LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTITON

21 -23 May 1993

Edited documentation of issues discussed during a three-day conference held at Sanbonani, Eastern Transvaal from 21 to 23 May 1993 and hosted by The Community Law Centre, University of the Western Cape. The conference was sponsored by the Friedrich Ebert Foundation, the Swedish International Development Authority, and the Danish International Development Authority

Edited by: Minnie Venter
Minna Anderson

The contents of this document are intended as a summary of speeches and panel discussions at the conference. They represent the interpretations of the documentalist and do not necessarily reflect the views of the sponsors or organizers.

Typesetting and design: Stefan Coetzer
Co-operative Designs: (021) 686 8800

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TOWARDS A FUTURE MINERAL LAW SYSTEM FOR SOUTH AFRICA

Patrice T Motsepe

Introduction

THIS paper consists of two parts. The first part briefly discusses the common law and the *Minerals Act 50* of 1991 (*Minerals Act*). The second part deals with the proposed changes to the mining and mineral laws of South Africa.

From the earliest days of the discovery of precious and base metals, minerals and precious stones, the policy of the State has been to encourage the search for, and exploitation of, the vast mineral wealth of the country.

It has done so by passing a series of enactments designed to reward and to protect the interest of private enterprise, whilst at the same time imposing a system of control by the State of mining operations and of the use of the surface in connection with those activities, and ensuring for itself a substantial share in the profits derived from mineral exploitation without accepting any of the attendant risks."[1]

However, with the introduction of the *Minerals Act* (which came into operation on 1 January 1992), a radical departure from the repealed legislation and a different mining law system was implemented.

The Common Law

Despite the comprehensive range of the *Minerals Act*, there are important aspects of our mining law, which are governed by the common law. One of the basic principles of our common law is "the owner of the surface of the land is the owner of the whole of the land and of all minerals in it"[2] This principle is derived from the maxim *cuis est solum eius est usque ad coelum et ad inferos*. Thus unlike English law, it is not possible for different strata of a piece of land and the minerals in each strata to be owned by difference parties[3] or for separate ownership in horizontal layers of land and of the minerals in them[4].

"Ownership of minerals *in situ* can never be separated from ownership of the land - ownership of them remains vested in the landowner, irrespective of who may be the holder of the right to the minerals that are extracted and separated from the land, when ownership in the minerals vests in the mineral right holder."[5] The adherence to the *coelum est solum* principle has necessitated recognition of severance of rights to minerals in respect of land from the tie to land, in order to satisfy the needs of the mining industry.

Statutory Law

The Minerals Act

The Minerals Act regulates the prospecting and mining of virtually all minerals in South Africa[6]. The objects of the Minerals Act are:

1. to ensure the minerals of South Africa are optimally and safely mined and the surface, damaged during and after mining operations, is properly rehabilitated[7].

2. to ensure that Government's policy in respect of privatisation and deregulation of the minerals industry is implemented by:

   2.1 encouraging the alienation of held mineral rights[8].

   2.2 the restructuring of the Department of Mineral and Energy Affairs to provide, for three levels of authority, namely the Minister,

Director General, and Regional Director instead of the nine levels of authority in terms of repealed legislation[9].

2.3 disposing of matters mainly at the level of Regional Director in order to render the service to the public in the region where the need arises[10].

2.4 issuing only three authorisations (namely, prospecting permit, mining permit and mining licence) in respect of all minerals instead of the about 40 types of permits, licenses, permission etc. in terms of repealed legislation[11].

3. to deproclaim all proclaimed mining land[12] and to remove the diversity of permits, licenses, permissions etc. in respect of precious metals, base minerals and precious stones issued in respect of State Land, Private Land and proclaimed land in terms of repealed legislation.

4. to repeal the vesting in the State of the right to mine and dispose of precious metals, precious stones, and natural oil; and the revival of the common law rights of the holder of the rights to minerals, to prospect and mine[13].

5. to continue and preserve the rights of the mineral right holder acquired in terms of repealed legislation[14].

6. to recognise the free market system where demand and supply regulates the market so that the holder of mineral rights may mine and market his mineral where he finds the best market, and if at any given time there is no suitable market he may even leave the mineral *in situ* until such market exists[15].

7. to reduce Government involvement in the mineral industry[16].

8. to rationalise and consolidate the Acts which formerly conferred mining rights, *Mining Rights Act 20* of 1967 (*Mining Rights Act*) and *Precious Stones Act 73* of (*Precious Stones Act*) with legislation designed to secure safety and health (*Mines and Works Act 27* of 1956)[17].

9. to protect the rights of freehold owners against unnecessary damage to their property by mining operations.

10. to protect the rights of holders of mineral rights against the locking up of their minerals by the utilisation of the surface.

11. to treat minerals on land and minerals in tailings in the same way.

12. to repeal:

12.1 different classifications of minerals, namely precious metals, base minerals and precious stones in terms of the old legislation.

12.2 the different classifications of land, namely Private Land, Alienated State Land, and State Land, (as defined in terms of Section 1 of the *Precious Stones Act* and Section I of the *Mining Rights Act*) all of which could be unproclaimed, open proclaimed land or proclaimed land held under mining title, in terms of the *Mining Rights Act* or *Precious Stones Act* - and to introduce uniform regulation of all land and minerals.

Prospecting and Mining

Under South African mineral law a person wishing to prospect and mine should acquire the following:

1. the common law rights to prospect and mine[18], either by way of a mineral lease conferring the right to mine (which would automatically include the right to prospect) or purchase the common law right to minerals, in terms of a prospecting contract conferring the right to prospect with an option to purchase the mineral rights or to acquire a lease.

2. the statutory authorisations[19] to prospect and mine from the Regional Director in terms of Sections 6 and 9 of the *Minerals Act*. The conferral of these authorisations is based upon the applicant satisfying the criteria of optimal exploitation and utilisation, safety and health, and rehabilitation of the surface during and after mining operations.

These criteria reflects the objects of the *Minerals Act* as stated in its title. Thus the mechanism whereby the State aims to implement these objects is by way of this system of authorisations and not as was the case under repealed legislation by reserving to itself the right to mine for precious metals, precious stones and natural oil, and the use of the surface of land proclaimed for mining or held under mining title.

Optimal Exploitation and Utilisation of Minerals

Section 22 of the *Mineral Act* is the policing mechanism to ensure optimal exploitation and utilisation of minerals. This Section empowers the Minister of Mineral and Energy Affairs to institute an investigation and thereafter issue a directive ordering the mining authorisation holder to take rectifying steps. If the holder fails to comply with the directive he will commit an offence in terms of Section 60(b)(i). The Minister may then suspend or cancel the mining authorisation[20].

System of Authorisations in Relation to Safety and Health

It is a prerequisite to obtaining a mining authorisation (in terms of 9) that the applicant satisfy the Regional Director in regard to safety and health. This authorisation may be suspended or cancelled if the holder contravenes any provision of the *Minerals Act* or regulations made under the repealed *Mines and Works Act No.27* 1956 (these regulations remain in force in terms of Section 68(2) of the *Minerals Act*).

Section 27 of the *Minerals Act* provides that the Regional Mining Engineer may order that rectifying steps be taken or order the suspension of operations if he believes that any practise may cause a health or safety hazard.

Furthermore a new authorisation may be refused if safety and health measures have not been complied with during the period of the previous authorisation. "Breach of any statutory obligation would also find a civil action at the instance of a class of persons for whose benefit such obligation has been imposed"[21]

Power of Minister to Expropriate Surface or Mineral Rights

In order to avoid the sterilisation of minerals and to eliminate impediments militating against optimal utilisation, the legislature has, in terms of Section 24 of the *Minerals Act*, empowered the Minister at any time if he "deems it necessary in the public interest to expropriate any right including ownership) or share therein, in respect of land, the surface or any portion under the surface of land or to a mineral in respect of land".

The ground for expropriation is the "public interest". Compensation for the property or right expropriated will be determined in accordance with S12 of the *Expropriation Act 63* of 1975. The amount of compensation envisaged is an amount equivalent to the reasonable and fair market value of the land or mineral right expropriated[22].

Mining Law in South Africa's Homelands

The so-called independent national states of Transkei, Bophutatswana, Ciskei and Venda have their own mineral laws. These are the laws of South Africa, which were in force in these homelands prior to their 'independence', subject to amendments or repeal by their legislative bodies. Transkei passed a new *Diamond Control Act* in 1981. In Bophuthatswana the *Land Control Act 39* was passed in 1979. In terms of this Act prospecting and mining is subject to Ministerial permission. Proclamation 141/86 provides that the legislative assemblies of self governing territories (Lebowa, Kwa Zulu, Ka Ngwane, Kwa Ndebele, Qwa Qwa, and Gazankulu) may legislate on land and mineral matters subject to approval by the South African Parliament (item 31Z in Schedule I of the *Self Governing Territories Constitution Act* 21 of 1971 as read with S30 of Act). Thus unless specifically enacted in these so-called self-governing states, the *Minerals Act* will not apply.

A Future Mineral Law System for South Africa:

Safety and Health

Unlike under the Minerals Act, matters of mining heath and safety, in contrast with matters concerning optimal utilisation and exploitation of mineral resources, should not be dealt with in one statute and by the same department (Mineral & Energy Affairs).

The criticism is that "the desire to achieve optimum production is the very thing which causes the cutting of corners"[23]. Thus separate legislation dealing with safety and heath should be enacted. Furthermore, an independent 'state department' with representatives from management, government, and labour should be created to supervise and control matters relating to safety and heath.

According to a statement by J. Davitt Macateer, Executive Director of the Occupational Safety and Heath Law Centre in Washington DC:

"From 1952 until 1973 the Bureau (of Mines) was responsible for both safety enforcement, and mineral development and utilisation. This dual responsibility created a potential and frequently real conflict of interest within the Department and the Bureau, which hampered both the safety enforcement role and the minerals development role.

This conflict manifested itself in budget reconsideration, personnel considerations and in policy matters generally. Safety enforcement frequently received less attention and less budgetary support in favour of development. This is natural, because safety and heath frequently are costs without immediate return, while development and utilisation tended to produce an immediate return or the promise of an increased return in the future." As a result of this experience the functions of safety enforcement and mineral development were separated in the USA.

Repeal of Vesting in the State of the Right to Mine and Revival of the Common Law

The long standing principle, that the right to prospect for natural oil and to mine precious stones and precious metals vests in the State[24], has been repealed (and not re-enacted) in terms of the *Minerals Act*[25]. This has the effect that the revenue, which the State derived from leasing its right to mine, is lost. The Government's explanation that the repeal of the States's right to mine, is part of its policies of privatisation, deregulation and reversion to the common law[26], is unacceptable. Furthermore, the introduction of the system of authorisations, under the *Minerals Act* does not result in a revival of the common law, since at common law the holder of the rights to minerals did not need authorisation to prospect or mine[27].

A future mineral law system should re-introduce the basic philosophy underlying the *Mining Rights Act* and the *Precious Stones Act*, modified by certain principles under the *Minerals Act* namely:

1. that the right to prospect for natural oil and the right to mine for natural oil, precious metals and precious stones vests in the State,

2. that the right to prospect for base minerals, precious stones and precious metals and the right to mine for base minerals, vests in the mineral right holder. However, prospecting for precious stones and precious metals and prospecting and mining for base minerals may only take place upon the conferral of State authorisations in terms of Section 5(2) of the *Minerals Act*.

Thus prospecting for natural oil and mining for natural oil, precious metals and precious stones may only take place upon acquiring the requisite right to prospect and mine from the State. Prospecting and mining for base minerals and prospecting for precious stones and precious metals on the other hand, is subject to the conferral of State authorisations or 'licences' and not prospecting or mining rights.

Involvement of Blacks at all Levels of Mining in South Africa

This is doubtlessly going to be one of the biggest challenges of a future mineral law system. Blacks have over the years been excluded by law from prospecting, mining and have been restricted in terms of various job reservation laws, from occupying and being trained to occupy certain semi-skilled, skilled and managerial jobs in the mining industry.

Section 133 of the *Gold Law of the South African*

Republic (Law 15 of 1898) stated that no coloured person defined to mean African, Asiatic, Native or Coloured American, Coolie or Chinaman may be a license holder or in any way be connected with the working of the diggings, but shall be allowed only as a workman in the service of whites".

This discriminatory policy was continued in Section 14 of the *Transvaal Act No.35* of 1908 which provided that "a prospecting permit shall, upon application, be issued by the Mining Commissioner to any white person of the age of sixteen years". When the mineral laws of South Africa were consolidated under the *Mining Rights Act 20* of 1967, Section 7(3) provided that:

> No prospecting permit shall be issued to any coloured person or any coloured persons hold a controlling interest or to any Black person ...

A future government is going to be confronted with the legitimate expectations by blacks to be involved at all levels in the mining industry.

In this regard the following should be considered:

1. the introduction of an extensive government-initiated campaign aimed at training and providing blacks with mining related skills, in the same way that the present government utilised Iscor, Sasol, Mosgass and Eskom, to provide skills and jobs to Afrikaners. Tax incentives to encourage training and the provision of skills to blacks by private mining corporations should be implemented.

2. the re-acquisition of parastatal or State-owned corporations that were privatised after February 2,1990.

3. the consequences of Section 45 of the *Minerals Act*, which de-proclaimed all land, that at the commencement of the *Minerals Act* was proclaimed as public diggings, in terms of the *Mining Rights Act 20* of 1967 and all alluvial precious stones diggings in terms of the *Precious Stones Act 73* of 1964, should be reviewed.

4. the introduction of laws that are conducive to small scale mining (see the *Tanzanian Mining Law* of 1979).

5. mobilisation of savings within the black community to purchase equity in listed white-owned mining companies. Substantial shareholdings in some of the major pension funds (which in turn hold substantial shares in mining companies) are held by blacks.

Privatisation and Deregulation

The objective of the *Minerals Act* to encourage the alienation of State-held mineral rights[28] (that is on State land or alienated State land) is criticised, primarily because of South Africa's discriminatory history. Section 43 states that

> the landowner of alienated State land or his nominee is deemed to be the mineral right owner for purposes of obtaining a prospecting permit and that only such owner or nominee will, for five years or such longer period as the Minister may approve, be a competent applicant for alienation of the relevant mineral rights, for a consent to remove and dispose of minerals found during prospecting (section 8(2)), or for a consent to mine (section 9(2)).
>
> Furthermore, the aforegoing is subject to the qualification in Section 44(2) in respect of State land and alienated State land and that only the holder of a prospecting lease, permit, or permission under repealed legislation is, during the currency thereof a competent applicant for such alienation or for such aforementioned consent."

If the provisions of Section 43 and 44(2) are read together, it is clear that since blacks were prohibited from acquiring prospecting and mining rights, (see Section 7(3) of the *Mining Rights Act*) they will not qualify as a competent applicant for alienation or for the consent to remove and dispose of minerals found during prospecting (section 8(2)) or for a consent to mine (section 9(2) of the Minerals Act).

Furthermore, the privatisation of parastatals or State-owned corporations (like Iscor and Sasol), exacerbates the exclusion of blacks from acquiring a stake in the mining industry, since it is mainly whites

who can afford to purchase shares in these corporations.

Privatisation of State-owned mining corporations should be suspended until a democratic government is introduced. Deregulation, in the form of repealing the State's right to prospect and mine (in terms of the *Mining Rights Act* and the *Precious Stones Act*), is undesirable for reasons discussed elsewhere. Furthermore, deregulation of the mining industry should not result in an abdication of the State's duties to monitor and regulate the mining industry.

Nationalisation and the Establishment of State Mines

The first statutory provisions for the establishment of a State mine occurred in Sections 30(c), 49, 50 and 51(2) of the *Gold Law* 1908. Section 42 of the *Mining Rights Act* provided for the establishment of the mines. Section 43 stated that such mine shall be developed and worked according to instructions by the Minister on the advice of the Government Mining Engineer. The *Minerals Act*, which repealed the *Mining Rights Act*, does not provide for the establishment of State mines.

According to Thomas Walde,

> while some public enterprises have achieved considerable performance capabilities (eg. CODELCO in Chile and MMC in Malaysia), in other situations a considerable decline in production, productivity, profits and market share has taken place. A perhaps not uncharacteristic example is the current drama of Bolivia's failing COMIBOL. The company suffered from continuous over-employment, politicisation of management and labour, a decrease in exploration and productivity, and erratic tax treatment.[29]

He further remarks that

> many Governments that have nationalised petroleum and minerals production have seen their revenue decrease considerably and some have had to provide considerable financial support to keep State enterprises viable. (Indonesia, 1972-1975; Columbia, 1965-1975; Bolivia, 951-1972; Ghana, from 1960, Mexico, 1982).[30]

The performance of nationalised or State mines have over the years been less than satisfactory. However, a future government should not be hamstrung by either a new constitution or mining laws that prevent the expropriation of ownership in or to minerals in the public interest[31]. However, such expropriation should be coupled with appropriate compensation in terms of the *Expropriation Act 63* of 1975.

Environmental Legislation

Effective environmental legislation should be central to a future mineral law system. However, legislation in this area should not be excessive or over-regulatory. A balance should be struck between laws aimed at preserving and protecting the environment and the costs to the mining industry of complying with these laws.

Miscellaneous:

The following features should form part of a future mineral law system:

I. the introduction of a Minerals Advisory Council to advise the Minister of Energy and Mineral Affairs on all matters related to minerals.

2. the transfer of ownership of State-held mineral rights to a statutory trust to be administered for the benefit of the disadvantaged people in South Africa. For instance, the mineral rights in respect of various farms in Lebowa are presently administered by a statutory trust on behalf of the people of Lebowa.

3. the acquisition of prospecting and mining rights from holders of mineral rights or the State by the conclusion of only two types of contracts, namely - a prospecting contract or a mineral lease respectively. The transfer of mineral rights would still take place by means of cession of mineral rights. This would imply the different types of contracts that had to be entered into before 1 January 1992 and would be in line with the present simplified position.

4. security of title by the registration of cession of mineral rights, prospecting contracts and mine leases in the deeds office.

5. uniform mining and mineral laws for the whole of South Africa including the so-called 'independent' and self-governing territories.

Conclusion

In future, there should be a partnership between government, the mining industry and labour to exploit the vast mineral wealth of South Africa. A future mineral law system will be profoundly influenced by the apartheid history of South Africa. In particular the extent to which the legitimate expectations of blacks to participate at all levels in the mining industry, will be satisfied, will be an important test of the success of a future mineral law system.

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Footnotes:

1. Franklin and Kaplan, 1982, p.1.

2. Per Mason J., as cited in *Rocher v Registrar of Deeds*, 1911, TPD 311 at 315.

3. *Halsbury, Cox vs Gine* 1848, 5CB 533; 4th ed., vol.31, para.17, p.17.

4. *Coronation Collieries vs Malan*, 1911, TPD 577 at 591.

5. Franklin and Kaplan, *Erasmus v Afrikander Proprietary Mines Ltd.* 1976(1) SA 950(w) at 960, p.5, (1982).

6. Source material is mined in terms of the *Nuclear Energy Act 92* of 1982.

7. In terms of the title of the *Minerals Act.*

8. Sections 43 & 64 and to a lesser extent Section 6(3), 8(2).

9. Section 2 & Section 57 of the *Minerals Act.*

10. Section 4 of the *Minerals Act.*

11. Section 6 & Section 9 of the *Minerals Act.*

12. Section 45 of the *Minerals Act.*

13. Section 5(l) of the *Minerals Act.*

14. Chapter VII of the *Minerals Act.*

15. In terms of "memorandum of the objects of the *Minerals Act*".

16. In terms of "memorandum of the objects of the *Minerals Act*".

17. In terms of "memorandum of the objects of the *Minerals Act*".

18. Section 5(l) of the *Minerals Act.*

19. Section 5 (2) of the *Minerals Act.*

20. In terms of Section 14 of the *Minerals Act.*

21. Kaplan and Dale, 1992, p.13.

22. *Bestuursraad Van Sebokeng vs M & K Trust* 1973(3) SA 376(A).

23. Kaplan and Dale, 1992, p.166.

24. See Section 5(1) of the *Minerals Act* and the

discussion under Prospecting and Mining on page 4 supra.

25. See Memorandum on the objects of the *Minerals Bill*, 1990.

26. See Franklin and Kaplan, op cit. 7, and *Apex Mines Ltd vs Admnistrator*, Transvaal, 1988.

27. See Sections 43 and 64 and to a lesser extent Sections 6(3), 8(2) and 9(2) of the *Minerals Act*.

29. Walde, T.W., *Mining Policies and Planning in Developing Countries*, 1939, p.39.

30. Walde, T.W., *Permanent Sovereignty over Natural Resources: Recent Developments in the Mineral Sectors*.

31. See *Expropriation Act 63* of 1975.