



The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa

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Inauguration of the new political dispensation in South Africa in 1994 initiated a dynamic shift in the ownership, management and development of the country's affluent mineral heritage. The process of substituting the old South African regime with a new equitable system started soon after the 1994 election of the African National Congress (ANC) to parliament. The Congress's Freedom Charter revealed the intent of the new dispensation when it called for radical transformation of mineral development. However, since then there have been important changes affecting the rules of mineral development. These are:

- ▶ A drastic change in politics ushered in by negotiation, a spirit of reconciliation and a desire to settle disputes peacefully
- ▶ The globalization of the South African mining industry in tandem with the opening of domestic mineral resources to foreign capitalists and
- ▶ The introduction of sustainable development as a holistic approach to mineral development in order to replace traditional narrow-minded environmental management.

Each of these significantly shaped the new mineral investment environment of South Africa. This paper represents a summary of the historical developments leading to the current Mineral and Petroleum Resources Development Act No. 28 of 2002, its regulations, the much publicised Broad-Based Socio-Economic Empowerment Charter, its associated Scorecard, and the Draft Royalty Bill.

Introduction

South Africa stands at the dawn of a new era in its history. With the coming to power of a democratically elected African National Congress (ANC) political alliance government, a period of considerable flux in respect of mineral policy and its supporting legislative documents commenced. The impact of recent movements in gold and platinum prices, linked to the sustained growth in demand for other mineral commodities, are clearly visible in the national economy*. Essentially, South Africa remains a minerals-based economy.

This calls for a responsible attitude of all stakeholders, so that the store of mineral wealth can be unlocked for the benefit of all concerned. The process of shaping the new investment framework was extremely complex

because of the diverse range of stakeholders, their conflicting viewpoints and, most importantly, the dynamics of the continual shifts in the negotiation powers of the two main stakeholders during the bargaining process. Party-political and ministerial eagerness to address past imbalances were often regarded by industry as unjust intervention during the process of developing a mineral policy framework acceptable to all role-players. One must appreciate the dynamics of the process in a global context in order to fully understand the significance of the outcome.

In contrast to the South African situation, the bargaining powers rest internationally strongly in favour of the investor, the supplier of capital. The reason for this is the important role capital plays in today's world economy. Capital has become so important that the global economy is constantly converting non-renewable resources such as minerals into reproducible capital that can be mobilized for other purposes.

South Africa's policymakers had the rare, but enormously responsible opportunity to rewrite the country's mineral development rules. Long-term, stable and workable solutions could not be traded for radical decisions, which had short-term appeal to the electorate. Mineral rights ownership and black economic empowerment were at the heart of this process. Under historic legislation the

*The profitability ratio for the mining and quarrying industry has increased by 100 per cent since 1997 (Statistics South Africa, 2001). National accounts reported a growth of 79 per cent in exports for the same period, which resulted in a trade surplus for the country (Statistics South Africa, 2002 and South African Reserve Bank, 2003). These indicators demonstrate the direct impact mining has on the well-being of all South Africans.

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holder of mineral rights, as the possessor of the title, was and for the interim still is, entitled to some form of compensation when minerals covered by these rights are removed or depleted by another party. Possibly, this consideration payable to the holders of mineral rights, as well as the perception that public ownership offers limited security of tenure, caused some nervousness during the bargaining process.

This paper is a review of the political, legal and economic events that had a significant impact on the changes in South African mineral policy following democracy in 1994.

Events sculpting South Africa's new mineral and petroleum legislation

In order to fully understand the evolution of mineral law in South Africa, one must examine the mineral history from the time the Dutch colonized the Cape in 1652 up to the time when the country held its first democratic election in 1994. Cawood and Minnitt (1998) described these historic events and the reader is referred to that description for a better understanding of the issues. This paper serves as an update of that article and covers the events up to the release of the Draft Regulations Under the Mineral and Petroleum Resources Development Act No. 20 of 2002, and the Scorecard for the Broad-based Socio-economic Empowerment Charter for the South African mining industry. What follows is a description of the events as they unfolded in chronological order.

The 1955 African National Congress (ANC) Freedom Charter

Disillusioned by colonial rule that left the indigenous peoples without voting rights and condemned to a life of poverty, the ANC proposed a national conference to 'draw up a Freedom Charter for the democratic South Africa of the future' (*Reader's Digest*, 1995). This 'Congress of the People' was an extraordinary meeting and gave birth to a document that had a profound impact on the domestic investment environment, 'The Freedom Charter'. It consisted of ten clauses introduced by a preamble calling for a government to reflect the political will of all South Africa's people. The importance of mining is clearly visible in the Freedom Charter and five of the ten clauses have been incorporated in one way or another in the current minerals legislation. These are:

- 'The people shall govern
- All national groups shall have equal rights
- The people shall share in the country's wealth
- The land shall be shared among those who work it, and
- All shall be equal before the law.'

The 1955 vision of the Freedom Charter was aimed at reclaiming the wealth and political power from the white minority and empowering the black majority by nationalizing key industries such as the mining, banking and industrial sectors. It envisaged the redistribution of land and wealth through significant government intervention.

The 1994 Reconstruction and Development Programme (RDP)

The ANC used the Reconstruction and Development Programme (1994) document as the manifesto in its election

campaign, which stated the following with regard to mineral development:

'The current system of mineral rights prevents the optimal development of mining and the appropriate use of urban land. We must seek the return of private mineral rights to the democratic government, in line with the rest of the world. This must be done in close collaboration with all stake-holders.'

The main thrust behind this view is the notion that a mineral resource is a national asset, which should be developed for the benefit of all the citizens of a country. In practical terms it implies that ownership of all minerals must vest in the state on behalf of the people and that the users of mineral rights (mining companies) must pay rent to the state (the agent of the people).

The 1994 election of the ANC government

The historic 1994 election was the first truly democratic voting process ever held in South Africa. The ANC was the clear favourite to win the election, which gave the party the opportunity to introduce the principles of the Freedom Charter as they appeared in the RDP document, which ideology had by then become the political will of the majority. Despite some isolated incidents of violent acts by extremists, a relatively peaceful transition followed, during which time extensive negotiations took place in order to secure a peaceful outcome.

The 1995 view of the Chamber of Mines of South Africa

During 1995, the Chamber of Mines (1995) compiled a document on behalf of the owners of the domestic mining industry in which it argued that security and continuity of tenure, associated with a system of rights that allowed for both private and state mineral rights ownership, have enabled the effective utilization of South Africa's unique mineral resources. The owners argued that it would not be fair if mineral rights were transferred from existing owners to the state or new investors, given the original cost of acquisition. In its response to the release of the Chamber of Mines document, Urquhart (1995) neatly summarized industry's position by reporting '...the mining industry employers called for government intervention to be limited, and for policies on mineral rights, minerals beneficiation and other areas to remain unchanged'.

The 1995 Mineral Policy Process Steering Committee

In an effort to accelerate the process, Minister R.F. Botha, holder of the Mineral and Energy Affairs portfolio at the time, convened a meeting of all stakeholders on 24 April 1995. The Mineral Policy Process Steering Committee, a tripartite committee comprising representatives of business, labour and government, was established to manage the formulation process. The Committee released a discussion document in November 1995. In the chapter on resource management, the document considered the issues relevant to mineral rights and security of tenure. Among other things, the following policy proposals were listed:

- 'Mineral rights must be returned to the state and a system of state-held mineral rights, which are leased to companies, be introduced'; and
- 'The freezing or sterilising of mineral resources in

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areas of privately owned mineral rights should be discouraged by the imposition of a mineral rights tax...'

The 1996 Constitution of South Africa

This Constitution (1996) is the product of extensive political debate before and after the election. As the supreme law of the country, no other policy document or law may contradict it as it provides the fundamental pillars on which the Mineral Policy (1998) rests. Chapter 2 of the Constitution deals with fundamental rights, such as property, an essential precondition for mine development. A property right gives better security of tenure to mine developers than any other legal right, such as agreements, authorizations and licences. Because of the scale of investment, especially for deep mine development, it is important for investors to ensure that security of tenure is guaranteed. Furthermore, investors must be reassured that mining can proceed without policy uncertainties, which can be regarded as threats in the form of expropriation, groundless claims by indigenous groups, and new taxes. The Constitution states that:

- ▶ 'No one may be deprived of property...' and
- ▶ 'Where any rights in property are expropriated, such expropriation may only continue if it is in the public interest and owners are compensated for any losses.'

Despite this assurance, provision was made for land reform to ensure equitable access to all South Africa's natural resources. Section 39 of the Constitution deals with interpreting the Bill of Rights. It states that when interpreting the Bill of Rights, the interpreter must consider international law. This stipulation opened the door for implementing the ideology of the RDP document. For some years the United Nations have promoted the concept of National Sovereignty Over Natural Resources (NSONR), to the extent that it skewed international law in this direction (Barberus, 1998).

Chapter 2 of the Constitution also provides for restitution of land rights claims. A person or a community could claim restitution of a right to land if they were dispossessed of their rights based on racial discrimination after 19 June 1913. Subsequent events led to the establishment of a Commission on Restitution of Land Rights, which is responsible for:

- ▶ Investigating the merits of any claims
- ▶ Mediation and settlement of disputes arising from claims
- ▶ Administering the Restitution of Land Rights Act No. 22 of 1994, and
- ▶ The establishment of a Land Claims Court for the purposes of handling disputes on restitution, communal land rights and security of tenure matters.

The land policy shows some foresight in avoiding Zimbabwe-style land grabs by dealing with it in a responsible way before political stability at grassroots level is affected.

The Constitution contains several clauses affecting black economic empowerment (BEE), both directly and indirectly. To give an indication of its importance, the preamble of the Constitution starts with 'We, the people of South Africa, recognize the injustices of our past'. The preamble continues by explaining the importance of improving the quality of life of all citizens. According to the Bill of Rights, all people are equal and, in order to promote the achievement of equality,

government may take legislative action in order to protect persons disadvantaged by unfair discrimination. A flurry of acts governing employment equity and empowerment of historically disadvantaged persons have been promulgated since 1996 in order to give effect to this clause. The Mineral and Petroleum Resources Development Act is one of these[†]. This need for change is amplified by some depressing socio-economic indicators, most noticeably high unemployment, a comparatively low human development index, and a consistent increase in HIV/Aids infections. The following statistics published by the World Bank (2001) and Statistics South Africa (2002) give an indication of the socio-economic backlog of the country:

- ▶ 16 per cent of adult woman are illiterate
- ▶ 36 per cent of the population live on less than US\$2 per day
- ▶ 5.8 million people do not have access to clean drinking water
- ▶ 25 per cent of males between the ages 15 and 24 are HIV positive
- ▶ 10 per cent of people aged 18 and above had not attended any form of schooling.

Considering the above statistics, social change is therefore not an option. Frankly stated, it is a matter of life or death in some areas of South Africa. It therefore features high on the priority list for change in South Africa. Because the mineral policy must support national objectives, one would expect social issues to be LSO visible in the minerals investment environment. Investors generally have a different agenda. Although sympathetic to social issues, they are more concerned about stable political and legal frameworks, security of tenure, and return on investment when deciding on where to invest their capital.

The 1997 Green Paper on a Minerals and Mining Policy for South Africa

The Green Paper (1997) was released for public comment on 3 February 1998. The Green Paper provided a clear statement of intent with regard to mineral rights ownership in the following policy proposals:

- ▶ 'Government's long-term objective is for all mineral rights to vest in the State'
- ▶ 'Government will promote minerals development by applying the use it or lose it principle' and
- ▶ 'The right to prospect and to mine for all minerals will vest in the State'.

The 1998 White Paper on a Minerals and Mining Policy for South Africa

Cabinet approved the new White Paper on a Minerals and Mining Policy (Mineral Policy, 1998) for South Africa on 23 September 1998. As expected, exclusive state ownership of mineral rights was therefore the first significant proposal. How the actual transfer of mineral rights from the present mix of private and state ownership to the state was to be

[†]Other examples are the Preferential Procurement Framework Act No. 5 of 2000, the Employment Equity Act No. 55 of 1998, the Competition Act No. 89 of 1998 and the Skills Development Act No. 97 of 1998.

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initiated, was left for the Minerals Development Bill, which was to follow the White Paper. Ultimately the law determines the definition of property rights as well as the degree of exclusivity, transferability and enforceability associated with these rights. With regard to the administration of mineral properties, the Mineral Policy adopted the principle of 'use it or lose it' in an attempt to open access to undeveloped mineral rights. Concerning mineral rights, the policy states that government will:

- Ensure security of tenure in respect of prospecting and mining operations
- Prevent hoarding of mineral rights and sterilization of mineral resources, and
- Change the current system of mineral rights ownership with as little disruption to the mining industry as possible.

The major potential source of conflict was between the existing private owners of mineral rights, who demanded constitutional protection of their properties, and a new political regime that won an election based on the expectation that mineral rights will revert to the state and be managed for the benefit of the entire nation.

BEE is the second most important proposal and is visible in the White Paper through the following policy instruments:

- Promotion of small-scale mining through a special licensing arrangement
- Access for small-scale miners to government information and technical expertise, as well as government facilitating access to finance
- Engineering a wider spread of ownership in the minerals sector focusing on BEE and the promotion of employee share ownership schemes
- People issues, such as improving the health and safety of workers, human resource development through appropriate education and training programmes, representivity of all South Africans in the appointment of staff, on-mine housing and living conditions of workers, and preserving mining employment, and
- The introduction of social plans, which are aimed to benefit the wider community.

The 2000 Draft Minerals Development Bill

The Draft Minerals Development Bill (2000) was a first attempt to legislate the vision of the Minerals Policy. It was released in December 2000 without any public or industry input. Despite being a basically sound document, it was severely criticized for the wide and open discretionary powers it afforded the Minister. The criticism resulted in the government rewriting the Bill into a more acceptable document.

The 2002 Mineral and Petroleum Resources Development Act 28 of 2002

The new Act is the product of the responses given to the State after the release of the 2000 Draft Minerals Development Bill, the Draft Mineral and Petroleum Resources Development Bill (2002) and a consultation process that included a historic meeting at Mbulwa, during which

agreement was reached between industry executives and senior state officials on most of the conflict issues. Due to its importance, the Act is discussed separately in more detail below.

The 2002 Broad-Based Socio-Economic Empowerment Charter

Its first draft, the controversial 'Proposed Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry,' dated 18 June, was leaked to the press through Miningweb on 25 July 2002. The leaked document included BEE targets for ownership in the South African minerals industry and generally dealt with four main issues, namely:

- Existing mineral and petroleum right holders have to find a BEE partner, whose stake could not be less than thirty per cent of the business
- Any new application for rights had to include a BEE partner, whose stake could not be less than 51 per cent in ten years, time
- If a mining company were unable to find a BEE partner, the Industrial Development Corporation (a parastatal) was identified as the vehicle to warehouse equity stakes until a suitable BEE partner could be found
- Greater employee benefits for those already employed.

The document did not deal with specific issues and was typical of what can be expected in a document not yet approved at executive level. Nevertheless, it provided some insight into the position of the state with regard to BEE at the time. The leaked document prompted a dramatic response by the investment community, and the negative publicity resulted in investors dumping South African mining equities. The major concern was giving control of all new mines to black business within ten years (51 per cent), as opposed to a target of 25 per cent for the petroleum industry. One should keep in mind that empowerment targets are much easier to achieve in the petroleum industry for the following reasons:

- All off-shore petroleum rights are already state-owned
- The right to mine petroleum has always been reserved to the state, and
- Most petroleum projects are either run by parastatals or contracted out on behalf of the state.

Something positive came from the negative investor response because it prompted the DME to return to the successful recipe of stakeholder consultation. This immediately led to an improvement of investor confidence. The product of this consultation process was a much-improved document released in October 2002, which gained wide support from a broad base of stakeholders. In essence, the final Charter deals with how to expand opportunities for historically disadvantaged South Africans (HDSA) in:

- The ownership of the South African mining industry
- The management of mining projects
- Employment by the South African mining industry
- Worker and community participation in the South African mining industry and
- Sharing the benefits arising from the South African mining industry.

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Blacks, communities (which will include the major labour-sending areas) and women will be the main beneficiaries, as the Charter seeks transformation in ownership, management, skills development, employment equity, procurement and rural development. The intention is to meet empowerment objectives through fair market and human rights principles. The objectives are to substantially and meaningfully empower HDSA, utilize existing skills of HDSA, expand the skills base of HDSA, develop social and economic welfare of mining communities and labour sending areas, and to promote beneficiation. Several issues are discussed in the Charter and there are undertakings by both government and industry for each issue. The most important issues and undertakings are listed below:

- *Issue 1: Human resource development*—The industry will perform a skills audit, from which a comprehensive skills development strategy will be developed. Providing scholarships for mining related education will cater for long-term needs. In the short-term, employers will provide skills training to miners during employment in order to improve their income earning capacity after mine closure. These will include training in entrepreneurial skills and a programme to ensure adult literacy and numeracy by 2005. Mentoring programmes and career paths for HDSA will be part of the new system.
- *Issue 2: Employment equity*—Companies must publish employment equity plans and achievements and establish targets for employment equity for both junior and senior management positions (recommended 40 per cent in five years, time). There will be special training programmes for HDSA and talented individuals will be fast tracked.
- *Issue 3: Migrant labour*—There will be no discrimination against foreign labour, and labour-sending areas must share in the benefits of mineral development.
- *Issue 4: Mine community and rural development*—Industry will formulate development plans for communities as part of spreading the benefits of mining.
- *Issue 5: Housing and living conditions*—Industry undertook to improve the standard of housing and nutrition for live-in employees by upgrading the current hostel system to family units and to develop home ownership schemes for all employees.
- *Issue 6: Procurement*—Procurement objectives could be achieved by giving HDSA preferred supplier status in the provision of capital goods, services and consumables and to encourage existing suppliers to form partnerships with HDSA companies.
- *Issue 7: Ownership and joint ventures*—This is arguably the most significant undertaking. The aim is to achieve 26 per cent HDSA ownership within 10 years. A programme will be initiated in order to achieve such participation, which programme must be reviewed after five years in order to ensure that the goal is reached within ten years.
- *Issue 8: Beneficiation*—In an attempt to motivate industry to grow levels of beneficiation, the DME will

allow companies to offset the value of beneficiation against HDSA ownership targets.

- *Issue 9: Exploration and prospecting*—As stated in the new Act, government will provide institutional support for HDSA.
- *Issue 10: State assets*—State assets must also comply with the Charter.
- *Issue 11: Licensing*—In order to facilitate licensing and to reduce ministerial discretion on social aspects in the granting of rights, government will introduce a 'scorecard' concept to measure empowerment.
- *Issue 12: Financing mechanism*—In an attempt to finance the 26 per cent ownership target at fair value, industry will assist in establishing a fund for this purpose within five years.

The 2002 Draft Regulations under the Mineral and Petroleum Resources Development Act

The new Act commits itself to an internationally competitive and efficient administrative regime. There are three important issues to consider when aiming at such an administration, namely:

- The integrity of the process
- The integrity of the officials administering the process; and
- The clarity of the administration.

The most efficient way of resolving the above-mentioned issues is for government to supply detailed information on the specifics of the process, the framework in which decisions are made and, finally, the boundaries within which discretion can be exercised. This information, also called 'regulatory requirements in support of the Act', forms the basis of departmental procedures and guidelines, which must be reasonable, clearly understood by both officials and investors, and allow for a sustainable and enabling environment. A draft setting out these requirements was released on 6 December 2002 for public input. The closing date for public comment was 6 February 2003 and one can expect the final regulations to be promulgated before the end of 2003.

The 2003 Scorecard for the Broad-Based Socio-Economic Empowerment Charter

This document was released in February 2003 at the annual Mining Indaba in Cape Town. The main purpose of the Scorecard is to reduce discretion during the granting of new rights and the conversion of old-order rights in terms of the new Act into new-order rights. It is aimed at empowering HDSA, increased beneficiation of mineral production, and improved reporting in the minerals industry. The name is misleading because the Scorecard is essentially a checklist covering the following nine issues:

- Human resource development
- Employment equity
- Migrant labour
- Mine community and rural development
- Housing and living conditions for workers
- Procurement
- Ownership and joint ventures

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- Beneficiation, and
- Reporting.

An overview of the new Mineral and Petroleum Resources Development Act

By merely scanning the wording of the preamble (p. 2) of this Act it becomes clear that the new Act is unlike any of its predecessors. The most noticeable difference is the incorporation of social aspects. The role of mining in local and rural development, the social upliftment of communities that have been affected by mining, and redressing the results of past racial discrimination are common themes throughout the Act. What is also new is a realization by government that its administrative and regulatory regime must not only be efficient, but also be of international standard. When the preamble to the Act is compared with that of its predecessor (Minerals Act No. 50 of 1991), three issues become apparent:

- The emphasis is on equitable access to mineral properties
- Rehabilitation has made way for the more holistic concept of sustainable development, and
- The Act paves the way for substantial and meaningful empowerment of historically disadvantaged persons.

Fundamental principles of the new Act

The objectives (p. 18) of the Act and the instruments intended to achieve these objectives, can be summarized as follows:

- To entrench the State's role as owner and custodian of South Africa's mineral wealth by changing the mineral rights system, so that all mineral rights are exclusively State owned and the government has greater authority in the granting of legal rights on mineral and petroleum properties
- To promote equitable access to mineral resources and associated geological and mining information, with an assurance that historically disadvantaged persons and companies can benefit from this information
- To promote economic growth through increased beneficiation of mineral production
- To ensure that mining contributes to rural development through employment opportunities and advancement of social and economic welfare
- To guarantee security of tenure while at the same time ensuring that mineral developers comply with the principles of sustainable development and with the 'use-it-or-lose-it' vision of the Mineral Policy, and
- To ensure that holders of rights contribute towards socio-economic programmes through the implementation of proactive social and labour plans.

From the objectives listed above, it is clear that the key issue in the Act is to balance the mining industry's ability for creating wealth from natural mineral resources with the environmental and social needs of society. The Act will engineer this balance through implementing the following strategy:

- Changing the ownership of mineral rights to a system where these are exclusively State owned

- Applying pressure on industry to benefit within South Africa's borders
- Forcing mining companies to consider the social welfare of affected people working on and living near mining operations as part of the project feasibility study, and
- Stimulating growth in the small-scale mining industry through easy access to mineral resources and information about them.

In order to achieve the objectives of the Act, the following plans are required:

- Exploration plan (or work programme)
- Financial plan
- Mining plan (or work programme)
- Social plan
- Labour plan
- Environmental plan
- Empowerment plan, and
- Marketing plan.

In exchange for the commitments cited above, industry will receive the following assurances:

- Guaranteed security of tenure
- Rights that are conditionally registrable, transferable, tradable and bondable
- Procedures
- The ability to do business in a stable local, national and southern African setting.

There is also a commitment from government that decisions taken in terms of the Act will be conducted within a reasonable time frame and in accordance with the principles of lawfulness, reasonableness and procedural fairness. Future decisions will be in writing and accompanied by reasons. These provisions address concerns about ministerial discretion and suggest that government will compile procedural guidelines based on best administrative practice.

Historically disadvantaged persons

This category of persons includes any person or community that was at a disadvantage because of historic unfair discrimination before the Constitution took effect (p. 12). The unequal distribution of wealth in South Africa is an irrefutable fact. The Act tends to correct the imbalance in economic power by expanding opportunities for historically disadvantaged persons in the minerals sector. It is aimed at achieving substantial and meaningful black ownership of, and participation in, mining projects. This latest drive towards black economic empowerment has its own problems, namely:

- Providing access to capital needed to acquire equity stakes in mineral projects and
- Balancing black economic empowerment with the urgent need for social upliftment of the broader historically disadvantaged community.

In order to address these, the Act makes provision for technical and financial assistance for disadvantaged persons (HDPs) and communities, a social plan for the wider community, a labour plan aimed to benefit labour, and a special permitting regime.

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The major mining houses have been very active in creating a vibrant black mining sector since the release of the Mineral Policy. There are many examples of industry initiatives to promote BEE, for example:

- A dedicated fund was created to provide finance for BEE executives to acquire equity stakes
- Ownership in some AngloGold operations was transferred to African Rainbow Minerals (ARM) whose lean overhead structure turned these properties into lucrative assets, and
- In the platinum sector, Goldfields opened its Northam Platinum mine to BEE by way of a joint-ownership agreement with Mvelaphanda Resources.

While BEE is aimed at increasing black participation in the ownership of mines, the social plan concept stands to benefit the wider community. The details of social plans can be obtained from the Charter and its associated Scorecard, which initiatives are discussed above. Whatever the benefits contained in the social plan, these must be as a consequence of consultation and must visibly demonstrate opportunities for HDPs. Other issues to consider are given below:

- Clean community drinking water
- First right to employment for local communities, and
- Community funds.

Discretionary powers in the allocation of rights

With regard to the order of processing mineral and petroleum development applications, the Act states that competing applications (for the same mineral and land) will be dealt with in the order of receipt (section 9). When applications are received on the same date, preference will be given to those submitted by historically disadvantaged persons. With regard to the decision whether to grant or refuse an application, the discretionary powers are limited to the acceptability of the information on hand at the time of the decision. The extent of these discretionary powers can be summarized as follows:

- The Minister must grant a reconnaissance permission, when...
- The Minister must grant prospecting rights, when...
- The Minister must renew prospecting rights once, when...
- The Minister must grant mining/production rights,

when...

- The Minister must renew mining rights for the life of the mine, when...
- The Minister must grant cession, transfer, letting and disposal of rights, when...
- The Minister may grant mining permits, if...
- Private mineral royalties may continue, when...
- The Minister may grant retention rights, even if...
- The Minister may renew retention rights, even if...
- The Minister must approve an environmental management programme, when...
- The Minister may cancel or suspend rights, upon...

Granting and renewal of prospecting rights

Section 16 explains how discretion will be exercised when deciding on the granting and refusal of (new) prospecting rights. Briefly stated, the Minister must grant the right when all the requirements are met. Upon refusal, the unsuccessful applicant must be given written reasons for the decision within 30 days. Table I compares the new order with the old order in terms of the Minerals Act No. 50 of 1991.

The 'use-it-or-lose-it' principle is clearly embodied in the administration of prospecting rights in terms of the new Act. The maximum duration for holding on to prospecting rights is eight years and there is no provision for the renewal of non-active properties. There is a commitment for easy conversion from prospecting to mining rights in the event of successful prospecting.

Granting and renewal of mining rights (sections 22–25 and 27)

Like the Minerals Act, the new Act also distinguishes between large- and small-scale mining operations. Table II compares the new rights with the old-order rights issued in terms of the Minerals Act No. 50 of 1991.

As in the case for prospecting rights, the 'use-it-or-lose-it' concept is built into the mining right regime. Whereas rights could effectively be renewed in perpetuity in terms of the old order, the new Act restricts these durations to either the economic life of the mine or five years for small-scale operations. Mining permits are intended for small-scale mining enterprises with a life of less than two years over areas not exceeding 1.5 hectares in extent. The most

Table I

New-order versus old-order prospecting rights

Old-order (1991 Minerals Act) Prospecting permit	New-order (2002 Minerals Act) Prospecting right
<p><i>Granted if the applicant had:</i></p> <ul style="list-style-type: none"> ● The technical and financial ability ● A technical prospecting plan ● An approved Environmental Management Programme (EMP) ● Permission from mineral right owner 	<p><i>Granted if the applicant has:</i></p> <ul style="list-style-type: none"> ● The technical and financial ability ● A technical and economic plan ● An approved EMP
<p><i>Duration:</i></p> <ul style="list-style-type: none"> ● Minimum of one year ● Easily renewable 	<p><i>Duration:</i></p> <ul style="list-style-type: none"> ● Maximum of five years ● Renewable once for three years

Sources: Minerals Act No. 50 of 1991 and MPRDA (2002)

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Old-order (1991 Minerals Act) Mining licence	New-order (2002 Minerals Act) Mining right
<p><i>Granted if the applicant had:</i></p> <ul style="list-style-type: none"> ● The technical and financial ability ● A technical mining plan <ul style="list-style-type: none"> ● An approved EMP ● Permission from mineral right owner <p><i>Duration:</i></p> <ul style="list-style-type: none"> ● Minimum of two years ● Easily renewable 	<p><i>Granted if the applicant has:</i></p> <ul style="list-style-type: none"> ● Successfully prospected the property ● The technical and financial ability ● A technical, economic, labour and social plan ● An approved EMP ● Complied with the requirements of the Charter <p><i>Duration:</i></p> <ul style="list-style-type: none"> ● Maximum of thirty years ● Renewable until the end of the economic life of the mine
Mining permit	Mining permit
<p><i>Issued if:</i></p> <ul style="list-style-type: none"> ● Mining on a limited (small) scale ● A technical mining plan ● An approved EMP ● Permission from mineral right owner <p><i>Duration:</i></p> <ul style="list-style-type: none"> ● Maximum of two years ● Easily renewable for two years at a time 	<p><i>Issued if:</i></p> <ul style="list-style-type: none"> ● Economic life is less than two years ● Property is smaller than 1½ hectare ● An approved EMP <p><i>Duration:</i></p> <ul style="list-style-type: none"> ● Maximum of two years ● Renewable three times for one year at a time

Sources: Minerals Act No. 50 of 1991 and MPRDA (2002)

important requirement for the granting of a mining permit is environmental, since applicants will have the same commitment as big mining business. The intention is certainly to provide easy access to small properties aimed at (mostly) previously disadvantaged persons. No social plan is required for the permit, which supports the notion that its intention is for local communities to benefit from these small deposits and thereby provide for their own livelihoods.

New rights available to investors for the first time

Previous legislation did not make provision for retention permits and reconnaissance permissions. These are discussed in some detail in this section.

Retention permits (sections 31–36)

Whereas for other rights the Minister must issue the right upon compliance, the Minister may issue a retention permit when the applicant has:

- Successfully prospected the area
- Completed a mine feasibility study
- Found that the mineral resource cannot be profitably developed under current market conditions, and
- Compiled an Environmental Management Programme (EMP).

Provision is made for ministerial discretion and to evaluate each application on merit. Retention permits may be granted for a maximum of three years and must not result in: first, an exclusionary act of any kind; second, unfair competition; or third, hoarding of rights. Retention permits are renewable once for two years.

Again the 'use-it-or-lose-it' vision of the Mineral Policy is apparent, because the maximum duration for holding undeveloped properties is thirteen years (from prospecting to the end of the retention phase). Although this duration sounds fair, it could pose problems for deep mine development and mining operations that want to secure a future long-term supply.

Reconnaissance permission (sections 13–15)

Reconnaissance permissions are meant as starting points for exploration programmes and cannot be granted in areas already encumbered by other prospecting, mining or retention rights. The requirements and salient features of this type of right are as follows:

- The applicant must have the financial and technical ability to perform in accordance with the work programme
- The programme must be achievable with realistic estimated expenditure
- Reconnaissance in respect of petroleum must not damage the environment in any unacceptable way
- Rights are valid for two years for mineral properties and one year for petroleum properties
- Reconnaissance permissions are neither renewable nor transferable
- The reconnaissance permission does not give the holder of it the exclusive right to apply for a prospecting or any other right mentioned in the Act.

General provisions pertaining to holders of rights

The new order allows for subtle differences in the adminis-

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tration of rights and permissions. Many of the changes were introduced with the intent to encourage active development of mineral and petroleum properties. It provides for a free flow of information from holders of rights to the state, which information will be important when consideration is given to the granting and renewal of rights (sections 21, 28–30). The new way of doing mining business inside South Africa can be summarized as follows:

- Legal rights granted by the Department of Minerals and Energy (DME) must be registered at the Mining Titles Office, which office will have far greater responsibilities in the recording of rights than it had under the Minerals Act. It will effectively assume some of the tasks currently performed by the South African Deeds Office
- Prospecting must commence within four months from the date the right is granted, while the corresponding duration for mining rights is one year
- Holders of rights must actively develop mineral properties in accordance with the approved work programmes and comply with the EMP, social plan, empowerment charter, as well as the terms and conditions of the right, and
- Mineral production must be benefited within South Africa or ministerial permission must be obtained to export raw production.

Suspension and cancellation of permissions, rights and permits can only be done as a result of non-compliance with the new Act or any plan submitted when the application was first made. Here again, the Act makes provision for a fair process before steps are taken to cancel or suspend legal rights (section 47).

Minerals and Mining Development Board (Chapter 5)

The new Act provides for a board to advise the Minister on strategic mineral development issues, for example to ensure that minerals are optimally developed. The Board has an important role to fulfil in establishing administrative guidelines, especially in cases where ministerial discretion is required. In line with the strong social flavour of the new Act, the holder of a mining right must notify the Board when:

- A mine has been marginal (profitability ratio of less than six per cent) for a year, and
- More than ten per cent or 500 workers are likely to be retrenched.

The Board must then investigate the socio-economic and labour impacts of the potential mine closure and advise the Minister on corrective steps, which if accepted, become obligatory to the holder of the right. The intent is to engineer a reduced socio-economic impact on both labour force and local community.

The transition from the old to the new order

The objective of the transitional arrangements (schedule ii) in the new Act is to align old order rights (or existing legal rights) with the vision of the Mineral Policy. The intentions of the transitional arrangements are stipulated in their objectives (p. 98) as stated in the new Act, which are summarized below:

- To protect security of tenure of active mineral properties
- To give holders of old-order rights the opportunity to comply with the new Act, and
- To open access to non-active mineral properties by making them available to potential mineral developers.

The new Act gives detailed definitions for old-order rights (p. 98), which definitions are summarized for the reader's convenience in Table III. Old-order legal rights can be classified under prospecting, mining or unused old-order rights. Table III shows that all privately-owned mineral rights and almost all consents, rights or permissions granted under previous legislation, whether used or not, are included in the 'old-order' category. Privately-owned mineral rights are registered property rights and therefore enjoy constitutional protection. It is not yet clear how the DME will deal with this issue. It has the potential to spark significant conflict between the legal owners of mineral rights, the DME that must administer the new Act over these properties, and prospective mineral developers who want to gain access to them. The mineral right ownership issue will most probably be referred to the Constitutional Court for a judgement in this respect.

Table III

Classification of old-order rights

Old-order mining rights	Old-order prospecting rights	Old-order unused rights
Mining lease Claim license Mining authorization Consent to mine from private MR owner Diggers' rights Rights granted in former homelands**.	Prospecting permissions Consent to prospect from private MR owner Rights granted in former homelands	Any right, entitlement or permission granted Private MR Any consent from private MR owner Diggers' rights Rights granted in former homelands
Valid on the day the new Act is enacted	Valid and active on the day the new Act is enacted	Valid but not active on the day the new Act is enacted

Source: MPRDA (2002)

**These independent states were Transkei, Venda, Bophuthatswana and Ciskei (TBVC States). The Mineral and Energy Laws Rationalization Act No. 47 of 1994 repealed previous mineral laws of the former TBVC States and self-governing territories. As a consequence, the Minerals Act was made applicable throughout South Africa.

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Conversion of old-order petroleum rights (pp. 100–102)

Holders must convert oil prospecting subleases into petroleum exploration rights before the expiry date or, alternatively, 30 June 2007, whichever is sooner. Petroleum mining leases will continue for five years, during which time they must be converted to petroleum production rights. The Minister must convert these rights when:

- All the information required for the conversion has been submitted, and
- The property was actively explored or mined, whichever the case may be, for the duration of the old-order right.

Conversion of old-order prospecting rights (for minerals)

Old-order prospecting rights remain valid for a period of two years, during which time the original terms and conditions will still apply (p. 104). Within the two-year period the holder must convert to a new-order prospecting right. In terms of the new Act, the Minister must convert these rights when:

- Applicants submit all the information stipulated in the Act, and
- The property was actively explored for the duration of the old-order prospecting right.

Conversion of old-order mining rights

As in the case of old-order petroleum mining leases, mining rights for minerals remain valid for a period of five years (p. 106). Within the five-year period the holder has the exclusive right to apply for a new-order mining right and the Minister must convert the right when:

- The applicant supplies all the information as stipulated in the Act, and
- The property has been actively mined.

Conversion of surface use rights

Valid surface rights issued in terms of the Precious and Base Metals Act No. 35 of 1908, the Precious Stones Act No. 73 of 1964, and the Mining Rights Act No. 20 of 1967, remain valid but must be registered with the Mining Titles Office within one year (p. 108). The reason for this high degree of security of tenure is that these are strong legal (freehold) rights, making them freely mortgageable, tradable and transferable.

Treatment of unused old-order rights (p. 108)

The areas encumbered by this category of rights are identified as targets for opening access to undeveloped mineralized areas. The Act does not provide much security of tenure for unused old-order rights, which only remain valid for a period of one year. Within this year, holders can apply to convert these rights to any new-order right, provided they are able to supply the information required for the conversion. Unlike other old-order rights that must be converted when all the requirements are met, the Minister may convert inactive properties.

Alternative options for holders of old-order rights

For active holders of old-order rights who want to continue

conducting business, conversion is the only sensible option. Failure to convert means automatic cession. There is also the option of claiming compensation when rights are alienated from registered owners. Many of these rights are registered as immovable property at the South African Deeds Office and enjoy constitutional protection. Therefore, fair compensation can be claimed upon their alleged expropriation. When claiming compensation, holders must submit the following information (p. 112):

- Current market value, with sufficient information to defend the value
- Proof of actual loss because of the expropriation
- Description of the right or property, for example whether or not it is registered in the name of the claimant at the South African Deeds Office
- The current use of the property
- Any state assistance received during acquisition and ownership of the right or property
- The transaction amount for which the right or property was originally purchased, and
- Any benefits, for example prospecting fees, received for the duration of the right.

The Sstate will use this information to base its decision on first, whether the claim is valid and, second, what will be equitable compensation given the circumstances. In its decision, the State must consider:

- Its obligation to redress past racial discrimination in the allocation of rights
- Its obligation to effect equitable access to mineral resources
- The spirit of the Constitution
- Whether the claimant will continue to benefit from the use of the property.

Private mineral royalties to owners of old-order mineral rights

The old system of dual private- and state-owned mineral rights allowed for mineral royalties to be payable for the benefit of their owners. As a consequence of the transfer of privately-owned mineral rights to the state, private owners will no longer be entitled to mineral royalties once all old-order rights are phased out. This is yet another potential source of conflict, especially where mineral rights were purchased at great cost. An exception is made for community mineral royalties, because these must continue for the benefit of such community. The new Act states that other mineral royalties will cease to be paid for owners' benefits, provided that recipients can prove economic hardship as a result of such discontinuation or, alternatively, such persons use the consideration for social upliftment.

An overview of the Draft Mineral and Petroleum Resources Royalty Bill

Introduction and background to mineral royalties in South Africa

National Treasury released this Bill, which provides for one to eight per cent gross value royalties (Schedule 1 of the Royalty Bill), on 20 March 2003. Before analysing the royalties in the Bill it is important to reconsider the mineral

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rights ownership system that was (and essentially still is) in place, before the enactment of the Mineral and Petroleum Resources Development Act of 2002. In its simplest form, the current system of mineral rights ownership can be explained as a mixed system of private- and state-owned mineral rights. When a mining company wanted to explore privately-owned mineral rights, it had the option to buy these rights as property and then register these at the South African Deeds Office as immovable property. When the mineral rights owner did not want to sell the mineral rights, the mining company had to negotiate a suitable royalty package directly with the owner. Apart from taxes, the State was not entitled to any form of compensation in private agreements. The role of the State was to issue and administer licences in order to ensure that prospecting and mining activities were performed in an orderly manner and that the necessary health, safety and environmental regulations were adhered to.

When the mineral rights were state-owned, permission to develop the minerals was obtainable from the State. Consequently, the mineral royalty was then payable to the State. Compensation for the development of the State's mineral resources entailed any one, or a combination, of a number of considerations. Unfortunately these were not well documented and the lack of a clear-cut policy meant that investors had to go through a lengthy process of negotiation before the type and rate of royalty payments were determined. The advantage of the system was that it gave investors the opportunity to negotiate tailor-made royalties for their particular circumstances. Royalties based on revenue ranged from one to five per cent, while profit-based royalties were usually charged at ten per cent. Although revenue-based royalties were termed revenue, its definition was closer to net smelter return, with an added incentive for beneficiation of mineral production.

Main features of the Draft Royalty Bill

The Royalty Bill is a complete departure from the way things were done in the past. Whereas the Department of Minerals and Energy (DME) had the responsibility of determining, collecting and administering royalties over state-owned mineral rights, the new regime can be summarized as follows:

- Royalty policy will be determined by National Treasury (Department of Finance)
- Royalty collections will be the responsibility of SARS (South African Revenue Services)

- Special economic investigations (e.g. on marginal mines) will be performed by the DME, and
- Economic information will be submitted to both SARS and the DME.

Chapter one proposes collection of royalties on a quarterly basis on the tradable value of the mineral resource. Although the amount on which future royalties would be calculated is referred to as 'gross value', it is in fact a modified net smelter return-type royalty, because its definition allows for the deduction of transport and insurance costs. Net Smelter Return (NSR) income means gross value minus processing, refining, transport from the mine to the point of sale, handling fees, insurance, sampling and assaying during transport and marketing costs. The rates in Schedule 1 of the Royalty Bill are summarized in Table IV.

The rationale for grouping minerals in this manner is unclear and peculiar. To give just one example, internationally, oil and gas royalties are significantly higher than those for mineral commodities. One may also question the reason for having different rates for different commodities because the 'uniqueness' of each mineral is already reflected in the relationship between sales revenue and the total cost for producing it. What matters is the level of profitability and not the mineral type. Highly profitable ventures should pay at the maximum rate while others should pay at lower rates. The best way to achieve this sliding scale effect is to link the mineral royalty to some measure of profitability (Cawood, 1999).

The Royalty Bill further makes provision for the Minister of Minerals and Energy to allow partial or whole exemption from royalties for low grade mines of 'questionable economic viability' (section 8). Although it is desirable that provision is made for an alternative royalty structure for extraordinary projects, the mere inclusion of this provision suggests admission that there is something wrong with the structure and rates of the royalties proposed in the Bill. It also introduces the problems of subjectivity, ministerial discretion and, at worst, biased treatment.

The fiscal stabilization clause (section 15) also deserves special mention. The Bill makes provision for a 50 per cent premium on the proposed royalty rate in exchange for an assurance that the rate will not change for a period of thirty years. For example, the standard rate of 4 per cent for platinum products will be raised to 6 per cent if this option is exercised. This approach is questionable if compared to international practice. Internationally, fiscal stabilization

Table IV

Summary of royalty rates as stated in the Royalty Bill

Group	Mineral/petroleum commodity	Royalty rate (%)
1	Salt, sand, stone, sandstone, slate, gravel, clay and other construction materials that are not exempted under section 12	1
2	Offshore oil and gas products produced beyond depths of 500 metres	1
3	Alumino-silicates, asbestos, sulphates, barites, kaolin, mineral pigment, dimension stone, sulphur, perlite and others	1
4	Anthracite and bituminous coal	2
5	Antimony, copper, iron, manganese and other base metals	2
6	Offshore oil and gas products not included in Group 2	3
7	Gold, silver, vanadium, chromite and titanium dioxide	3
8	Platinum group metals	4
9	Amethyst, quartz products, tiger's eye and other stones suitable for jewellery manufacturing	5
10	Unpolished natural diamonds	8

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agreements have been implemented with great success when structured as an all-inclusive, maximum rate of tax, fixed for a long duration. For example, in Chile foreign investors have the option of entering into a Foreign Investment Contract with the Chilean state, which provides for a fixed (all-inclusive) overall income tax rate of 42 per cent for a period of ten years. This period can be extended for up to twenty years if the investment is more than US\$50 million. In Argentina it is done differently—a guarantee is given that the taxation rules will be kept the same for a period of 30 years from the date on which the feasibility study is submitted. In terms of the Argentinean Mining Investment Regulation Law No. 24 196, tax stability means no increase in the total tax charge for a mining operation and it includes municipal, provincial and national taxes.

The remaining sections of the Royalty Bill deal with administration issues, penalties, appeals, the collection of information and general governance issues. These provisions are what can be expected in such legislation. An obvious omission is the fee structure for prospecting, retention and the other rights provided for in the New Mining Act. The Mineral Policy of 1998 gave the assurance that these fees will be pre determined, standardized and internationally competitive.

Update on the Royalty Bill

Since March 2003 National Treasury has received an overwhelming response on the Draft Royalty Bill from a broad range of concerned stakeholders. This consultative approach slowed the process down considerably and it is unlikely that the next version will be released before February 2004.

Conclusion

This paper attempts to summarize and explain a complex ten-year bargaining process. This was necessary because past injustices, questionable government laws, racial conflict and diverse economic doctrines needed to be reconciled with the current spirit of nation building. The laws and administrative procedures controlling the development of South African mineral resources provide for a complex system of mineral rights ownership. Mineral rights ownership, influenced by mineral law development in South Africa, was the subject of frequent change in the country's relatively short history. At the centre of this drama are the many and diverse stakeholders who are using the process as an opportunity to secure their long-term positions. An acceptable outcome is not an option, but a must because 'at stake is the daily bread of five million employees as well as their dependants ... and fifty per cent of South Africa's export earnings' (Coetzee, 2002). One thing is clear, however: security of tenure cannot be compromised in a competitive investment environment that offers no second chance. The 1994 peaceful political transition proved that South Africans have the political will to make things work

when it comes to the crunch. What seemed impossible ten years ago is now generally accepted as 'the right thing to do'.

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