could give heed to its comments and

particularly comment 2 above which De Beers believes to be very significant. It hopes that its comments will be of assistance to the Committee and will be found to be constructive. It would also like to make oral submissions when the Committee considers the Bill, and should be grateful if it could be afforded the opportunity to enable it to do so.

End