



# A historical perspective on the economics of the ownership of mineral rights ownership

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*'It is in the interest of stability and investor confidence that the healthy and necessary debate on such a (minerals) policy should soon find its way to consensus.'* (President Nelson Mandela at the 104th (1995), AGM of the South African Chamber of Mines)

## Synopsis

Inauguration of the new political dispensation in South Africa, initiated a dynamic period in the historical development of its minerals policy. The process of substituting the current South African mineral policy framework with an acceptable 'post apartheid' system, started soon after the 1994 election of the African National Congress (ANC) government. The Green Paper on a Minerals and Mining Policy for South Africa released for public discussion in February 1998, calls for radical transformation in mineral rights ownership. A shift towards exclusive state ownership of mineral rights, away from the present dual system of private and state ownership, is the most significant proposal. The current holders of mineral rights, or their nominees, who lawfully enjoyed security of tenure under past and present mineral laws are opposed to this transformation because mineral rights were often acquired at considerable cost. The situation is compounded by poor public record-keeping and passive mineral rights administration over a very long period. This paper represents a summary of the historical developments leading to the current legislative environment and forms the basis for any discussion on which future sculpturing of South Africa's policy regarding mineral rights can take place. One cannot plan for the future without considering the past!

## Introduction

South Africa stands at the brink of a new era in its history. With the coming to power of a democratically elected African National Congress (ANC) political alliance government, an era of considerable flux in respect of property rights and ownership commenced, despite the fact that the new constitution entrenches these rights<sup>1</sup>. Because South Africa is a minerals-based economy (mineral sales about forty per cent of foreign exchange earnings and ten per cent contribution to GDP), the issue of mineral rights and its impact on the welfare of the mining industry, is a matter of grave concern.

The process of formulating a new mineral policy for South Africa is extremely complex.

Political eagerness to shape the future, without due consideration of how the current mineral policy framework has evolved over time, could in all likelihood lead to new policies which are more complex and expensive to administer. The way in which mineral policy evolved in tandem with a growing minerals economy needs to be appreciated. The historical posturing of past governments and industry around South Africa's mineral wealth has led to a complex legislative web being woven around mineral rights ownership. Each new legislative strand was laid down in response to the needs of either government or industry, as the minerals industry has grown from the mid-1652 to the present.

Unfortunately, there are instances in the historical development of mineral rights legislation that basic principles of ownership and property rights were tampered with. The failure to submit to the discipline of the rule of law has resulted in an extremely complex system of mineral rights ownership in South Africa.

South Africa is in the process of developing a mineral policy framework acceptable to all role-players. The process of substituting the current legislative framework that underlies the minerals industry, commenced soon after the 1994 election. The process has now reached the 'Green Paper' stage but it appears that the views of stakeholders on some of the issues are so divergent that finding a negotiated solution has not yet been achieved.

The issue of mineral rights ownership is at the heart of the policy debate. The holder of mineral rights, as the possessor of the title, is entitled to some form of compensation when

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minerals, covered by these rights, are removed or depleted by another party. In the case of privately held rights, compensation usually takes the form of an outright sale at market related value. The State, however, prefers to lease its rights against payment of a royalty, despite a provision in the current Minerals Act that it may dispose of its mineral rights to the private sector. It is the consideration payable to the owners of mineral rights, as well as the security of tenure afforded through private ownership that sparked the debate.

Control over mining operations by holders of mineral rights, via the terms and conditions of exploitation, are generally considered their prerogative and the owners instruments for exercising this control. Because of this the mining industry, as stated in their contributions to the minerals policy formulation process, believes that long-term security of tenure embedded in private ownership of mineral rights is essential if capital intensive, long lead-time mineral resources are to be exploited.

## Historical overview of mineral law development in South Africa

The current system of dual private- and State-owned mineral rights developed over a period of more than three hundred years. This paper recounts how mineral rights evolved within a developing minerals economy, dominated by colonial investment and rewarded by continuous discoveries of large, high quality mineral resources. The issue of aboriginal rights which is currently dominating many mining countries, has not escaped South Africa. Early legislation (Native Land Act 27 of 1913) in respect of mineral rights and mineral development considered the rights of indigenous communities as unimportant. However, there were periods when attempts were made to restore the rights of indigenous communities through the creation of tribal lands, (SA Development Trust Act 18 of 1936). While there is no clarity on how such rights are to be administered in future, the nation has reached a turning point in the recognition of the rights of indigenous peoples through the Restitution of Land Rights Act 22 of 1994. Apart from these brief comments, the intricacies of this problem is beyond the scope of this paper.

### The Dutch era

When the Dutch colonized the Cape in 1652, the Roman-Dutch legal system as practised in Holland at that time, became the law of the land. Dutch Law had no influence on mining law as such, because mining did not play a significant role in Holland at the time. However, we inherited the principle rule of property law from Roman Common Law. This principle stated '*Cuius est solum eius est usque ad coelum et usque ad inferos*' - Accurcius, 13th century—meaning the owner of the land is not the owner of the surface only, but also of the 'fruits of the land'<sup>4</sup> extending to the space above (up to the heavens) and below it (to the centre of the earth). In modern terminology this simply means the recognition of private property rights.

### The British era

In 1806 the Cape came under British rule and though the Roman-Dutch legal system was retained as the common law,

it became 'overlaid with a substantial blanket of English Law'<sup>2</sup>. The Cradock Proclamation of 1813 was the first significant alteration to the Roman-Dutch Law as it was practised in the Cape at the time<sup>20</sup>. This Proclamation reserves the 'right to mine' precious stones, gold and silver for the Government of the Cape Colony as is the custom in English Law. Although the intention was not to influence the ownership of private mineral rights, the unintended implications created a Gordian knot when it came to establishing mining operations. Having acquired this right the State was in a position to lease these rights to whoever it pleased. This significant proclamation led to an important modification in the exclusivity characteristic of mineral rights ownership<sup>(i)</sup>. This was a first step away from private towards State ownership of mineral rights.

### The independent provincial states

After the 1836 Great Trek into the interior, several independent provincial governments were established. Each of these governments of the Republics of the Transvaal, Orange Free State and Natal, passed statutes which reserved certain minerals to these new States. Natal reserved to itself the right to mine all minerals, including coal, while the Transvaal and Orange Free State Governments followed the example of the Cape by reserving the right to mine gold, silver and precious stones for their respective States. Once again, only the right to mine was affected which implied that private ownership of mineral rights was not at risk.

Probably as a consequence of the discovery of vein gold at Eerstelung in 1871, the Transvaal Republic passed Law 1/1883 which reserved the rights to all minerals for the State, and not only the right to mine for precious stones and metals. This form of statutory expropriation represented a drastic modification of mineral rights ownership. It seems from the following observation by Dale<sup>4</sup> that the expropriation of mineral rights, introduced through this statute, was quickly repealed:

'and one wonders what the effect of expropriation was on the mineral rights themselves, the rights adherent to which would have been nullified and worthless, and furthermore what the nature of the re-annexation of the mineral to the soil was, on repeal of this statute and the re-imposition merely of a reservation to the State of the right to mine'. (P. 182). Law 8 of 1985 reintroduced the reservation of the right to mine for precious stones and metals to the State.

Apart from these events, the Transvaal Republic was also responsible for introducing the category of proclaimed land over precious metal and precious stone mining areas. By proclaiming land, the State granted surface right permits over privately owned land to the mining companies for the purpose of their surface installations. This measure violated

(i) According to Hartwick and Olewiler<sup>3</sup>, a property right is a *bundle of characteristics that convey certain powers to the owner of the right*. The characteristics of the right make it *exclusive, enforceable, divisible and transferable*. The exclusivity of a right gives the holder the power to the exclusive use of a natural resource. The holder does not have to share the natural resource with any others. However, the rights may be constrained by restrictions imposed by governments in that the right may have degrees of exclusivity. The South African situation where the State reserved the right to mine for itself and then leased this right to a third party, is a worthy example.

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the personal rights of farmers and land owners in the interest of stimulating mining development. The effect was that the privilege of exclusivity which land owners had previously enjoyed in terms of surface utilization, was overridden.

The Natal Government introduced the category that later became known as Trust Land by the enactment of Law 15/1867. The then Natal Native Trust was empowered to grant mineral leases on land under its control on terms and conditions approved by the Lieutenant-Governor.

### **The Union era**

With the unification of the former independent Republics of the Transvaal, Orange Free State, Natal and the Cape Colony into the Union of South Africa in 1910, an attempt was made to consolidate the various Provincial Statutes. The first statute affecting mineral rights ownership in this consolidation process was the Land Settlement Act of 1912. This Act specifically reserved ownership of all mineral rights, and not only the right to mine, for the State. Was history about to repeat itself? However, the reservation to the State was overturned in 1917 so that mineral rights reverted to the land owner—a significant step towards privatization of mineral rights ownership. By the repeal of the reservation, to the extent that it affected privately owned land (and, therefore also the mineral rights), the principle was established that the State owned the mineral rights to the vast tracts of land it owned at that time. As the State disposed of this land to individuals it retained to itself the right to the minerals. Such land subsequently became known as Alienated State Land<sup>(ii)</sup>. Despite this step towards private ownership of mineral rights, the Union still wanted control over the industry and therefore reserved for itself the right to mine gold, silver and precious stones on all categories of land. The Union also upheld the proclaimed land category, the lease consideration concept (for the right to mine) as well as the mining lease administration procedures introduced by the Transvaal Republic.

An important development followed in 1925 with a provision whereby land owners of Alienated State Land or their nominees, acquired the exclusive right to prospect and mine on their land. However, if a mine were established on this type of land, the State was entitled to royalty payments (Reserved Minerals Development Act of 1925).

The next significant legislation, from a mineral rights ownership point of view, was the passing of the Base Minerals Development Act 39 of 1942 and its Amendment Act 22 of 1955. The 1942 Act gave the State the right to intervene should the owner of any land, including private land, not exercise his/her exclusive right to prospect for and mine base minerals. This move towards State control allowed the State to transfer the exclusive right to prospect to a third party if it were considered to be in the national interest. The year 1942 also saw the introduction of a provision whereby the State reserved the right to prospect and mine for oil for itself (Natural Oil Act 46/1942).

The move towards State control continued in 1948, with the promulgation of the Atomic Energy Act 35 of 1948 which vested the right to prospect and mine for prescribed minerals for the State.

### **The Republic era**

The next stage in the constitutional development of South

Africa was the formation of the Republic of South Africa in 1961. Over the years mineral rights legislation developed in such a way that various minerals were regulated by separate statutes which added to the complexity of the system. The Mining Rights Act 20 of 1967 was an attempt to consolidate the plethora of legislation under a single Act. However, it was decided that precious stones should continue to be governed by the Precious Stones Act 73 of 1964. The 1967 Act recognized the historically different categories of land as they had developed over the years and dealt mainly with administration of land over which the State had some control (e.g. proclaimed land).

We interpret the intent of the Mining Titles Registration Act 16 of 1967 as a tactical move on the part of government to collect information with regard to the different categories of mineral rights ownership. This Act was a precursor to the Mining Rights Act 20 of 1967 by which recognition of registered 'or declared' ownership would be ensured. This approach demonstrates a sense of equity and co-operation between government and holders of mineral rights that present-day policy makers should try to emulate.

Mineral rights were again affected in 1975, this time with the passing of the Mineral Laws Supplementary Act 10 which provided, first, a means by which mining companies could obtain mineral rights over land where:

- private mineral rights ownership was separated from the land
- the mineral rights were held in undivided shares, and
- permission to exploit the mineral rights could not readily be obtained;

and, second, it prevented further fragmentation of private mineral rights by testamentary succession without State approval.

With the passing of the Minerals Act 50 of 1991 in 1992, the 'right-to-mine' principle which had been a legal cornerstone of mineral exploitation in South Africa, expired. The Minerals Act is arguably the biggest step towards a system of exclusive private mineral rights ownership in the history of South Africa. It provided for:

- the abolition of the various classes of land and categories of mineral rights that had resulted as a consequence of the fragmented legal developments in the four provinces
- the transfer of the right to prospect for and to mine those minerals that had previously been reserved exclusively for the State, to the mineral rights owner. The State thereby relinquished its exclusive right to prospect and mine for natural oil, precious metals and precious stones on private land. By the same token, land owners on Alienated State Land, or their nominee, lost their exclusive right to prospect in favour of the State. This meant that the past practice whereby mining houses secured prospecting rights by agreement with the surface owner over Alienated State Land in perpetuity, ended on the cut-off date of

(ii) Prinsloo, F. (1998). *Mineral rights in the new South Africa, unpublished paper discussing the critical issues facing the post-1994 minerals industry with regard to mineral rights.*

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31 December 1996. This abolition of nomination agreements, confirmed by the 1997 Green Paper<sup>5</sup> represents a drastic change in historical precedent

- ▶ all proclaimed land was deproclaimed which meant that the State lost its permitting control over proclaimed mining areas in favour of the surface owner.

Perhaps the most interesting feature of the Minerals Act 50 of 1991, from a mineral rights ownership point of view, is section 64 which allows for the outright disposal of State-owned mineral rights to the private sector. The aim was to reduce government involvement and to create a market for State-owned mineral rights. This provision in the 1991 Act was directly opposed to the declared political philosophy of the up-and-coming ANC calling for State ownership in respect of all mineral rights. It seems that the cabinet at that time and the Department of Mineral and Energy Affairs (DMEA) were very aware of the ANC's views as this provision was never exercised nor were any mineral rights disposed of by the then government up to 1994 when the ANC was elected.

In its Minerals Act Circular no. 13 dated 14 September 1994, the DMEA discouraged the disposal of State-owned mineral rights on the grounds that there were sufficient provisions in the Minerals Act to protect the interests of mining companies. These provisions are nomination agreements and mineral leases in terms of section 9(2) of the Minerals Act. Section 43 of the Minerals Act was, however, a transitional arrangement which was put into place in order to facilitate the phasing out of all nomination agreements over Alienated State Land. In retrospect it is surprising that the government was encouraging people to enter into nomination agreements, while simultaneously administering an Act designed to abolish such agreements.

The on-going controversy regarding the administration of previously so-called 'Alienated State mineral rights' as regulated by section 43 of the Minerals Act, warrants some discussion. In terms of the transitional provision contained in section 43 of the Minerals Act, the surface owner of Alienated State Land has the first right to prospect for minerals and not the State. This situation developed as a result of historical administrative procedures which then became the precedent. This provision was necessary because the imperfect administration of mineral rights over a long period led to a situation where the surface owner held the first right to the minerals and effectively, by default, became the owner of the mineral rights. This was arguably never the intention of the law and consequently mining companies negotiated directly with the surface owners rather than the State, through nomination agreements, to become effectively 'the prospector-owners' of the mineral rights. If exploration led to the discovery of minerals the State, because of the considerable costs incurred during prospecting, had to grant a mineral lease in favour of the applicant. This transitional arrangement expired on 31 December 1996 after which the surface owner lost the first right to prospect in favour of the State. This drastic change in the Act has negative implications for mining companies which had entered into expensive nomination agreements with surface owners based on how these rights had, for half a century, been administered. A nomination agreement effectively gave the

holder the first right to the minerals and was, therefore, the customary way mining houses obtained security of tenure to the minerals on Alienated State Land.

To date no acceptable solution to the nomination agreement conundrum has been found and it seems that the matter will have to be resolved either by implementation of correct policy or by the courts. Whatever the outcome, it will have a profound impact on the current and future ownership of mineral rights in this country. Should the decision support the proposal in the Green Paper (that all nomination agreements be abolished), it will cause enormous problems for the mining and property sectors and add to the mood of uncertainty and insecurity prevailing in the mining industry.

### Mineral rights ownership in South Africa

#### Classes of ownership

South Africa has a complex system of mineral rights and land ownership with a strong racial bias towards whites. During white-dominated rule, land in South Africa was generally categorized into four main types, that is, Private, State, Alienated State and Trust land. The principle of severance of land and mineral title (embedded in the Cradock Proclamation of 1813) led to the enactment of the Deed Registry Act 47 of 1937 when diamonds were discovered in the Northern Cape. Such separation of rights was recognised through either separate registration of a certificate of mineral rights holding or a notarial registration at the deeds office. For each category of land there is a unique procedure by which mineral and surface rights are acquired. The ANC government inherited this complicated system. It should be noted that the previous government was not the architect but that the system is a product of three hundred years of historical development and precedent.

#### Different categories of land

- ▶ Private land<sup>(iii)</sup> is land in respect of which both the surface and mineral rights are owned privately. Ownership of the land and the minerals may not necessarily be vested in the same person or company. The number of mineral right owners can range from a single person or company to a large number of individuals.
- ▶ State land<sup>(iii)</sup> is land in respect of which both the surface and minerals are owned by the State. This is the simplest type of ownership and permission to utilize land and minerals is obtainable from the State.
- ▶ Alienated State Land<sup>(iii)</sup> is land in respect of which the surface is owned privately, while all or some of the mineral rights are owned by the State. After obtaining a nomination agreement and permission to use the surface from the land owner, mining companies need to obtain permission from the State in order to extract

*(iii) Classes of land as it appeared in the repealed Mining Rights Act 20 of 1967. Although this classification is no longer applicable, it provides a useful guide to some of the subtleties of the ways in which land is held in South Africa.*

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its minerals. Although this category of ownership may appear to be simple, the complexities surrounding nomination agreements are detailed in this paper. This situation arose because the surface owner, who had the first right to exploration as well as the subsequent exploitation of the mineral rights, disposed of that right to a third party (e.g. a mining company) by way of a tripartite nomination agreement.

- ▶ Formerly, Proclaimed land was land held under claims where the surface rights were owned either by the State or by private individuals. However, where the surface was privately owned, the State could issue Surface Right Permits (SRPs) to the mining companies, which were a stronger right than that of the freehold owner. Although entitlements to this category of land are no longer accessible, there remain areas which are still affected by SRPs and will continue to be recognised.
- ▶ Trust land or Tribal land is land where the land and, in most instances, the rights to the minerals were set aside for certain communities in the former homelands and self-governing territories. Past laws prevented black communities from negotiating directly with mining companies to exploit their minerals and the community had to operate through a trustee. This is a very complex form of ownership because the people on the land owned the mineral rights, but had no rights to enter into mineral lease agreements. The Native Land Act 27 of 1913, the SA Development Trust Act 18 of 1936 and the Rural Areas Act 9 of 1987 dealt with the Trust land issue. Schuring identified the following six categories of Trust land during the deliberation of the Discussion Document<sup>6</sup>:

Land historically occupied by communities or tribes and declared to be part of a tribal area ( $\pm 9\ 000\ 000$  ha). The government acted as trustee for the community, except for Kwazulu-Natal.

Land presently occupied by communities or tribes and declared to be part of a tribal area ( $\pm 5\ 000\ 000$  ha). The government or a third party, for example the Lebowa Minerals Trust, acts as trustee for the community.

Land historically occupied by communities or tribes who were evicted from their land by the previous government. These farms were subleased to farmers who had the first option to buy the land ( $\pm 1\ 000\ 000$  ha). Ownership of the mineral rights is vested in the State;

Land purchased by tribes and registered in the deeds office ( $\pm 1\ 000\ 000$  ha). Registration of these rights was in the name of a trustee, e.g. the President of Bophuthatswana, which meant that the mineral rights were effectively vested in the State.

Land earmarked for incorporation into former homelands ( $\pm 1\ 200\ 000$  ha). The mineral rights could be vested in the State or a third party.

Land occupied by coloured communities. Ownership vested in the State in trust for the community. However, these communities exercised some control through Management Boards.

### Information and administration

One of the reasons for the controversy regarding mineral rights is the uncertainty of who owns what, or which, mineral rights. Information on mineral rights ownership is available at the various deeds offices in notarial format. This means that a deeds office search to establish ownership over a particular area could be an extremely complex and time-consuming exercise. A mineral rights register cross-referenced to Survey General plans, which would allow for easy access to mineral ownership information, is not available.

Presently the onus is on mineral rights owners (or mining companies) to present certificates of mineral rights, pre-1937 servitude documents and notarial registration of deed, as proof of title before prospecting and mining authorizations may be granted by the DME. The situation is just as bad for State mineral rights and, to date, neither the Department of Minerals and Energy (DME), the new name for the DMEA, nor any other state department has a register or database of State-owned mineral rights. This means that mining companies wanting to prospect or mine State-owned mineral rights must prove to the DME that the State is in fact the owner of these rights before the terms and conditions of the agreement can be negotiated—a highly inconvenient consequence of passively administering mineral rights over a very long period. While we agree with Dale<sup>7</sup> that the Chief Registrar of Deeds has taken steps to improve the system and while we endorse his proposals for improving it, it is in its infancy and far from being a user-friendly or complete database.

Given this uncertainty about mineral rights ownership in South Africa, it is little wonder that so many contradictory views exist as to how mineral right holdings are spread amongst the different owners in South Africa. Jourdan<sup>8</sup> is of the opinion that 'almost all mineral rights are held by the large mining houses'. Another estimate suggests that about half of the country's mineral rights are State owned, twenty per cent belongs to mining companies, while the remaining thirty per cent belongs to tribes, landowners and private individuals<sup>9</sup>. The estimate of two-thirds privately-owned and one-third State-owned mineral rights quoted in the Green Paper is considered unreliable because it is based on the number of applications processed through the DME's offices rather than on the area those rights cover.

The confusion in the system of administering mineral rights arose because of a lack of defined policy and administrative procedures in the DME and the deeds office. The ineffective administrative system of simply paying ridiculously low annual fees in order to retain, indefinitely, a right did not provide an incentive for the development of minerals on State land. The weakness in the system is clearly the lack of incentives to motivate holders to relinquish their rights if no exploration or development were undertaken. Poor record-keeping contributed to the problem. The major advantage to the mining companies was the high security of tenure that the administrative system inadvertently afforded. This provided an incentive for companies to explore and develop privately-owned land and created the illusion that companies were hoarding worthwhile rights.

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## A new mineral policy for South Africa

Historical developments which led to the current minerals legislative environment form the basis for any discussion on which the future sculpturing of South Africa's policy on mineral rights should take place. Since 1994, South Africa has entered into one of the most dynamic periods in the history of its minerals industry. As a consequence of the Government's decision to reformulate the minerals policy, a number of actions were initiated which are recorded in several documents. The documents referred to below are arranged chronologically rather than in terms of their relative importance.

### **African National Congress and Mineral and Energy Policy Centre: February - November 1994**

The revision of the Minerals Policy was initiated by the ANC in its publication of the Reconstruction and Development Programme (RDP)<sup>10</sup> in February 1994. The RDP document stated the following with regard to the ownership of mineral rights:

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

As a follow-up to the RDP document, the results of research undertaken by the Mineral and Energy Policy Centre (MEPC), an independent research institute requested by the ANC to investigate the revision of the Mineral Policy, were presented at a policy workshop held in Johannesburg<sup>11</sup>. Page eight of the discussion document mentioned that the ANC's view on mineral policy is centred on its Freedom Charter of 1955, which reads as follows:

'The people shall share in the country's wealth...', and  
'The mineral wealth beneath the soil...shall be transferred to the people as a whole.'

It is argued that a mineral resource is a national asset which should be developed for the benefit of all the citizens of a country. This implies that ownership of all minerals must vest in the State on behalf of the people and that the users of mineral rights (mining companies) must pay rent to its owners, the State (the people).

How the transference of mineral rights to the State can be initiated and motivated to take place remains to be decided, but the Green Paper is presently in favour of the imposition of a mineral rights tax and minimum work requirements as preferred instruments. As far as could be established, Jourdan was the first to propose these in South Africa<sup>8</sup>.

### **Department of Mineral and Energy Affairs: December 1994**

In a document dated December 1994, the then Department of Mineral and Energy Affairs proposed a number of principles on which they believed a mineral and mining policy for the new South Africa should be based. The following principle contains the view of the previous government on the ownership of mineral rights<sup>12</sup>:

'The policy shall recognise State as well as private ownership of mineral rights and shall encourage utilization of such rights within prevailing economic conditions.'

This principle embodies the view of the previous government on mineral rights ownership, a fundamentally different position to that which the newly elected ANC government had in mind. Possible reasons for this dichotomy are firstly, that the DMEA was, at that time, under the control of National Party Minister R.F. Botha and secondly, that no affirmative action appointments at senior official level had been made in the DMEA.

Since December 1994, the DMEA has undergone a management transformation. It was renamed the Department of Minerals and Energy (DME). ANC Minister P. Maduna took control and a variety of officials, drawn from industry, other government posts and the Minerals and Energy Policy Centre (MEPC) were appointed to senior managerial posts in the Department. This means that the DME is now staffed by proponents of policies advocating private ownership as well as those who prefer exclusive State ownership of mineral rights.

### **Chamber of Mines of South Africa: June 1995**

In the Chamber of Mines document<sup>13</sup>, compiled on behalf of the owners of the domestic mining industry, security and continuity of tenure associated with the current system of rights (that allows for private and State mineral rights ownership), are considered to be the cornerstones that have enabled the effective utilization of South Africa's unique mineral resources. The owners argue that it would not be fair if mineral rights were transferred from existing owners to the State or new investors, given the original cost of acquisition. They also opposed the introduction of a mineral rights tax to achieve such transfers.

In its response to the release of the Chamber of Mines document, Business Day<sup>14</sup> neatly summarized industry's position by reporting '...the mining industry employers called for government intervention to be limited, and for policies on mineral rights, minerals beneficiation and other areas to remain unchanged'.

### **Other role-players**

Apart from the ANC, DME, MEPC and Chamber of Mines, at least two groups representing significant numbers of interested and affected parties were identified. They include the National Union of Mineworkers (NUM), which also produced a policy document focusing mainly on the development of human resources, worker's rights and other social issues, and the foreign investor, a non-vociferous and under-represented role-player.

The purpose of formulating an investor-friendly mineral policy is to encourage local and multinational companies to invest their limited financial resources on exploration within the borders of South Africa. Rio Tinto Zinc, in its Mining and Exploration Modern Mining Code,<sup>15</sup> listed their requirements for host government behaviour. They require the regulatory framework to provide not only security of tenure, but also a clear statement with regard to the granting of licences. Host governments must ensure that their total take, that is '...the total burden of revenues going to the State and the way in

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which those revenue flows are levied', is competitive<sup>(iv)</sup> with other countries who also seek direct foreign investment. Indirect methods of taxation should be kept to a minimum and incentives to reduce the direct taxation burden need to be introduced because '...an internationally competitive tax package and assurances of long term stability make investment more likely'.

### **Mineral Policy Process Steering Ccommittee: April 1995 - October 1996**

In an effort to accelerate the mineral policy formulation process after April 1994, R.F. Botha, holder of the Mineral and Energy Affairs portfolio at that time, convened a meeting of all stake holders on 24 April 1995. The Mineral Policy Process Steering Committee (the Committee), a tripartite committee comprising representatives of business, labour and government, was established to manage the formulation process. The Committee was chaired by Marcel Golding, chairman of the Parliamentary Portfolio Committee on Mineral and Energy Affairs, former NUM official and Member of Parliament at the time.

In November 1995 a discussion document, also referred to as the 'Chopping block document', was compiled from the policy proposals received from all stake holders. The Committee at that stage, was well on its way to meeting its target of preparing a Green Paper by the end of July 1996, and anticipated publication of the White Paper in October, 1996<sup>16</sup>.

In the chapter on Resource Management, the discussion document considers the issues relevant to mineral rights and security of tenure. Among other things, the following policy proposals are listed

- 'Mineral rights must be returned to the State (publicly owned) and a system of State-(crown) held mineral rights, which are leased to companies, be introduced.'
- 'The freezing or sterilizing of mineral resources in areas of privately owned mineral rights should be discouraged by the imposition of a mineral rights tax.'

However, in contradiction to these statements, it was also proposed in the same document that:

'The existing system of public and private ownership of mineral rights should be retained'.

The discussion document was deliberated in September 1996 by stake holders in an open forum where discussions were especially heated on the issue of mineral rights ownership. In retrospect it appears that President Mandela's words (early 1995) that ' a policy should soon find its way to consensus' is far from reality. Despite the political miracle negotiated in 1994, it appears that all the above initiatives for negotiations on property rights, inherent in mineral rights ownership, is somewhat like a prickly pear. Many will have to overcome their fear of thorns before they are able to enjoy the fruit of the debate.

The Committee handed a draft Green Paper on a Minerals

and Mining Policy for South Africa to Maduna in October 1996. Maduna replaced Botha when the National Party resigned from the Government of National Unity. A period of silence, frequently broken by media speculation that the Green Paper was ready for public release, followed.

### **Green Paper for public discussion on a Minerals and Mining Policy for South Africa**

The Green Paper was finally released for public scrutiny on 3 February 1998. It came as no surprise that the main reason for the delay was the controversy surrounding mineral rights ownership<sup>(v)</sup>. Certain adjustments to the original document were necessary to bring the Green Paper in line with Maduna's budget speech in the National Assembly on 21 May 1997.

The Green Paper provides a clear statement of intent with regard to mineral rights ownership in the following policy proposals<sup>5</sup>

- 'Government's long-term objective is for all mineral rights to vest in the State.' (Is history again repeating itself?)
- 'Government will promote minerals development by applying the *use it or lose it* principle.' It should be noted that this was the first time that the words 'use it or lose it' appear in official government documentation.
- 'The right to prospect and to mine for all minerals will vest in the State.' In terms of previous legislation, the State had the right to mine for precious stones and metals until 1994, two years after the enactment of the Minerals Act 50 of 1991. This statement implies that a lease consideration concept for all minerals is again favoured.
- 'Government will investigate the feasibility of imposing a mineral rights tax which would be intended to discourage the non-utilization of privately-owned mineral rights.'
- 'Annual minimum work and investment requirements to discourage the unproductive holding of prospecting and mining rights.'

The Green Paper is a discussion document and the views therein should not therefore, be interpreted as final. The White Paper will follow once feedback of all the interested and affected parties has been considered.

### **Conclusion**

The laws and administrative procedures controlling the development of South African mineral resources provide for a complex system of mineral rights ownership. Mineral rights ownership, influenced by mineral law development in South Africa, was the subject of frequent change in the relatively short history of South Africa. As a consequence of a shift in political power that led to the rise and subsequent

(iv) The importance of tax competitiveness in an open economy is highlighted in the 1997 report, Global Mining Taxation Comparative Study, co-ordinated by J.M. Otto of the Institute for Global Resources Policy and Management at the Colorado School of Mines.

(v) An equitable decision on mineral rights ownership will not be achieved easily. Submissions by stake holders to the Committee are proof of this. Several submissions called for a State-owned system of mineral rights, while others pleaded for the present system to be retained, the different points of view being defended energetically<sup>17</sup>.

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empowerment of the ANC, mineral rights ownership is again facing significant changes. An outstanding feature of the evolving mineral laws described in this paper, was the consistent failure to recognise the rights of indigenous people who occupied the land long before the Europeans arrived in South Africa—a tradition which is continued in the Green Paper.

By documenting the historical development of the complex interaction between the State, mining companies, private individuals and mineral laws in South Africa, the lack of foresight and long-term planning normally embodied in a minerals policy, is clearly evident. Until 1986 when the White Paper of the previous government was published, policy had to be interpreted from the changes made to the legal framework, as well as public administrative practices and government announcements<sup>18</sup>. The question remains as to how this ponderous situation can responsibly be resolved, without further complicating the matter. It is our opinion that the Green Paper does not give adequate consideration to these complexities and, in addition, ignores realities such as constitutional guarantees in respect of the sanctity of property rights. However, a system of State ownership of mineral rights certainly has its merits and a future shift towards public ownership of mineral rights seems inevitable at this stage. To achieve that, and not scare off the investor in our minerals industry may yet demand more time, energy and compromise by all stakeholders.

A plausible aspect of the Green Paper is a commitment to introduce a dynamic mineral resource management system combined with efficient administration of mineral rights. However, it is unlikely that such a system will be implemented if decision makers do not have access to reliable and up-to-date mineral rights and resource information<sup>(vi)</sup>. It is no secret that better informed policy makers are likely to make better policy decisions.

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(vi) In a presentation at the Global Mining Taxation Workshop in Cape Town<sup>19</sup>, a strategy for the rapid compilation of a Mineral Rights Register and a National Inventory Of Mineral Resources through declaration of information, was proposed.

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