

**THE LEGAL PITFALLS OF INVESTING IN MINING
INDUSTRY IN SOUTH AFRICA: A COMPARATIVE
ANALYSIS**

by

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ABSTRACT

Previously the concept of ownership has played a role in the development of Minerals right and was regarded as an absolute right of the owner to do what he desired with property. It is nowadays accepted that ownership is not an absolute and unlimited but the concept is still undergoing transformation. Since the enacted of the Mineral and Petroleum Resources Development Act (MPRDA) now vest on the State as the Custodian of all minerals in South Africa. The vesting of the Mineral right does however interfere with the common law right private ownership, and the investor as expressed in the constitution. The term Custodian as used in the Bill is a misnomer, in that the Bill proposes not mere Custodianship, but an actual vesting in the State by giving effect to the universally accepted right of the State to exercise permanent Sovereignty to all minerals resources. The new Mining legislation regime with specific reference Mineral and Petroleum Resources Development Act and National Environmental Management Act are precisely paced to ensure optimal exploitation of natural resources while promoting sustainable development.

DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by Manasoe Justinus Matime for the degree of Master of laws (LLM) in Management and Development law be accepted for examination.

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DECLARATION BY STUDENT

I, Adv. Manasoe Justinus Matime declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Laws (LLM) in Management and Development Law has not been previously submitted by me for the Degree at this university or any other university, that it is my own work and in design and execution all materials contain herein has been dully acknowledged.

Signed _____

Date _____

Manasoe Justinus Matime

DEDICATION

To my Mom (Annie) and Dad (Marcus) thank you for being wonderful parents to my two sisters and me, for supporting us since childhood, with love and gratitude through this academic journey. You are the best parents one would ever wish for.

To my mother in law thank you so much for the support you have given us.

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1. Constitution of the Republic of South Africa Act 106 of 1996
2. Minerals Act 50 of 1991
3. Minerals and Petroleum Resources Development Act 28 of 2002
4. Precious Stone Act 73 of 1964
5. Mineral Rights Act 20 of 1967
6. Atomic Energy Act 90 of 1976
7. Nuclear Energy Act 92 of 1982
8. Freedom Charter of 1955
9. Deeds of Registries Act 47 of 1937
10. Diamond Act 58 of 1986
11. Precious Metal Act 37 of 2005
12. Diamond Second Amendment Act 30 of 2005
13. United Nations General Assembly Resolution 1803
14. United Nations General Assembly Resolution 3201

LIST OF ABBREVIATIONS

ANC	African National Congress
ANCYL	African National Congress
BEE	Black Economic Empowerment
BBEE	Broad Based Economic Empowerment
DRM	Department of Minerals Resources
GDP	Gross Domestic Products
SOE	State Owned Company
MPRDA	Mineral and Petroleum Resources Development
NDP	National Development Plan
GN	Government Notice
UN	United Nation
WBG	World Bank Gecamines
M23	March 23 movement rebels from Democratic Republic of Congo
MIGDETT	Mining Industry Growth Development Empowerment Task Team

TABLE OF CASES

1. Agri South Africa v Minister of Minerals and Energy 2010 (1) SA 104.
2. De Beers v Antagua Mining [2007] ZAFSCH 74.
3. Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A).
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6. Meepo v Kotze & Others 2008 (1) SA 104 (NC).
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CHAPTER ONE: INTRODUCTION

1.1 THE HISTORICAL BACKGROUND OF SOUTH AFRICA MINING INDUSTRY

Our country¹ has a long innovative history of utilising Mineral resources for our people, a need which predates European colonial conquest by thousands of years ago. In fact it appears that the earliest evidence of Mining in the world came from Southern African, by the San hunter-gatherers². Before the European colonial invasion, Minerals were generally mined or prospected to local users to create and manufacture clay for pottery, iron for hoes, arrow heads, and assegais, copper and tin for ornamentation. It appeared that South Africa played significant role as a supplier to the world economy between 600 and 1000 years ago, via the east African island city state (such as Mozambique, Kilwa and Zanzibar) and trading boats to the Middle East and on to Asia. The colonial discovery of our substantial and varied minerals resources led to a ratcheting –up of the influx European and the destruction of pre-colonial economic system, due to the massive needs of new Mining Companies for an abundant cheap labour. Migrant labour systems combine with land appropriation; reserve the Bantustans which led on passing laws and rigorous policing provided a cheap supply of labour and huge profits in Mining Companies.

The white Afrikaner capitalist was not in total alignment with English mining capitalist, so the apartheid state made any interventions to increase the developmental impact of Mineral for its constituency³. Including policies to grow white Afrikaner mining capitalist (affirmative action, particularly in coal mining) policies to grow the state mineral based sector⁴ through state owned enterprise⁵ such as the industrial development corporation

¹ The Republic of South Africa (known as Motherland).

² African National Congress Report on state interventions in the mining sector: prepared for the national executive committee, maximizing the Developmental of people's Minerals Asset on state interventions in minerals sector (SIMS).<http://www.anc.org.za/docs/reps/2012/simssummaryz.pdf>.

³ Volk K, THE VOLK: Policies to grow the white Afrikaner Mining Companies.

⁴ Beneficiation in relation to any mineral primary stage which includes any process of winning, recovering minerals as described in terms of Section 9 of MPRDA OF 2008 (ACT 28 OF 2008).

(IDC – phosphates, aluminium and ferroalloys). Iscor (iron and steel) Sasol and moss gas (coal/gas to liquid fuels and Petron-chemicals), and Eskom (coal to energy) and policies to ensure viable input prices (coal to Eskom).

After the discovery of diamonds and gold in 1867 and 1870 (and also 1882) respectively,⁶ the South African Legislature played an active part in the development of Mining and Mineral law. The period before the Union of South Africa was characterised by the adoption of a plethora of legislation in the Cape Colony,⁷ Zuid-Afrikaansche Republiek (or Transvaal Colony)⁸, Orange River Colony and Natal Colony. The English Colonies (such as Natal and the Cape) derived more from English Law, whilst those colonies that were Boer Republics tended to develop their own systems.⁹ The Mining laws in force in the colonies which were subsequently to form the Union of South Africa, remained in force in respect of provinces, subject to the subsequent legislation that was introduced from time to time.¹⁰

During 1955, the African National Congress enquired by sending their activist to communities around the South Africa in an attempt to find out what type of freedom they aspired.¹¹ The result was the ANC Freedom Charter¹² a blue print of non- racial South Africa. One of the pillars of the Freedom Charter was “The land shall be shared among those who work it and the people shall share in the country wealth which is inclusive the mineral wealth beneath the soil, the banks and the monopolization of industry shall be transferred to the people as a whole”. The Freedom Charter was endorsed by nearly 3000 delegates at the Congress of the people which became a

⁵ SOE: State Owned Enterprises (Company registered in terms of South African Laws and the State is the majority shareholder).

⁶ Davenport History 192 and Franklin and Kaplan Mineral laws and Jones and Nel Conveyance pg.403-428.

⁷ Dale Mineral Rights pg. 216-226.

⁸ Dale Mineral Rights pg. 175-203, Kaplan Gold Mining Laws 1; Viljoen Mineral Rights 12-13

⁹ Dale 1994 JENRL pg. Nr 226-227.

¹⁰ Franklin and Kaplan Mineral Laws; Dale Mineral Rights pg.226.

¹¹ Ford G “South African President Jacob Zuma closed the book on the Freedom Charter’s promise to nationalize the mining industry.” 2012 available online Glen.Ford@BlackAgendaReport.com.

¹² The Freedom Charter was adopted in 1955 by the Congress of the people, the African National Congress.

manifesto.¹³ Unfortunately the multinational's corporations were puzzled by the above mentioned statement.

Various statutes were adopted in the Post-Union period. During the sixties, four important consolidating statutes were adopted, namely the Precious Stone Act 73 of 1964, the Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1976. The last Act was replaced by the Nuclear Energy Act 92 of 1982.¹⁴ These four statutes together, with subsequent minor amendments thereto, formed the legislative basis of virtually all mining for precious stones, precious metals, base minerals natural oil and sources material.¹⁵

During 1986, the then government adopted a white paper on Mineral Policy of South Africa. On the 15th of December 1988 the Department of Mineral and Energy Affairs published the proposed Mineral Bill, 1988 for general information and comment.¹⁶ Despite opposition from the Mining Industry, especially the Chamber of Mines,¹⁷ trade unions and academics¹⁸ final approval of the Minerals Bill was granted by the Cabinet¹⁹ and the Bill was introduced during the 1990 session of Parliament.

Prior to the MPDRA, South Africa Mining sector was governed by the 1991 Minerals Act, a product of reformist De Klerk administration. The Minerals Act revives the common law principles of mineral right ownership, which had previously been eviscerated by apartheid government. Under common law, the owner of land was the owner of the whole of the land including the minerals in the soil. The long awaited white paper on Mineral and Mining policy was released in 1998. The underlying objectives of the white paper were proposed change in the ownership of the minerals. Unlike most

¹³*ibid.*

¹⁴ The Act was in turn repealed by the Nuclear Energy Act 131 of 1993.

¹⁵ Franklin and Kaplan Mineral Laws Vol: 2.

¹⁶ Government Gazette GN 856 OF 1988.

¹⁷ Minerals and Energy and the Memorandum to the Minister of Economic Affairs and Technology; "Government Presses with Mineral Bill Business Day (189-06-22) 1-2.

¹⁸ Badenhorst 1990 TSARpg. 531 539-541; 1991 TSAR pg.113 124-131.

¹⁹ Press release by the Bureau for information on behalf of the Minister of Mineral of Mineral and Energy Affairs and Public Enterprises on 20 November 1989.

countries in the world, private individuals own most of South Africa's Mineral rights. Currently, two thirds of South African's mineral rights are privately owned, and the remainder vested in the State. This law has effectively prevented minerals development occurring in the country via two processes. The owner of the minerals refuses to allow access to property, as he owns these rights which are minerals and the property. Through the kaleidoscope of past, Mining legislation and despicable racial discriminatory history of South Africans in particular people of colour were not allowed to acquire access to the minerals resources.²⁰The policies of the former Apartheid Government in relation to the land dispossession and deprivation of ownership precipitated or aggravated the situation to the dire.²¹Often farms are heavily subdivided, thus making it virtually impossible to locate the rightful owners.

The Constitution lays a foundation for measurement to redress the inequalities in access to the country's natural resources and enjoins the State to take reasonable legislative and other measures in available resources to achieve the progressive realisation of constitutional rights.²²

1.2 The Problem Statement

The licensing issues are one of the concrete examples of the current problems facing South African minerals regulatory regime:

- South Africa does not have publicly accessible register containing the details of existing prospecting or mining rights or pending applications for such right, and details of the land to which these rights and applications relate. What South Africa needs to implement is cadastre²³system similar to those found in Chile, Zimbabwe, Democratic Republic of Congo and Mozambique and many other mining Jurisdiction.

²⁰De Rebus, July 2011 Bold interpretation in Mining Law: The Constitutional Court approach in Bengwenyama case.

²¹*Ibid.*

²² Constitution of Republic of South Africa

²³ Mining title which deals with Mining Management.

- The crony capitalism and opportunism have emerged as a significant problem. In part, this is vague legislative requirements and high level of administration discretion. These factors have also allowed the security of tenure of mining to be undermined.²⁴
- In particular, the MPRDA does not contain clear time frames for decision and of equal concern the manner in which the Act's aims and objective are met. There are many technical terms which are not defined, and as such have led to different interpretations within different regional offices and a resultant lack of certainty regarding the application of the Act.
- Owing to the unclear provision of the MPRDA, the DMR²⁵ has broad discretion in accepting and processing application for various rights. The subjective interpretation of unclear provision is antithetical to security of tenure. In addition the length of time taken in processing applications goes well beyond what is reasonable.
- There are unfortunately many examples of legal uncertainty in the current mineral regulatory regime. The MPRDA, is the backbone of this regime, is fraught with vague provision which are more alike the Mining Charter, an ancillary document aimed at providing a framework for promoting Economic Empowerment in the mining industry. It requires among things, that Mining Companies demonstrate 15 percent and 26 percent of their asset, whether through equity, attributable units of production, collective schemes or partnership are owned by Historically Disadvantage South African until May 2014, but it does not give a directive on how to achieve those objectives and 2016 is nearby. The issues of administrative weakness in the DMR, capacity problems, as well as the lack of transparency in licensing system posed further problems. The Minister herself,²⁶ in a media statement of 17 August 2010, has acknowledged as much.

²⁴ South Africa's Mining Industry in Decline : An analysis- Peter Leon

²⁵Department of Mineral Resources.

²⁶Then Minister of Minerals Susan Shabangu.

The first hurdle to regulatory reform has been overcome: acknowledgement that there is a problem.

- Empowerment v Enrichment: The intended effects of Broad-Based BEE are increased opportunities, skills and social welfare of previously disadvantaged, which in the long term reduced vertical inequalities and threat of populist. However recent debates have challenged the policy suggesting that the effects have been narrow, that is enrichment of few political connected elites instead of the empowerment of a wider range of individuals.

The Lonmin (Marikana) saga revealed the weaknesses in the South African Minerals regulatory framework as well as the DMR's poor record in the processing of prospecting and Mining rights. Of greater concern, however is the insight that provides into the security of tenure under the current systems. Lonmin's issue indicates that the current regulatory regime is unclear about associated minerals. In particular the MPRDA failed to clarify what procedures Mining Companies were required to follow the conversion of their old order rights relating to associated of Minerals. Prior to the MPRDA and under the Minerals Act,²⁷ a party authorised to mine any mineral could also prospect and dispose of any associated minerals. The MPRDA however does not make provision for the prospecting or mining associated with minerals. The DMR appears not to have furthered the MPRDA's transitional provisions. These arrangements are meant to provide a seamless interface between the previous regulatory regime and MPRDA regime.

In February 2011, the ANC's most important decision-making body, its National Working Committee, appointed a research team to investigate and report back by November 2011, on the feasibility of mine nationalisation. The three-person research team, led by Parlo Jourdan, has conducted a detailed inquiry, involving extensive case studies of Botswana, Brazil, Chile, China, Finland, Malaysia, Nigeria, Norway, Sweden,

²⁷Minerals Act 50 of 1991.

Venezuela, Zambia and Zimbabwe.²⁸ While the report was submitted on schedule, its contents remain unknown. This is because of the subsequent request that, the reports be re-drafted into plain language to ensure that its findings can be understood by ranks members within African National Congress, as well by providing additional detailed with reference to the country and specific case studies.²⁹

South Africa presently is in the midst of serious debate around mine nationalisation. A recent source of populist pressured for nationalisation of the country's mining industry stems from the African National Congress youth League (ANCYL). More than two years ago, while the world was battling the global financial crises, Julius Malema, recently expelled ANCYL President, called for the nationalisation of South Africa's mines.³⁰ This call began an intense and very public debate with Tripartite Alliance, the ANC electoral partners. In a documentary entitled "Mining for change: a story of South African Mining" released during June 2011, Malema argued that the country's mines must be nationalised to returned minerals, wealth stolen by white colonist to the black majority.

1.3 The Literature Review

South Africa is one of the world wealthiest countries interms of minerals and Minerals reserves. Up to now however, this enormous wealth has only been used for the benefit of the white minority.³¹ The minerals underground belong to all South Africans, including future generations.³² Moreover, the current systems of minerals rights prevent the optimal development of mining and the appropriate use of urban land. The principal objective is to transform mining and mineral-processing industries to serve all our people. We can achieve this goal through a variety of government interventions, incentives and disincentives. The Minerals and Minerals products contribute three-

²⁸ According to Sunday Times, the research team examined: the effective use of mining licences; local beneficiation strategies ;royalties; various forms of ownership, including joint ventures; and passive nationalization which entails public control but private management of mine production.

²⁹ ANC tells research to simplify Mining Report, Business Day, and 29 November 2011.

³⁰ ANC Rejects Call to Nationalise Mines, Mail & Guardian, 02 July 2009.

³¹ Mandela N.R, The RDP Programme: A policy framework of the African National Congress 1994.

³²The freedom charter 1955.

quarters of our exports and the industry employs three-quarters of a million workers, but this could be much higher if our raw materials were processed into intermediate and finished products before export. The Reconstruction and Development Programme must attempt to increase the level of mineral beneficiation through appropriate incentives and disincentives in order to increase employment and add more value to natural resources before export. Moreover, this policy should provide more appropriate inputs for manufacturing in South Africa.

In late 2000, the draft Minerals Development Bill was released for public comment. The Bill³³ intended to usher the New Era of Minerals and Mining law in South Africa. The core objective of this Bill was to:

- Recognise the minerals resources as common heritage of all South Africans and collectively belonging to all people of South Africa;
- Ensuring that a proactive social plan is implemented by all Mining Companies;
- Attract foreign direct investment;
- Contribute to rural development and support of communities surrounding mining operations;
- Redress the result of the past racial discrimination and ensure that historically disadvantaged persons participate meaningfully in the industry;
- Guarantee security of tenure to existing prospecting and mining operations.

The Bill encompasses broader issues, including addressing the following:

- Transformation of the Minerals and Mining Industry;
- Promotion of equitable access to South Africa Mineral Resources;

³³ White paper based on Minerals and Mining Policy released in 1998.

- Promotion of investigating in exploration and mining with spin- offers
- Socio- economic development of South Africa; and
- Environmental sustainability of the mining industry

The intention of the Bill have been guided by the State's Constitutional obligations among others to promote equality, to advance persons or categories of person disadvantage by the past racial discrimination and also promoting or reforms to bring about equitable access to South Africa's resources (mineral resources included). This will require a balancing of individual interest versus the interest of society in requiring that substantial justice is done in transforming the minerals and mining industry.

As one of its fundamental principles, the Bill has as its objective to change the common law to the extent that it applies to minerals and ownership of a mineral.³⁴As will be seen from the discussion of the impact of the bill on real (and personal) rights, the bill would achieve the objective: the Ownership of minerals resources not yet severed is vested in all the peoples of South Africa. The consequences of the rule regarding ownership and transfer of ownership of minerals contained in the land are therefore abolished. The state is made the custodian of minerals resources for the benefit of all South Africans.³⁵The term custodianship as used in the bill is a misnomer in that what the bill proposes is not mere custodianship, but an actual vesting in the state. One of the objectives of the bill is to give effect to the universally accepted right of the state to exercise permanent sovereignty over all minerals resources.

The nucleus of the MPDRA can be found in section 3 (1) which provides that mineral and petroleum resources are a common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all the people of South Africa.³⁶The concept of Custodian is a novel entity in South African law, ³⁷the significance of this provision is drastically alters the legal relationship between the holders of minerals and

³⁴ CI 2(j) of the Bill (white paper), minerals Act 50 of 1991.

³⁵cl 3(1) of the bill (white paper), Mineral Act 50 of 1991.

³⁶Section 3 (1)

³⁷This is an extract of the master's thesis by Narshai. For full discussion on Expropriation under Minerals Petroleum Resources Development Act 28 of 2002, LLM thesis of Raakesh Narshai, University of Cape Town.

prospecting rights.³⁸ Bardenhorst and Mostert take a view that the State's custodianship causes the principle of abrogated entirely in context of minerals, result by virtue of previous dispensation of common law mineral rights were obliterated.³⁹ However they propose that this abrogation couple with State's new authority to grant statutory mining is an implicit *ex lege* transfer of the entitlement to exploit minerals of the State.⁴⁰

Custodianship has to be looked at in regard to the transition from a private law point of view to the public law perspective. Minerals have been removed from the private sphere and new public law powers are the only form in which minerals can be exploited.⁴¹ According to Dale argument to be preferred with respect with the view of entitlement of exploitation does not vest in the state but, of the opinion that is offered as to whether the ownership of the unsevered mineral remains with the land owner.⁴²

The legislators of MPRDA agree with the point view that common law approach on the minerals is inexistence and it becomes more evident in a case of *Agri South Africa v Minister of Minerals and Energy*⁴³, wherein the Learned Hartzenberg J described all common rights as having disappeared in to the air, as though they were extinguished.

According to Peter Leon, a mining expert at law firm Webber Wentzel, the MPRDA has come at the cost to South Africa, including a decline in foreign investments in the mining industry.⁴⁴ He added that South Africa's new mineral regulatory regime, however well intended, has created an unpredictable, discretionary regulatory environment, at the heart of which lies the Minister of Minerals and Energy's discretion to grant, refuse,

³⁸*Ibid.*

³⁹Badenhorst P.J and Mostert .H Mineral and Petroleum in South (2004)pg 13

⁴⁰*Ibid.*

⁴¹Mostert H, Perspective on minerals law 2nd ed (2005) pg 47

⁴²2007 ZAFSHC 74.

⁴³2010 (1) SA 104.

⁴⁴Peter Leon is a partner at Webber Wentzel and heads up the law firms in the division of Mining law department and specialises in all aspect of mining law.

suspend or cancel prospecting and mining rights, premised on a vague and potentially immeasurable social and labour objectives.⁴⁵

The South African Mining industry is a mainstay of the country United State of America \$357 billion economy, the largest in Africa as well as the basis of the country's industrialization and it is at the crossroad.⁴⁶ The centralisation of Mining to South Africa's economy is illustrated by the fact, that nearly 60 per cent of the country export revenue is attributed to Mining, mineral and secondary beneficiated products.⁴⁷ The national development plan is the blue print for the country development and growth. Its aim to eliminate poverty and reduce inequality by 2030.⁴⁸The government was very committed to the implementation of the NDP, but would need assistance from business and industry to make it happened said the ministers in the national planning.⁴⁹

South Africa mining industry is supported by extensive and diversified resources base and has ever since inception been the corner stone of South African's economy.⁵⁰ The changes which have come in our country make it necessary to prepare the industry for the challenges which are facing all South African's. Equitable access to all natural resources is required, based on economic efficiency and sustainability.⁵¹ The creation of wealth and employment is required for the economic empowerment of communities, both directly and through the multiplier effect.⁵²

1.4 Aims and objectives of the study

- This study aims at conducting a concrete analysis of current laws, policies and regulations in the mining sector.

⁴⁵*ibid.*

⁴⁶ Peter Leon: Whither the South African mining industry- *Journal of Energy and Natural Resources Vol 30 No12012.*

⁴⁷ National Development plan: Vision for 2030, planning commission, 11 november2011, at 124.

⁴⁸www.South Africa.info/business/economy/policies/mining-indaba-050213.htm#.VZLYBtBvMI.

⁴⁹Trevor Manuel.

⁵⁰<http://www.info.gov.za>:found at 16H00 on the 18.12.2012.

⁵¹*ibid.*

⁵²*ibid.*

- An analysis of strategies put in place to tackle the ownership challenge in this sector.
- This dissertation will through the critical analysis of the current legal situation determine if there is a need to develop new policies and regulation dealing with mineral beneficiation.
- The study aims at assisting the incumbent investors and also law student who based in mining communities to understand the mining dynamics in South Africa.
- It aims to evaluate the impact of the Act on Socio-economic development of communities.
- Lastly it aims to benefit prospective student, investor and any person interested in this field of mining of the legal ramifications of the MPRDA.

1.5 Research methodology

The research methodology to be adopted in the study is qualitative. Consequently, it is a combination of the legal comparatives and also legal history methods based on jurisprudential analysis utilized. Legal comparatives will be applied to find solution, especially for the interpretation of economic consequences based on ownership structure in the mining sector. The research library based and reliance is placed on materials such as journal, textbooks, case law, conference papers, law reports, legislation and electronics sources.

1.6 Scope and Limitation of Study

This mini dissertation consists of five chapters. Chapter one is the introductory chapter crystallising the foundation of the study. Chapter two deals with legislative and policy framework. Chapter three deals with mining investment Jurisprudence. Chapter four deals with comparative analysis with other Countries. Chapter five deals the conclusions and recommendation.

CHAPTER TWO: LEGISLATIVE FRAMEWORK AND POLICY FRAMEWORK.

2.1 INTRODUCTION

The common law provides only limited guidance regarding the legal principle governing the nature and exercise of minerals.⁵³ The *salva rei substantia* requirement of usufruct⁵⁴ in turn may lead to the difference of opinion as to whether the usufructuary could open any new mines upon land which was subject to usufruct.⁵⁵ A further distinction was made by the Roman between minerals and metals which are renascent, such as limestone and those which are not (non renascentia).⁵⁶ The distinction led to a debate whether mineral had to be of renascent character to qualify as *fructus* for purpose of usufruct. The debate persisted throughout the law of middle ages, Roman-Dutch law and even early South African law.⁵⁷ A so-called right to mine developed against the background of the development of unrestricted ownership of the land in the interest of the mining industry. Because land in Roman provinces was owned by the state, the State as holder of the right to mine, granted this rights to the third parties.⁵⁸

2.2. THE INFLUENCE OF PROPERTY LAW DOCTRINE

The concept of Ownership has played an important role in the development of the law of Minerals rights. It is trite law that ownership has always been regarded as real right.

⁵³ Trojan Exploration Co (Pty) Ltd V Rustenburg Platinum Mines Ltd 509D-E, Dale Mineral Rights 3; Wilmans Mineral eregte 4.

⁵⁴ *The right to use and enjoyment of thing (in Latin).*

⁵⁵ Van der Merwe A.J, The introduction to the Law of Property (Professor of Law, University of South Africa, 1996) Sakereg pg 552.

⁵⁶ Master V African Mines Corporation Ltd 1907 TS pg. 925 930-931; Badenhorst 1993 Stel LR 394 -396.

⁵⁷ See further Viljoen Rights 9-12, 15-16. Viljoen submits that minerals and metals did not have to be renascent to qualify as fructus.

⁵⁸ Dale Mineral Rights 5-9-11 examines the different views which vary from regarding it as proprietas subject to forfeiture, a ius abutendi, a system not unlike emphyteusis, a restriction of ownership, a type of right of occupation, a right analogous to a servitude or partarian lease He warns that the true nature of the right to mine is not capable of definitive determination due to the inaccuracy of terminology used.

Whether Ownership has, at any stage since its development in Roman times, has been regarded as an absolute right of an owner to do with property as he wished or desired.⁵⁹ Nevertheless, it is nowadays accepted that ownership is not absolute and unlimited but the concept is still undergoing transformation.⁶⁰In past Mining legislation and the general history of racial discrimination in South Africa prevented black people⁶¹ from acquiring access to minerals resources. Land dispossession and deprivation of ownership aggravated the situation.

A mineral right may be defined as a limited real right that entitles its holder to go upon the land to which the Mineral right relates and prospect for minerals, if minerals are found, to mine the minerals and dispose thereof.

2.3 TRANSFER OF MINERAL RIGHTS

The transfer of Minerals rights involves the transfer of the mineral right from the holder of such rights to another legal subject. If the mineral rights have not yet been separated from the complete ownership of land, transfer of entitlement to exploit the minerals takes place upon registration of deed of transfer of ownership in deeds office.⁶²If owner intends to transfer only the mineral rights to the transferee, he /she may do so by registration of notarial deed of cession in the deed office.⁶³ Taking out a certificate of rights to minerals is not necessary in these instances. Where the mineral right have been separated from the ownership of land in partly only, the owner of the land may cede such right as remain vested in him/her by virtue of his/her ownership of the land. Minerals Rights held under separate title (such as a certificate of rights to minerals or

⁵⁹ See further/ *supra* Van der Merwe Sakereg 171-173; Van Zyl Roman Private Law 132.

⁶⁰ Andre J Van der Merwe, An overview of different views on ownership- concept of ownership has been transformed to such an extent by social, economic and political forces that no longer designates plena in re potestas sekereg(Professor of Law , University of South Africa) Pg.173.

⁶¹African descendants, the natives who were born in Africa inclusive of slaves.

⁶² S 16 of the Deeds Registries Act 47 of 1937.

⁶³ S 3(1) (m) and s 16 of the Deeds Registries Act; Franklin and Kaplan Mineral Laws 603.

deed of cession) may be transferred by the holder thereof to a transferee by registration of notarial deed of cession in the deeds office.⁶⁴

2.4 IMPACT OF BILL ON EXISTING RIGHTS

As one of its fundamental principles, the Bill has as its objective to change the common law to the extent that it applies to minerals and ownership of a mineral.⁶⁵As will be seen from the discussion of the impact of the bill on real (and personal) rights, the bill would achieve the objective: the Ownership of minerals resources not yet severed is vested in all the peoples of South Africa. The consequences of the rule regarding ownership and transfer of ownership of minerals contained in the land are therefore abolished. The state is made the custodian of minerals resources for the benefit of all South Africans.⁶⁶The term custodianship as used in the bill is a misnomer in that what the bill proposes is not mere custodianship, but an actual vesting in the state. One of the objectives of the bill is to give effect to the universally accepted right of the state to exercise permanent sovereignty over all minerals resources

2.5. MINING AND MINERALS POLICY DEVELOPMENT 1998.⁶⁷

The Mining and Mineral Policy Development is responsible for developing minerals policies, norms and standard as well as draft and amend mineral and related legislation. This directorate has a number of legislation under review for possible amendment to the effect the goals of MPDRA and Section of the Constitution.⁶⁸

⁶⁴ S16 of the Deed Registries Act; Government of Republic of South Africa v Oceana Development Investment Trust plc. 1989 1SA 35(T) 37B ; Franklin and Kaplan Mineral Laws 603.

⁶⁵ cl 2(j) of the Bill (white paper), minerals Act 50 of 1991.

⁶⁶cl 3(1) of the bill (white paper), Mineral Act 50 of 1991.

⁶⁷This directorate is located in the Department of Mineral Resources and Development.

⁶⁸Act 108 of 1996.

2.5.1 THE MINERALS AND PETROLEUM RESOURCES LAWS GENERAL AMENDMENT BILL 2011.

This bill amends both the minerals and petroleum resources development Act 28 of 2002 and Minerals and Petroleum Resources Amendment 49 Of 2008. The object of the Minerals and Petroleum Amendment Act is to strengthen the current construction of legislation, fortify the penalty provision, to streamline the administrative process and to provide for a single regulatory system.

2.5.2. THE DIAMOND GENERAL LAWS AMENDMENT BILL 2011.

The Diamond Act 58 Of 1986, the Diamonds Amendment Act 29 of 2005 and Diamond Second Amendment Act 30 of 2005 facilitate access to funding and markets by diamond cutters and polishers, improve on the composition o the Board, in order to align the legislation with other pieces of legislation, defined and refined concepts to remove ambiguities, make provision for offences and penalties and for arbitration process, to improve the regulatory system and provide for matters connected therewith.

2.5.3 THE PRECIOUS METAL AMENDMENT BILL 2011.

This Bill amends the Precious Metal Act, 37 of 2005, so as provide and improve on definition of words and expression to remove ambiguities, streamline administrative processes, improve the regulatory framework and provide for matters connected with the precious metals.

2.6THE MINING HEALTH AND SAFETYLEGISLATION IN SOUTH AFRICA

It is important to be aware of the Laws and Regulations governing Mining Safety in South Africa.

Mining health and safety in South Africa is governed by Act 29 of the 1996 Mine Health and Safety Act. The base premise of the Act is:

- To ensure owner responsibility for health and safety through creation of codes of practice, training, identifying potentially hazardous factors, investigating said factors, employing hygienists for the industry, and founding methods of medical attention and recording for the site.
- To safeguard the rights of employees to refuse or move away from areas which are unsafe or potentially unsafe.
- To create the Inspectorate of Mining Health and Safety.
- To establish the three-party Mine Health and Safety Council.

Following amendments in 1997, the original 1996 Act now also includes:

- Provision of a monetary fining system in support of tripartite institution regulation and to provide health and safety-appointed employees in the case of any inquiry.
- The constitution of the Mine Health and Safety Council concerning matters of procedure within said council.
- Amendment concerning the election and appointment of health and safety employees, and establishing the authority of health and safety inspectors.

The Mine Health and Safety Inspectorate of South Africa is very clear about the ways in which they aim to push legislation and national mining standards to reduce mining deaths and occupational injuries. They also emphasises the importance of support and training in this. Their goals are:

- Providing policy inputs for the establishment and application of mine safety standards at mining operations, and promote their application;
- Providing policy inputs for the establishment and application of mine equipment safety standards at mining operations, and promote their application;
- Providing policy inputs for the establishment and application of mine health standards at mining operations, and promote their application; and
- Ensuring an effective support and inspection service.

CHAPTER THREE: MINING INVESTMENTS JURISPRUDENCE

3.1 Introduction

There are those who believe that mining is an old industry with limited attractions, if any at all for the modern investors. Indeed mining has often been written off as a sunset industry and it is hardly rated and egotistically mentioned in the early 60's as a previously highly technological boom unfolded. It is however true that mining struggles with the technological revolution and metals, as a component of economic growth, which has lost its ground as the knowledge based economy which has overtaken the raw material based on economic infrastructure particularly in the advance world. From the perspective of the investors familiarity is a good starting point, and can cover a number of issues including language, legal integrity, environmental constraints, economic policy and political prejudice.

If one had to observe at the portfolios of the bigger specialised mining investments funds one would find that majority of stock held still come from a very limited number of countries primarily South Africa, Canada, Australia , United kingdom and the United States of America.⁶⁹ In some industries, merger and acquisition follow a well establishes formula *customs* and *usus*⁷⁰ for instance buying a restaurant involves location. As I have mentioned there are some countries that are more relaxed than others when it comes to environment and related issues such as pollution and health and safety.

The state of South Africa Mining industry is in stark contrast to the world at large. Between 2001 and 2008, Chile, as a key of the Mining jurisdiction in the developing world, experienced a 12 per cent growth in the value added to the GDP.⁷¹ During the 2000s, in more stable Mineral Regulatory regimes such as Australia, investments in mining sector advanced by 24 per cent, while average investment growth in South Africa was relatively pedestrian seven per cent.⁷² South Africa's decline can to a large

⁶⁹Big five Countries (Worldwide).

⁷⁰Customs and Usage

⁷¹ Baxter B: The vision towards Compentative growth and meaning transformation of South African in Mining Sector, Mckinsey & Company, 2011.

⁷² National Treasury of the Republic of South Africa.

degree, be linked to the regulatory of uncertainty which precipitated in small part by the architecture, as much as the implementation of the Mineral and Petroleum Resources Development Act 2002 (MPRDA).⁷³

3.2. The Universal and Domestic Access to Minerals

International law recognizes that States have the right to exercise full and permanent sovereignty over their natural resources. The principle of public trusteeship of mineral resources is recognized and acceptance in all major mining countries. Therefore:

- South Africa's Constitution recognizes that natural resources belong to all South African's;
- It is, therefore the responsibility of the State to ensure equitable access to these resources; and
- The State must consequently also ensure that benefits emanating from the exploitation of South Africa's minerals accrue to all citizens.

The principal legislation governing the Mining industry in South Africa is the Mineral and Petroleum Resources Development Act 28 of 2002 which came into force on the 01st May 2004 replaced the minerals Act of 1991.⁷⁴ The MPRDA is not a "Mining code" because it does not codify Mining Law in South Africa. As such the MPRDA is the starting point; the common law remains applicable in certain instances where the MPRDA is vague.

The MPRDA repealed the Minerals Act and the common law to the extent that either was in conflict with the MPRDA. It abolished the property law based system of the Minerals Act, and introduced a fundamentally different regulation regime which relate to the administrative law based on conditional State licenses. Accordingly, landowners no longer owned the minerals to the Minerals resources on their property. These now fall

⁷³ Also referred to as "the Act" (Mineral and Petroleum Resources Development ACT 28 OF 2008) .

⁷⁴ MPRDA Act 28 of 2002

under the public test doctrine of “ State Custodianship”, under which the State is acting through the Minister of Minerals and Energy (now the Minister of Minerals Resources), holds Mineral rights in “Custody” for the benefit of all South African’s and empowered to grant, issue, refuse, control, administer and manage rights of minerals.⁷⁵ The concept of “State Custodianship” is in turn based on South Africa’s permanent sovereignty over Minerals and Petroleum resources. Both two concepts, in turn have been influence by United Nations General Assembly resolutions passed during the Cold war:⁷⁶ By firstly declaring a Nation’s permanent sovereignty over its non-renewable natural resources⁷⁷ and Second on the creation of a new international economic order.⁷⁸

In order to facilitate the introduction and establishment of the new Mineral law regime, schedule 2 to the MPRDA created ‘transitional arrangements’ under which holder of Pre-MPRDA old order prospecting and Mining rights had an opportunity to apply to convert these rights into new order Prospecting and Mining rights before the 30th April 2009. Holder of unused old order rights had until 30 April 2005 to apply for new order rights. On any one of these dates, the respective old order rights simply ceased to exist.

The MPRDA’s upheaval of South Africa’s Mineral law regime is fundamental to an understanding of what has followed. Mineral rights now have lesser inherent value under the MPRDA than they did under the erstwhile Mineral Act of 1991. It is arguable that the implementation of the MPRDA may even amount to the indirect or creeping

⁷⁵ The objects of the MPRDA include, among others a recognition of the international accepted right of the State to exercise sovereignty over all the minerals and petroleum resources within South Africa and the need to give effect to the principle of State Custodianship (section 2 (a) and (b) of MPRDA). These objects are given effect to by section 3 of the MPRDA.

⁷⁶ U.N resolutions neither binds its members nor are they source of international law: its resolution is purely recommendatory. Such resolution , of course may be binding if they reflect rules of customary international law and they are significant as instances of state practice that may lead to information of new customary rule(M N Shaw, international Law 5th Edition, Cambridge University Press ,2003) ,1090).

⁷⁷ United Nations General Assembly Resolution 1803: Permanent Sovereignty over natural resources 1962.

⁷⁸ United Nations General Assembly Resolution 3201: Declaration on the establishment of new international economic order, 1974.

expropriation of ownership rights of old order Mineral right holders. Factors that support this argument are:

- The MPRDA's extinction of all privately owned common law mineral rights;
- The statutory removal of the landowner's right of control; and
- The replacement of absolute rights of ownership with conditional and time bound state license (which cannot be transferred without Ministerial consent and are subject to Ministerial suspension or cancellation).

Recently, holders of unused old order rights who failed to meet the application deadline for new order rights under the MPRDA claimed before the South African High Court that this resulted in the compensable expropriation of their unused old order rights. Government then excepted⁷⁹ to the claimant's claim. In determining whether the exception was valid, the High Court held:

*"That it admits that the holders will be deprived of their rights and that such deprivation couple with the State's assumption of custody and the administration of those rights constitute expropriation thereof".*⁸⁰

The Constitution lays a foundation to redress inequalities of the pre-colonial in access to the Country's natural resources and enjoins the state to take reasonable legislative and other measure in its available resources to achieve the progressive realization of Constitutional rights.

Author Peter Leon, argues on a cautionary principle with regard to the MPRDA. In his codification Leon states further that the new elected Government of 1994 was quick to set it sight on the on the Republic of South African mining industry.⁸¹ Leon further points

⁷⁹ Raised an objection interms of rule 23 of the superior High Courts of South Africa : to claimants cause of action (Bengwenyana Minerals (Pty) Ltd and Others V Genorah (Pty) Ltd and Others (cc) unreported case no: (CTNET 39/10, 30-11-2010) (FRONEMAN J).

⁸⁰ Agri SA v Minister of Minerals and Energy [2011] 3 All SA 296 (GNP)

⁸¹ Leon Peter, A fork in the investor-State Road : South Africa's New Mineral Regulatory Regime Four Years on Journal of World Trade 42 (4) Kluwer law International (Nederlands) (2008) 671-690. See also Ndlovu FP LLD

out clearly in his writing that South Africa State Custodianship is largely supported by section 2(a) of the MPRDA and state that the development of the MPRDA stems from internationally accepted right of the State, in order to exercise legal Sovereignty over all its minerals and petroleum resources.⁸²The State Sovereignty in turn reflects the sentimental of the new international economic order, however Leon argument is that South Africa has resulted in a law that is uncertain and in its application has created an unattractive venue for foreign investment.⁸³

3.3. Consultation with communities in terms of MPRDA

South African Mining law requires mining companies to engage in public consultation in relation to exploration of rights, mineral rights and environmental impact.⁸⁴However the consultation does not require public consent, but these consultation processes is merely formalistic.⁸⁵Furthermore, there's a vast imbalance in knowledge resources, wealth and power that underpin such engagement, and the most communities are cowed by expertise presented by corporations at such gatherings.⁸⁶ When mines hold compulsory environmental impact assessment meeting with communities the representative of corporation has a concentration of environmental, geographical, geological and hydrological knowledge, whereas in contrast communities have low levels of literacy and hardly any tertiary education.⁸⁷

According to Nevondwe and Choma the law should be clear in the sense, stipulating that the consultation of communities should occur on their lands and should ensure that they receive prior information regarding the context of the project they are expected to

Thesis, An analysis of the regulation of South African Diamond Trade from 1994-2009 with reference to aspect of the 1996 Constitution 2009.

⁸²*Ibid.*

⁸³*Ibid.*

⁸⁴Badenhorst PJ and Olivier NNJ, Host community and competing applications for prospecting rights in terms of Mineral and Petroleum Resources Development Act 28 of 2002. See section 10 of MPRDA.

⁸⁵*Ibid.*

⁸⁶*Ibid.*

⁸⁷Ramatjie KN LLM Dissertation, A legal analysis of Mineral and Petroleum Resources Development Act 28 of 2002 and its impact in mining operations in Limpopo Province, University of Limpopo.

express their opinion.⁸⁸In *Meepo v Kotze & others*⁸⁹ the view was expressed that legislature provided due consultation between land owner and the holder of a permit in order to alleviate possible serious in roads being made on property right of the land owner. Consultation is the means where the land owner is appraised of the impact that prospecting or mining activities may have on his land. In case of Bengwenyama Minerals Pty Ltd,⁹⁰ the issue was the lawfulness of granting the company prospecting on the land of the Bengwenyama community. This case is indicative of the insufficient protection of communities provided for by the MPRDA, notwithstanding Broad Based Economic Empowerment as provision of MPRDA stipulates. The Court stated that the Constitution furnishes the foundation for measures to redress inequalities in respect of access to natural resources of the country. The Constitution provides legislative and other measures to be made to protect and advance person disadvantaged by unfair discrimination.⁹¹Clearly the MPRDA is one of those positive laws that are established in creating equity and balance in accessing economic involvement.⁹²

3.4. THE BLACK ECONOMIC EMPOWERMENT

In 1994, South Africa transitioned from apartheid to democratic rule. One of the principle objectives of the post-apartheid government was to redress the overwhelming socio-economic impact of apartheid.⁹³ To date, progress has been made however, poverty is still wide-spread and income inequalities remain vast, for example black South Africans who make up approximately 79 per cent of the population are estimated to only own 18 per cent of all land in South Africa.⁹⁴ Hence the BEE Initiative it's response to the market and political failures caused by apartheid. It is aimed at redressing the past imbalances by seeking to substantially and equitably transfer and confer the ownership,

⁸⁸Supra (n 82) at 70.

⁸⁹2008 (1) SA 104 (NC)

⁹⁰CCT39/10(2010) ZACC 26.

⁹¹*Ibid* and further at <http://www.saflii.org/za/cases/ZACC/2010/26.html>.

⁹²2004 (4) SA 490 (CC) 525 E-F

⁹³<http://www.anc.org.za/ancdocs/history/charter.html> last visited 1st February 2013.

⁹⁴Groenewald Y, Who owns land in South Africa Land Audit by Department of Land Affairs 2008.

management and control of SA's financial and economic resources to the majority of its citizens.⁹⁵

3.5. THE SHIFT: BEE TO BB-BEE (BROAD BASED ECONOMIC EMPOWERMENT)

The policy was first initiated by the private sector in 1993, exclusively focusing on the transfer of equity from white Companies to partners from the previously disadvantage group. At this period, there was minimum government involvement and process only benefited a few politically connected individuals.⁹⁶ During 2003, discussions were held to address the aforesaid deficiency, government introduced and institutionalized the transformative initiative known as Broad-Based Economic Empowerment (BB-BEE). The focus of the BEE shifted from being solely ownership-orientated to include other key elements known as the 7 pillars, which includes ownership, management representation, skill development, employment equity, preferential procurement, enterprise development and corporate social investment.

The government also identified the factors hampering the downstream beneficiation in the mining sector. The factors include but not limited to access to raw materials for beneficiation, shortage of critical infrastructure, limited exposure to research and development, inadequate skills, access to international markets or investor. The government has summed up some possible challenges in a long term plan.⁹⁷ The government has to do the following: increase State Custodianship on the country's minerals to effect beneficiation and to amend the MPRDA to strengthen beneficiation provision. For the economy to grow, firms must make a profit, invest and increase productivity.

⁹⁵ BEE Commission Report 2003, [http://www. Capegateway.gov.za/text/2004/beeecomreport.pdf](http://www.Capegateway.gov.za/text/2004/beeecomreport.pdf) last visited 05 March 2013.

⁹⁶ Acemoglu D, Gelb S and Robinson J.A: Black Economic Empowerment.

⁹⁷ The beneficiation Strategy for Minerals Industry of South Africa, June 2011.

3.6. SOCIAL COHESION

Positive institutional change is a challenge where society has low cohesion and it features vertical inequality. Social cohesion is required to deal with temporary losses linked with economic reforms. It is argued that the interface between point source and low social cohesion result in poor public policy and institutions. The vertical inequality hinders development and diminishes the poverty- reduction powers of economic growth. It is more evidently in point source resource privileges' are enjoyed by a few, where diffuse resources show horizontal relationship where benefits are shared among the elites. This is because social investment and institutional capability develop more rapidly under the condition of diffusing, where the resources are more evenly distributed less scope for political capturing, and government is more likely to adapt institutions in response to social pressure.

3.7. Changes brought by MPRDA

The enigma of expropriation of mineral rights has been one the controversial topics and this issue came before the Court in case *Annis Mohr van Rooyen v The Minister of Minerals and Energy*.⁹⁸ The plaintiffs were respectively holders of coal and clay rights before the MPRDA came into force. When the MPRDA, came in force the plaintiff lodge claims for compensation in terms of item 12 in schedule II to, and regulation 82(A) (1) of the MPRDA on the bases that their rights had been expropriated by the coming into force of MPRDA.⁹⁹The Court found that MPRDA did not acknowledge any existing holding of mineral rights, and the insofar as they have not been exploited, they simply disappear in thin air, and that transitional arrangement in Schedule II, to the MPRDA, unused older rights would simply have been extinguished without compensation,

⁹⁸2010 (1) SA 104.

⁹⁹Dale M, *South African and Petroleum Law* (2005) 591.

rendering the MPRDA contrary to section 25 of the constitution and hence unconstitutional.¹⁰⁰

According to Van der Walt, whether any individual effects of regime change satisfies the requirements of section 25(1)¹⁰¹ because the loss of individual older rights does bring about deprivation of property.¹⁰² At least as far as deprivation is concern the MPRDA is law of general application and the purpose of the regulatory scheme is clearly justified by the normative and Constitutional considerations.¹⁰³

3.8. Environmental Impact and Rehabilitation

The concept of rehabilitation during prospecting, exploration and mining are well accepted and are enforced¹⁰⁴, the current mining legislation in particular the environmental has been integrated into an aspect of prospecting and mining management. The Recognition of past deficiencies has been seen as a great involvement from other government departments, stakeholders and the affected parties.¹⁰⁵ Often mining operations impacts beyond the borders of mining operation and infringes the right of the surface owners. The rights of surface owners and prospecting or mining operations by focusing on the relevant provision of MPRDA.¹⁰⁶ The most important sustainability provision of South African regime towards ensuring environmentally friendly exploitation and sustainable utilization of the country's minerals

¹⁰⁰(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of Law of general application.

¹⁰¹*Ibid.*

¹⁰²Van der Walt A J H, Constitutional Property Law 3 edition (2011) 466.

¹⁰³*Ibid.*

¹⁰⁴ Andries H.S, et al Environmental management in South Africa (2008) 517-518.

¹⁰⁵ *Ibid.*

¹⁰⁶ Ramatji KN,LLM Dissertation, A legal analysis of Mineral and Petroleum Resources Development Act 28 of 2002 and its impact in mining operations in Limpopo Province, University of Limpopo.

is detailed provision on minerals and environmental regulations.¹⁰⁷ These provision are not only detailed, but MPRDA also states that in all categories of mining permits, detailed environmental management programme is required as condition precedent to consideration of application for the title either prospecting right, mining right, mining permit or other privileges.¹⁰⁸ The MPRDA also entrenches institutionalized devise to ensure sustainability of actual mining operation and effective rehabilitate the mining sites after mining operations through the integration of environmental management into environmental responsibility to remedy. Under this provision, holder of mining of the mining titles must reasonably practicable, rehabilitates the environment affected by prospecting or mining operations to its natural or predetermined state in conformity with the generally acceptable standards under the concepts of sustainable development.

The MPRDA provides for the regulation of environment impact caused by the mining operations and makes the Minister of Minerals Resources the competent authority responsible for the environmental regulation for South Africa and the Minister of Water and Environmental Affairs is competent authority

3.9. Conclusion

The MPDRA has been a controversial legislation in South African context in that it has eliminated the notion of private ownership of minerals and has given effect to the principle that the state is the custodian of the nation's mineral resources and that the state has the right to exercise sovereignty over all minerals resources within the country.¹⁰⁹ The state holds all of South Africa's minerals in custodianship and decides licensing system on who is able to explore and exploit them.¹¹⁰ This was one of the fundamental achievements of MPRDA which changed the previous system of private

¹⁰⁷ Oke Y, An appraisal of the paradigm shift in South Africa Mining Law and Regulation 2004 available on-line at <http://www.africafiles.org/articles.asp?ID=6962>>.

¹⁰⁸ *Ibid.*

¹⁰⁹ Robert C etal, A review on indicators of sustainability for the minerals extraction industries (2006) 156.

¹¹⁰ Hofmeyer Jeta from Inequality to exclusive Growth: South Africa's Pursuit of Shared Prosperity in Extraordinary Times (2011) 21.

and public ownership of minerals where the state has custodianship through the MPRDA regime and the mining charter and the industry has opened up considerably degree of access to ownership for the historically disadvantage.¹¹¹

CHAPTER FOUR: CRITICAL COMPARATIVE ANALYSIS

4.1. Introduction

Since it re-engaged with the DRC and Botswana, the World Bank has emphasized the need to increase foreign investment in the Country's Mining sector in order to boost economic recovery and growth. In a country that was been wracked by natural resources related to conflict and corruption for years and where the Government lacks the capacity to mitigate the impact of Mining and ensuring that the investments benefit the Congolese people and thus approach has not been without problems.

The World Bank's work to revitalize private investment in mining sector has focused primarily on three areas, the development of mining code, adopted in 2002, the establishment of mining Registry of cadastre, to coordinate the allocation of new mining titles and the restructuring of the Country's State owned copper Company. Despite the precocious state of DRC's institution however the WBG¹¹² has not placed equal emphasis on building capacity and equipping Government agencies to manage new investments in the sector, particularly at the provincial and local levels.

Due to poor dissemination of mining code and its inconsistent application, the code provisions concerning artisanal miners and affected communities are not well understood. Furthermore tax rates set under the code have been criticized as unduly

¹¹¹*ibid.*

¹¹² World Bank Gecamines.

favorable to Mining Companies. Meanwhile, provision in the mining code pertaining to the distribution of 40 per cent of Mining Revenues from taxes and royalties to local and provision government are reported not being implemented. The World Bank has recently admitted that the mining cadastre, which it helped to put in place, is not functioning. A lack of office capacity has thwarted efforts to keep pace with the large volume of application of new mining titles that have flooded in since it was opened in 2003 under the transitional government. As of April 2006, the cadastre had reportedly issue 2,300 license and its emphasis on rapid processing of application and allocation of permits are particularly troubling given the low level government capacity to monitor and mitigate environmental and social impact of mining sector activities or ensure adherence to rules governing land use and title boundaries.

The bank¹¹³ supports the restructuring of Congo's State owned copper Company. Gecomines, has failed to revive the sector as originally intended while the world bank group was advising DRC Government on reforms, but therefore a plan for the Company's restructuring was agreed upon Government officials in Kinshasa signed three deals with private Mining Companies that, according to confidential world bank memo, effectively transferred over 70 per cent of Gecomines most valuable copper and cobalt reserves into private hands. The World Bank has also received criticism for its apparent reluctance to leverage the Congolese Government to renegotiate, revoke or cancel the deals, which the bank itself acknowledges were approved with a complete lack of transparency.

4.2. OVERVIEW OF DEMOCRATIC REPUBLIC OF CONGO ON THE POLITICAL LANDSCAPE.

The Democratic Republic of Congo commonly referred to as the DRC, is a country located in the central Africa. It is the second largest country in the world with a population of over 71 million. The second Congo war, beginning in 1998, devastated the country and is sometime referred to as the African world war because it involved nine

¹¹³ Programmes which World Bank created.

African Nations and some twenty armed groups. Despite the signing of peace accords in 2003, fighting continues in the east of the country.

The economy of the Democratic Republic of Congo, it is a nation endowed with resources of vast potential wealth has decline drastically since the mid- 1980's, at the time of independence in 1960, DRC was the second most industrialized Country in Africa after South Africa, it boasted a thriving mining sector. Foreign business has curtailed operations due

Uncertain outcome of conflict, lack of infrastructure and difficult operating environment. The war has intensified the impact of such basic problem as an uncertain legal framework, corruption, inflation and lack of openness in government economic policy and financial operations

The economy of the second largest Country in Africa relies heavily on Mining. However, the smallest scale economic activity occurs in the informal sector.¹¹⁴ The largest mines in Congo are located in the Shaba Province in the South. The Congo is the world's largest producer of cobalt ore¹¹⁵ and a major producer of copper and industrial diamonds, the latter coming from the Kasai Province in the West. The Democratic Republic Congo has 70 per cent of the world Colton, and more than 30 per cent of the world diamond reserves. During 2002, tin was discovered in the East of the country but to date mining has been on small scale.

Smuggling of conflict minerals such as coltan and cassiterite core tantalum and tin respectively which has helped fuel the war in Eastern Congo. Katanga Mining Ltd, a Swiss owned Company owns the Luilu Metallurgical don't, which has a capacity of 175,000 tons of copper and 8,000 tons of cobalt refinery in the world. After the major rehabilitation programme, the company restarted copper production in December 2007 and cobalt production in May 2008.¹¹⁶ The Democratic of Congo also possess 50 per

¹¹⁴ Central Intelligence Agency (2001) Congo, Democratic Republic.

¹¹⁵ It is the major source of tantalum used in the fabrication of electronic components in computer, and mobile phone.

¹¹⁶ Katanga project update and 2008 financial, Katanga mining limited 8/12/08.

cent of African forest and a river system that could provide hydroelectric power to the entire continent according to an U.N report on the country strategic significance and its potential role as an economic power in Central Africa.¹¹⁷ Much of gold mining in DRC is done by artisanal miners and the UN report¹¹⁸ states that insecurity at gold mining sites all over eastern DRC is still widespread.

Smuggling remains a major problem, as that is how most of the gold from the east of the DRC reportedly leaves the country, much of it apparently making its way to Dubai. Still in mining there is 12 per cent of the GOP¹¹⁹ in 2010 is the largest source of direct foreign investment. The sector has already suffered from publicity over the conflict minerals and there are concerns that current rebel's¹²⁰ activity and potential for war could have further negative effects.

4.3. THE HELICOPTER VIEW OF MINING LAWS AND REGULATION IN THE DEMOCRATIC REPUBLIC OF CONGO

The legal system of the DRC is civil law based and mining industries are regulated through national legislation.¹²¹The legal system of the DRC is civil law-based and mining industries are regulated through national legislation.¹²² The main legislation that the mining industry come under the control of the mining code and the ancillary mining regulation. ¹²³

¹¹⁷ John Vondlver DR Congo economic and strategic significance.

¹¹⁸ Article 2012/10/17 US Congo democratic Rwanda – Uganda – idusbre 89 FIRQ 2012/10/17.

¹¹⁹ [http:// www.state Gov./r/pa/ei/bgn/2823.htm](http://www.state.gov/r/pa/ei/bgn/2823.htm).

¹²⁰ M23 – March 23 movement rebels from Democratic Republican of Congo.

¹²¹ World Bank.

¹²² Regulation issued by the DRC parliament and the DRC executive branch.

¹²³ Adopted in 2002, Law No:007/2002

The legislation is in general application throughout the entire country. The implementing measures of the mining code are provided by the mining regulation¹²⁴ and the core legislation includes environment standard applicable to mining activities.

The main administrative entities in charge of regulating activities in the DRC as provided by the mining code are:

- The president of the Republic, who can enact mining regulation to implement the mining code and exercises his power by Decree made on his own initiative or on proposal of the minister of mines, after having obtained the opinion of the Directorate of Geology or of the mining Registry.
- The Minister of Mines, who has amongst other powers, jurisdiction over the granting refusal and cancellation of mining rights and exercise his powers by way of Decree.
- The Mining registry, which is a public entity under the supervision of the minister of mines and the Minister of finance, whose assignment is to conduct administrative proceeding concerning the application for, and registration of mining rights as well as the withdrawal cancellation and expiry of those rights.
- The directorate of mines, which is responsible for inspecting and supervising mining activities with regard to health and safety, work, practices, production, transport, sale and social matters.

The Department in charge of mining environment, which has powers regarding the definition and implementation of the mining regulation concerning environmental

- Protection and the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study and the environmental management plan.

According to the Constitution and the mining code, the state is the owner of all mineral in the soil or subsoil. The state may grant to private parties¹²⁵ the right to explore and exploit minerals resources by awarding mining titles.¹²⁶ The mining legislation also,

¹²⁴ Adopted in 2003.

¹²⁵ Enacted by Decree No: 038/2003 on the 26th March 2003.

¹²⁶ Private parties referred to local or Foreign Citizens.

does not impose a specific classification system for reporting minerals resources and reserves.

The Mining Rights are protected by the DRC judicial system which adheres to the rule of law enforced pursuant to established procedures by Courts that are independent from the executive and legislative branches of the State. Moreover, the Mining code provides for a specific resource system for Mining Right Holders and organizes three ways to resolve mining dispute or threats over mining rights. Such dispute can be resolve by administrative recourse, judicial recourse and national or international arbitral recourse, depending on the nature of such threat or dispute.¹²⁷

4.4. THE SPECTRE OF MINES BEEN NATIONALISED

Nationalisation may be defined as the acquisition of privately owned enterprises by a government with or without compensation.¹²⁸It is important to emphasize on the actual act of acquisition. The State ownership or existence of State-owned enterprises is not the same thing as nationalisation. Historically the State has owned and operated enterprises in all economies whether they are mainly capitalist, socialist or mixed economies.

As the demand for effective Socio-economic transformation increases, so does the demand for the nationalisation mines. Indeed, the resources of nationalism, trend appears to be gathering pace in Southern Africa as a whole. Namibian government's intention to declare copper, coal, gold, uranium and zinc, as "strategic" minerals regulated in additional national protection.¹²⁹This means the exclusive exploration and Mining rights to all these strategic Minerals will in future be held by Namibia's State-Owned Mining Company, Epangelo Mining Company Limited.

¹²⁷[http://www.Yavassociates.com/blog2011/04/17 /Mining Laws and Regulation](http://www.Yavassociates.com/blog2011/04/17/Mining%20Laws%20and%20Regulation) (Accessed on29 November 2012).

¹²⁸ Routledge, Dictionary of economics (2002), London.

¹²⁹ Namibia's strategic Minerals, Mining Journal, 28 April 2011.

Consequently, investors will be required to partner with Epangelo ¹³⁰should they wish to acquire rights to any of these “strategic” Minerals in Namibia.¹³¹ While initially concerned about this, Mining Companies operating in Namibia appear to have been reassured by *Isak katali*'s subsequent statements that Government's reforms would only apply pre-operatively: existing exploration and mining licences would remain unaffected.¹³²

Their confidence may have been somewhat attenuated, however the national Government announcement entailed Canadian Afri-Can Marine Minerals Corporation¹³³, which owns the rights to Namibia's Second largest copper deposit in Haib, must enter into a joint venture with Epangelo.¹³⁴ The Namibian Government has made no secret of fact that it wishes Epangelo to participate in the project of development.¹³⁵ This comes on top of the publication of Zimbabwe's Indigenisation and Economic Empowerment Regulation, on 25 March 2011.

4.4.1. The Chinese experience of Nationalization.

The nationalisation of the People Republic of China was dominated and made success by industrialization which created jobs and directly empowered the people through worker cooperative so as to alleviate poverty. When the Communist Party of china took power in 1949, its long term goal was to build a socialist country and that meant to industrialization to take place.¹³⁶ It is important to note that the motive behind the

¹³⁰ State Owned Company

¹³¹ *The State owned company will be entitled 50% of shares.*

¹³² Minister of Mining and Energy of Namibia.

¹³³ Partnership between Namibian Government and Canadian Government.

¹³⁴ “Mining Companies welcomes clarifications on New Namibian Policy”, mining Weekly 11 May 2011.

¹³⁵ Epangelo Mining wants in On Haib Copper, The Southern Times, 5 September 2011.

¹³⁶ Wikipedia.org, The Economic History of the People 's Republic of China

Chinese Industrializations or Nationalisation was to empowered the people of the country as a whole and industrialisation was as a result couple with socialization.

Of second importance, it should be borned in mind that by virtue of china being under the leadership of the communist party politically and economically, socialization is inevitable and nationalisation as way of achieving socialism would go without heavy criticism and ideological confusion as it was the case in South Africa.¹³⁷ In the South Africa case, the call for the nationalisation of mines is undoubtedly mala fide given the fact that it is made within the womb of the capitalism where the ruling party has got the character of multi class and of concern, dominated by the anti and non-communist who would without doubt call for nationalisation that seek to pursue State capitalism and not for the benefit of the people as whole.¹³⁸ This immediately explain why the Chinese nationalisation was bound to be successful, it was made in the interest of the working class and poor¹³⁹by the leader of the organisation for the working class and the poor.

The clear economic vision that the country had contributed to the success of their nationalisation program, to show soberness and the careful consideration of the material facts. They first stabilize the economy by nationalizing the banking system and centralising it under the people Bank of China so as to bring inflation under control and unifying the monetary system. The land was directly transferred to the people and they were encouraged to form mutual aid scheme and deposit a certain percentage of their agriculture products to the state as a form of tax. They also established state owned firms to compete with private firms while partnering with them and slowly negotiating for a subtle and total takeover.

The second factor which contributed to the success was the development of educated and skilled personnel in strategic position of government and the economy. China as it aspired to be like the established Soviet Union, it sought assistance from the union and as a result, considerable number of skilled personnel relevant for industrialisation were deployed to assist china economically. This goes without saying that South Africa,

¹³⁷*Ibid.*

¹³⁸The call for the nationalisation of mines is vocally led by a proud enemy of the communist party.

¹³⁹The Chinese nationalisation was aimed aimed at improving living standards, narrowing of the income different and production of modern military equipment to guard against the capitalist countries

seeking to pursue nationalisation, we should dramatically change the status quo of skill shortage if we ever dream of succeeding in a wholesale nationalisation. The importance of educated personnel in economic development was stressed out by then President¹⁴⁰ of china in 1968 after the cultural revolution when he said “to revive the efficiency in the industry, the communist party of China Committees should be returned to the positions of leadership and campaign ship should be carried out to return skilled and highly educated personnel to jobs from which they had been displaced during the cultural revolution”.¹⁴¹

4.4.2. The Chilean experience of Nationalisation.

The nationalisation of mines in Chile was mainly on copper mines and the process was commonly describe as the “Chileanisation of Copper”.¹⁴² The government acquired control of the major foreign owed section of the copper mining industry in the country. This process was started by Carlos Ebarnez Campo¹⁴³ and was completed by Salvador Allende¹⁴⁴ following the negotiated nationalisation which was deemed as too slow and expensive process under the president of United Democratic Christian party in 1969.¹⁴⁵This act of sovereignty by Chilean government was socialist move and as a result inevitably angered the imperialist countries such as United States of America which pressed for international Economic embargos against the Chilean government and isolated it from the world economy. This worsened that State of politics in the country and created a space for a *coup de tat* and the assassination of the president in 1973.

The Second stage of nationalisation proceeded the afore discussion and was in 1969 under President Eduardo Freimontaiva. In this process the government acquired 51per

¹⁴⁰Zhou Enlai.

¹⁴¹*Ibid.*

¹⁴²The nutshell means the transfer of copper to the people of chile from foreign Investors or people.

¹⁴³The Constitutional President of Chile from 1952-1958, he was sympathetic to the Socialist cause of the Communist Party in the Country.

¹⁴⁴ The first democratically elected socialist President of Chile 1970-1973.

¹⁴⁵Eduardo Freimontalva.

cent of the two major mines which were American owned.¹⁴⁶This process was described as negotiated nationalisation designed to avoid conflict with the international state with specific reference to the United State of America. Also the movement for negotiated process was enable the state to acquire the assistance from the multination list in terms of technical, financial and marketing skill who have long been in the mining industry.

The outright nationalisation as already hinted above the was implemented after a victory of socialist candidate president Salvador Allende. In 1971 after the constitutional amendment which led to the immediate affection of law 17.450,¹⁴⁷ the expropriation without compensation was justified by assertion that the multinationals had already made enough profit which exceeds the book value of their property during their time of copper mining in Chile.

According to the Article 1 of the Chilean Mining code, the State has absolute exclusive, inalienable and imprescriptibly ownership of all mines in the country. It goes on however to state that everyone may prospect for and search for mining substance and this include foreign investor who must in addition observe the decree law 600¹⁴⁸ which deals with foreign investment and investment contracts. Owing to international economic pressures by the imperial countries, the Chilean nationalisation of copper industry was not success. This point is deliberately alluded on the bases that the ownership of mines in the hands of government but mining activities are carried by multinationals¹⁴⁹ liable to an overall tax of 42 per cent. This mode of nationalisation is comparable with South Africa mode which is far better because South Africa is collecting 50 per cent of mining profits through tax¹⁵⁰ with no track record of wholesale nationalisation which may attract economic embargos at international level¹⁵¹.

¹⁴⁶Chiquicanta and El Salvador.

¹⁴⁷This law empowered the government to expropriate mines without Compensation

¹⁴⁸In terms of Law, Foreign investors are liable for combine tax of 42%.

¹⁴⁹Article 1 of mining code of Chile.

¹⁵⁰*Ibid.*

¹⁵¹Mafa MJ LLM Dissertation, Critical analysis of the Law Regulation State Intervention in the Mineral Sector and Nationalisation of South African Mines University of Limpopo (2012).

4.4.3. The Venezuela experience of nationalisation.

The energy policy of Venezuela gave rise to the nationalisation of the oil industry in 1976, creating a State owned company, Petros de Venezuela which controlled oil and natural gas. It is important to note that Venezuela has the largest oil reserves in the Western Hemisphere. The State owned company of Venezuela accounts for about a third of country's GDP¹⁵², 50 per cent of government revenue and 80 per cent of the country's exports earnings.¹⁵³ Nationalisation policy was altered in 1990 when the country introduced new which allowed for private companies to invest in upstream oil sector of country which led to 22 foreign oil investing.¹⁵⁴ In 1999 Venezuela adopted a new Hydrocarbon Law which opened all aspect of the sector to private investment. In 2007, Hugo Chavez¹⁵⁵ announce the nationalisation of oil industry in which foreign companies were obliged to sign agreements to effect the State owned Oil Company, Pds was given majority control of oil industry.

Since Chavez took over and implemented nationalisation policies, the oil production fell by quarter and the government budget was affected severely. But since 2009 due to high need energy, many countries turned to Venezuela.¹⁵⁶ Currently the State owned company of Venezuela produces 3.3 million barrels per day, putting Venezuela as the world eight oil exporter and fifth largest net exporter around 15 per cent of the US oil consumption.¹⁵⁷ The Venezuela nationalisation of its strategic resources has beyond reasonable doubt proven to be a success and is remediable case study for South Africa. However, what must be born in mind is the political leadership an policy position of the Venezuela leading structure. It is a pure socialist country¹⁵⁸ like China which puts a position of unquestionable nationalisation debate.

¹⁵²Gross Domestic Products.

¹⁵³http://en-wikipedia.org/wiki/energy-policy_of-Venezuela.

¹⁵⁴This includes international Oil major like Chevron, Bp, Total and Repso YPF of Italy.

¹⁵⁵The leader of United Socialist Party Venezuela.

¹⁵⁶This includes Italy EniSPA, Petrovietnam and Japan's Itouch Corporation, with the China National Corporation signing a 16.3 million US dollar joint venture.

¹⁵⁷The energy policy Venezuela, Wikipedia. org

¹⁵⁸Venezuela is led by a coalition of Marxist Leninist organisation, the Communist party of Venezuela and the United Socialist party of Venezuela which is led by Hugo Chavez.

4.4.4. The South African mode of nationalisation.

Since the mid-19th century till now, South Africa discovered many mineral resources and it is home to vital and most diversified mineral reserve in the world and this includes platinum group metals, manganese, chromium and 54 other minerals. South Africa's economy has been based on the production and export of minerals, which in turn have contributed significantly to the country's industrial development.¹⁵⁹ Nationalisation would be unaffordable, according to the report there would be a cost of R1 trillion for total nationalisation and around R500 billion for majority ownership based on just compensation as government would need to raise R1 trillion to buy the listed out listed mining companies.¹⁶⁰ The minerals energy complex is still at the heart of South Africa's economy and will continue to be so far very long time to come.¹⁶¹ It has contributed and still contributes significant share to Gross Domestic Product in the form of export earnings, fixed capital formation, employment and sources of taxes for the state. Given its size, it has significant influence in many sphere of South Africa society.¹⁶² If minerals energy complex is to continue being the bulwark of South Africa economy then South Africa needs to ensure that, as resource owners, its citizens are getting a fair share of the resources rents from their extraction by mining companies.¹⁶³ A resource rent is the surplus value and the difference between the price at which a resource can be sold and its extraction cost and reasonable returns.¹⁶⁴

The position of the State's claim over profits and push for greater beneficiation, such as jewellery making and other finished products is about to locking mining capital for long haul¹⁶⁵. Nevertheless, nationalisation is not necessarily immune from the same problems as mining capital: short-term predatory rents for self-accumulation. It is for this reason that the ANCYL call for nationalisation only reinforces the perception that it

¹⁵⁹NovondweL.T and Ramatjie K, Nationalisation of mines in South Africa not a viable option for economic growth, *The Thinker*, vol. 38, April 2012, pg 36.

¹⁶⁰*Ibid.*

¹⁶¹*Ibid.*

¹⁶²*Ibid.*

¹⁶³*Ibid*

¹⁶⁴Supra (n153) at Para 8, Manuel T, Seccombe A and Mkokeli S, Mining report dismisses nationalisation of mines , *Business Day*, 7th February 2012.

¹⁶⁵*Ibid.*

is predatory rent seeking the kind.¹⁶⁶ South Africa's resources-based comparative advantage can be transformed into a national competitive advantage. The report warns against "asset grabs" by the State because such policy would be unconstitutional and inconsistent with section 25 of the Constitutional, property clause and because the government could also not afford to buy mining stakes.¹⁶⁷ Lack of co-ordination and strategy alignment between key departments (Mineral Resources and Trade and Industry) has seriously compromised the management of South Africa's minerals resources and lack of backward and forward linkages which should be contributing to economic development more broadly and to the creation of jobs. Empathic on the need for a decisive state role in reorganizing and managing the minerals sector, market forces alone will not help to align South Africa's rich and diverse minerals resources with its development needs, and have signally already failed to do so. ¹⁶⁸

Legally South African mines in principle are nationalised in perspective of the regulations and granting or issuing permits for mines and all activities in relation to mines. According to the Minerals and Petroleum Resources Development Legislation¹⁶⁹ the minerals and petroleum resources are common heritage of the people of South Africa and the State is the custodian thereof for the benefit of all South African. The State as the custodian acting through the Minister of the DMR¹⁷⁰ has the power to grant issue or refuse amongst other things any permission or license connected any mining operation. This provision is in line with the clause in the Freedom Charter¹⁷¹ upon with ANCYL call for nationalisation of mines and other commanding heights of the economy derive its full substantiation and existence. The debate about nationalisation of mines scares the investors and brought too much uncertainty on the policy direction of government. Influential people from politics, business and mining sector rejected the

¹⁶⁶*Ibid.*

¹⁶⁷Nevondwe L.T and Ramatji K, opcit at page 59-60.

¹⁶⁸*Ibid.*

¹⁶⁹ Section 3(1) of Act 28 of 2002.

¹⁷⁰The Department of Minerals Resources responsible for the issuing mining permits and regulation of mining related activities.

¹⁷¹The national wealth of our country is the heritage of all South Africans, shall be restored to the people, the mineral wealth beneath the soil shall be transferred to ownership of the people as a whole.

idea of nationalisation of mines and suggested that if it became a government policy, it will cripple the economy.¹⁷²

On the same topic nationalisation puts South African government in an advantageous position to deal with mining industry with specific reference to mining companies which may be problematic in terms of paying the levy which the government is entitled to get from the exploitation of the country minerals resources. Given the South African history and manner of transition to power, this mode of nationalisation is suitable by far, within the power given by State through the MPRDA. The nationalisation mode can work to the delight of the masses of our people and also is in line with the freedom charter if carefully and bona fide managed going forward.

While South Africa has been drifting down the international competitiveness rankings, many of our competitor nations are becoming very attractive to investors, thanks to their fast growth and their clear, consistence and socially sensitive market oriented economic policies.¹⁷³ Potential investors will just go elsewhere if they think that there is a real risk that they could lose their asset to nationalisation in South Africa. This effect is perhaps not immediate, but it is pervasive and long lasting. The real issue remains the growth of the mining sector so that it can prosper, employ more people, earn more foreign exchange and achieve its beneficiation ambitions.¹⁷⁴ The challenge is for government to work with the private sector to facilitate the creation of a conducive investment environment that enjoys the appeal and the lustre of foreign capital will lead to an expanded contribution by mining industry, which is complex and requires a very close co-operation of government, the mining sector and other interested groups that play a pivotal role in the socio-economic development.¹⁷⁵

¹⁷²Titio Mboweni, former Reserve Bank Governor, Patrice Motsepe, Mining Magnite and business Cyril Ramaphosa, the Deputy President of South Africa and member of African National Congress Executive Committee and Joel Netshitenzhe, a member National Planning Commission, Moeletsi Mbeki, an independent political analyst and businessman, Suzan Shabangu, Minister of Minerals have criticised the nationalisation of mines and suggested that it not a viable option.

¹⁷³Tshabala S, Nationalisation, accessed on the on 20th September 2014. See [www. Standard bank .co.za](http://www.standardbank.co.za).

¹⁷⁴Mbeki M, Nationalisation: What's to debate, Mining Weekly, available online.

¹⁷⁵*Ibid*.

4.5. THE GENERAL OVERVIEW OF BOTSWANA MINING STRUCTURE

Sectors involved: Mining – diamonds. State ownership in Botswana is not the result of nationalisation but rather state participation in the development of the industry from the beginning.

Current status: no active nationalisation policy and the Government is at pains to distance itself from any suggestion that new mining legislation is intended to be a form of nationalisation. Botswana clearly appreciates that to be associated with nationalisation can have negative consequences for a country's reputation.

Mining: state is majority shareholder in Debswana¹⁷⁶ and a significant shareholder in De Beers.

Consequences: not nationalisation but very successful.

Botswana has not employed nationalisation. The main area of consideration is the diamond industry and when diamonds came to be mined in Botswana, the government was involved as part owner from the beginning. The matter of compensation therefore did not arise.

Botswana is a good example of public/private participation in the mining industry rather than nationalization in the normally understood meaning of the term (forced takeover of a going private concern by Government). The Botswana Government owns 50 per cent of the Botswana mining Company Debswana and 15 per cent of De Beers which owns the other 50 per cent of Debswana.

The arrangement appears to have been very successful. It has been remarked that "Botswana seems to squeeze the last dollar of benefit out of the diamond industry". Some 40 per cent of Government revenue comes from the mineral sector. Botswana has built up foreign exchange reserves of more than \$7 billion. Its constitution prohibits nationalisation of private property. The Country has enjoyed very high rates of GDP growth for many years – even claimed as the highest in the world in a purely

¹⁷⁶State owned Company.

mathematical comparison. This successful performance suggests that the public partnership in Botswana works well.

4.6. The Nationalisation in other Countries.

After considering case studies of other countries and models for extracting greater revenue from the natural resources sector, some models were found to be inappropriate to the South African context, and a few including the Chilean model. This model had been examined so was Venezuela model which leans towards wholesale nationalisation.¹⁷⁷The Chilean model advocates co-existence of the private and the public sector in the mining sector. The Chilean model is attractive because it has similar challenges to South Africa especially its inability to create jobs in a downstream industry.¹⁷⁸

Key features of Chilean models are a focus on strategic minerals especially its copper, in which it is the world leading producer. If South Africa was to follow Chile's model, minerals such as platinum, chrome and iron ore may be targeted by the State for partial ownership. Another characteristic of Chilean model is a multiple ownership structure, with the State playing a significant role in ownership of resources assets.¹⁷⁹ Research indicates that nationalisation can be a solid move in some countries in some countries but it has a limited life cycle and is depended upon the choice of commodity such as the Venezuela experience in the oil fields.

Nationalisation had taken place in thirteen countries around the globe, after looking all data available for these countries, it was established that the only success stories are those of public private partnership (PPP) such as Botswana in the diamond mining industry and the case of China, which nationalised and liberalised significant parts of the economy. In most Europe countries such as France, Sweden, United Kingdom and

¹⁷⁷ANC Policy Discussion Document, maximising the development impact of the people's mineral asset: State intervention in the minerals sector (September 2012) accessed on 20th September at www.anc.org.za.

¹⁷⁸*Ibid.*

¹⁷⁹*Ibid.*

Norway, practice of nationalisation had always been followed by privatisation.¹⁸⁰ This has also been the case in countries in other parts of the world such as Zambia. Zambia has gone down the route before and it didn't work very well. But the government of Zambia has intended to increase participation in the mining industry and encourage new operations. The Zambian government has since warned South African that nationalisation of mines is not a viable option.¹⁸¹

4.6. Conclusion

The phenomenon of Europe wide sector research and dealing are components which are well established, but the imperatives of national economic trends have an irritating way of reasserting themselves. For Mining the global picture is paramount and the Mining Companies may have operations in half a dozen Countries but the market and price for its product is international, homogenous and largely unaffected by local considerations. Even those other great international leviathans, the oil majors, can find downstream profitability materially affected by local conditions. Mining then is an industry which requires an international outlook from investors. An open and enquiring mind is essential and in order to make informed judgments about investing possibilities a wide body of knowledge about the world is essential. Many people make the mistake of thinking that the mining sector is difficult because it requires technical knowledge of the industry itself and unless one is familiar and comfortable with engineering and geological concepts one is bound to flounder.

¹⁸⁰Supra (n171)

¹⁸¹ Nevondwe L.T and Ramatjie K, Nationalisation of mines in South Africa not a viable option for economic growth, The Thinker, vol. 38, April 2012, pg 61.

CHAPTER FIVE: RECOMMENDATION AND CONCLUSION

This is a critical time for South Africans mining industry. South Africa's precipitous decline in 2011 on Fraser Institute rankings, a flawed BEE policy driving populist pressures for mines nationalisation couple with the increase assertiveness of African Exploration do not, firstly sight create a pretty picture. At the same time the DMR's introduction of new mining cadastre system, audit of right by DMR and the prospect of significant amendments to the MPRDA maybe next year may well presage a significantly better future for the mining industry.

The Government was aware of the increasing negative sentiment towards South Africa's mining industry in particular, its regulatory frame work. There are number of ambiguities in the MPRDA that creates lack of transparency in and also access to the DMR's licensing data, that the DMR is plagued by administrative capacity problems, and that there is a growing perception of maladministration within the DMR. For the first time the government has prepared to admit that there is a problem and has undertaken to fix it. The objectives of the MPRDA do not currently include the maximisation of the development impact, particularly job creation through realisation of the linkages to the rest of economy. We need to urgently rectify this by amending the MPRDA objectives. This would permit the State to impose necessary condition on all prospecting or mining licenses.

There is an overhaul announcement of the regional office of the DMR, by introduction of a publicly accessible web-based systems of licensing data to enable companies to track the progress of their licensing application and also the imposition of a moratorium on the lodging and acceptance of prospecting right applications. The moratorium is particularly intended to give the DMR an opportunity to conduct a comprehensive audit of all licenses granted since the promulgation of the MPRDA, by placing its data base in order and preparing a new license data system.

Perhaps upon the announcement one can reach an inference that the DMR is well aware of the problems that are currently beset on the regulatory regime and now the

Department is attempting to take a pro-active stance to remove these blockages. Of course, it is incumbent on DMR to be seen whether these measures are implemented. The other alternative will be to redraft the MPRDA in order to improve on its predecessor. The new Mining Cadastre system should add greater transparency to the process of applying for prospecting rights, mining rights and permits. The tripartite Mining Industry Growth, Development and Employment Task Team (MIGDETT) was established in December 2008 to achieve two critical outcomes : firstly to help the mining industry manage the negative effects of the global economic crisis and to save jobs and, secondly to position the industry for growth and transformation in the medium to long term.

Good governance is vital to achieving sustainable development. It is pivotal to the success of BEE. However it is argued that good enough governance is sufficient for developing countries. The concept suggests that government do not have to resolve all problems at once but should instead prioritizes and focus on the areas that matter most. Furthermore, to shift the process from the private sector, an independent and dedicated government authority must be established to monitor and enforce BEE.

The real challenge for government is what will happen after the targets are achieved in 2016, sustaining the economic growth is more difficult than starting it and that the following stage will require more extensive institutional reform. South Africa has to strengthen its institution including social cohesion, which is essential to building more effective public institution.

In conclusion once the government tightens up mining legislation, it will have a huge leverage in the mining sector compared to other industries through the issuance of licenses, political will and purchase power. Thus compliance is likely to be higher in this sector. However institutions have to be strengthened and other policy-coordinated actions are required.

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