

“A legal analysis of the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002” and its impact in the mining operations in the Limpopo Province”

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ABSTRACT

In terms of the previous mining legislation in South Africa, mineral rights were held privately and in some instances by the state. The Mineral and Petroleum Resources Development Act (MPRDA) now vests all mineral rights in the state. Through the transitional provisions included in the MPRDA, mining companies can convert their existing 'old order' rights to prospect and/or mine (previously granted under the now repealed Minerals Act) to the 'new order' rights introduced by the MPRDA. The purpose of the MPRDA is to ensure the sustainable utilisation of South Africa's mineral and petroleum resources within a national environmental framework policy which primarily protects sensitive environments and the interests of affected communities, organisations and individuals, while promoting socio-economic development.

DECLARATION BY SUPERVISOR

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

Signed-----

Date-----

Adv. Lufuno Tokyo Nevondwe

DECLARATION BY STUDENT

I, Kanuku Nicholas Ramatji declare that this mini-dissertation submitted to the University of Limpopo (Turfloup Campus) for the degree of Masters of Laws (LLM) in Management and Development law has not been previously submitted by me for a degree at this university or any other university, that it is my own work and in design and execution all material contain herein has been dully acknowledged.

Signed-----

Date-----

Kanuku Nicholas Ramatji

DEDICATION

To my Mother Magomalatsi Ivy Ramatji for being such wonderful parents to me and for supporting me since childhood, with love and gratitude, I would like to thank you for your patience during my studies and for the courage you gave me when things were not good.

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I also wish to acknowledge my aunt Sanna Motladi Senong who through her love and support I managed to soldier on, and to my sister Maselo Ramatji who stood by me through trials and tribulations, to Mabileu Ramatji who through her courage made me to keep my head high and to Martha Mohlala who supported me in trying times and always gave me courage to be strong, and lastly to Robert Malemone, who through his contributions and motivation motivated me to completed my studies.

TABLE OF STATUTES

1. Constitution of the Republic of South Africa Act 108 of 1996.
2. Minerals Act 50 Of 1991.
3. Mineral and Petroleum Resources Development Act 28 of 2002.
4. Administrative Authorities Act 37 of 1984.
5. National Environmental Management Act 107 of 1998.
6. National Water Act 36 of 1998.
7. Promotion of Administrative Justice Act 3 of 2000.

LIST OF ABBREVIATIONS

MPRDA	Mineral Petroleum Resources Development Act
DME	Department of Mineral and energy
EIA	Environmental Impact Assessment
EMP	Environmental Management Programme
EMPR	Environmental management Programme Report
NEMA	National Environmental Management Act
NWA	National Water ACT
DWAF	Department of Water Affairs
DEAT	Department of Environmental Affairs and tourism

TABLE OF CASES

1. *Agri South Africa v Minister of Minerals and Energy* 2010 (1) SA 104.
2. *Anglo Operations v Sandhurst* 2006] SCA 146 (RSA).
3. *Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Others* 2004 (4) SA 490(CC).
4. *Bengwenyama Minerals v genorah* CCT39/10 (2010) ZACC.
5. *De Beers v Atagua Mining* [2007] ZAFSHC 74.
6. *Director: Mineral Development, Gauteng and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).
7. *Holcim v Prudent Investors* 2011 1 All SA 364 (SCA).
8. *Lebowa Mineral Trust Beneficiaries Forum v The President of the Republic of South Africa* 2002 1 BCLR 23 (T).
9. *meepo v kotze & others* 2008 (1) SA 104 (NC).
10. *Tongoane and others v Minister for Agriculture* BCLR 741(CC).
11. *Van Vuuren and Others v Registrar of Deeds* 1907 TS 289.

1. Historical background of the study.

Since the discovery of diamonds and gold in 1867, South African legislature has taken an active part in the development of this complex area of law.¹ The periods before and after the establishment of the Union of South Africa in 1910 were characterised by the adoption of a plethora of legislation on mining, minerals and mining safety matters. During the sixties four important consolidating statutes were passed which, together with subsequent amendments, comprised the legislative basis.²

The history of South African mining law has been to reward and protect the interest of private enterprise in the exploitation of minerals. However, this is not to say that the state had no control involvement in mining activities. Historically, the state has always retained control over mining operations, and under the Mining Rights Act.³ The state even held the exclusive authority to confer mineral rights in respect of precious metals.⁴ The minerals Act passed in 1991⁵ reorganised the mineral law of South Africa and became the legal basis for any and all mineral and prospecting rights in existence prior to the coming in to operation of the current mining legislation.⁶

Prior to the enactment of the Minerals Act⁷, mineral law was characterised by a series of statutes that were differentiated by both mineral type which they applied to and the area of mining law they regulated. The three primary effects of the Minerals Act⁸ were that it consolidated the fragmented mineral law, caused all mineral and

¹ Davenport T *A modern history* (2000)192-3.

² *Ibid.*

³ Act 20 of 1967

⁴ *Ibid.*

⁵ Minerals Act 50 Of 1991.

⁶ Preamble provides that "The purpose of the act is to regulate the prospecting for and the optimal exploitation, processing and utilization of minerals; to regulate the orderly utilization and the rehabilitation of land surface during and after prospecting and mining operations.

⁷ Act 50 of 1991.

⁸ *ibid.*

prospecting rights to conform to a common law basis and amended the balance between state and private interests in minerals firmly in favour of private enterprise.⁹

The Minerals Act¹⁰ regulated the method and manner in which mineral rights were exercised through the use of a system of authorisations. These amounted to a system of common law rights.

The past mining legislation and the general history of racial discrimination in South Africa prevented black people from acquiring access to mineral resources.¹¹ Land dispossession and deprivation of ownership aggravated the situation.¹² The constitution lays a foundation for measures to redress inequalities in access to the country's natural resources and enjoins the state to take reasonable legislative and other measures in its available resources to achieve the progressive realisation of constitutional rights.¹³

In 1955, the African National Congress of South Africa sent 50,000 activists into communities around the country to ask the people what kind of freedom they wanted.¹⁴ The result was the ANC's Freedom Charter,¹⁵ a blueprint for the non-racial South Africa. Two key provisions of the Freedom Charter were especially troubling to multinational corporations.¹⁶ The first declared that "The land shall be shared by those who work it," meaning redistribution of farmland. The other proclaimed: "The mineral wealth beneath the soil, the banks and the monopoly industry shall be transferred to the people as a whole." The Freedom Charter, which sprang directly from the aspirations of South Africans, and was endorsed by nearly 3,000 delegates at a Congress of the People, was a socialist document.¹⁷

⁹ This is an extract of the masters' thesis by Narshai. For a full discussion on Expropriation under the Mineral Petroleum Resources Development Act 28 OF 2002 see the LLmthesis of Raakesh Narshai, University of Western.

¹⁰ Act 50 of 1991.

¹¹ De Rebus, July 2011 Bold interpretation in mining law: The Constitutional Court approach in the Bengwenyama case.

¹² *Ibid.*

¹³ Constitution of the Republic of South Africa.

¹⁴ 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.

¹⁵ The Freedom Charter has been adopted in 1955 by the Congress of the People.

¹⁶ *Supra* (n 14)

¹⁷ *Ibid.*

It was for this reasons, among others that parliament enacted the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act)¹⁸ to expand opportunities for historically disadvantaged people to enter the mineral and petroleum industries and to benefit from the exploitation of these resources. Immediately prior to May 1, 2004, the principal legislation governing mineral rights in South Africa was the Minerals Act,¹⁹ which came in to effect in 1991. The MPRDA is amongst others to transform the mining and production industries in South African mineral resources.²⁰

1.2 The problem stated.

There is a general trend for mining companies not to contribute enough to the development of the communities around mining activities. The root cause of the problem is that mining companies have a tendency to prioritise profit making than to contribute to development of communities. This does not suggest that mining companies must compromise their business objectives in favour of community development. But is a point made to indicate the need to balance between profit making and corporate social responsibilities.

The introduction of MPRDA constituted a revolution in South Africa's mineral law regime. Prior to this point, there had always been a public law administrative element to mineral law, but the system was largely based on private law rights and duties.²¹ The MPRDA²² abolished the previous regime of mineral law and replaced it with a new statutory regime which had elements of strong state control in the obtaining, exercising and transfer of mineral law related rights. However, such a radical change could not be implemented rapidly without the destabilization of the mining sector economy. Therefore

¹⁸ Act 28 Of 2002.

¹⁹ Minerals Act 50 Of 1991.

²⁰ <http://www.dmr.gov.za>: Found at 14:30 on the13/02/2012.

²¹ This is an extract of the master's thesis by Narshai. For a full discussion on Expropriation under the Mineral Petroleum Resources Development Act 28 OF 2002 see the LLMthesis of Raakesh Narshai, University of Cape town.

²² Act 28 Of 2002.

the transitional provisions of the MPRDA²³ were created to govern the change between two regimes of law.

For many years, the South African mining industry has been the top employer in the country. It would make sense, therefore, that the bulk of this employment is made up of members of local communities. Although mining companies strive to do this, certain skills within the company are specialised and cannot be filled by members of the local community. Often there are misunderstandings between mining companies and local communities regarding employment targets.²⁴

In many instances, mining companies have invested huge amounts of capital for development and openly stated that they are contributing to socio-economic development at a grass root level in mine- affected communities.²⁵ In reality, however, communities in the developing world have usually been completely by passed by any development benefits from mining project and are often left in a marginalised state in which they are far worse off than before a mine opened.²⁶ The identification and mitigation of both positive and the adverse social impacts that may arise from a given project such as the establishment of a mine can be solved by the proper implementation of the Act.²⁷

1.3 Literature review.

According to Peter Leon, a mining expert at law firm Webber Wentzel, the MPRDA has come at some cost to South Africa, including a decline in foreign investment in the mining industry.²⁸ 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,

²³ (*supra* n21)

²⁴ J Fourie South African Mining Companies Embracing Social Uiftment.

²⁵ (*supra* n12)

²⁶ *ibid*

²⁷ Act 28 of 2002.

²⁸ Peter Leon is a partner at webber wentzel and heads up the firm's mining law department. He specialises in all aspects of mining law.

suspend or cancel prospecting and mining rights, premised on vague and potentially immeasurable social and labour objectives²⁹.

The nucleus of the MPRDA can be founded by reading Section 3 (1) which provides that “mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africa”.³⁰ The concept of custodianship is novel entity in South African law.³¹ The significance of this provision is that it drastically alters the legal relationship between the holders of mineral or prospecting rights.³²

Custodianship has to be looked at with regard to the transition from a private law dispensation to a public law dispensation. Minerals have been removed from the private sphere and new public law powers are the only form in which minerals can be exploited.³³ Commentators on the MPRDA concur that the view point that common law mineral rights are no more, and this has been confirmed in both *Agri South Africa v Minister of Minerals and Energy*³⁴ and *De Beers v Atagua Mining*.³⁵ Hartzenberg J in *Agri SA* described all common law rights as having disappeared in to the air, as though they were extinguished.

According to Dale, when the minister exercises the power to grant new order rights, the minister is not transferring rights but creating new statutory limited real rights with the entitlements to prospect or exploit minerals. Furthermore,³⁶ Mostert claims that no other view adequately explains where ownership of minerals vests.³⁷ Dale’s argument is to be preferred with respect to the view that the entitlement of exploitation does not vest in the state but no opinion is offered as to whether the ownership of unsevered mineral remains with the land owner.

²⁹ *Ibid.*

³⁰ Section 3 (1).

³¹ *Supra* (n 21).

³² *Ibid.*

³³ Mostert H, *Perspective on mineral law* 2nd ed (2005) 47.

³⁴ 2010 (1) SA 104.

³⁵ [2007] ZAFSHC 74.

³⁶ *Supra* (n21).

³⁷ *Supra* (n33).

Badenhorst and Mostert take the view that the state's custodianship causes the *cuius est solum* principle to be abrogated entirely in the context of minerals, with the result that previous dispensation of common law mineral rights is obliterated.³⁸ However they propose that this abrogation coupled with state's new authority to grant statutory mining rights is an implicit *ex lege* transfer of the entitlement to exploit minerals of the state³⁹.

The study will examine the role and function of the MPRDA in the development of communities located in mining areas hereafter referred to as mining communities. Since the promulgation of the Act in 2002 we had cases which have served the purpose of the Act as a developmental orientated legislation.⁴⁰ Section 104 of the Act introduced preferrent rights as an option for communities who wish to participate in mineral development on their land.⁴¹ When a preferrent right is granted to a community, a mining company is obliged to obtain the consent from that community before it can secure any mineral development.

It is hoped that this new feature will make a difference to the livelihoods of people in rural communities. Preferrent rights also provide for ongoing benefit sharing that is made possible by royalties payable directly to communities.⁴² In the case of *Bengwenyama Minerals v genorah*,⁴³ the community contended that the Supreme Court of appeal erred in finding that the application for prospecting rights by the community was brought out of time and for not finding that the community should have been awarded a preferrent right to prospect in terms of MPRDA,⁴⁴ Leave to appeal was accordingly granted to the community. This was a move by the court to enforce the objectives of the Act. Also in *Tongoane and others v Minister for Agriculture and Land Affairs and Others*, the court held that the Act seeks to redress past wrongs.⁴⁵

³⁸ Badenhorst P. J and Mostert H Mineral and Petroleum Law in South Africa (2004) 13.

³⁹ *Ibid.*

⁴⁰ Act 28 of 2002.

⁴¹ Section 104 MPRDA.

⁴² World Investment Report: Transnational Corporations, Extractive Industries and Development 176.

⁴³ *CCT39/10 (2010) ZACC*

⁴⁴ *Ibid* at para 9.

⁴⁵ BCLR 741(CC) AT paras 10-11

In terms of the MPRDA the mineral resources of this country are the heritage of the people. This means people have the right to benefit from the mineral resources underneath their soil. But unfortunately those who have been entrusted with the responsibility to extract some of these minerals have not yet started to contribute immensely and qualitatively to the benefit of the people. The issue of mining beneficiation is legislated but unfortunately compliance is not been adequately monitored.

The primary purpose of this dissertation is to expose the weakness of failure to comply and the incapacity of government as the custodian of these minerals on behalf of the people to ensure full adherence to the legislation and other mining documents like the mining charter, SLP's and the code of good practice. In the event companies were complying with all the relevant legislation and documents and furthermore responding positively to their morale obligation, mining would be contributing significantly and decisively to the development of mining communities in Limpopo province and South Africa in general.

South African mining industry is supported by an extensive and diversified resource base and has since its inception been a cornerstone of South Africa's economy.⁴⁶ The changes which have come about 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.⁴⁷ The creation of wealth and employment is required for the economic empowerment of communities, both directly and through the multiplier effect.⁴⁸

This is especially relevant in the underdeveloped regions of the country. In order to contribute to a competitive and sustainable minerals industry in South Africa, government involvement should be focused on efficient and cost effective resource management.⁴⁹ This should include the opportunity for other parties and individuals to

⁴⁶ <http://www.info.gov.za:found at 13H45 on the 10.02.2012>.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

constructively engage government and the main stakeholders on matters of common concern⁵⁰.

1.4 Aims and objectives of the study

- This study aims to benefit prospective students, the province and the academic body of knowledge with regard to the legal implications of the MPRDA.
- This study will serve as an eye opener for prospective students and practitioners of mining law with special interest and speciality in mining law.
- To examine the participation of surrounding communities where there are mining operations.
- To change the peoples view with regard to mining law.
- To evaluate the impact of the Act on socio-economic development of communities.

1.5 Research methodology.

The research methodology to be adopted in this study is qualitative. It shall go on historical excursion and exposition based on robust jurisprudential analysis. The research is library based and reliance is placed on materials such as journals, textbooks, case law, conference papers, law reports, legislation and electronic sources.

1.6 scope and limitation of the study

The study consists of five chapters. Chapter one is the introductory chapter laying the foundation of the study. Chapter two will focuses on the analysis of the Act and its impact in the mining industry in the Limpopo province. Chapter three will deals with jurisprudence and case law where mining companies were taken to court for non-compliance with the Act. Chapter four deals with the issue of nationalisations of mines

⁵⁰ *Ibid.*

on whether is a viable option for the benefit of Limpopo Province and South Africa at large. Chapter five is the summary of conclusion drawn from the whole study and makes some recommendations.

CHAPTER TWO: LEGAL ANALYSIS OF THE MPRDA AND ITS IMPACT

2.1. Introduction

The systematic marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Historically Disadvantaged South Africans (HDSA's) from owning the means of production and meaningful participation in the mainstream economy.⁵¹ To redress these historical inequalities, and thus give effect to section 9 of the Constitution of the Republic of South Africa,⁵² the democratic government has enacted inter alia, the MPRDA.

The introduction of the MPRDA constituted a revolution in South Africa's mineral regime⁵³. Prior to this point, there had always been a public law administrative element to mineral law, but the system was largely based on private law rights and duties.⁵⁴ The MPRDA abolished the previous regime of mineral law and replaced it with a new statutory regime which had elements of strong state control in the, exercising and transfer of mineral law related rights. However, such a radical change could not be implemented rapidly without the destabilization of the mining sector of the economy.⁵⁵ Therefore the transitional provisions of the MPRDA were created to govern the change between the two regimes of law.⁵⁶

According to its long title, the MPRDA was enacted to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources."⁵⁷ By enacting the MPRDA, parliament also took into consideration "the state's obligation under the constitution to take legislative and other measures to redress the results of past racial discrimination. It is therefore, not surprising that, in

⁵¹ The amendment of the Broad-Based Socio-economic empowerment Charter for the South African Mining and Minerals industry (preamble).

⁵² Section 9 provides that "Everyone is equal before the law and has the right to equal protection and benefit of the law".

⁵³⁵³ *Supra* (n30)

⁵⁴ *Ibid.*

⁵⁵ Item 2(a) of schedule II of the MPRDA has the protection of the security of tenure of existing mining operations as an objective of schedule II.

⁵⁶ *Ibid.*

⁵⁷ *Supra*(n 37).

terms of section 2 (c),⁵⁸ it is one of the objectives of the MPRDA to “promote equitable access to the nation’s mineral and petroleum resources to all the people of South Africa.

2.2. The objectives of the Act are to-

- a) Recognise the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic;⁵⁹
- b) Give effect to the principle of the State’s custodian of the nation’s mineral and petroleum resources;
- c) Promote equitable access to the nation’s mineral and petroleum resources to all the people of South Africa;
- d) Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources;
- e) Promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
- f) Promote employment and;
- g) Provide for security of tenure in respect of prospecting, exploration mining and production operations;
- h) Give effect to section 24⁶⁰ of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
- i) Ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

The first objective of the deals with International law pertaining to state sovereignty. Although formulated as a right, it clearly positions the state to fulfil its responsibilities for

⁵⁸ Act 28 of 2002.

⁵⁹ These principles are contained in two UN general assembly, Resolution on permanent Sovereignty over natural resources. GH Res 1803, GHOR 17th session (1962), and Declaration on the Establishment of a new International Economic Order GA Res 3201, UN GAOR 6th special session (1974).

⁶⁰ Constitution of the Republic of South Africa.

dealing with the mineral wealth of the country in the best interest of the country and its people.⁶¹ The next three objectives deal with socio-economic matters involving the states responsibility to its nation, equity when it comes to access to the mineral wealth of the country and create access to wealth creation opportunities for the previously disadvantaged.⁶²

Objective I also is a principle of the duty of holders of mining and production rights to contribute to the development of the areas in which they operate. Objectives e-h are based on principles of economic industrial development and from the basis on which the mining and petroleum industry must be developed.⁶³ These principles *inter alia* provide a secure framework for investment in the mining industry in South Africa.⁶⁴ Objective h is aligned with the fundamental environmental principle of sustainable use of natural resources in South Africa. It however balances the right to development with the right to a safe and healthy environment.⁶⁵

2.3. Custodianship

Prior to the MPRDA coming in to operation mineral rights in respect of immovable property formed part of the rights of the land owner.⁶⁶ It was also possible to sever the mineral rights from the ownership rights, and third parties could accordingly become holders of mineral rights. Such rights were freely transferable and were valuable and could be held for as long as the owner wished. The holder of a mineral right was under no obligation to exploit the rights. The state could not force him to start with the exploitation thereof.⁶⁷ The then position where by mineral rights were held and transferred between persons as private property as basis for obtaining property and mining licences was changed to a system of state control.⁶⁸

⁶¹ Schepeers T, *Law and development* (2011) 19.

⁶² *Supra* (67).

⁶³ *Ibid.*

⁶⁴ *Ibid*

⁶⁵ Kidd M *Environmental law* (2009), 19

⁶⁶ [http:// www.cliffedekkerhofmeyer.com](http://www.cliffedekkerhofmeyer.com) at 20h05 on the 05/03/2012

⁶⁷ *Ibid.*

⁶⁸ <http://www.petmin.com/bee>: Found at 00:21 on the 05/03/2012.

This position changed on 1 May 2004 and effectively the MPRDA placed the mineral and petroleum resources in South Africa in the hands of the state. The state is the custodian of all mineral and petroleum resources and controls all rights granted under the Act.⁶⁹ In order to provide equitable access and ensure the sustainable development of the mineral and petroleum resources in South Africa, the MPRDA introduced a new regulatory framework, which provides that all rights to minerals and petroleum resources are granted to applicants who comply with the objectives and requirements of the Act.⁷⁰ The Act aims to avoid discrimination and promote the distribution of assets among historically disadvantaged groups.⁷¹

This is a drastic break with the past. Different people, South African and foreigners prior to the coming in to effect of this Act owned different rights to mineral resources in South Africa.⁷² Private ownership of the mineral wealth of the country is no longer possible, because the laws had declared that the resource wealth belong to the citizens of South Africa.⁷³ The state is the custodian who holds and cares for as well as manages and protects these resources for and on behalf of the people of South Africa and the future generations; this is a far reaching and fundamental shift of great significance for the future development of the country and its people.⁷⁴

The fundamental principle here is for the benefit of all South Africans. This principle, and the others relating to socio-economic development, brings the MPRDA squarely within the ambit of development law.⁷⁵ In terms of section 3 (1) mineral resources” are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans”. Under section 3(2) the state, as the custodian of the nation’s mineral resources, may through the Minister” grant, issue, refuse, control administer and manage any prospecting right, permission to remove, mining right, mining permit and retention permit. Cawood’ correctly articulates the

⁶⁹ Section 3 MPRDA.

⁷⁰ Act 28 of 2002.

⁷¹ Cinder M Getting to the bottom of mining rights September 20 11.

⁷² *Supra* (n 70) at 20.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

historical and legal developments leading to the creation of the MPRDA.⁷⁶ He makes some observations that further support the constitutionally progressive branding of these new minerals laws in South Africa's development.⁷⁷ He states that the MPRDA is concerned with the important role played by the South African State in using its resources to incorporate social aspects of an economy and makes it thoroughly inclusive by making an important and special mention of the role played by mining in local and rural development.⁷⁸ This is a leap forward for the law when one compares the MPRDA with its predecessor in the form of the Minerals Act.⁷⁹

2.4. The application process in terms of MPRDA

In terms of section 16 of the MPRDA any person who wishes to apply for a prospecting, may apply to the Minister for a prospecting right.⁸⁰ Such an application must comply with stated requirements and it is submitted to a Regional Manager of the Department of Mineral Resources (DMR).⁸¹ If the requirements are met and no other person holds a prospecting right, mining right, mining permit or retention permit" for the same mineral and land", the Regional Manager must accept the application. On acceptance, the Regional Manager must notify the applicant to submit an environmental management plan and give written notice to the land owner, the lawful occupier or other affected person and to consult with them.⁸² On receipt of the environmental management plan and a report as to the outcome of the consultation, the Regional Manager submits the application to the Minister⁸³.

When the Minister grants a prospecting or a mining right, she grants, in terms of section 5 of the MPRDA, a limited real right the content whereof is similar to the content of the rights of the holder of mineral rights. In *Holcim v Prudent Investors*⁸⁴ the new

⁷⁶ Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 60.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Act 50 of 1991.

⁸⁰ Section 16 MPRDA.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ 2011 1 All SA 364 (SCA) par 21.

mining right was perceived as being similar to the common law mineral right. It was reasoned that the mining right 'is also a limited real right that confers upon the holder the right to enter on to the land, to search for minerals, and, if found, to mine and dispose of them for the account of the holder'.⁸⁵

The combined rights of the holders of prospecting and mining rights are to go upon the land, search for the minerals and if found, mine them, carry them away and dispose of them.⁸⁶ It is the Minister who grants those rights. In South African law, a prospecting right is generally valid for 5 years while a mining right is valid for 30 years.⁸⁷ Both rights are exclusive in that no other person may be granted a right to remove and dispose of any mineral in respect of the same land.

The Minister of mineral resources is the authority responsible for granting prospecting or mining rights. In practice, this authority is often delegated to lower-ranking officials, in particular, the Regional manager.⁸⁸ The MPRDA provides that the minister may refuse to grant a prospecting right if the granting of such a right will result in an exclusionary act; prevent fair competition; or result in the concentration of a mineral resource under the control of an applicant. This provision may therefore be used to prevent one private entity holding a monopoly over rights to a specific mineral across large areas.

In terms of the MPRDA the rights holder has an obligation to ensure optimal exploitation of the mineral resource.⁸⁹ A person is only entitled to a mining, prospecting, exploration or production right to the extent that they actively exploit these rights.⁹⁰ Holders of such rights therefore have an obligation to continuously conduct their operations within the period of the right. A retention permit may only be issued if the

⁸⁵ Section 5(1), (2) and (3)(a) to (c) of the MPRDA.

⁸⁶ Section 5(3) MPRDA.

⁸⁷ Section 17 (6) and section 23 (6) MPRDA.

⁸⁸ For purpose of mining, South Africa is divided by regulation in to a number of regions. The regional manager is official designated by the Director-general as the regional manager for a specific region. See also "four sustainable mining-key institutions, process and funding mechanisms.

⁸⁹ Tucker C and Gore S Getting the deal through mining 2011.

⁹⁰ *Ibid.*

applicant has completed prospecting activities and markets studies have revealed that mining of the mineral will be uneconomical due to prevailing market conditions.⁹¹

There is pressure on successful applicants to commence prospecting or mining soon after a right is granted. The holder of a prospecting right must commence with prospecting activities within 120 days from the date on which the prospecting right becomes effective. In the case of mining right, activities must commence within one year of the right becoming effective.⁹² Prospecting and mining rights are generally not transferable; i.e. they may not be transferred, let, ceded, alienated or otherwise disposed of without the written consent of the Minister of Mineral Resources. This also applies to a controlling interest in the company or close corporation holding such right. The only exception relates to a change of controlling interest in listed companies.⁹³

Under the MPRDA the holder of mineral rights no longer has an asset that can be sold, otherwise alienated, used as security or kept as an investment.⁹⁴ The mineral right holder's contingent ownership in the minerals, once severed, has similarly disappeared. The right to grant, subject to statutory regulation, the right to others to prospect for and mine has disappeared. In sum the holders of mineral rights have, since the enactment of the MPRDA, not one of the competencies that the law conferred upon them by virtue of the quasie-servitude. All that the MPRDA conferred on those holders is the right to apply, in competition with any other person, to be granted prospecting right or a mining right. Such rights are granted on a "first- come- first – serve" basis. If applications are received on the same day, preference is given to applications from historically disadvantaged persons.⁹⁵ There is a lacuna in the provisions of section 9, as the section

⁹¹ Section 32 MPRDA.

⁹² Supra (n 97).

⁹³ Section 11(1) MPRDA.

⁹⁴ Section 11 MPRDA.

⁹⁵ Section 9 of the MPRDA "provides that if a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on-

(a) The same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);

(b) (b) different dates must be dealt with in order of receipt

(2) When the Minister considers applications received on the same date he or she must give preference to applications from historically disadvantaged persons.

does not determine how applications received on the same day from (a) applicants who all fit in the “historically disadvantaged persons” category, or (b) applicants none of whom fit in the “historically disadvantaged persons” category, must be dealt with.⁹⁶

In addition to the rights referred to in section 5, the holder of a prospecting right has the exclusive right to apply for a renewal of the prospecting right and for a mining right.⁹⁷ Such a holder also has an exclusive right to remove and dispose of unlimited quantities any mineral to which the right relates.⁹⁸ The holder must pay to the state prospecting fees and royalties in respect of minerals removed and disposed.⁹⁹ Prospecting rights are registered in the mining titles office.¹⁰⁰

2.5. Obtaining a prospecting or a mining right

The process for obtaining a prospecting and a mining right are similar. In both cases an application must be lodged with the Regional Manager who generally accepts it if the applicant has paid the application fee and no other person holds a prospecting or a mining right in respect of the same mineral on the same land.¹⁰¹ Thereafter the applicant must prepare an environmental plan/ programme; and consult with interested and affected parties, including the owner and occupiers of the land. In order to obtain a prospecting or a mining right, it is not necessary to obtain the consent of the owner and occupiers of the land- the duty to consult is all that is required. However, the applicant may be required to pay compensation to the owner.¹⁰²

⁹⁶ Dale et al *South African Mineral and Petroleum Law* par 112.4. Applications which simultaneously comply with the initial requirements in Western Australia are resolved by resorting to a ballot system (see a 105A (3) of the Mining Act 1978). These so-called ‘same time applications’ happen if applications are lodged by mail or by courier delivery and two or more applications for the same land are by the same post or courier delivery (Hunt Mining Law in Western Australia (2009) 264). In *Hot Holdings v Creasy* (unreported WASC FC 27 September 1996 (cited by Hunt 264)) the Western Australian Supreme Court decided that the words “at the same time” do not mean “at precisely the same millisecond”. See also Badernhorst P J Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (2011) De jure 28

⁹⁷ Section 19 (a), (b) MPRDA.

⁹⁸ Section 20 MPRDA.

⁹⁹ Section 19 (f) MPRDA.

¹⁰⁰ Section 19 (2) (a).

¹⁰¹ *Supra* (n 95).

¹⁰² In the case of *Magoma v Sebe NO and Another* 1987 (1) S A 483 (ck), the meaning of ‘Consultation’ was considered in the context of section 2 of the Administrative Authorities Act 37 of 1984, E Pickard J observed: it seems that “consultation” in its normal sense, without reference to the context in which it is used, denotes a

An applicant for a prospecting right must complete consultation process with interested and affected parties within 30 days,¹⁰³ and must submit an environmental management plan within 60 days of notification by the Regional Manager,¹⁰⁴ while an applicant for a mining right must complete the consultation process and submit an environmental management programme within 180 days of notification. After receiving the environmental management plan/programme and the result of the consultation with interested and affected parties, the application is considered by the Minister or the delegated authority.

The criteria the Minister must consider when exercising his or her discretion include that the prospecting or mining 'will not result in unacceptable, ecological degradation or damage to the environment.'¹⁰⁵The entitlements that flow from the right to prospect or mine are far-reaching. Prospecting entails the intentional searching for any mineral by means of any method that disturbs the surface or substance of the earth. Mining refers to any operation aimed at winning any mineral on, in or under the earth whether by underground or open workings.¹⁰⁶

Section 104 of the MPRDA creates a preferential right for communities to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application with the Minister.¹⁰⁷ The term "preferent right" is not defined in the MPRDA and its content is unclear. A community may apply for such a preferential prospecting right in respect of land which is registered or is to be registered in its name. A "community" is defined in section 1 of the MPRDA as "a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law". This is qualified however, in section 104 (4), where it says it shall not be granted in areas where a prospecting right, mining right, mining permit,

deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.

¹⁰³ Section 16 (4)(b) MPRDA

¹⁰⁴ Reg 52 (1) MPRDA Regulations.

¹⁰⁵ Section 17 (1) (c) and 23 (1)(d) MPRDA, see also Four sustainable mining-key institutions, process and funding mechanisms.

¹⁰⁶ Section 1 MPRDA.

¹⁰⁷ Brannigan K Position of black rural communities in the mining sector of South Africa 2009.

retention permit has already been granted.¹⁰⁸ Applications for prospecting and mining rights are being given on communal land on a first-come- first- serve basis before the land is transferred to the rightful community owners, and before communities can effectively apply for preferent rights.¹⁰⁹

2.6. Beneficiation

Section 26 of MPRDA currently provides that the Minister may promote beneficiation of minerals in South Africa, subject to such terms and conditions as the Minister may prescribe.¹¹⁰ It also requires persons who wish to beneficiate minerals outside South Africa to do so in consultation with the Minister.¹¹¹ With the provision of section 26, the Minister has been empowered to prescribe beneficiation levels.¹¹² These levels will be specified in the regulations, which will be informed by the current and future absorptive capacity of the local beneficiation industry.¹¹³ These provisions will ensure that downstream industries have a reliable supply of input materials for conversion in to higher value goods, resulting in increased job opportunities and export revenue gains through increased economic activities realised by extended mineral value gains.¹¹⁴ Beneficiation seeks to translate comparative advantage as fulcrum to enhance industrialisation in line with state development priorities. In this regard, mining companies must facilitate local beneficiation of mineral commodities by adhering to the provision of section 26 of MPRDA and the mineral beneficiation strategy.¹¹⁵

With the conversion of existing rights in mind the MPRDA led to the mining charter.¹¹⁶ The charter made provision for ownership to the offset against beneficiation, the prospecting of minerals.¹¹⁷ To date, however, the Department of Mineral Resources (DMR) has never exempted a company from its full Black Economic Empowerment

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Section 26 MPRDA.

¹¹¹ Prinsloo L, Amended minerals law administratively burdensome, has financial implications for mineral sector (march 2012), accessed on 14th March 2012 at [www. Mining weekly.com](http://www.Miningweekly.com).

¹¹² A beneficiation strategy for the minerals industry of South Africa June 2011 (Department of Mineral Resources)

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Cargill J *Trick or Treat: Re-thinking Black Economic Empowerment* (2010) 96.

¹¹⁷ Ibid.

(BEE) ownership obligation as a result of it beneficiating a mineral.¹¹⁸ No one quibbled with the empowerment objective, which sought to ‘equitable access’ to all South Africans; to ‘substantially and meaningfully expand opportunities for blacks, and women in particular; and to ensure that mining companies contribute to the socio-economic development of communities in which they operate.’¹¹⁹

The MPRDA and the Mining Charter are mechanism tools that the DMR has adopted to ensure that the holders of the mining rights are committed to the development of the community through their various undertakings.¹²⁰ For instance, s25(2)(h) provides for the holder of a mining right to submit a prescribed annual report, detailing the extent of compliance with the provisions of s2(d) and (f), which deal with the expansion of opportunities for historically disadvantaged persons, the promotion of employment, and the advancement of the social and economic welfare of all South Africans.¹²¹ Ultimately, the holders of the mining rights would have used their own discretion in determining both the undertakings and the amounts committed to.

If there are any changes to the documents submitted pursuant to the application of the right, for example the company can no longer afford to employ as many people as were initially contemplated, they may submit an amendment to their mining right in terms of s102.¹²² In addition to this, s93 of the Act stipulates that any authorized person may during office hours, without a warrant, enter mining production in order to inspect any operation carried out and require the holder of the right to produce any book, record statement or other document for inspection.¹²³

One of the reasons for these inspections is to ensure that the holder is complying with the undertakings that have been made in the Mining Work Program, Social and

¹¹⁸ Ibid.

¹¹⁹ Supra (n 15).

¹²⁰ In a speech delivered on 2 August, Minister of Mineral Resources, Susan Shabangu, gave a stern warning to the mining industry when she indicated that the Department of Mineral Resources (DMR) is serious about the implementation of measures to address the “evil triplets of poverty, inequality and unemployment” faced within the communities where mining operations are conducted.

¹²⁰ Section 25 (2) MPRDA.

¹²¹ Section 2 of MPRDA.

¹²² Section 93 MPRDA.

Labour Plan, and Environmental Management Program. The holder of a mining right is required to report back in terms of compliance with the Mining Charter and must ensure that by 2014 there will be 10% participation by women and a 26% ownership by historically disadvantaged South Africans. Furthermore, the holder must adhere to the Mining Charter's scorecard, which dictates that Black Broad Based Economic Empowerment (BBBEE) codes have a target of 1% of net profit after tax and must be spent on mine community development projects.¹²⁴

South Africa, in terms of its industrial policy, seeks to diversify its exports away from unrefined or unprocessed commodities or intermediate mineral products.¹²⁵ With this policy objective in mind, the authorities are gradually introducing regulatory requirements in support of enhanced beneficiation of its commodities.¹²⁶ In particular, the South African Mining charter specifically provides for the offsetting of HDSA ownership requirement by mines against enhanced levels of beneficiation of their extracted minerals.¹²⁷

2.7. Environmental measures under MPRDA

The environmental measures in the MPRDA are more detailed and stringent on those in the mining industry.¹²⁸ Under the previous legislation the mining industry did not get involved with the environmental and social impact of mining.¹²⁹ However due to the MPRDA, the focus has changed it has become important to safe guard the health of humans and animals from the dangers resulting from mining process. It is also necessary to minimize the damage done to the environment and rehabilitate the

¹²⁴ <http://www.petmin.com/bee>: Found at 00:21 on the 05/03/2012.

¹²⁵ Grote M A South African Prospective, about the author Martin Grote is a tax specialist in the National Treasury of South Africa. See also Department of Minerals Resources: South Africa's industry in 2005/06, pp10-11.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Hebert T, The impact of environmental protection on the acquisition, transfer and renewal of the mineral rights LLB Dissertation University of Cape Town (2006) 4. See also Andries H *etal Environmental Management in South Africa* (2007) 554.

¹²⁹ Ibid.

surface of the land as far as practically possible.¹³⁰ The broader socio-economic issues are now taken into account.

These issues are viewed in light of how to make use of mineral resources in the most optimal way. Contrary to the MPRDA, surface rehabilitation is not the MPRDA's sole environmental focus.¹³¹ Surface rehabilitation is merely one of the environmental protection measures the MPRDA uses in working towards its broader environmental focus.¹³² This broader focus is due to the fact that the MPRDA was enacted to give effect among others to the environmental right in the Constitution which entails ensuring that the minerals are exploited in an orderly and ecologically sustainable manner for the present generation whilst not detrimentally affecting the needs of the future generation.¹³³ Section 38 of the MPRDA deals with integrated environmental management and prescribes the responsibility to remedy any environmental degradation or pollution.

The holder of a prospecting right, mining right or mining permit must:

- give effect to the general principles of integrated environmental management prescribed in Chapter 5 of NEMA;
- consider, investigate, assess and communicate the impact of his or her prospecting or mining on the environment;
- manage all environmental impacts in accordance with the EMP or approved EMPR; and
- as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land

¹³⁰ Ibid.

¹³¹ Glazewski *Environmental law in South Africa* (2006) 468. See also Badenhorst *Introduction to the law of mineral rights* (2005) 14.

¹³² Ibid.

¹³³ Ibid.

use which conforms to the generally accepted principle of sustainable development.¹³⁴

The holder of the right is responsible for any environmental damage, pollution or ecological degradation as a result of the prospecting or mining operations. Significantly, this duty extends to damage, pollution or degradation which occurs both inside and beyond the boundaries of the area to which such right or permit relates.¹³⁵

Before the minister approves an EMPR or EMP, the applicant for a prospecting right, mining right or mining permit must make the prescribed financial provision for the rehabilitation or management of negative environmental impacts.¹³⁶ If the holder of a prospecting right, mining right or mining permit fails to rehabilitate or manage any negative impact on the environment, or is unable to undertake such rehabilitation or management, the minister may, upon written notice to the holder, use all or part of the financial provision to rehabilitate or manage the negative environmental impact in question.¹³⁷

2.8. Closing of a mine

An application for a closure certificate must be made to the Regional Manager concerned and be accompanied by a closure plan and the environmental risk report.¹³⁸ A closure certificate may only be issued if Department of Water Affairs (DWA) has confirmed in writing that the provisions pertaining to management of potential pollution of the water resources have been addressed.¹³⁹ Regulation 56 sets out general requirements for mine closure. The holder of a prospecting right, mining right, retention permit or mining permit remains responsible for the environmental liability, pollution or

¹³⁴ Section 38 MPRDA.

¹³⁵ Section 41 MPRDA.

¹³⁶ Ibid.

¹³⁷ Section 45 MPRDA.

¹³⁸ Section 43 (5) see also Thompson H *Water law: Practical approach to resource management and the provision of services* (2006) 336. See also Kidd M *Environmental law* (2008)191.

¹³⁹ Section 43 (1) MPRDA.

ecological degradation of the operations and the management thereof, until the Minister has issued a closure certificate to the holder.¹⁴⁰

If any prospecting, mining, reconnaissance or production operations cause or result in ecological degradation, pollution or environmental damage which may be harmful to the health or well-being of a person and requires urgent remedial measures the Minister may direct the holder of the relevant right, permit or permission to investigate, evaluate, assess and report on the impact of any pollution or ecological degradation. The Minister may also direct that the necessary measures are taken and the measures must be completed before the date as specified in the directive.¹⁴¹

If the holder of a right, permit or permission fails to comply with the directive, the Minister may take the measures necessary to protect the health and well-being of any affected person to remedy ecological degradation and to stop pollution of the environment. In order to implement the measures, the Minister may by way of a court order seize and sell the property of the holders as may be necessary to cover the expenses of implementing the measures. The Minister may also use funds appropriated by parliament and recover the cost from the holder concerned.¹⁴²

If the minister has directed that measures must be taken, but establishes that the holder concerned is deceased and cannot be traced, ceased to exist or has been liquidated the Minister may instruct the Regional Manager concerned to take the necessary measures to prevent further pollution or degradation or to make the area safe.¹⁴³ The measures are funded from the financial provision made by the holder concerned, or if no provision is made or it is inadequate, from money appropriated by parliament.

Upon completion of the measures, the title deed of the property is endorsed to the effect that the land has been remedied.¹⁴⁴

¹⁴⁰ Section 45 (1) MPRDA.

¹⁴¹ Section 45 (2) MPRDA.

¹⁴² Section 46 (1) MPRDA.

¹⁴³ Section 41 (2) and 46 (2) MPRDA.

¹⁴⁴ Section 46 (3) MPRDA.

2.9. Conclusion

A significant consequence of the new order is that mineral law, which was usually accepted as part of private property law, now falls within the sphere of public law as well. Yet the entire mineral law system has not been removed from the sphere of private law.¹⁴⁵ Certain aspects of mineral law are regulated by administrative law, for example the granting of rights to prospect and to mine. Other parts of mineral law are still firmly rooted in private law, for example ownership of minerals and the consequences thereof.¹⁴⁶

The MPRDA achieves the reform goals by extinguishing private mineral rights, establishing the state as custodian of all mineral and petroleum resources and creating a system where the state receives public law powers to grant prospecting and mining rights.¹⁴⁷ The state thus gains control over rights to minerals in an effort to redress past discrimination. The MPRDA is the core legal instrument regulating the industry, and aims to promote the sustainable development of the nation's mineral resources.¹⁴⁸ It has a number of flaws and inconsistencies, and is currently being revised to address these. Other legislation, such as the National Environmental Management Act (NEMA)¹⁴⁹ and the National Water Act¹⁵⁰ are also pertinent to the regulation of mining operations, to which the MPRDA is also subject.

¹⁴⁵ Julie Stacey - Associate: Centre for Sustainability in Mining and Industry (CSMI) Wits and Managing Member: Envaluation cc, SEE also enviropedia .com

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Prinsloo L, Amended minerals law administratively burdensome, has financial implications for mineral sector (march 2012), accessed on 14th March 2012 at [www. Mining weekly.com](http://www.Miningweekly.com).

¹⁴⁹ Act 107 of 1998.

¹⁵⁰ Act 36 of 1998.

CHAPTER THREE: CHANGES AND IMPLICATIONS BROUGHT BY MPRDA

3.1. Introduction

The policy objective of MPRDA of South Africa envisaged opportunities for historically disadvantaged persons (which include communities in the mining regions) to enter the mining and minerals industry or benefit from the exploitation of the mineral resources within their areas of habitants.¹⁵¹ It is not clearly articulated in the MPRDA as to how the communities in the mining regions could be empowered. The concept of promoting sustainable development at the level of the affected community has gained interest over the past decade, and a key question that has arisen is how such efforts can and should be funded. Increasingly government is looking at distributing a portion of the fiscal benefits that arise from a mine to affected communities.¹⁵² It is expected that legislation requiring social commitment is likely to grow significantly in the future as states implement sustainable development principles in their mining regimes.¹⁵³

Author Peter Leon, argues a cautionary point concerning the MPRDA. In his writings Leon states that the newly elected government of 1994 was quick to set its sights on the Republic's mining industry.¹⁵⁴ Leon, further points out in his writings that the South African State custodianship is largely supported by section 2(a) of the MPRDA and states that the development of the MPRDA stems from the internationally accepted right of the State to exercise sovereignty over all its mineral and petroleum resources.¹⁵⁵ State sovereignty in turn reflects the sentiments of the new international economic order, however Leon argues that in South Africa this has resulted in a law that is uncertain in application and thus has created an unattractive venue for foreign investment.¹⁵⁶

¹⁵¹ <http://www.site resource>. World Bank: found at 23:10 on the 27/02/2012.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ 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 (Netherlands) (2008) 671 – 690. See also Ndlovu F P LLD Thesis, *An analytical study of the regulation of South African diamond trade from 1994 to 2009 with reference to aspects of the 1996 constitution* 2009.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

The governments and mining industries should recognize that one of the means effecting the entry of communities in the mining regions in to the mining industries and of allowing them to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industries assets by communities in the mining regions. Ownership and participation by communities in the mining regions can be divided into active and passive involvement.¹⁵⁷ The industry is growing at a rapid pace and it must be further noted that the mining industry has also affected communities in the areas of its operation.¹⁵⁸ Some communities, for example, have relocated to give way to mining activities. As a result, conflicts between the mining companies and communities have emerged. Since Limpopo Province has a large mineral base, for example, platinum, disputes between the mining companies and surrounding communities are likely to happen in many of these instances.¹⁵⁹

3.2. Consultation with host communities in terms of the MPRDA.

South African mining law requires that mining companies engage in public consultation with regard to exploration rights, mineral rights and environmental impact.¹⁶⁰ However, because this consultation does not require public consent, the consultation process is merely formalistic.¹⁶¹ Furthermore, there is a vast imbalance in knowledge resources, wealth and power that underpin such engagements, and most communities are cowed by the semblance of expertise presented by corporations at such gatherings.¹⁶² When mines hold compulsory environmental impact assessment meetings with communities the representatives of the corporation have a concentration of environmental, geographical, geological and hydrological knowledge, whereas, in

¹⁵⁷ Government Gazette, mentioned above. During the debate, International Bar Association vice-chairperson Peter Leon, who is also Webber Wentzel Bowens top mining lawyer, said that South Africa's minerals legislation was in "complete breach" of 42 international investment treaties, which South African had signed since 1994. Retrieved from <http://www.miningweekly.co.za/article.php2=102969>.

¹⁵⁸ Nevondwe L.T and Choma H J, *Socio-Economic Rights and financial planning in South Africa* (2010), 63.

¹⁵⁹ Ibid.

¹⁶⁰ Badenhorst PJ and Olivier NJJ, Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002. See also Section 10 of MPRDA.

¹⁶¹ Ibid.

¹⁶² Ibid.

contrast communities have low levels of literacy and hardly any tertiary education. This imbalance works in the favour of the corporation.¹⁶³

According to Nevondwe and Choma the law should be clear in this sense, stipulating that the consultation of the communities should occur on their lands, and should ensure that they receive prior information regarding the context of the project they are expected to express their opinion on.¹⁶⁴ It should also establish, if necessary the obligation that the mining company should assume the payment of independent consultant which may offer the indigenous community technical information regarding the operation.¹⁶⁵

In *meepo v kotze & others*¹⁶⁶ the view was expressed that the legislature provided due consultation between a land owner and the holder of or applicant for a permit in order to alleviate possible serious inroads being made on the property right of the land owner. Consultation is the means whereby a land owner is appraised of the impact that prospecting or mining activities may have on his land.¹⁶⁷

In dealing with the impact of EIA's a review of Anglo Platinum's decision to move the Ga Puka and Ga Sekhaolelo communities is illuminating.¹⁶⁸ The mine began planning for the Potgietersrus north pit in the mid-1990s.¹⁶⁹ An environmental Impact Assessment (EIA), guided by the environmental management (EMPR), began to determine the potential social and environmental impacts from the proposed open pit at Potgietersrus north.¹⁷⁰ From the mine plan and EIA process specialist studies showed that the two communities would need to be relocated to mitigate the safety and environmental risks posed by mining. When no viable alternative to resettlement could be found, the mine began an extensive process to seek approval for resettlement. What is clear is that the planning Potgietersrus North and the EIA largely excluded the

¹⁶³ Ibid.

¹⁶⁴ Supra (n 160) at 70.

¹⁶⁵ Ibid.

¹⁶⁶ 2008 (1) SA 104 (NC).

¹⁶⁷ Ibid at 11 4D-E.

¹⁶⁸ platinum under our feet: Dissenting Voices And Images Of Community Struggles Against Platinum Mining Companies In South Africa's Limpopo Province: makeitfair.org/en/the-facts/reports/platinum-under-our-feet.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

community. Furthermore, it is clear that the community's right to refusal to have the mining operation at all was not even a consideration.¹⁷¹

The Constitutional Court recently considered, amongst others, the issue of consultation in terms of the MPRDA in the case of *Bengwenyama Minerals Pty Ltd and others v Genorah Resources Pty Ltd and others*.¹⁷² At issue in this case was the lawfulness of the grant to the company Genorah Resources of a prospecting right on the land of the Bengwenyama-Ye-Maswazi community. This case is indicative of the insufficient protection of communities provided for by the MPRDA, notwithstanding the broad-based black economic empowerment (BBBEE) provisions of the MPRDA. The Constitutional Court noted that equality, together with dignity and freedom, lie at the heart of the Constitution, that equality includes the full and equal enjoyment of all rights and freedoms, and that to promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination.¹⁷³

The Court stated that the Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Court explained that the MPRDA was enacted, amongst other things, to give effect to those constitutional norms, and that it contains provisions that have a material impact on individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to South Africa's bounteous mineral resources.¹⁷⁴ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*¹⁷⁵ Judge Ngcobo emphasized that South Africa is a country in transition from a system of inequality to a system of equality therefore it is impossible to root out systematic racial discrimination without taking positive action. Therefore equitable legislation was introduced in order to remove competitive access which had its roots in forms of discrimination. Clearly the MPRDA is one of those positive laws that are

¹⁷¹ *Ibid.*

¹⁷² CCT 39/10 (2010) ZACC 26.

¹⁷³ *Ibid.* at par 65 and further at <http://www.saflii.org/za/cases/ZACC/2010/26.html>

¹⁷⁴ *Ibid.*

¹⁷⁵ 2004 (4) SA 490 (CC).

established to assist in creating equity and balance in accessing economic involvement¹⁷⁶

The department had an obligation founded upon section 3 of Promotion of Administrative Justice Act (PAJA) ¹⁷⁷ , to directly inform the community and Bengwenyama Mineral of Gerona's application and its potentially adverse consequences for their own preferent rights under section 104 of MPRDA.¹⁷⁸ This obligation entailed, in the circumstances of this case that the community and Bengwenyama should have been given an opportunity to make an application in terms of section 104 of the Act for a preferent prospecting right, before Genora's section 16 applications was decide.

This was the court's move to give preference to previously disadvantaged communities which is a requirement of the MPRDA. Peter Leon mining law specialist held the view that "this is a very important judgement because prospecting rights have been granted left, right and centre, all over the country, and the consultation with landowners by both the DMR and the prospecting right applicants is often fairly desultory."¹⁷⁹The mining charter is intended to bring about widespread socio-economic transformation in South Africa's mining industry. It was developed collaboratively by government and the mining industry. The outcome of the case would ensure a "balance of rights and interests" for the benefit of both mining industries and local communities, which did not exist under previous mining legislation.¹⁸⁰

The requirements to notify and consult in terms of MPRDA are contained in sections 5, 10 and 22, these sections, together with the compensation and expropriation

¹⁷⁶ 2004 (4) SA 490 (CC) 525 E - F.

¹⁷⁷ Act 3 of 2000.

¹⁷⁸ Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application to the Minister.

¹⁷⁹ Peter Leon is a partner at Webber wentzel and heads up the firm's mining law department. He specialises in all aspects of mining law

¹⁸⁰ An Mbendi industry (sector) profile for South Africa: Mining. This will require balancing of individual interest versus interest of society in requiring that substantial justice is done in transforming the minerals and mining industry. Retrieved from <http://1166.218.69.11/search/cache?e.=UTF-8&9>. See also Nevondwe L.T and Choma C.J *Socio-economic Rights and financial planning in South Africa (2010) 67.*

provisions.¹⁸¹ The obligation to consult with interested and affected parties rests on the applicant, the mining company, and not the State. However, the State, specifically DME, must ensure that this obligation has been fulfilled and proof thereof submitted to the DME as part of the application process. Section 25 of the Constitution also recognises the public interest in reforms to bring about equitable access to all South Africa's natural resources, not only land, and requires the state to foster conditions which enable citizens to gain access to land on an equitable basis.¹⁸²

3.3. Changes brought by MPRDA

The question of expropriation of mineral rights has been one of the controversial topics during and after the legislative process culminating in the coming into operation of the MPRDA. This issue came before the court in *Agri South Africa v The Minister of Minerals and Energy; and Annis Möhr van Rooyen v The Minister of Minerals and Energy*,¹⁸³ The plaintiffs were respectively holders of coal and clay rights before the MPRDA came into force. When the MPRDA came into force, the plaintiffs lodged claims for compensation in terms of item 12 in Schedule II to, and regulation 82A(1) of, the MPRDA on the basis that their rights had been expropriated by the coming into force of the MPRDA.¹⁸⁴

The court found that the MPRDA did not acknowledge any existing holding of mineral rights, and that insofar as they have not been exploited they 'simply disappear in thin air' ; and that but for the transitional arrangements in Schedule II to the MPRDA, unused old order rights would simply have been extinguished without compensation, rendering the MPRDA contrary to section 25 of the Constitution and hence unconstitutional.¹⁸⁵

¹⁸¹ MPRDA.

¹⁸² Constitution of the Republic of South Africa.

¹⁸³ 2010 (1) SA 104.

¹⁸⁴ Dale M *South African Mineral and Petroleum Law (2005)591*.

¹⁸⁵ (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-
(a) for a public purpose or in the public interest; and

According to Van der Walt, whether any of the individual effects of the regime change satisfies the requirements of section 25 (1)¹⁸⁶ has first of all to be determined with reference to section 25 (1)¹⁸⁷, because the loss of individual old order rights does bring about deprivations of property.¹⁸⁸ At least as far as deprivation is concerned the MPRDA is law of general application and the purpose of the regulatory scheme is clearly justified by normative and Constitutional considerations.¹⁸⁹

In South African law, it is not entirely certain whether a right with minerals as its object is property in the Constitutional sense.¹⁹⁰ In *Lebowa Mineral Trust Beneficiaries Forum v The President of the Republic of South Africa*,¹⁹¹ the court rejected the idea that a mineral right could have Constitutional protection. The court took the view that if the Constitution was intended to protect mineral rights; such protection would be provided for expressly.

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

¹⁸⁶ (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.

¹⁸⁷ Ibid.

¹⁸⁸ Van der Walt A J H *Constitutional Property Law* 3^{ed} (2011) 446.

¹⁸⁹ Ibid.

¹⁹⁰ Supra (n 30) at 18.

¹⁹¹ 2002 1 BCLR 23 (T).

The DMR has long argued that the MPRDA did not bring about any expropriation of common law privately owned mineral rights as all it did was regulate the use of mineral rights which the Act placed under state custodianship in accordance with internationally recognised principles.¹⁹² The court in *Agri SA* thus found that under the MPRDA the holder of mineral rights “no longer has an asset that can be sold, otherwise alienated, used as security or kept as an investment.”¹⁹³ The mineral right holder’s contingent ownership in the minerals, once severed, has similarly disappeared. The right to grant, subject to statutory regulation, the right to others to prospect for and mine has disappeared. In sum the holders of mineral rights have, since the enactment of the MPRDA not one of the competencies that the law conferred upon them.¹⁹⁴

It should also be borne in mind that some unused old order rights would be worth substantially more than others, with many being virtually without any value at all. Any person who wishes to claim compensation under the MPRDA will need to be able to prove the value of the right he or she alleges to have been expropriated by means of a valuation report prepared by a qualified geologist.¹⁹⁵

If the regime change brought about by the MPRDA is a legitimate exercise of the state’s police power intended to ensure effective promotion of the state’s conservation, sustainable management and distributive obligations regarding limited and important natural resources, it stands to reason that loss caused by the implementation of a stricter regulatory regime has to be accepted by the holders of rights in those resources, without compensation.¹⁹⁶

3.4. Legal nature of a mining right

The nature of rights to minerals which had been separated from the ownership of the land, as they had developed in South Africa, was described by Innes CJ in *Van Vuuren*

¹⁹² Leon P “*Agri SA v Minister of Mineral Resources: a judicial warning on nationalisation?* May 2011.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Mitchell A and van der Want M *Mondaq South Africa: Claims for Expropriation of Unused Old Order Rights: Energy and Natural resources* September 2010.

¹⁹⁶ *Supra* (n 179) at 448.

*and Others v Registrar of Deeds*¹⁹⁷ as being the entitlement, 'to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away'. As these rights could not be fitted into the traditional classification of servitudes with exactness - they were not praedial as they were in favour of a person, not a dominant property - they were not personal as they were freely transferable - they had to be given another name, and the Chief Justice dubbed them quasi-servitudes, a label that has stuck.¹⁹⁸

The MPRDA illustrates that the holder of a mining right, granted in terms of the MPRDA, has a limited real right in respect of the minerals or petroleum in the land to which such right relates. The court held in the *Meepo v Kotze & Others*¹⁹⁹ case that the granting of a mining right is contractual. It found that the minister is a representative of the state, which is the custodian of mineral resources in South Africa. Furthermore, it found that an applicant is granted a limited real right by the DMR for a specified duration, mineral, surface area, subject to the conditions determined or agreed on. Regulation 12 to the MPRDA reiterates the court's view when it states that the terms and conditions of a mining right agreed upon will be approved by the minister.

3.5. Environmental Impact and Rehabilitation

The concept of rehabilitation during and after prospecting, exploration and mining activities is now well accepted and is entrenched in law.²⁰⁰ In the current MPRDA, environmental management has been integrated into an aspect of prospecting and mining management. Recognition of past deficiencies has seen a great involvement from other governmental departments, stakeholders and interested and affected parties.²⁰¹

¹⁹⁷ 1907 TS 289.

¹⁹⁸ Ibid at 294.

¹⁹⁹ 2008 (1) SA 104 (NC).

²⁰⁰ Andries H S *et al*/ Environmental management in South Africa (2008) 517.

²⁰¹ Ibid.

Mining often impacts beyond the borders of the mining operation infringing on the rights of other surface owners. Often competing rights of a surface owner and a prospecting or mining operation by focusing on the relevant provisions of the MPRDA, some recent case law, The NEMA²⁰² and reference to other relevant legislation. In *Anglo Operations v Sandhurst*²⁰³, the court was asked to consider whether the rights of a mineral right holder included the right to open-cast mining at the expense of the surface rights owner. The court likened a mineral right to that of quasi-servitude. It held that provided that it is necessary to undertake open-cast mining operations (ie that the mineral could not be mined by any other means such as underground mining) and further provided that the right is exercised in a reasonable way and all precautionary measures against degrading the environment are taken, then the mineral rights holder has the right to pursue open-cast mining.²⁰⁴

In *Director: Mineral Development, Gauteng and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*,²⁰⁵ an unincorporated association sought to resist the holders of mineral rights from commencing mining operations in an environmentally sensitive area. Though the case was decided based on the old Minerals Act²⁰⁶ the basis of the decision of the court, per Oliver JA, was that by including environmental rights as fundamental and justiciable human rights under the Constitution, the Director of Mineral Development was bound not only to give regard to environmental implications under the constitution but also mining law and other relevant environmental codes in making decisions on issues affecting the environment.²⁰⁷

The most important sustainability provision of the South African regime towards ensuring environmentally friendly exploitation and sustainable utilization of the country's mineral resources is detailed provisions on mineral and environmental

²⁰² Act 107 of 1998.

²⁰³ [2006] SCA 146 (RSA).

²⁰⁴ Ibid at para 4.

²⁰⁵ 1999 (2) SA 709 (SCA).

²⁰⁶ Act 50 of 1991.

²⁰⁷ Supra (n 200) at para 20.

regulations.²⁰⁸ These provisions 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 title either prospecting right, mining right, mining permit or other privileges.²⁰⁹

The MPRDA also entrenches institutionalized devices to ensure sustainability of actual mining operations and effective rehabilitation of the mining sites after mining operations through the integration of environmental management into environmental responsibility to remedy.²¹⁰ Under this provision, holder of mining titles must, as far as reasonably practicable, rehabilitate the environment affected by prospecting or mining operations to its natural or predetermined state in conformity with the generally acceptable standards under the concept of sustainable development. By implication, this extends to environmental damage, pollution or ecological degradation that occurs in both inside and outside the boundaries of the area to which such right or permit relates.²¹¹

The MPRDA provides for the regulation of environmental impacts caused by mining operations and makes the Minister of Mineral Resources the competent authority responsible for environmental regulation in the mining industry.²¹² However, NEMA provides a general environmental regulation for South Africa and the Minister of Water and Environmental Affairs is the competent authority. Invariably, mineral development and environmental conservation do not coincide and the mandates of the two Ministers often conflict.²¹³

3.6. Conclusion

The MPDRA has been a controversial legislation in South African context in that it has eliminated the notion of private ownership of mineral rights and has given effect to the

²⁰⁸ Oke Y, An appraisal of the paradigm shift in South African Mining Law and Regulation (2004) available on-line at <http://www.africafiles.org/article.asp?ID=6962> >.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Matlou O, Environmental impact is responsibility of mining houses 2010 miningweekly.com

²¹³ Ibid.

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 the mineral resources within the country.²¹⁴ In addition to the MPRDA there are other acts that govern the way environmental resources should be governed, all of which have been promulgated post 1994.²¹⁵

The state holds all of South Africa's mineral resources in custodianship and decides through licensing system who is able to explore and exploit them.²¹⁶ This was one of the fundamental achievements of the MPRDA, which changed the previous system of private and public ownership of mineral rights into a state custodianship system through the MPRDA and mining charter, the industry has been opened up and a considerable degree of access to ownership and management of mines for historically disadvantaged South African's has been created.²¹⁷ The MPRDA introduced a fundamental change that brought South Africa more in line with the practice of many mining countries elsewhere where mineral rights are owned and regulated by the state.

²¹⁴ Roberto C etal *A review on indicators of sustainability for the minerals extraction industries (2006)* 156

²¹⁵ Ibid at 160.

²¹⁶ Hofmyer J etal *from Inequality to Inclusive Growth: South Africa's Pursuit of Shared Prosperity in Extraordinary Times* (2011) 21.

²¹⁷ Ibid.

CHAPTER: FOUR MPRDA AND NATIONALISATION OF MINES

4.1 Introduction

Since the mid-19th century to now, South Africa discovered many mineral resources and it is home to vital and most diversified mineral reserves 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.²¹⁸

In 1952 the Trade Union organiser, Solly Sachs noted that, "it is abundantly clear to anyone who has the welfare of South Africa at heart that the future of the people and the whole country depends on extensive and intensive industrial development, and that the mining of precious minerals can serve the interest of the country only as a stimulus for the development of other branches of the national economy".²¹⁹

The debates on the nationalisation of mines have the roots from the Freedom Charter,²²⁰ Ready to govern document,²²¹ the Reconstruction and Development Programme,²²² the 52nd African National Congress ("ANC") Polokwane Conference (2007) Economic Transformation resolution. The ANC commissioned a team of researchers last year to investigate state involvement in the mining industry. Their report was tabled at a meeting of the party's national executive committee which was held in the first week of February 2012 and the report is now available in the ANC website. The debate about nationalisation of mines scares the investors and brought too much uncertainty on the policy direction of the government. Influential people from politics, business and mining sector reject nationalisation of mines and suggest that if it became a government policy, it will cripple the economy.²²³

²¹⁸ Nevondwe L.T and Ramatji K, Nationalisation of mines in South Africa not a viable option for economic growth, *The Thinker*, vol. 38, April 2012, p36.

²¹⁹ Sachs, S (1952), *The Choice Before South Africa*, London: Turnstile Press.

²²⁰ The Freedom Charter has been adopted in 1955 by the Congress of the People.

²²¹ This document has been adopted by the ANC in 1992.

²²² This is the policy of the government which was adopted in 1994.

²²³ Tito Mboweni, former Reserve Bank Governor, Patrice Motsepe, Mining Magnate and business man, Cyril Ramaphosa, a Member of the African National Congress National Executive Committee and a business man, Joel

4.1 The ANC policy discussion document on maximising the development impact of the people's mineral assets: state intervention in the minerals sector.

Uncertainty over the ANC position after calls by the ANC Youth League ("ANCYL") was clarified early this year when an ANC-commissioned report on state intervention in the minerals sector ruled out nationalisation.²²⁴

The report has been welcomed by the mining sector which has complained that the extensive debate on this issue over the past years may have seriously affected investment in the sector. The ANC report examining the mining sector was compiled by three economists who visited 13 countries to investigate mining models and best practices that would be viable for South Africa.²²⁵ South Africa's mining industry appears to have fended off calls for nationalization as a report commissioned by the ANC proposed higher taxes for the sector but said state ownership was not feasible.²²⁶

Nationalisation would be unaffordable. According to the report there would be a cost of R1 trillion for total nationalisation or around R500 billion for majority ownership based on just compensation as the government would need to raise R1 trillion to buy out listed mining companies. This exceeds the entire government budget, which exceed R1 trillion rand for the first time in 2012/3 national budget.²²⁷ The report does not go out of its way to console the sector either. Although the main conclusion is that the nationalization of mines will not be good for the country as the suspended President of ANCYL, Julius Malema insisted, it goes on to suggest other methods that can be implemented to achieve the same share of the national wealth by everyone equitably. These include a 50% tax on the sale of mining rights to prevent speculation; another 50% tax on any

Netshitenzhe, a Member of the National Planning Commission, Moeletsi Mbeki, an independent political analyst and business man, Suzan Shabangu, Minister of Minerals have criticised the nationalisation of mines and suggest that it is not a viable option.

²²⁴ ANC Policy Discussion Document, maximising the development impact of the people's mineral assets: state intervention in the minerals sector (March 2012), accessed on 6th March 2012 at www.anc.org.za.

²²⁵ The thirteen countries visited were Brazil, Chile, Venezuela, Botswana, Namibia, Zambia, China, Malaysia, Norway, Finland and Australia.

²²⁶ Nevondwe L.T and Ramatji K, Nationalisation of mines in South Africa not a viable option for economic growth, *The Thinker*, vol. 38, April 2012, p37.

²²⁷ ANC Policy Discussion Document, maximising the development impact of the people's mineral assets: state intervention in the minerals sector (March 2012) at page 28, accessed on 6th March 2012 at www.anc.org.za.

super profits. At least these solutions are more sensible options that protect private property and ensure our mining industry does not fall to pieces, while at the same time increase tax on these activities which benefits South Africans.²²⁸

What is heartening is that the report acknowledges the country's limitations in terms of the success of its education policies and the limits on its delivery of infrastructure. And, it notes the crucial role the sector plays as an employer and a builder of infrastructure. For this reason the document says, the sector needs to be placed at the heart of the country's development framework.²²⁹ Given the current climate of macroeconomic uncertainty, high, if volatile, commodity prices and a large unemployment problem, many governments are turning again to the mining sector as a way to help solve some of these problems. This move is especially evident in Africa where there is not only the possibility of a financial and employment benefit to be gained from the mining sector but, also a longer-term infrastructural one as well. However, the main focus of the report is a number of very specific policy recommendations. Put simply, these address how to utilise SA's US\$2.5 trillion mineral wealth for the benefit of the population rather than mining companies.²³⁰ The greater extraction of wealth for the population is understandable and desirable but can only work in a sustainable fashion (promoting the safeguarding and continued productive use of the remaining mineral wealth of the country over the long run) if competitiveness is addressed.²³¹

The South African mining sector is the fifth-biggest in the world by value and has long been in the government's sights. Under the current fiscal regime the state is clearly not getting a fair share of the resource rents generated from its mineral assets. The report says total nationalisation of the industry would cost R1 trillion and nationalisation without compensation, as proposed by the ANCYL, 'would require a constitutional change and would result in the near collapse of foreign investment as well as widespread litigation by foreign investors domiciled in states that we have trade and investment (protection)

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

agreements with ²³². The report, due to be considered by the ANC at a policy conference at the end of June, calls for the creation of a State Minerals Company by transferring capacity and holdings from the state.²³³ Once legislation was in place the company should fall under the control of a super ministry, the Ministry of the Economy, encompassing the current Departments of Trade and Industry; Mineral Resources; Energy; Public Enterprises; Economic Development; and Science and Technology.²³⁴

The minerals energy complex is still at the heart of South Africa's economy and will continue to be so for a very long time to come. It has contributed and still contributes a significant share to Gross Domestic Product (GDP) 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 spheres of South African society. If the minerals energy complex is to continue being the bulwark of the South African economy then the loyalties of mining and private capital for the long-term future of South Africa are paramount.²³⁵ Motive is as key to the question as are the stakes in rent rewards. South Africa needs to ensure that, as a resource owner, its citizens are getting a fair share of the resource rents from their extraction by mining companies. A resource rent is the surplus value – the difference between the price at which a resource can be sold and its extraction costs plus reasonable returns.²³⁶

The positioning of the state's claim over profits and the push for greater beneficiation, such as jewellery making and other finished products, is about locking in mining capital for the long haul. Nevertheless, nationalization is not necessarily immune from the same problem as mining capital: short-term predatory rents for self-accumulation. It is for this reason that the ANCYL call for nationalization only reinforces the perception that it is predatory rent seeking of the worst kind.²³⁷ South Africa's resource-based comparative advantage can be transformed into a national competitive advantage. The report warns

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ . Manuel T, Seccombe A and Mkokeli S, Mining Indaba: Mining report dismisses nationalization of mines, Business Day, 7th February 2012, available online www.business.com.

²³⁷ Ibid.

against "asset grabs" by the state because such a policy would be unconstitutional and inconsistent with section 25 of the Constitution, property clause and because the government could also not afford to buy mining stakes²³⁸

Lack of co-ordination and strategy alignment between key departments (Mineral Resources and Trade and Industry among them) has seriously compromised the management of South Africa's mineral resources and also lack of backward- and forward-linkages which should be contributing to economic development more broadly and to job creation. Emphatic on the need for a decisive state role in reorganising and managing the minerals sector, market forces alone will not help to align South Africa's rich and diverse mineral resources with its developmental needs, and have signally already failed to do so. South Africa is in ferocious competition with dozens of developing economies for capital, and now with a raft of European nations and financial institutions.

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, consistent and socially sensitive market-oriented economic policies²³⁹. Potential investors will just go elsewhere if they think that there is a real risk that they could lose their assets 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 ambitions²⁴⁰. 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 the work that will lead to an expanded contribution by mining is complex and requires the very close cooperation of government, the mining sector and other interest groups that play a pivotal role in socioeconomic development.²⁴¹

²³⁸ Nevondwe L.T and Ramatji K, opcit at page 37-38.

²³⁹ Tshabalala S, Nationalisation, accessed on 08th march 2012. See www.standardbank.co.za for more information.

²⁴⁰ Mbeki M, Nationalisation: what's to debate, Mining Weekly, available online.

²⁴¹ Ibid.

4.2. The debate on nationalisation of mines

The perspective on the nationalisation of mines is understood within the context of the National Democratic Revolution (NDR), which seeks to resolve the national, gender and class contradictions through the creation of a non-racial, non-sexist and democratic South Africa, and emancipation of the black majority and Africans in particular. The most direct route through which this can be achieved, within the framework of deepening nation-building and maintaining the unity of the motive forces of revolution, is through democratic state ownership and control of the strategic sectors of the South African economy.

It will be important to begin by outlining the meaning of nationalisation in the context of this perspective. Nationalisation of mines means the democratic government's ownership and control of mining activities, including exploration, extraction, production, processing, trading and beneficiation of mineral resources in South Africa. It is against the background of the Freedom Charter upon which a concrete position on the nationalisation of mines is formulated which states:

“The national wealth of our country, the heritage of all South Africans, shall be restored to the people; the mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole; all other industry and trade shall be controlled to assist the wellbeing of the people; all people shall have equal rights to trade where they choose, to manufacture and enter all trades.”²⁴²

The Freedom Charter is regarded as a guiding framework for the transfer of mineral wealth and the actual process of extraction, processing, beneficiation and trade of mineral resources. Again in 1956, a leader of the ANC, Nelson Mandela said, “it is true that in demanding the nationalisation of the banks, the gold mines and the land the charter strikes a fatal blow at the financial and gold-mining monopolies and farming interest that have for centuries plundered the country and condemned its people to servitude. But such a step is absolutely imperative and necessary because the realisation of the charter is inconceivable, in fact impossible, unless and until these

²⁴² Freedom Charter, 1955 which was adopted by the Congress of the People in Kliptown.

monopolies are first smashed up and the national wealth of the country turned over to the people.”²⁴³

The abovementioned view of Nelson Mandela is supported by the Congress of South African Trade Unions (COSATU) which entered the nationalisation debate in its discussion paper. Their position is similar to that of the ANCYL except to the extent that, in their view, nationalisation of mines on its own will not be enough to achieve economic transformation in South Africa, COSATU argues that there is an inextricable link between mineral wealth and monopoly industry. To achieve economic transformation nationalisation would have to be implemented in conjunction with the dismantling of monopoly domination. COSATU view on nationalisation of all sectors will only become relevant when the state has achieved its immediate challenges of unemployment, poverty, education, health, land reform and other challenges which are not listed here (our own emphasis).

The ANC Polokwane Economic Transformation resolution states that “the developmental state should maintain its strategic role in shaping the key sectors of the economy, including minerals and energy complex and the national transport and logistics system” and goes on to say that we must “...ensure that our national resource endowments, including land, water, minerals and marine resources are exploited to effectively maximize the growth, development and employment potential embedded in such national assets and not purely for profit maximisation.”

4.4. Nationalisation in other countries

After considering thirteen countries case studies 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 the Venezuelan model which leans towards wholesale nationalisation.²⁴⁴ The Chilean model advocates co-existence of the private and the

²⁴³ Mandela N, “In our life time”, Liberation (1956). See also for more information Bunting B and Kotane M, The Freedom Charter, <http://www.marxists.org/subject/africa/bunting-brain/kotane/ch12.htm>.

²⁴⁴ ANC Policy Discussion Document, maximising the development impact of the people’s mineral assets: state intervention in the minerals sector (March 2012), accessed on 6th March 2012 at www.anc.org.za.

public sectors in the mining sector. The Chilean model is attractive because it has similar challenges to South African especially its inability to create jobs in downstream industries.²⁴⁵ Key features of the Chilean models are a focus on strategic minerals especially its copper, in which it is the world's 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 the Chilean model is a multiple ownership structure, with the state playing a significant role in the ownership of resources assets.²⁴⁶ Research indicates that nationalisation can be a solid move in some countries but it has a limited life cycle and is depended upon the choice of commodity such as the Venezuelan experience in the Orinoco oil fields. This has not addressed poverty on the ground but it has enabled the state to balance its books, buy armaments and create a number of jobs.²⁴⁷

Nationalisation would not solve South Africa's problems of low growth and high unemployment. Nationalisation had taken place in thirteen countries, after looking at all the data available for these countries, it was established that the only success stories are those of public private partnerships (PPP) such as the one in Botswana in the diamond mining industry and the case of China, which nationalised and liberalised significant parts of the economy. In most European countries such as France, Sweden, the United Kingdom and Norway, the practice of nationalisation had always been followed by privatisation.²⁴⁸ This has also been the case in countries in other parts of the world such as Zambia. Zambia has gone down that 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 Africa that nationalisation of mines is not a viable option.

²⁴⁴ Ibid.

²⁴⁵ Ibid

²⁴⁶ Ibid.

²⁴⁷ Netshitenzhe J, Nationalisation of mines, Mining Weekly, accessed on 28 April 2010, see also www.miningweekly.co.za.

²⁴⁸ ANC Policy Discussion Document, maximising the development impact of the people's mineral assets: state intervention in the minerals sector (March 2012), accessed on 6th March 2012 at www.anc.org.za.

4.5 Challenges to nationalisation

Against the backdrop of recent uncertainty around the security of mineral rights, the nationalisation debate had raised anxiety levels among domestic and international mining groups operating in South Africa. If mines are nationalised there would be a big outflow of capital out of the country, which would lead to a rapid depreciation of the rand. The weak rand would benefit some manufactures in the short term. This would then cause high interest rates and inflation in the mid- to long term. This would not immediately affect the poor since they do not have debt with the banks. It will affect the middle-class because they have loans and investments. A higher interest rate would lead to slower economic growth and a loss of jobs.

The other potential challenge to the nationalisation of mines will come from those who have private interest in mining. These include the established mining corporations and recent past beneficiaries of mining activities. Several challenges do point to the need to attend to macro-economic issues in the sector, including declining fixed investments and low growth in mining production, in the midst of a commodities boom. This stands out even more starkly when compared with Australia, where gross fixed investment in mining far exceeds South African investment²⁴⁹. The biggest challenge the government will face in nationalisation is the powerful unions in the country. The government could either choose to focus on labour-intensive processes and use the mines to hire as many peoples as possible or it could try to maximise capital and use the profits to fund the welfare state projects.²⁵⁰

The nationalisation of South Africa's mines is not supported by strong enough evidence and it appears that it is based on an emotional perception that since 1994, South Africans, particularly, the blacks are still poor and the wealth is still in the hands of the minority. Netshitenzhe says that the ANC has adopted an approach to State

²⁴⁹ J Netshitenzhe Mining Weekly Online accessed on 28/04/2010 www.miningweekly.co.za.

²⁵⁰ Nevondwe L.T and Ramatji K, opcit at page 39.

ownership, which is different from an earlier interpretation of the Freedom Charter, in which nationalisation was a given.²⁵¹

While the ANCYL may be factually correct in its interpretation of the Freedom Charter in years gone by, Netshitenzhe says that the ANC's current approach to State ownership is to "weigh the balance of evidence" - a process that is informed by the impact that State ownership has on the ability of the economy to address poverty and inequality and to encourage growth and competitiveness.²⁵²

While the ANCYL is correct to want the mining industry to play a larger role in improving the country's fiscal capacity; creating more jobs; improving working conditions; enhancing South Africa's sovereignty; and transforming the country's accumulation path, it appears that some of the mining industry's most significant growth constraints are bottlenecks within State-owned infrastructure.

In the early days of the implementation of the new Mineral and Petroleum Resources Development Act (MPRDA)²⁵³ insufficient capacity within the then Department of Minerals and Energy and the slow processing of environmental-impact assessments were also growth constraints.

The challenges which South Africa faced is that little progress has been made in developing the much-vaunted mining sector strategy as part of the country's industrial policy and action plans. South Africa can hardly claim to be exploiting the opportunities for mining-related backward and forward linkages optimally. With regard to beneficiation, for instance, the impression among many in government is that there is a dogged resistance to a comprehensive approach to beneficiation within the private sector. Besides weaknesses of demographics in management, professional, skilled and semiskilled categories, the industry is "not producing sufficient skills to replace the ageing engineering and artisan population, let alone gear the industry for growth".²⁵⁴

²⁵¹ Creamer M, ANC heavyweight weighs in against mine nationalisation, accessed on 6 March. 2012. See also [www. Mining weekely.com](http://www.Miningweekely.com), online.

²⁵² Ibid.

²⁵³ Act, 28 of 2002.

²⁵⁴ Ibid.

4.6. Conclusions

In the 1970's resources nationalisation was understood to be an attempt by the developing countries to address inequality caused by former colonial governments. However, in the 21st century the policy is driven by global concern for resource security, sustainable development, environmental sustainability and poverty reduction. As a nation we need to ask: can we take this step of nationalisation when so many other burning issues are on the agenda for development of the people?, if this call by the ANCYL is a move to fight poverty and to transfer the country's wealth in a durable manner for the benefit of all the people, then it lacks substance and shows no real evidence to support its attempt.

Much as we understand that poverty and unemployment are rooted in decades of economic injustices, so too must we accept that the frustration being witnessed today arises in part from our collective inability to sufficiently transform the economy. This inability has certainly sparked the call for the nationalisation of mines.²⁵⁵ The country should continue the discussion, in a mature and constructive fashion. Amid the sharp and sometimes shrill public commentary on nationalisation, the greatest mistake we can make is to ignore the concerns the ANCYL is raising, because they go to the heart of the issue that we need to be grappling with.

It is premature to formulate an official position while the debate is on-going. There should be a national convention on the mining sector which should be held in an open, honest, transparent and inclusive engagement. The agenda should be discussed and agreed by all stakeholders. There should be no predetermined outcomes. The objective should be an agreement on a model that will deliver a strong and durable mining sector empowerment to take its rightful place in ensuring that the wealth of South Africa benefits all who live in it. The mining charter which supports social investment by mining companies needs to be implemented without any compromise. The government must always ensure that there is compliance with the MPRDA.²⁵⁶

²⁵⁵ Ramaphosa C, Mines 'not transforming as agreed, Mail & Guardian newspaper, 8 August 2011, online.

²⁵⁶ Nevondwe L.T and Ramatji K, opcit at page 40.

The objectives of Black Economic Empowerment (BEE) should be one part of the mining strategy, instead of being an end in itself; ownership should be seen as a means of promoting the government's strategic imperatives. The charter has set back the mining sector in South Africa by taking precedence over other key strategic goals. The Amended Charter and the proposed changes to the administration of the MPRDA represent significant attempts by the South African government to further participation in the mining sector by HDSAs and provide additional clarity to the regulatory regime²⁵⁷. While these measures are to be applauded, their impact and ability to effect the required changes in the South African mining regulatory regime remains to be seen. Initial industry reaction to the new measures would suggest that the South African government has introduced more uncertainty to the regulatory regime than intended and further steps will have to be taken to provide the clarity and consistency required to implement these new rules.²⁵⁸

²⁵⁷ Avril C, Recent developments in the regulation of the mining industry in South Africa, African Business Journal, accessed on 8 March 2012. See also www.tabj.co.za.

²⁵⁸ Ibid.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

The MPRDA was only recently promulgated, but preliminary investigations show that there is considerable confusion, uncertainty and scepticism around the ability of the legislation to achieve its stated aim of equity and poverty alleviation.²⁵⁹ Without clear guidelines and objectives from provincial governments, it is unlikely that the sector can achieve these aims and so contribute to sustainable livelihoods.²⁶⁰

Having considered legal sources and other academic legal contributions pertaining to the MPRDA, it is clear that constitutional values are at the forefront of interpreting the MPRDA's provisions.²⁶¹ However, this understanding of the Act to date has not been without challenges on the ground or to the average person involved in the mining industry or diamond industry.²⁶² This is because when one looks at current legislation it is clear that the South African State is requesting mining giants to open mineral resource markets to new entrants and thus creating undesired market competition in an effort by the State to enforce broad-based socio-economic empowerment for its people.²⁶³ In line with the MPRDA mining needs to deepen its contribution to socio-economic development and that it has "a responsibility to practically promote and uplift community livelihoods."²⁶⁴ The MPRDA provides a changed paradigm for the activities of mining enterprises to the extent that they must deepen their commitments to local development.²⁶⁵

The participation of the indigenous communities, particularly in the allocation and use of the revenue in the form of compensation should be subjected to the guardianship of the government. The MPRDA can be seen as the framework legislation aimed at defining overarching and generic principles in terms of which sectoral-specific legislation

²⁵⁹ Hoadley M and Limpitlaw D the artisanal and small scale mining sector & sustainable livelihoods(2004) available on-line at <http://www.africafiles.org/article.asp?ID=6962> >.

²⁶⁰ Ibid.

²⁶¹ Ndlovu F P LLD Thesis, An analytical study of the regulation of South African diamond trade from 1994 to 2009 with reference to aspects of the 1996 constitution .

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Rogerson C M, Mining enterprise, regulatory frameworks and local economic development in South Africa 2011 www.academicjournals.org.

²⁶⁵ Ibid.

should subsequently be made.²⁶⁶ Framework legislation such as the MPRDA reflects governmental policy in the area they regulate and in this case minerals and petroleum resources exploitation and utilization.²⁶⁷ It is therefore important to highlight the principles and themes promoted by the MPRDA and its supporting regulations.²⁶⁸

Although the MPRDA does not contain specific rights afforded to communities affected by mining activities it does specify the obligations that the mining companies are compelled to take to ensure that the environment is protected for the benefit of present and future generations, as a well as to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.²⁶⁹ The substantial benefits of mining cannot be underestimated. In South Africa it has contributed considerably to the national economy and has resulted in the establishment of the country's secondary industries.²⁷⁰

Effective stakeholder engagement is arguably the most critical factor in the success of inclusive solution.²⁷¹ Despite significant social spending, mining companies in South Africa frequently are under siege from frustrated communities, not only do communities have unrealistic expectations and fail to give the mines credit for the good work they have done, but in many cases projects and initiatives are misdirected due to company's poor understanding of the actual needs of the community.²⁷² The state may be custodian of the minerals, but it is still not able to free its self from strong grip of the mining lobby. The economic benefits that the mining companies can provide to the South African economy are far more important than seeing that justice be done to the rural communities in Limpopo province.

What the MPRDA has done with the mining charter is to put issues of Corporate Social Responsibility (CSR) and sustainable community development in the hands of

²⁶⁶Supra (n 261) at 53

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Mohamed F, LLM Thesis: Environmental rights afforded to residents affected by mining activities: A case study in Hondenklip bay(2006),46.

²⁷⁰ Ibid.

²⁷¹ Lane E Reggio R Mining in Africa: How inclusive solution can mitigate Risk <http://www.monitor.com>: found on the 02 April 2012.

²⁷² Ibid.

the mining industry at national level, but what it has not done, is to spell out what this means in practical terms.²⁷³ The results is that the voluntary nature of these concepts still exists in terms of how companies choose, and to what extent, they implement their CSR programmes.²⁷⁴ Ultimately the government has not got a measuring tool or benchmark to ascertain to what extent companies are implementing their CSR and how it contributes to sustainable community development.²⁷⁵

The objectives of the MPRDA do not currently include the maximisation of the development impacts, particularly job creation, through realisation of the linkages to the rest of our economy.²⁷⁶ We need to urgently rectify this by amending the MPRDA objectives. This would permit the state to impose necessary conditions on all prospecting or mining licenses. In order to discourage mineral right speculators we must introduce an exploration right transfer capital gains tax of 50% payable if the right is on-sold or the company changes hands before mining commences. This will encourage genuine mineral property developers rather than speculators.²⁷⁷

There is a need of codes and regulations that require the necessary steps of environmental impact assessment, development of environmental management plans, mine closure planning, and environmental monitoring during operation and after closure.²⁷⁸ Monitoring and evaluation should be done through a specialised state agency under the Ministries of Mineral Resources and of Environmental Affairs and Tourism. In South Africa, the issue of environmental damage resulting from mining is particularly serious requiring urgent attention by the government, particularly the Minister of Mineral Resources, and of the Environment.²⁷⁹ These can be tackled

²⁷³ Marais A "Assessing Corporate Social Responsibility in terms of its impact on sustainable community development: Anglo American PLC programmes as case study (2010) 59.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ ANC Policy Discussion Document, maximising the development impact of the people's mineral assets: state intervention in the minerals sector (March 2012), accessed on 6th March 2012 at www.anc.org.za.

²⁷⁶ Ibid at 28.

²⁷⁷ Ibid at 34

²⁷⁹ Ibid at 35.

through research, technology development and training that reinforces our minerals backward cluster and mitigates environmental damage to the absolute minimum.²⁸⁰

With regard to nationalisation this was realised through the MPRDA in line with the Freedom Charter (the mineral wealth beneath the soil shall be transferred to the ownership of the people as a whole) through the conversion of “old order” private rights to “new order” state rights.²⁸¹ However, there have been challenges to this conversion on the basis that it is in effect a property expropriation under Section 25 of the constitution.²⁸²

In conclusion, it is clear that even MPRDA does not go far enough to ensure full community participation, involvement and sustainable receipt of benefits, and that a number of further amendments are urgently required.²⁸³ Furthermore, it is suggested that the development of a comprehensive mechanism to give substantive effect to the preferential right of the community to prospect or mine in the new rush for mineral resources should be a matter of the highest priority for the Department and Parliament.²⁸⁴ It is recommended that the MPRDA be amended to ensure that non-compliance with the provisions of both the Charter and the Act is severely penalised.²⁸⁵

²⁸⁰ Ibid.

²⁸¹ Ibid at 28.

²⁸² Ibid.

²⁸³ Badenhorst PJ and Olivier NJJ, Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 [2011] De jure 9. See also Section 10 of MPRDA.

²⁸⁴ Ibid.

²⁸⁵ Department of Mineral Resources Republic of South Africa: Mining Charter Impact Assessment Report 2009.

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