
**USE IT OR LOSE IT POLICY IN MINING – GOVERNMENT POLICY,
OR A LEGISLATIVE REALITY**

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Over the past few months, a number of mostly large scale mining entities have received notices from the Mining Affairs Board, requiring that they show cause why their mining locations should not be expropriated on account of them not being adequately worked on, or developed. There has been an outcry over these notices, particularly as the legal basis for expropriation is largely unknown, notwithstanding the legal provisions having been in existence from as far back as the promulgation of the Mines and Minerals Act (Chapter 21:05), several decades ago.

The “use it, or lose it principle” relates to the policy on the subject of mining locations not being worked, at all, or adequately worked. The background to this policy lies in Government’s efforts to expand mining revenue. The sector is required, therefore to make use of what may be deemed to be idle resources held by mining houses and others, in order to ensure that these resources are fully exploited for the benefit of the sector and the economy.

Explained loosely, the use it or lose it principle is to the effect that if one is a holder of a mining location and they have not used, or adequately exploited it commercially, then the location may be liable to forfeiture for failure to adequately work, or exploit it. This is meant to ensure that holders of mining locations do not simply hold them for speculative purposes, but actually utilise these rights for the benefit of the Zimbabwean economy.

In this article, we will address the use it or lose it principle, its applicability in terms of the relevant legislation, in particular the Mines and Minerals Act [Chapter 21:05], and the circumstances in which a miner may find themselves having to appear before the Mining Affairs Board to defend their mining rights from expropriation.

LEGAL FOUNDATIONS

One will not find the term, use it, or lose it expressly used in that form in the Mines and Minerals Act Chapter 21:05), (the Act). It is, however, a phrase which has been adopted by the Government to explain the circumstances in which mining locations may be expropriated from their lawful holders.

The provisions relating to the use it or lose it principle are found in Part XXIII of the Act under the heading Expropriation of Mining Locations Not Being Worked, or Developed. Section 319 of the Act provides for the process leading to the expropriation of an undeveloped, or idle mining location.

In order for the process to be initiated, there has to be a report that a mining location is not being adequately worked. Such a report may be made by any person in terms of section 320 (1), of the Act, which states that, ***“if any person has reason to believe that a registered mining location is not being adequately worked at all, or is not being adequately developed or worked, he may report the matter in writing to the Mining Commissioner*”**

The process, therefore, can be initiated by any person and he, or she must file a report with the Mining Commissioner, now known as the Provincial Mining Director (PMD), for that mining district. All that the report needs to state is that a mining location is not being worked at all, or it is not being adequately worked, or developed. Once the PMD (Mining Commissioner) receives such a report, he is obliged to

facilitate the generation of a report by the Government Mining Engineer on the mining location concerned as part of the investigation into the allegations made in terms of section 320(1).

Upon receipt of the Government Mining Engineer's report, the Provincial Mining Director is then obliged to refer the matter to the Mining Affairs Board. The Mining Affairs Board (MAB) is a creature of statute created in terms of section 6 of the Act and is the body mandated, amongst other things, to investigate issues of expropriation in this context.

Once the MAB has considered the report from the Government Mining Engineer it may then call upon the holder of the mining location to show cause why his mining location should be expropriated. It is at this time that the holder of the mining location has an opportunity to defend his mining location against expropriation.

The mere fact that the Government Mining Engineer may have recommended an expropriation of the location does not on its own necessarily mean that the MAB will make a ruling that the claims be expropriated. In making representations against expropriation, a holder of a mining location can rely on the provisions of section 323 of the Act, in particular that the failure to adequately work, or develop the claim was based on at least one of five exceptions provided in that section which include: -

- a) That the failure to develop or work, or adequately develop or work such location is due to causes beyond the control of the holder, which he has made every effort to overcome;*
- b) That it is the holder's intention to start or continue developing or working the location within a period of six (6) months on a scale satisfactory to the board;*
- c) That the location is essential to other mining operations being conducted by the holder and would be worked when the mine he is at present operating ceases to be productive;*
- d) That there is reasonable cause for the delay in developing or working such location or for not adequately developing or working such location;*
- e) That the location forms a series of not more than ten blocks contiguously to a main block being worked by a holder and is essential to the proper working of such main block.*

If a holder of a mining location satisfies the MAB on any one of the above mentioned provisions, then the Board is obliged not to recommend the expropriation of the mining location to the President of Zimbabwe. However, if after consideration of these representations, the Board is not satisfied that the holder of the mining location has met any of these exceptions, then it will recommend to the President that the mining location concerned be expropriated.

It is important to note, however, that even if the Board makes a recommendation for the expropriation of the mining location concerned, the President may require the Board to conduct further investigations. In that event, the MAB must afford the holder of the mining location a further opportunity to make representations as to why the expropriation order should not be granted. At the same time, the President is obliged to afford the holder of the location an opportunity to make further representations as to why the expropriation order should not be granted. A failure to do so by the President may render any decision made by the President to confirm the recommendation to expropriate the claims invalid as the

provision relating to the holder of location being granted a further opportunity to make representations is peremptory in its nature.

If, however, following such representations before him, the President is of the opinion that the mining location is not being worked at all, or adequately developed, then he may make an order declaring that such mining location be expropriated and the said order shall be published in the Government Gazette and a copy thereof sent to the holder of the expropriated mining location and the Provincial Mining Director for the mining district in question. Once expropriated the mining claim must be transferred to the Minister of Mines and Mining Development who will then hold the mining location in question. The Mining Affairs Board may sell such expropriated mining location on such terms and conditions as it deems fit to any other third party post its expropriation by the President.

CASE FOR LARGE SCALE MINING HOUSES

The use of these provisions have presented a number of difficulties for large scale mining entities which hold vast numbers of mining rights. Large scale mining by its very nature requires the mining houses concerned to hold a vast number of mining locations as part of their development plans, to ensure long term sustainability and viability of their operations. Indeed, this is the only way to justify their massive investments. In a number of instances, the mining rights held form the basis upon which the mining entities raise capital on international markets to be able to fund and sustain their development programs. As a result, though a mining house may be working on a specific set of mining locations, other mining locations which may not be worked at a specific time will, therefore, be at risk of expropriation given the above mentioned provisions.

It is, therefore, important that all mining houses ensure that at all given times, the Ministry of Mines and Mining Development is aware of their development plans which explain how the mining location, which may not necessarily be under exploitation at a particular time, will be worked as part of the life of mine work programme. This is specifically provided for in section 323 (c) of the Act, which deals with the exceptions against expropriation, particularly that the mining location is essential to other mining operations being presently conducted by the holder when the mine he is at present operating ceases to be productive. By this provision, mining houses should be able to defend their mining locations against expropriation on the basis that the said claims are an integral part of the mine as they would be providing much needed ore and resource once the current workings have been exhausted.

At the same time, experience has shown that a number of the reports filed with the local Provincial Mining Directors alleging that a mine is not be adequately worked or developed, are in actual fact filed by local members of the public in which those mining locations are located. This may also be evidence of poor relations between mining entities and the communities in which they operate. If local communities appreciate the value which the mining entities bring to their communities, it is highly unlikely that they will seek to have any of their mining locations expropriated in the hope that new investment will come into the local economies from other investors.

In summary, the Government's policy is supported by the provisions of the law and it is, therefore, the responsibility of every holder of mining rights to ensure that they utilise the resources that they hold for

the benefit of the economy. Miners should ensure that the Ministry is in possession of the development and work plans showing how the resources are to be exploited over a period of time as this will ensure that the mining entities are able to protect their rights from expropriation, in the event of there being any delays in the working of any mining rights.

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