

NOTHABISO CLEMENCY MBONAMBI

STUDENT NO: 12207528

A CRITICAL ANALYSIS OF THE LEGAL ENVIRONMENT FOR MINING IN SOUTH AFRICA: IT'S IMPLICATIONS ON THE INFLOW OF FOREIGN INVESTMENT INTO THE SECTOR

Declaration

Certification

I declare that this Mini-dissertation is hereby submitted for the award of Legum Magister (LLM) in Trade and Investment at International Development Law Unit, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Nothabiso Clemency Mbonambi

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Trust in the Lord with all your heart and lean not on your own understanding; in all your ways acknowledge Him, and He will make your paths straight. (Proverbs 3:5-6)

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God bless.

List of Acronyms

ANC	African National Party
ATNS	Agreements, treaties and negotiated settlements project
BEE	Black Economic Empowerment
BBBEE	Broad Based Black Economic Empowerment
DEIC	Dutch East India Company
DMR	Department of Minerals and Resources
GDP	Gross Domestic Production
HDSAs	Historical Disadvantaged South Africans
NP	National Party
IMF	International Monetary Fund
RDP	Reconstruction and Development Program
RSA	Republic of South Africa
OFS	Orange Free State
TBVC	Transkei Botswana Venda Ciskei
UDF	United Democratic Party
PAC	Pan African Congress
SACP	South African Communist Party
SAMDA	South African Mining Development Association
MIGDETT	Mining Industry Growth, Development and Employment Task Team

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Minerals and Petroleum Resource Development Act 28 of 2002

Mining Charter of 2002

Minerals and Petroleum Resource Development Act 49 of 2008

The Revised Mining Charter of 2010

Mining Titles Registration Act 20 of 1967

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Chapter 1

1 Introduction

South Africa is rich in natural resources especially minerals and mining plays a significant role in the development and history of South Africa; both as a country, and as a leading economy on the African continent¹. Mining in South Africa not only provides vast opportunities for employment, but is also a good source of trade and attraction of foreign investment. In South Africa, gold mining has resulted in a change of ownership structure and has empowered the local black population.² A range of legislations passed in the mining sector of South Africa had been mostly influenced by different political regimes.

Until 30 April 2004, the Minerals Act 50 of 1991 primarily regulated the right to prospect for and mine ('the Minerals Act'). The Minerals Act vested the right to mine a particular mineral in the holder of the mineral rights in respect of the relevant mineral in relation to the land in question³. The right of ownership on the particular land, which bore the mineral resources, played an important role in the olden days. Therefore, mining tended to have a close relationship with land acquisition and the principle of accession was commonly applied. South Africa's previous mining regime had a relatively secure system of mineral rights, based principally on private ownership⁴. The latter gave foreign investors assurance, certainty and confidence on their investments because they knew whom to deal with and mining laws were transparent.

In South Africa the state is now the custodian of mineral resources on behalf of its people, this means that mineral resources belong to all people of South Africa. The Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) was adopted by Parliament and came into operation on 1 May 2004. The MPRDA replaced the Minerals Act; it vests custodianship of all

¹<http://www.projectsia.com/mining-in-south-africa.htm> (accessed 12 March 2012).

²<http://www.kwintessential.co.uk/articles/south-africa/Advantages-and-Disadvantages-of-Gold-Mining-in-South-Africa/4015> (accessed on 13 March 2012).

³http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6146 (accessed 27 March 2012).

⁴(n 3 above).

minerals in the South African state and brings amend to the old order mineral law⁵. The current Act contains certain transitional measures with regards to mineral rights, prospecting permits and mining authorizations. Therefore, old mining right holders are required to acquire new mining rights, which are in line with the MPRDA.⁶

Under the MPRDA, the Minister of Mineral Resources has power to grant or withhold mining or prospecting rights in the mining sector of South Africa. This result in confusion and concern among investors, as it is not clear when, how or why “Ministerial concern” could result in withholding mining rights or prospecting rights in certain circumstances⁷.

The MPRDA also introduced a broad-based socio-economic charter for the South African mining industry, which sets a framework, targets and timetable to give effect, the entry of Historical Disadvantaged South Africans into the mining sector.⁸ The Mining Charter like the MPRDA came into effect on 1 May 2004 and it requires, among other things, that mining companies demonstrate that 15 percent and 26 percent of their assets, whether through equity, attribute units of production, collective schemes or partnerships, are owned by HDSAs by May 2009 up to May 2014.⁹ Since the introduction of the Mining Charter, the mining industry has offered foreign investors with unstable session of trust and fatalism.¹⁰

⁵PJ Badenhorst & H Mostert *Minerals and petroleum law of South Africa* (2011) 1-20.

⁶<http://www.platmin.com/p/legislation.asp> (accessed on 28 May 2012).

Old order rights held under the previous dispensation are required to be converted to (new order) rights recognized under the MPRDA. In accordance with the transitional arrangements of the MPRDA all applications for prospecting permits, mining authorization, consent to prospect to mine and all environmental management programs made under the Minerals Act but not finalised or approved before May 1, 2004 (the date which the MPRDA took effect), are treated as having been made under the MPRDA.

⁷<http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012).

⁸(n 7 above).

⁹Badenhorst (n 5 above) 6.

¹⁰http://www.miningmx.com/special_reports/mining-yearbook/2010/Foreign-investors (accessed on 28 May 2012).

1.1 Definition of foreign investment

Foreign investment involves the transfer of tangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.¹¹ The International Monetary Fund defines foreign investment as, 'an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective choice in the management of that enterprise'.¹²

Currently there is a trend toward globalization where large, multinational firms often have investments in a great variety of countries and many see foreign investment in a country as a positive sign and as a source for future economic growth.¹³ Flows of capital from one nation to another in exchange for significant ownership stakes in domestic companies or other domestic assets, normally, foreign investment signifies that foreigners take a somewhat active role in management as a part of their investment.¹⁴

1.2 Problem statement

The Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) is the law currently regulating the mining industry in South Africa. Section 2 (e) of the Act provides for the promotion of economic growth and mineral and petroleum resources development in the Republic. Section 2(f) of the Act, emphasizes the promotion of employment as well as advancing the social and economic welfare of all South Africans. Section 2(e) states, '...ensure that holders of mining and production rights contribute towards the socio-economic development of the areas of which they are operating.' These objectives are quite clear, they indicate that the Act aims at promoting growth, promote employment, advance social and economic welfare, and ensure that holders of mining rights contribute towards the development of the community of which they are operating.

¹¹ M Sornarajah *The international law on foreign investment* (2004)7.

¹²Sornarajah (n 11 above) 7.

¹³<http://www.investopedia.com/terms/f/foreign-investment.asp#axzz1uNC4Uioh> (accessed on 09 May 2012).

¹⁴ n7 above.

The Act was relatively transparent and clear when published and it was supposed to be complimented by the Mining Charter as well as other regulations and other publications.¹⁵ The impact of the Mining Charter as well as other regulations and other publications are removing the MPRDA transparency and clarity. South Africa's revised Mining Charter, black economic empowerment (BEE), the judicial system and reviewed laws are restraining the mining industry development as well as its foreign investment¹⁶. The issues that this study aims to address are the BEE issues as incorporated in the MPRDA.

On the 11th of October 2002, the Department of Minerals and Resources, together with mining industry stakeholders, including the Chamber of Mines, South African Mining Development Association and the National Union of Mine Workers signed the Mining Charter. The Mining Charter is regarded as a policy instrument to effect the transformation of the mining sector in South Africa. The objectives of the Charter are among other things. The 2010 revision of the Mining Charter combined with other regulatory uncertainty makes it hard for foreign investors to get assurance for their investment in the mining sector of South Africa. The fact that the Minister of Mineral Resources have excessive powers over granting mining rights or contracts, results in confusion and concern among investors, as it give the Minister overly broad administrative discretion in withholding mining or prospective rights in certain circumstances.¹⁷

Licensing data and administration processes regarding license issuing seem to lack transparency and raises some suspicions.¹⁸ Many of the business people who get BEE deals have strong ties to the political elite, which is contrary with Section 2 (f) of the main Act. This raises a risk that pursuit of transformation at the level of ownership could entrench a culture of political favor and cronyism and this cause concerns among investors over the potential for corruption.¹⁹

¹⁵<http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012).

¹⁶(n 15 above).

¹⁷(n 15 above).

¹⁸<http://www.polity.org.za/article/minister-in-major-overhaul-of-ambiguous-mine-laws-licence-tracking-to-go-public-2010-08-18> (accessed on 15 April 2012).

¹⁹Rowan Watt- Pringle 'South Africa in review: A satisfactory framework for transformation?' <http://www.mining-technology.com/features/feature99877/> (accessed on 29 May 2012).

The revised Charter has also seen foreign investors unfamiliar with South Africa as they see it as a place where the industry is heavily over regulated, with regulations changing ever so often.²⁰

The decrease of foreign investment flow into South Africa is a source of concern in the mining sector. Ever since the 26 percent scheme (provided by the BEE system) was enforced in South Africa no significant investment has come into the mining sector; instead there has been a flight of private capital.²¹ The main aim for foreign investors to invest in a certain project is the hope and belief to make a profit. Investors are not keen on investing in a country where they are obliged to make socio-economic commitments towards that country. Therefore, this study seeks to investigate what the revised Mining Charter signifies and its effect on foreign capital attraction in the mining sector of South Africa. In addition, this study inquires what the present South African mining laws and regulations portend for in connection with the inflow of foreign capital into the mining sector

1.3 Research question (s)

The overarching goal of this study is to investigate the impact of the Mining Charter as well as other mining laws and regulations on foreign investment flow into the mining sector of South Africa. In addressing these issues this study will also seek to answer the following pertinent questions:

- How has the mining sector of South Africa evolved until the present day?
- What does the legal environment of the South African mining sector look like; a brief overview of the mining sector's legal environment from its inception to its present form?
- What are the implications of the Mining Charter on the national quest to attract foreign capital into the country, especially in the mining sector of South Africa?

²⁰ (n 19 above).

²¹ www.typepad.com (accessed on 29 May 2012).

1.7 Rationale and objectives of the study

There are extensive works done in this field but not in the exact manner that this work approaches the issues in terms of analyzing and criticizing the Mining Charter and its influence in the attraction of foreign investment in the mining sector in South Africa. Apart from adding value, this study will emphasize and also inform the need for South Africa to attract foreign investment by affording protection to foreign investors through enacting policies which are certain and clearly defined while also realizing the right to promote black economic empowerment.

1.8 Research methodology

The approach this study intends to adopt is the analytic as well as critical approach. The analytic approach will entail desk and library research because this is a qualitative research, it does not require going to the field and collecting data. The dissertation aims to discuss and critically analyze various mining legal frameworks in light of foreign investment in the mining sector in South Africa as well as the black economic empowerment (BEE) concept.

1.9 Literature review

There are two schools of thought when it comes to the question whether the Mining Charter is the cause of the decrease in South African mining industry. One school of thought regards the revised Mining Charter, black economic empowerment (BEE), the judicial system and reviewed laws as constrains in the mining industry development and its foreign investment.²² The other school of thought regards the current mining regulation not an investment hindrance but a tool to reduce poverty and promote national investment.²³

²²<http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012).

²³ Unpublished: K Malunga 'The altered anatomy of an international transaction in South Africa-the impact of equity laws' unpublished Paper, University of the Witwatersrand, 2.

According to Imogen Harding, ‘the lack of certainty regarding mining regulations is making it difficult to assure investors that South Africa is a good investment hub’.²⁴ ‘The 2010 revision to the Mining Charter combined with other regulatory uncertainty, recent court decisions and actions of the Department of Minerals and Resources are making it hard to provide investors with a sense of assurance for their investments, taking into account the large size and long duration of mining projects.’²⁵ As Leon says, ‘the most significant contributor to the mining industry’s current calamity was the introduction of the MPRDA in May 2004’.²⁶

According to Kohler, the Charter still has some major shortcomings and believes that ownership level transformation does not necessarily contribute significantly to job creation, growth or beneficiation.²⁷ ‘BEE ownership targets have the potential to overshadow the need for transformation on a more real level, and while billions are being invested in the pursuit of transformation at the level of ownership, the ownership structures to date have benefited neighboring communities’, says Kohler.²⁸

South Africa is not benefiting from the commodities boom as other countries have and one of the reasons is the perception of undue government interference in the mining industry in light of foreign investment.²⁹ Lunsche believes that, ‘Had we had the investment seen in other countries it would have attracted an estimated R100bn or more, which in turn could have created significantly more jobs’.³⁰

While South African mining industry is in gloom all hope is not lost according to Leon. He points out that the DMR’s new mining cadastre system and audit of rights and the prospect of significant amendments to the MPRDA may well presage a significantly bright and better future for South African mining.³¹

²⁴(n 21 above).

²⁵(n 21 above).

²⁶ Peter Leon ‘Quo Vadis the South African mining industry?’⁴

http://www.moneyweb.co.za/mw/action/media/downloadFile?media_fileid=8821 (accessed on 18 May 2012).

²⁷(n 19 above).

²⁸(n 19 above).

²⁹(n 19 above).

³⁰(n 19 above).

³¹<http://www.miningweekly.com/article/critical-time-for-south-africas-mining-industry> (accessed on 10 April 2012).

Not all writers believe that the Mining Charter is the hindrance to the attraction of foreign investment. Others believe that empowering the historically disadvantaged people is the positive way of redressing past inequalities and showing the world that we believe in our people's ability to invest at home. On that note, Malunga says, 'Based on constitutional principles and statistical figures, BEE laced transactions and companies are not a hindrance but rather a positive development for investment and the lofty aspirations of reducing poverty and inequality.'³² The main objective of South Africa's equity laws is to reverse the inequalities of the past, the concerns over vagueness and lack of clarity and consistency with regard to BEE Charters and regulations are observably justifiable.³³

It is the aim of this study to investigate whether the Mining Charter is the problem in the attraction of foreign capital in South Africa's mining sector. In addition, this research will try and find whether it is possible to find a balance between empowering the previously disadvantaged people and attracting foreign investment simultaneously. As Faruque says, 'the traditional view is that the difference in nature between human rights and investment protection means that they operate on different planes and are thus not amenable to balancing'.³⁴

1.10 Limitations of the study

The obvious limitation of this study is that the number of published books on South African mining industry was relatively limited, which caused this study to rely more on internet sources. The current study was not specifically designed to evaluate factors related to nationalisation although nationalisation also contributes to the decrease of foreign investment into the mining sector in South Africa.

³²(n 23 above) 2.

³³(n31 above).

³⁴AA Faruque 'Mapping the relationship between investment protection and human rights' (2010) 11 *The journal of world investment and trade* 539.

1.8 Overview of chapters

This research will be divided into five chapters:

Chapter one will serve as introduction.

Chapter two will look and cover the general history of the mining sector in South Africa. This chapter will look at how the sector generally evolved from the pre- apartheid, apartheid, up to the post- apartheid era. This will enable the reader to have a vivid understanding of the origins of the South African mining sector.

Chapter three will give an overview perspective of the legal environment of South African mining sector since its inception up to the present day. In order for one to understand the present, one has to know where he is coming from, and the purpose of this chapter is to give a base of how our mining regulation was or is formulated.

Chapter four aims to address the implications of the current mining regulations in the form of the MPRDA as incorporated by the Mining Charter on the inflow of foreign investment into South African mining industry. The main aim of this chapter is to give factors which will prove or refute whether the Mining Charter is really a cause of the decrease of foreign investment in the mining sector in South Africa.

Chapter five's purpose is to provide the summary of the findings of the study, conclusions and recommendations.

Chapter two

2.0 A synopsis of the South African mining industry

2.1 Introduction

This chapter aims to give an overview historical and factual background of the mining industry in South Africa. An insight as well as the issues that motivated the current general position of South Africa's mining sector will be addressed. In addition, this chapter will illustrate how different political regimes influenced mining regulation in South Africa from the pre-apartheid era to the present.

2.1.1 The pre-apartheid era: how it all started in the mining industry of South Africa

South Africa is one of the only areas on earth that contains an almost complete history of mining, going back to pre Homo sapiens³⁵ and continuing with the first human workings through the first underground mines, on to Iron Age mining and finally colonial commercial mining.³⁶

South African mining industry is one of the largest and most important sectors in the Republic, and it occupies a key position in the national economy of South Africa.³⁷ Mining in South Africa has been the main driving force behind the history and development of Africa's most advanced and richest economy.³⁸ Several minerals mined in South Africa, includes platinum metals,

³⁵<http://www.anc.org.za/docs/reps/2012/simsreport.pdf> (accessed on 25 May 2012).

The first use of minerals by Homo sapiens is presumed to be probably the recent discovery at Pinnacle Point (Mossel Bay) of the heat treatment of rock (silcrete) to harden it for the making of microlith (flake) tools (80 -150 000 years BP) constituting the first human heat treatment.

³⁶(n 35 above).

³⁷BLS Franklin & M Kaplan *The mining and mineral laws of South Africa* (1982) pg.1

³⁸http://en.wikipedia.org/wiki/Mining_industry_of_South_Africa (accessed on 16 April 2012)

manganese, chrome, vanadium, gold, coal, diamonds, iron ore, copper, nickel, building materials and other non-metallic metals.³⁹

The earliest South African example of shaft, gallery, and adit was found at the Lolwe Hill, Phalaborwa where a shaft of six metres in depth with a ten metres horizontal gallery was dated at AD770.⁴⁰

The Rooiberg tin mines in Limpopo province operated from the 15th to the 17th century and the Mussina copper deposits were mined from the 10th century but sadly the early workings were destroyed by the European miners at the start of the 20th century.⁴¹ Consequently, the invasion of the Cape by the Dutch East India Company in 1652 portended the start of the systematic dispossession of indigenous South Africans of their land, minerals and liberty.⁴²

Alluvial diamonds were discovered on the Vaal River in the late 1860s.⁴³ The consequent discovery of dry deposits at what became the city of Kimberley drew tens of thousands of people, black and white, to the first great industrial hub in Africa, and the largest diamond deposit in the world.⁴⁴

Large scale and profitable mining started with the discovery of a diamond on the banks of the Orange River in 1867 by Erasmus Jacobs and the subsequent discovery and exploitation of the Kimberley pipes a few years later⁴⁵. A chance find in 1867 drew several thousand-fortune seekers to alluvial diamond diggings along the Orange, Vaal, and Harts rivers.⁴⁶

Discovery of lucrative deposits of diamonds, gold and other minerals, starting in 1886, was the motivation for the development of towns and cities in South Africa.⁴⁷ In 1886, Witwatersrand

³⁹http://www.bowman.co.za/LawArticles/Publications/GettingTheDealMining2011SouthAfrica_1.pdf (accessed on 15 March 2012)

⁴⁰(n 35 above).

⁴¹(n 35 above).

⁴²n 35 above.

⁴³<http://www.info.gov.za/aboutsa/history.htm> (accessed on 16 April 2012).

⁴⁴P Waterhouse Doing business in South Africa (1990) pg.5

⁴⁵(n 38 above).

⁴⁶ Britannica Academic Edition ‘ South Africa : Gold Mining’

<http://www.britannica.com/EBchecked/topic/555568/South-Africa/44076/Gold-mining> (accessed on 16 April 2012).

⁴⁷Waterhouse (n 44 above).

discovered gold and as a result, Johannesburg was founded in 1887. These discoveries attracted fortune –seekers from around the world, including many from the goldfields of California and Australia.⁴⁸

Richer finds in “dry diggings” in 1870 led to a large-scale rush and by the end of 1871 nearly 50,000 people lived in a sprawling multi-lingual mining camp that was later named Kimberley⁴⁹. Originally, individual diggers, black and white, worked small claims by hand, as production rapidly centralized and mechanized, however, ownership and labour patterns were divided more simply along racial lines⁵⁰. A new class of mining capitalists oversaw the transition from diamond digging to mining industry as joint-stock companies, and consequently diggers were bought out and the industry became a monopoly by 1889 when De Beers Consolidated Mines (controlled by Cecil Rhodes) became the sole producer⁵¹.

In 1871, the British, who ousted several competing claimants, annexed the diamond fields and it was only after the mineral discoveries of the late 1800s did the balance of power swing decisively towards the colonists.⁵² The Boer republics then took on the trappings of real statehood and imposed their authority within the territorial borders that they had speculatively claimed for themselves.⁵³

Gold rushes to Pilgrim's Rest and Barberton were precursors to the biggest discovery of all, the Main Reef/Main Reef Leader on Gerhardus Oosthuizen's farm Langlaagte, Portion C, the Witwatersrand Gold Rush (1886) and the subsequent rapid development of the gold field there, were the biggest innovation⁵⁴. The discovery of the Witwatersrand goldfields in 1886 was a turning point in the history of South Africa, as it presaged the emergence of the modern South African industrial state⁵⁵. Once the magnitude of the reefs had been established and deep-level mining had proved to be a viable investment, it was only a matter of time before Britain and its

⁴⁸Waterhouse (n 44 above).

⁴⁹(n 46 above).

⁵⁰(n 46 above).

⁵¹(n 46 above)

⁵²(n 4 above).

⁵³(n 38 above).

⁵⁴(n 38 above).

⁵⁵(n 43 above).

local representatives again found an excuse for war against the Boer republics of Transvaal and the Orange Free State⁵⁶.

The cosmopolitan population of the goldfields was in constant disagreement with the conservative government of the pastoral Boers, who resented the invasion of foreigners⁵⁷. This was the period when British imperialism reached its climax, black nations were conquered and their lands annexed, the Boer republics were threatened; the result was the Anglo-Boer War of 1899-1902⁵⁸. The British Empire emerged victorious from the Anglo-Boer War and the Orange Free State and South African Republic (Transvaal) added to the Empire⁵⁹.

In 1910 the Cape Colony (British since 1814) and Natal (British since its establishment in 1841), together with Zululand (annexed in 1881), the Orange Free State and the Transvaal (both independent Boer Republics, 1840-1902), were united to form the Union of South Africa, under the leadership of Boer generals Louis Botha and Jan Smuts⁶⁰. For administration purposes, the country consisted originally of four provinces: the Cape of Good Hope, Natal, the Orange Free State, and the Transvaal⁶¹. The Act of Union, followed by a resurrection of Afrikaner (Boer) nationalism, exemplified the founding of the National Party, led by Boer General JBM Hertzog, in 1914⁶². Limitations were placed on the movements of Africans and Indians (but not of Coloured) from the earliest times and Africans were also prohibited from acquiring title to land in 1913, only certain territories were reserved for black ownership⁶³. The Afrikaner nationalist movement grew steadily on a foundation of sectarian preference, patronage and discrimination⁶⁴. The Afrikaner population lifted the economic and social degradation, following the Anglo-Boer War and the depression of the 1930s to economic parity with and later to political dominance over the English-speaking whites⁶⁵.

⁵⁶(n 46 above).

⁵⁷Waterhouse(n 44 above) 5.

⁵⁸Waterhouse (n 44 above)5.

⁵⁹Waterhouse (n 44 above)5 .

⁶⁰Waterhouse (n 44 above) 5.

⁶¹Waterhouse (n 44 above)5.

⁶²Waterhouse (n 44 above) 6.

⁶³Waterhouse (n 44 above) 6.

⁶⁴Waterhouse (n 44 above) 6.

⁶⁵Waterhouse (n 44 above) 6.

The mineral discoveries had some positive impacts on the subcontinent as a whole, for example, a railway network linking the interior to the coastal ports revolutionized transportation and energized agriculture⁶⁶. In addition, coastal cities such as modern-day Cape Town, Port Elizabeth, East London and Durban experienced an economic boom as port facilities were upgraded⁶⁷.

By the late 19th century, the discovery of mineral riches in the interior of Southern Africa overlapped with the hardening of racial attitudes that accompanied the rise of a more militant imperialist spirit.⁶⁸ The mineral discoveries had a radical impact on every sphere of society as labour was required on a massive scale and could only be provided by Africans, who had to be drawn away from the land⁶⁹. The fact that the mineral discoveries overlapped with a new era of imperialism and the scramble for Africa, brought majestic power and stimulus to bear in Southern Africa as never before⁷⁰.

From the turn of the 19th century mining became the backbone of the European settler economy and with the formation of the Union of South Africa in 1910; the indigenous people were increasingly stripped of their rights and controlled through the migrant labour system (Wenela, later Teba) and the Pass Laws (“Domboek”).⁷¹ After World War II the apartheid system further entrenched the discriminatory system including the exclusion of black South Africans from all skilled work categories (job reservation).⁷²

Most of the seven “mining houses” which dominated the South African minerals sector and the economy fled (moved their listings overseas) after the advent of democracy because their need for cheap coerced labour coincided with the Boer need to suppress and control the black population, and a complex system of migrant labour, pass laws and policing was established to this end.⁷³

⁶⁶ (n 43 above).

⁶⁷ (n 43 above).

⁶⁸ (n 43 above).

⁶⁹(n 43 above) .

⁷⁰(n 46 above).

⁷¹(n 35 above).

⁷² (n 35 above).

⁷³The discovery of diamonds at Kimberley in 1871 generated substantial capital from British and European banks to finance the new diamond mining houses started by Cecil Rhodes, Alfred Beit and Barney Barnato and others, who eventually came together to form De Beers. Diamond capital was consequently available to mine the Wits gold.

2.1.2 Apartheid system and its effect in the mining sector

Apartheid was a system of racial segregation enforced through legislation by the National Party governments of South Africa between 1948 and 1994, under which the rights of the majority of non-white inhabitants of South Africa were curtailed, where white supremacy and Afrikaner minority rule maintained⁷⁴. The term ‘apartheid’ comes from the Afrikaans word which means ‘separateness’⁷⁵. The mining industry enjoyed a close relationship with the apartheid regime by benefitting from its laws⁷⁶.

In 1948, a government was elected (by the whites alone) that introduced the policy of apartheid (segregation) that was allegedly to allow different racial groups to progress in their separate areas⁷⁷. Afrikaner nationalism achieved this objective when the National Party under Dr DF Malan won the post-war election in 1948, with a minority of votes but a majority of parliament seats⁷⁸. In practice, apartheid legalized racial division that confirmed white economic and political superiority and ensured that blacks maintained submissive positions⁷⁹. The relationship between mining companies and mineworkers was a touchy one, characterized by the manipulation of mineworkers⁸⁰. The Bantustans, to which the black majority confined under apartheid law, provided reservoirs of cheap labor, which the mining companies exploited to their own benefit⁸¹. In other words this means that in the past the mining industry functioned with little or no respect for the well-being of its non- white employees.

In 1948, the Republic of South Africa governed by the National Party, which basic tenet of its apartheid policy was the partition of the country on ethnic lines implemented the policy which led to the independence of Transkei, Bophuthatswana, Venda, and Ciskei (TBVC countries) and

Cecil Rhodes, an unscrupulous British imperialist, founded Gold Fields of South Africa (GFSA) in 1887. Rand Mines, Johannesburg Consolidated Investments, General Mining and Union Corporation were also established to exploit the bonanza, all backed by diamond capital. Anglo American was established in 1917 by Ernest Oppenheimer and Anglovaal was founded in 1933. These houses represented the ‘seven mining’ houses before apartheid. See (n 35 above).

⁷⁴http://en.wikipedia.org/wiki/Apartheid_in_South_Africa (accessed on 02 April 2012).

⁷⁵(n 46 above).

⁷⁶<http://thinkafricapress.com/south-africa/south-african-miners-fight-justice> (accessed on 16 April 2012).

⁷⁷http://en.wikipedia.org/wiki/Economic_history_of_South_Africa (accessed on 16 April 2012).

⁷⁸Waterhouse (n 44 above) 6.

⁷⁹(n 43 above).

⁸⁰(n 42 above).

⁸¹(n 42 above).

a large degree of political autonomy for KwaZulu, Lebowa, KaNgwane, KwaNdebele and Qwaqwa (national homelands)⁸².

Also in 1984, the government, still controlled by the National Party, introduced a new constitution. For the first time since the removal of African and Colored voters from the rolls, coloureds were to be represented in Parliament. Parliament consisted of three houses, one each for Whites, Coloureds and Indians (Africans were not represented, nor were they eligible to vote in parliamentary elections)⁸³. The constitution was unacceptable to a considerate segment of the National Party because it was regarded the beginning of transferring political power to a black majority, but to African political groupings, it was undesirable because it entrenched racial origins as the basis for political rights and failed to extend direct political representation to the African majority⁸⁴.

The proposed constitution was approved by a large majority (of the then exclusively white electorate) after a political campaign marked by much civil unrest which led to the imposition of a state of emergency⁸⁵. Extra - parliamentary opposition to the government was, largely coordinated by the United Democratic Party (UDF), an umbrella body, largely representative of the African National Congress (ANC), to which about 600 different organizations were affiliated⁸⁶. One of the main objectives of the ANC and UDF was to acquire support of continued economic sanctions on South Africa until the political situation changed⁸⁷.

In February 1990, State President FW de Klerk announced far-reaching changes to the status quo, including the unbanning of the ANC, Pan African Congress (PAC), SACP, and other organizations of the similar nature⁸⁸. Subsequently, Nelson Mandela was released from prison and appointed Deputy President of the ANC. The government and the ANC set up joint working parties to examine and resolve major differences prior to the entering into negotiations for the

⁸²The independence of the TBVC countries was not recognized by the rest of the world, although their political and economic viability was comparable with that of many former colonies of European powers. See Waterhouse (n 44 above) 6.

⁸³(n 42 above).

⁸⁴(n 42 above).

⁸⁵(n 42 above).

⁸⁶(n 42 above).

⁸⁷(n 42 above).

⁸⁸Waterhouse (n 44 above) 6.

development of a new constitution⁸⁹. The negotiations commenced in early 1991 and the National Party government stated its commitment to the eradication of the apartheid system, which it imposed in 1948 and admitted that it was a mistake⁹⁰. Principal areas addressed were; the problems of full political representation at the central government level for the African population, the educational system which operated along segregated lines for blacks, the elimination of all remnants of apartheid, and the reallocation of resources toward giving greater importance to the social and other needs of the African inhabitants⁹¹.

Mandela and de Klerk finally reached a peaceful agreement on the future of South Africa at the end of 1993, an achievement for which they jointly received the 1993 Nobel Peace Prize⁹². A parliament to be elected at that time would administer the drafting of a permanent constitution for the country⁹³. The temporary constitution empowered all citizens 18 and older, eliminated the homelands, and divided the country into nine new provinces, with provincial governments receiving substantial powers⁹⁴. The temporary constitution also contained a long list of political and social rights, and a mechanism through which blacks could regain ownership of land that had been taken away under apartheid⁹⁵.

The apartheid era represented a sad era for Africans especially black people, the wounds inflicted by apartheid especially in the mining sector will take time to heal and this cannot happen overnight.

⁸⁹Waterhouse (n 44 above) 6.

⁹⁰Waterhouse (n 44 above) 6.

⁹¹Waterhouse (n 44 above) 6.

⁹² (n 46 above).

⁹³Waterhouse (n 44 above). 6.

⁹⁴(n 46 above).

⁹⁵Waterhouse (n 44 above) 6.

2.1.5 Post – apartheid era

The 1990s were a transition period in South Africa. The country experienced economic, social and political transformation and this brought momentous changes to a country formerly overwhelmed by apartheid.⁹⁶ The challenge was the reconstruction of the post-apartheid economy with regards to development of human capital and the improvement of the country's competitiveness in the global marketplace.⁹⁷ After the apartheid era, legislation was developed to outlaw unfair racial discrimination and to redress past imbalances.⁹⁸

The mining industry in South Africa has seen significant restructuring and changes since the early 90's with the traditional "big six" mining houses - Anglo American / De Beers, Gencor / Billiton, Goldfields, JCI, Anglo Vaal and Rand Mines - being restructured and extending their global presence⁹⁹. These companies traditionally controlled gold, platinum, chrome, coal and base metal production in South Africa and the advent of a new democratic constitution and rising costs from gold mining activities gave rise to several changes in the industry.¹⁰⁰

The project of non-racial democracy defended by organizations proclaiming adherence to the Freedom Charter envisaged democratic transformations both of the political and of the socio-economic pillars of apartheid during the transition period.¹⁰¹ The problems of a transition phase in South Africa were thus enormous. Major challenges of economic management, employment, urbanization, land redistribution, among others, were to be confronted immediately after liberation and they commanded great attention and resources.¹⁰²

Mineral policies in South Africa stem from the ruling party and state policies development committee.¹⁰³ The government's policies and strategies on mineral resources have its roots in

⁹⁶T Phakathi 'Self-directed work teams in a post-apartheid gold mine: perspective from the rock face' in E Webster & K Von Holt (eds) *Beyond the apartheid workplace: studies in transition* (2005) 1

<http://ccs.ukzn.ac.za/files/Post-apartheid%20Gold%20Mine.pdf> (accessed on 25 May 2012).

⁹⁷ (n 96 above) 1.

⁹⁸<http://www.pins.org.za/pins33/Martin%20&%20Durrheim.pdf> (accessed on 25 May 2012).

⁹⁹<http://www.mbendi.com/indy/ming/af/sa/p0005.htm> (accessed on 23 May 2012).

¹⁰⁰ (n 99 above).

¹⁰¹<http://www.history.ukzn.ac.za> (accessed on 25 May 2012).

¹⁰² (n 101 above).

¹⁰³ (n 35 above).

“The Freedom Charter” (1955)¹⁰⁴, the “Ready to Govern” (1992)¹⁰⁵ document and the Reconstruction and Development Program 1994¹⁰⁶.

The global depression hit the mining sector very hard and the decrease in export sales and commodity prices in late 2008 and early 2009 led to immense job losses, estimated to be in region of 50000¹⁰⁷. This number could have been even bigger with analysts putting estimated losses at between 100000 and 150000 had the government, labor unions and mining companies not implemented the Mining Industry Growth, Development and Employment Task Team (MIGDETT), which helped mitigate against those larger prospective losses¹⁰⁸.

Presently the mining sector faces serious issues such as wage increase, safety in mines and illegal mining among other things. Although the government is trying to bridge the gap between blacks and whites in the mining sector by enacting laws that uplifts or give privilege to the historical disadvantaged people, the results are still far from achieving this aim.

¹⁰⁴The Freedom Charter states the following: “The national wealth of our country, the heritage of 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 to enter all trades, crafts and professions.” See (note 35 above).

¹⁰⁵The position on ownership and utilisation of minerals enunciated in the Freedom Charter was amplified at the ANC’s “Ready to Govern” Conference in 1992 which stated: “The mineral wealth beneath the soil is the national heritage of all South Africans, including future generations. As a diminishing resource it should be used with due

regard to socio-economic needs and environmental conservation. The ANC will, in consultation with unions and

employers, introduce a mining strategy which will involve the introduction of a new system of taxation, financing, mineral rights and leasing. The strategy will require the normalization of miners’ living and working conditions, with full trade union rights and an end to private security forces on the mines. In addition, the strategy will, where appropriate, involve public ownership and joint ventures. Policies will be developed to integrate the mining industry with other sectors of the economy by encouraging mineral beneficiation and the creation of a world class mining and mineral processing capital goods industry.” See (note 35 above).

¹⁰⁶ Paragraph 4.4.2.6 of the Reconstruction and Development Programme states that, ‘Policies must aim to reduce the gap between conglomerate control of a wide range of activities within the financial, mining and manufacturing

sectors and sub-sectors, on the one hand, and the difficulties faced by small and micro enterprises in entering those

sectors on the other’

¹⁰⁷ <http://www.tradeinvestsa.co.za> (accessed on 17 April 2012).

¹⁰⁸ (n 107 above).

Concluding remarks

South Africa's mining industry is seen as one of the important and largest sectors in the country. South Africa is also the main driving force behind the history and development of Africa's richest economy. To local people of South Africa, mining brought systematic changes during the ancient times because their land, minerals and freedom were disposed as a result of the discovery of minerals in the country. Mining started with individual diggers consisting of blacks and whites digging small claims by hand in unity. It was then where the capitalists oversaw an opportunity to form joint-stock companies which resulted to the industry becoming a monopoly. In 1871, the colonists took over mining in South Africa from the British by annexing the diamond fields.

The discovery of Witwatersrand goldfields in 1886 earmarked a turning point in the history of South Africa as it prophesied war between Transvaal and Orange Free State. Subsequently, in 1910 the Union of South Africa under the Boer was formed. This formation led to the founding of the National Party. Under the National Party leadership, Africans became labourers in the land which they once owned and the system of apartheid reserved better jobs to non-blacks within the sector.

The post-apartheid era in South Africa meant social as well economical challenges in the sector. Government was required to redress the past imbalances and exercise the principle of democracy at the same time. This required government to pass legislation that will empower people who were previously disadvantaged in terms of employment, land restitution and equality.

Chapter three

3 Legal frameworks for Mining Industry

3.1 Introduction

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 system¹⁰⁹.

The purpose of this chapter is to give a factual outlook of the most important and relevant mining laws that were and are presently regulating the mining industry and the amendments made on some of those laws. The latter will be done by way of discussing the relevant laws in the mining industry before, during and after the apartheid era because the history of minerals and mineral rights in South Africa was and is still very much influenced by political circumstances.

3.2 Mining legislation in the pre- apartheid South Africa

The first legislation relating to mining in the former South African Republic appears to have occurred in 1858 when a Volksraad resolution of 21 September dealt with the subject of mining development¹¹⁰. The first gold law passed was Law No 1 of 1871 and it was followed by successive laws to keep pace with the changing circumstances and the development in mining.¹¹¹ After the discovery of diamonds and gold in 1867 and 1870, the South African legislature played an important role in the development of mining and mineral law.¹¹² The entire structure of mineral and mining law in South Africa was developed by courts and various legislations and the need of this development arose out of the lack of such laws within the Roman-Dutch law system.¹¹³ The unification of the former independent Republics¹¹⁴ of the Transvaal, Orange Free

¹⁰⁹FT Canwood & RCA Minnitt 'A historically perspective on the economics of the ownership of mineral rights ownership' (1998) 98 *The Journal of the South African Institute of mining and metallurgy* 371.

¹¹⁰B Franklin & M Kaplan *The mining and mineral laws of South Africa* (1982) 334.

¹¹¹Franklin & Kaplan (note 110 above) 334.

¹¹² PJ Badenhorst & H Mostert *Minerals and petroleum laws of South Africa* (2011) 1-2.

¹¹³Badenhorst & Mostert (note 112 above) 1-2.

State, Natal and the Cape Colony into the Union of South Africa in 1910 enforced an attempt to consolidate various provincial statutes and the first statute affecting mineral rights ownership in this consolidation process was the Land Settlement Act 12 of 1912¹¹⁵. However, the reservation of ownership of mineral rights to the State was upturned in 1917 so that mineral rights reverted to the land owner, which was a noteworthy step towards privatization of mineral rights ownership.¹¹⁶ As the State disposed of the land to the individuals, it retained to itself the right to the minerals on the land which was not claimed, such land became known as ‘alienated state land’ and the right to mine gold, silver and precious stones on all categories of land vested in the Union.¹¹⁷

A brief summary of how the mining laws started in South Africa has been elaborated above and this section will now discuss the four most important laws which governed and shaped our mining sector during the pre-apartheid regime, namely: (i) The Mines and Works Act 12 of 1911 (ii) The Natives Land Act 27 of 1913 (iii) The Reserved Minerals Development Act 39 of 1942 (iv) Natural Oil Act 46 of 1942.

3.2.1 The Mines and Works Act 12 of 1911

The Mines and Works Act No. 12 of 1911 allowed the granting of certificates of competency for skilled mining jobs to be given to Whites and Coloureds only¹¹⁸. This Act gave privilege to whites and Coloureds in terms of better jobs in the mining industry, black people as well as Indians were left behind and given hard jobs with less pay. The Minerals and Works Act discriminated against race and the principle of equality was not applied at that time. This Act is sometimes referred to as ‘Colour Bar’ or ‘The Colour Bar Act’. The Colour Bar Act refers to a

¹¹⁴During the independent colonial era each colony had its own mining legislation. Transvaal had the Precious and Base Metals Act (the Gold law) and the subsequent Mineral law Amendment Act See The Precious and Base Metals Act 35 of 1908 (T) and also see The Minerals Law Amendment Act 36 of 1934 (T). Orange Free State had the Orange Free State Metals Mining Act that incorporated the Gold law in the OFS, see The Orange Free State Metals Mining Act 13 of 1936 (OFS). Natal had the Mines and Collieries Act, see The Mines Collieries Act 43 of 1899(N), while the Cape had the Precious Minerals Act and the Mineral law Amendment Act. See The Precious Minerals Act 31 of 1898 (C) and also see The Mineral law Amendment Act 16 of 1907 (C). The Colonial mining legislation remained in force in the Provinces even after the Union was formed: Section 123 of the South Africa Act of 1909 conferred all mining and mineral rights on the Governor-General-Council. See Franklin & Kaplan (note 110 above) 1.

¹¹⁵Cawood & Minnitt (n 109 above) 371.

¹¹⁶Cawood & Minnitt (n 109 above) 371.

¹¹⁷Cawood & Minnitt (n 109 above)371,

¹¹⁸<http://www.africanhistory.about.com/od/preapartheidlaws/g/No12Of11.htm> (accessed on 26 April 2012) .

group of labor practices, informal trade union practices, government regulations, and legislation all of which were developed over time to prevent blacks from competing for certain categories monopolized by whites¹¹⁹. Although this Act did not put it bluntly that blacks and Indians should be discriminated upon but by implications, Section 4 (n) of the Act adopted the latter. Section 4 (n) gave the Governor-General authority to grant, cancel and suspend certificates of competency to mine managers, mine overseers, mine surveyors, mechanical engineers, engine-drivers and miners entitled to blast¹²⁰. Paradoxically, only whites were permitted to attain the certificates of competence essential, for instance, by engine drivers and boiler attendants¹²¹.

The Mines and Works Act was amended in 1912 as a result of the criticism by some or other mine Commissions with regard to mine management for employing large numbers of unskilled whites. Therefore some modifications were made and the draft regulation served as a model for the 1912 Act.¹²² Some modifications took the form of an injunction to employ only whites in specified occupations, such as blasting, running elevators, driving engines, supervising boilers and other machinery or as shift boss and mine overseer.¹²³ Furthermore, only whites would be allowed to obtain the certificates of competence required, for instance, by engine drivers and boiler attendants. The 1912 Act was repealed by the Mines Works Act 25 of 1926.¹²⁴

The revised Act reinforced the colour bar in the mining sector as a result of the 1922 Rand Revolt, when mine owners attempted to replace white workers with lower paid blacks.¹²⁵ In addition, Indian miners were also excluded from skilled jobs. In contrast to the 1912 regulations, this Act grouped Coloureds with whites in a position of privilege.¹²⁶ Furthermore, the key section of the Act stated that, ‘the Minister, before announcing regulations for issuing certificates of competency, should seek the advice of the owners and of the organization whose members hold a majority of the certificates, that is, the white unions, including the Mine Workers Union and he was to do this through the formation of advisory committees.¹²⁷ The 1926 Act was repealed by

¹¹⁹http://en.wikipedia.org/wiki/Mines_and_Works_Act,_1911 (accessed on 29 March 2012)

¹²⁰(n 119 above).

¹²¹(n 119 above).

¹²²(n 119 above).

¹²³(n 118 above).

¹²⁴(n 118 above).

¹²⁵(n 119 above).

¹²⁶(n 118 above).

¹²⁷(n 118 above).

the Mines and Works Act 27 of 1956 which commenced on May 4 of 1956 which dealt mainly with the declaration of work in the national interest, for example, working on mines during holidays and weekends.¹²⁸

3.2.2 The Natives Land Act 27 of 1913

The Natives Land Act commenced on the 19th of June 1913¹²⁹. This Act made provisions as to the purchase and leasing of land by natives and other persons in the several parts of the Union and for other purposes in connection with the ownership and occupation of land by the natives and other persons¹³⁰. This law was passed because of constant pressure by whites to prevent the intrusion of blacks on white areas and it incorporated territorial segregation into legislation for the first time since Union in 1910¹³¹. This Act indirectly played an important role in stripping mining rights from blacks to whites by forcing blacks to surrender their land, some of which had minerals on it and also it created an imbalance between South Africans because it favored whites against blacks in terms of consistent living conditions. The Natives Land Act remained a cornerstone of apartheid until the 1990's when it was replaced by the current policy of land restitution.

3.2.3 The Reserved Minerals Development Act 54 of 1926

The date of commencement of this Act is the 16th of June 1926¹³². This Act provided that land owners of alienated land or their nominees acquired the exclusive right to prospect and mine their own land, however, the condition was that the State was entitled to royalty payments¹³³. Therefore the impact of this law was that the owner of the alienated land enjoyed a limited right in his or her own land when he or she decides to put the land to use because the owner could not enjoy the benefits of his or her land solely without the State intervention.

¹²⁸(n 119 above).

¹²⁹Statutes of South Africa 1913.

¹³⁰<http://www.sahistory.org.za/dated-event/native-land-act-was-passed> (accessed on 26 April 2012).

¹³¹(n 130 above).

¹³²Statutes of The Union of South Africa 1942

¹³³Canwood & Minnitt (n 109 above) 371.

The Reserved Minerals Development Act 21 of 1955 amended the 1926 Act. The Act dealt with minerals on land becoming the property of the native trust and it also inserted a new section that permitted the Governor-General to vest in the trust mineral rights reserved to the Crown over such land.¹³⁴

3.2.4 The Base Minerals Development Act 39 of 1942

This Act gave the State the right to intervene should the owner of any land including private land not exercise his or her right to prospect for and mine base minerals¹³⁵. This Act gave the State through the Minister power to transfer exclusive rights to third parties if it considered being in the national interest¹³⁶. The State through this Act adopted a ‘use-it-or-lose-it’ approach. The holder of the mineral rights could lose his or her rights if he or she does not avail him or herself and exercise his or her mining rights to the satisfaction of the Minister.¹³⁷ This principle applied to both private as well as crown land, the holder was not completely stripped of his or her rights, since he or she could still receive some income from his or her mineral rights¹³⁸.

The Base Minerals Development Act 22 of 1955 amendment Act 39 of 1942 by giving wide powers to the Minister of Mines in regards to coal from which coke suitable for metallurgical purposes can be produced.¹³⁹ If the Minister is satisfied that any seam contains such coal he may prohibit any person mining it except upon such terms and conditions, including conditions as to the use or disposal of the coal, as he may specify.¹⁴⁰

¹³⁴http://heinonline.org/HOL/Page?handle=hein.journals/assaf11955&div=26&g_sent=1&collection=journals (accessed on 03 May 2012).

¹³⁵ Statutes of the Union of South Africa 1942.

¹³⁶ Canwood & Minnitt (n 109 above) 371.

¹³⁷ See Section 3 of the Base Minerals Amendment Act 39 of 1942. See also, Unpublished: HM Van den Berg ‘Mineral rights under development: A comparative study of the evolving nature of mineral rights in South Africa and Namibia’ unpublished dissertation, University of Cape Town, 2009 27.

¹³⁸ Unpublished: HM Van den Berg ‘Mineral rights under development: A comparative study of the evolving nature of mineral rights in South Africa and Namibia’ unpublished dissertation, University of Cape Town, 2009 27.

¹³⁹ Van den Berg (n 138 above) 27.

¹⁴⁰ Van den Berg (n 138 above) 27.

3.2.5 Natural Oil Act 46 of 1942

The year 1942 also saw another development in the mining industry of South Africa in terms of mining legislation and this development was in the form of Natural Oil Act. This Act introduced a provision where the State reserved the right to prospect and mine for oil for itself.¹⁴¹

3.3 The South African mining legislation in the apartheid-era

The apartheid era started in 1948 and ended in 1991¹⁴². Apartheid had two legislative pillars, the Natives Land Act 27 of 1913 and the Groups Areas Act 41 of 1950. The Natives Land Act remained a cornerstone of apartheid, it created a system of land tenure that deprived the majority of South Africa's inhabitants of the right to own land which had a major socio-economic repercussions¹⁴³. The Group Areas Act will not be discussed in this study because it does not fall within the purview of this study. The mining industry enjoyed a close relationship with the apartheid regime, it benefitted from its laws, the Bantustans, to which the black majority were confined under apartheid law, provided reservoirs of cheap labor which the mining companies abused to their own advantage¹⁴⁴.

The Union of South Africa became the Republic of South Africa in 1961 and all laws which were in force in any part of the Union of South Africa remained in force until they were repealed or amended and new laws regarding mining and mineral rights were also passed¹⁴⁵. The four most important laws passed in the mining industry of South Africa during the apartheid era, which this study is going to discuss are: (i) the Precious Stones Act 73 of 1964, (ii) the Mining Titles Registration Act 20 of 1967, (iii) the Mining Rights Act 16 of 1967 and the (iv) Atomic Energy Act 90 of 1967.

¹⁴¹Canwood & Minnitt (n 109 above) 371.

¹⁴² Wikipedia 'Apartheid legislation in South Africa' http://en.wikipedia.org/wiki/Apartheid_legislation_in_South_Africa (accessed on 23 March 2012).

¹⁴³http://www.mongabay.com/reference/country_studies/south-africa/ECONOMY.html (accessed on 23 March 2012).

¹⁴⁴ Think Africa Press 'South African Miners fight for justice' <http://thinkafricapress.com/south-africa/south-african-miners-fight-justice> (accessed on 02 April 2012).

¹⁴⁵Van den Berg (n 138 above) 28.

3.3.1 Precious Stones Act 73 of 1964

This Act was a consolidate measure, but it contained a few important amendments which superseded the earlier legislation relating to the regulation and control of prospecting and mining for and dealing in precious stones¹⁴⁶.

3.3.2 The Mining Titles Registration Act 16 of 1967

This Act was a tactical move on the part of government to assemble information with regard to the different categories of mineral rights ownership¹⁴⁷. This has established a sense of fairness and co-operation among government and holders of mineral rights¹⁴⁸. Section 5 of this Act gave the Director-General the duty to record and file a great number of documentation in terms of Section 5 (1), and most of these were the inputs of the surveyor via diagrams and plans.¹⁴⁹

The Mining Titles Registration Amendment Act 24 of 2003 amended the 1967 Act. Section 5 (a) of the amendment Act gives the Director-General power to take charge of and preserve all records of the Minerals and Petroleum Titles Registration Office, provided that the Director-General may, with due regard to any regulations made under Section 10 (1) (k), destroy or otherwise dispose of any record which has been cancelled in terms of this Act or any other law.¹⁵⁰

3.3.3 Mining Rights Act 20 of 1967

The purpose of this Act was to regulate prospecting and mining for precious metals, base minerals and natural oil in the Republic, and to provide for matters incidental thereto¹⁵¹. This Act was an attempt to consolidate the overabundance of legislation under a single Act. However, it provided that precious stones should continue being under control of the Precious Stones Act 73

¹⁴⁶Franklin & Kaplan (n 110 above) 100.

¹⁴⁷Canwood & Minnitt (n 109 above) 371.

¹⁴⁸Canwood & Minnitt (n 109 above) 371.

¹⁴⁹http://www.africageodownloads.info/3a_020_strydom.pdf (accessed on 03 May 2012).

¹⁵⁰<http://www.info.gov.za/view/DownloadFileAction?id=68000> (accessed on 03 May 2012).

¹⁵¹The Mining Rights Act 20 of 1967.

of 1964¹⁵². This 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)¹⁵³. This Act made a distinction between different types of land: state land, alienated state land and private land¹⁵⁴.

3.3.4 The Atomic Energy Act 90 of 1967

The Atomic Act was promulgated shortly after the Mining Rights Act 20 of 1967 and came into operation on 1 November 1967¹⁵⁵. The Act provides for the control of prospecting and mining for and the processing, enrichment, re-processing, possession and disposal of source material and of the production of nuclear or atomic energy and radio- active nuclides¹⁵⁶.

3.4 Mining legislation in the post apartheid South Africa

This section is going to deal with mining laws after the apartheid era. The primary aim of this chapter is to give a clear understanding of the current legal environment of our mining sector and the challenges the sector is facing. This will be done by looking at the mining legislation immediately after the attainment of democracy and investigating the factors that led to the passing of the current mining legislation(s). The most important laws which this section is going to discuss are: (i) Minerals Act 50 of 1991, and (ii) The Minerals and Resources Development Act 28 of 2002 and the (iii) Mining Charter.

¹⁵²Canwood & Minnitt (n 109 above)371.

¹⁵³Canwood & Minnitt (n 109 above) 371.

¹⁵⁴ State land means land, other than land held by a lessee, which is owned by the state and in respect of which the state is also the holder of the right to mineral. Alienated state land means land which is not owned by the state or, if owned by the state, is held by a lessee, and a reservation to the state is made in the title deed or lease as regards the minerals on that land. Private land means any land in respect of which the state is not the holder of the mineral rights. See Section 1 of the Mining Rights Act 20 of 1967.

¹⁵⁵Canwood & Minnitt (n 109 above) 525.

¹⁵⁶Canwood & Minnitt (n 109 above) 525.

3.4.1 Minerals Act 50 of 1991

The Minerals bill was published for comment in 1988 by the Department of Minerals and Energy Affairs.¹⁵⁷ The bill was formulated without consulting any sector of the South African minerals industry¹⁵⁸ and received strong criticism from the Chamber of Mines and trade unions.¹⁵⁹ Despite strong opposition including opposition from academics, the Minerals Act 50 of 1991 was promulgated and came into force in January 1992.¹⁶⁰

The purpose of the Act was to regulate the prospecting for and the optimal exploitation, processing and utilization of minerals; to regulate the orderly utilization and the rehabilitation of the land surface during and after prospecting and mining operations.¹⁶¹ The Act was a product of the National Party's government's policy of privatization¹⁶² and attempted to restore the common law rights of the holder.¹⁶³

The Minerals Act introduced a system of authorization over mineral rights. According to Section 5 (2) of the Act, no person could prospect or mine for any mineral without the necessary authorization granted to him in accordance with the Act. Before commencing prospecting operations, a prospecting permit or temporary prospecting permit had to be obtained first and this permit was issued by the Regional Director.¹⁶⁴ Before mining takes place, a mining authorization, or a temporary mining authorization, issued by Regional Director, was required¹⁶⁵ and the Regional Director also had to approve an environmental management program in respect of the land before prospecting and mining commenced.¹⁶⁶ The State neither held the mineral rights, nor the entitlements flowing from the mineral rights under this authorization system.

¹⁵⁷Government Notice 856 of Government Gazette 11606 of 15 December 1988.

¹⁵⁸MJ Martison 'Mining Law' 1989 Annual Survey of South African Law 203-208.

¹⁵⁹PJ Badenhorst 'The Revesting of State-held Entitlements to Exploit Minerals in South –Africa: Privatization or Deregulation?' 1991 (1) TSAR 113.

¹⁶⁰Anonymous 'Mining in South Africa and Private Enterprise' 1987 SAJHR 167. See also Unpublished: HM Van den Berg 'Mineral rights under development: A Comparative study of the evolving nature of mineral rights in South Africa and Namibia' unpublished dissertation, University of Cape Town, 2009 19.

¹⁶¹See The preamble of the Minerals Act 50 of 1991.

¹⁶²The White Paper on Privatization and Deregulation in the Republic of South Africa (1987).

¹⁶³Badenhorst (n 159 above) 114.

¹⁶⁴See Section 6 (1) and Section 10 of the Minerals Act 50 of 1991.

¹⁶⁵See Section 9 and Section 10 of the Minerals Act 50 of 1991.

¹⁶⁶See Section 39 (1) of the Minerals Act 50 of 1991.

There was no race distinction under this system and also the system did not distinguish between different types of minerals or different classifications of land.

Shortly, after the promulgation of the Minerals Act 50 of 1991, a debate about the future of the South African mining industry arose in light of the political fluctuations facing South Africa.¹⁶⁷ Nationalization of the South African mineral law system was both foretold and recommended early in the 1990's.¹⁶⁸ The roots of nationalization of minerals stem back from the ANC's Freedom Charter of 1955 which provides that, '[t]he mineral wealth beneath the soil...shall be transferred to the ownership of the people as a whole'. Another reference of nationalization is found in the ANC's draft Reconstruction and Development Program of 1994, which states (in clause 4.6.1) that, '[t]he minerals in the ground belong to all South Africans, including future generations. Thus we must seek the return of the mineral rights to the democratic government, which should in turn give the people control over optimum exploitation of this important natural resource.'

In September 1995, the Mineral Policy Process Steering Committee was formed, and its mandate was to conduct a broad consultative process to campaign for stakeholder's opinion for the preparation of a new minerals and mining policy for South Africa which would cater for all people of South Africa regardless of race or gender.¹⁶⁹ After an extensive consultations with various stakeholders and passing of various white paper on the energy policy of the Republic of South Africa¹⁷⁰, the white paper on environmental policy for South Africa¹⁷¹ and the white paper on integrated pollution and waste management.¹⁷²

The first Mineral Development Draft Bill was published for public comment in 2000.¹⁷³ The constitutionality of the Bill was questioned by certain scholars, especially as regards the

¹⁶⁷Van den Berg (n 138 above) 21.

¹⁶⁸Badenhorst (n 159 above) 287.

¹⁶⁹See the Introduction, Department of Minerals and Energy White Paper on a Minerals and Mining Policy for South Africa General Notice 2359 (1998). The White Paper was promulgated by Government Notice 2359 in Government Gazette 19344 of 20 October 1998.

¹⁷⁰The White Paper released on 17 December 1998 in Government Notice 3007 of Government Gazette 19606.

¹⁷¹The White Paper released on 15 May 1998 in Government Notice 749 of Government Gazette 18894.

¹⁷²The Draft of the White Paper released on 19 August 1998 in Government Notice 1686 of Government Gazette 19161.

¹⁷³Government Notice 4577 of Government Gazette 21840 of 18 December 2000.

omission of provisions relating to compensation where existing rights are infringed.¹⁷⁴

Subsequently, a substantially revised Minerals and Petroleum Resources Development Act (MPRDA) was approved, and came into operation on 1 May 2004, the 1991 Act was repealed by Section 110 of the Minerals and Petroleum Resources Development Act 28 of 2002.¹⁷⁵

3.4.2 The Minerals and Petroleum Resources Development Act 28 of 2002 (as complemented by the Mining Charter)

The Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) came into effect on the 1st of May, 2004, replacing the Minerals Act 50 of 1991.¹⁷⁶ The Act provides for the parameters of the minerals and petroleum resources diligences in South Africa and vests custodianship of all minerals in the South African State.¹⁷⁷ According to its preamble, the Act's purposes include: (i) eradicating all forms of discriminatory practices in the minerals and petroleum industries; (ii) fulfilling the State's obligations under the Constitution to take legislative and other measures to redress the results of the past racial discrimination; and (iii) recognizing the need to promote local and rural development and the social enrichment of communities affected by mining.¹⁷⁸

The principal Act was repealed by the 2008 Amendment Bill which gave the Minister power to amend the transitional arrangements so as to further afford statutory protection to certain existing old order rights.¹⁷⁹ The Act incorporates the South African government's policy of Black Economic Empowerment (BEE), including providing for increased participation, ownership and management of 'historically disadvantaged South Africans (HDSA's) in the minerals and petroleum industries.¹⁸⁰ These policy objectives are linked to the MPRDA's most important licensing provisions. In the case of mining rights, an applicant must satisfy such policy objectives and in the case of prospecting rights, the Minister of Minerals and Energy has

¹⁷⁴Van den Berg (n 138 above) 24.

¹⁷⁵ Proclamation 25 of 2004, Government Gazette 26264 of 23 April 2004.

¹⁷⁶<http://www.platmin.com/p/legislation.asp> (accessed on 30 April 2012).

¹⁷⁷Section 3 (1) of the Minerals and Petroleum Resources Development Act 28 of 2002.

¹⁷⁸<http://www.atns.net.au/agreement.asp?EntityID=4282> (accessed on 30 April 2012). See also The Minerals and Petroleum Resources Development Act 28 of 2002's preamble.

¹⁷⁹Section 2 of The Minerals and Petroleum Resources Development Act 49 of 2008

¹⁸⁰(n 178 above).

discretion whether or not to impose the objectives.¹⁸¹ The Act also provides the opportunity for communities to obtain preferential rights to prospect or mine an area that is registered, or to be registered in their name.¹⁸²

The MPRDA contains transitional measures with regards to mineral rights, prospecting permits, and mining authorization (old order rights) obtained prior to May 1, 2004.¹⁸³ Section 3 (2) (a) empowers the State, acting through the Minister, to grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, technical co-operation permit, reconnaissance permit, exploration permit and production right.¹⁸⁴

The Mining Charter and its scorecard for Broad-Based Black Economic Charter for the South African Mining Industry established social upliftments objectives to promote the entry of HDSA's into the South African mining industry.¹⁸⁵ The most important objective this study is going to embark on is the BEE ownership objectives as it falls within the ambit of this study. Under the Mining Charter's ownership provisions, mining companies must, by 2014 transfer 26 percent of their assets or equity to BEE groups or individuals and ensure that HDSA's constitute 40 percent of the industry management.

The BEE requirements of the Bill are essential to the grant of rights under the MPRDA. No 'old order' right may be changed unless the Minister is satisfied that the holder has complied to the MPRDA's BEE and social upliftments objectives.¹⁸⁶ The latter caused grief among investors because even though the owner of the old order mining right was given the opportunity to convert an old order right was less valuable in terms of adequate compensation.¹⁸⁷

The conversion of old mining rights into new order mining rights takes a significant amount of time. At the start of 2009, only about 25 percent of conversion had been granted and the Chamber of Mines estimated that these delays had cost the country between R5- billion and R10-

¹⁸¹http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6146 (accessed on 27 March 2012).

¹⁸²Section 104 of the Minerals and Petroleum Resources Development Act 49 of 2008.

¹⁸³(n 181above).

¹⁸⁴Van den Berg (n 138 above) 36-37.

¹⁸⁵(n 181above).

¹⁸⁶Section 2 (i) of the Minerals and Petroleum Resources Development Act 49 of 2008.

¹⁸⁷(n 181 above).

billion.¹⁸⁸ The Amended Bill gave the country's Minerals and Energy Minister the power to impose conditions around community involvement and possibly withhold a mining or exploration right if these conditions were not met.¹⁸⁹ Regrettably, the Bill was totally inconsistent with the Minister's statement as the Bill failed to introduce any measurable objectives in the MPRDA's licensing requirements and it now required Ministerial approval for the cession or sale of any mining or prospecting right, or for any other party interested in such right¹⁹⁰.

To attract investment, a mining regulatory regime should construct regulatory assurance and firmness in order to guarantee the investors that the sector in which the investors are willing to invest into is secure. Unfortunately, South Africa's mining regulatory system lacks regulatory predictability and thus creates regulatory uncertainty for potential investors.

3.5 Conclusion

Mineral law has traditionally been regarded as resorting under private law, specifically, private property law. All mineral resources vested in the owner of the land in accordance with the principle of *cuis est solum, eius est usque ad caelum et ad inferos*¹⁹¹. The discovery of gold and diamonds led to the State interest in the regulation of minerals. The need to develop the structure of minerals and mining by courts and various legislations arose out of lack of such laws within the Roman-Dutch law system which was used after the discovery of gold.

Mineral entitlements which are the entitlements to seek and remove minerals were detached from mineral rights which were the underlying proprietary rights that used to form part of ownership. The entitlements were reserved for the state; this system was used before the introduction of democracy in South Africa's mining sector. The State has always been involved in one way or another in all various political regime systems. For example, in 1917 during colonization, the

¹⁸⁸<http://www.miningweekly.com/article/mprda-amendments-do-little-to-clear-up-dump-confusion---matjila-2009-04-06> (accessed on 14 April 2012).

¹⁸⁹(n 188 above).

¹⁹⁰Franklin & Kaplan (n 110 above) 4.

¹⁹¹*Cuis est solum eius est usque ad caelum et ad inferos* stems from the Roman-Dutch law principle which states that the owner of the land is the dominus of the whole land, including the air space above the surface and everything below it. See: Franklin & Kaplan(note 110 above)4.

State disposed off the land to individuals but retained to itself the right to minerals on alienated land. During apartheid, the State entrenched the discriminatory system including the exclusion of black South Africans from all skilled work categories.

The introduction of the Constitution and the new mining regulations brought a new mineral law system in South Africa. In terms of the current mining legislation (the MPRDA), the collective mineral and petroleum resources vests in the state, and the state controls it for the benefit of the nation. All underlying rights to minerals vest in the state in public ownership and the state grants the entitlements to search for and remove minerals. The state's duty to control minerals for the benefit of the nation is regulated by the administrative law framework for minerals (MPRDA).

It is evident that with every change of government there will be change in the regulation of the mining industry. The government in power passes legislation which is in line with its commitments. The Mining Charter is a living proof of the latter; its aim is to redress the past inequalities through social as well as economic upliftments.

Chapter Four

4 The Implications of the Mining Charter on the Inflow of foreign investment into South African mining industry

4.1 Introduction

The mining industry in South Africa has seen momentous reformation and fluctuation since the early 90's, with the traditional 'big six' mining houses (Anglo American / De Beers/ Gencor, Billiton, Goldfields, JCI, Anglo Vaal and Rand Mines) being restructured and extending their global presence.¹⁹² Before 1990, the mining sector was dominated by the 'big six', emphasis is now being placed on encouraging black empowerment in the industry and as a result, several black or union owned firms are now beginning to play an important role in the industry.¹⁹³ Mvelaphanda, with Tokyo Sexwale, a prominent black businessman at the wheel, has become one of South Africa's most successful empowerment resource companies and to date it has acquired interests in developing platinum, energy and diamond resources in South Africa.¹⁹⁴ African Rainbow Minerals, a company formed in 1997 by Patrice Motsepe acquired several mining shafts from Anglo Gold's Vaal Reefs; ARM also jointly developed platinum mine with Anglo Platinum as well as a joint venture with Harmony Gold to exploit several Free State assets acquired from AngloGold.¹⁹⁵

The black empowerment strategy came about in the form of the Mining Charter which is incorporated in the Minerals and Petroleum Resources Development Amendment Act 49 of 2008, which aims to empower the previously disadvantaged people of South Africa in various sectors including the mining sector. The problem facing our country today in the mining sector is striking a balance between addressing past inequalities against promoting the inflow of foreign investment. This chapter aims to investigate whether the Mining Charter really hinders the inflow of foreign investment into the mining sector of South Africa.

¹⁹²<http://www.mbendi.com/indy/ming/af/sa/p0005.htm#15> (accessed on 04 May 2012).

¹⁹³(n192) above.

¹⁹⁴(n192) above.

¹⁹⁵(n192) above.

4.2 The overview of lack of regulatory certainty and maladministration in the mining industry in South Africa

The MPRDA as well as the Mining Charter (which is an auxiliary document of the MPRDA), aimed at providing a framework for the promotion of Black Economic Empowerment in the mining industry is burdened with hazy provisions.¹⁹⁶ The Charter aims to alter the racial composition in the mining industry by empowering the previously disadvantaged groups through racial quotas in both employment and ownership of mining companies 'stock'.¹⁹⁷ The Mining Charter non-compliance amounts to a breach of MPRDA resulting in the suspension or cancellation of licenses granted under the Act. Mineral exploitation companies found many provisions of the MPRDA upsetting, including a five year limit on licenses after which companies must reapply and furthermore such licenses could be denied for a broad range of reasons¹⁹⁸ and this led to a famous *Foresti* case which resulted to the parties ultimately settling outside of the tribunal.¹⁹⁹

The revised 2010 South African Mining Charter is a reformulation of the originally manuscript published in 2004. The vision of the originally charter was to facilitate sustainable transformation, growth and development of the mining industry and the revised charter formalizes this process by introducing penalties for non-compliance, while there is a more structured scorecards to evaluate if mining companies are meeting transformation targets for historically disadvantaged South Africans (HDSA's).²⁰⁰

¹⁹⁶http://www.moneyweb.co.za/mw/action/media/downloadFile?media_fileid=8821 (accessed on 11 May 2012).

¹⁹⁷<http://www.cato.org/publications/commentary/wellintended-south-african-mining-charter-is-recipe-disaster> (accessed on 10 May 2012).

¹⁹⁸http://www.law2.byu.edu/ilmr/articles/winter_2010/BYU_ILMR_winter_2010_2_Arbitration.pdf (accessed on 11 May 2012).

¹⁹⁹The *Foresti* case began on November 8, 2006 when several Italian citizens and a number of Luxembourg-based corporations engaged in mining in South Africa registered a request for arbitration with the International Centre for the Settlement of Investment Disputes (ICSID) against the Republic of South Africa. The case concerned the Black Economic Empowerment (BEE) provisions of the Minerals and Petroleum Resources Development Act of 2002 (MPRDA), which was enacted after South Africa transitioned from an apartheid system to a democratic government. Pursuant to authority granted under the MPRDA, the South African government seized ownership of all natural resources located in the country, and thereafter determined the rights of mineral exploitation through a system of licensing. Companies that previously held private mineral rights were forced to apply for licenses to continue their operations. While these laws were designed to alleviate the effects of the historical racial inequity that occurred under the apartheid system, the claimants challenged that the MPRDA's system of government ownership of previously held private mineral rights amounted to expropriation. See Friedman (n 198 above).

²⁰⁰<http://www.mining-technology.com/features/feature99877/> (accessed on 08 May 2012).

South African government developed market driven policies to promote transformation in the mining sector.²⁰¹ The Charter attaches conditions of which the mining companies in South Africa have to abide with when applying for rights and permits to the State for exploration and exploitation of the mineral resources.²⁰² In addition, the Charter also embraces the same values of the supreme law of the country which is the Constitution of the Republic of South Africa as it addresses the subject of equality and discrimination that acknowledges historical and social inequalities.²⁰³

It is important to note that the Charter was developed in order to give effect to Section 100 (2) (a) of the MPRDA and promote transformation in the mining sector; its aim is to achieve among other things ‘substantially and meaningfully expand opportunities for HDSA’s including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation’s mineral resources’.²⁰⁴ Despite the decent intention of the empowerment vehicles to effect the broad ownership transformation prophesized in the Mining Charter, a closer investigation of these vehicles highlights the persistent problems presented in the form of non-equitable distribution of benefits inherent in their implementation and such benefits being extended to non HDSA, which remains problematic.²⁰⁵ The venality within the mining sector were detected in the

²⁰¹ <http://www.info.gov.za> (accessed on 17 May 2012).

²⁰² When applying for rights and permits in the mining sector of South Africa the companies applying for such rights must adhere to the following nine conditions: Human resource development (Skills development Act 97 of 1998), Employment equity (Employment equity Act 55 of 1998), Migrant labor(Immigration Act13 of 2002), Mine community development, Housing and living conditions, procurement(Preferential Procurement Policy Framework Act 5 of 2000), Ownership and joint venture(Competition Act 89 of 1998), Beneficiation and Reporting. See (n 201 above).

²⁰³ The Constitution the Republic of South Africa Act 108 of 1996, Section 9 provides as follows: ‘(1) everyone is equal before the law and has the right to equal protection and benefit for the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. (4) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds...’ See(n 201 above).

²⁰⁴ Section 100 (2)(a) of the Minerals and Petroleum Resources Development Act 49 of 2008 provides as follows, ‘To ensure the attainment of the Government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources’.See(n 201 above).

²⁰⁵ (n 192 above).

ICT / ArcelorMittal transaction which astonishingly involved a ZAR9.1 billion (approximately US\$1.24 billion) BEE transaction.²⁰⁶

Meanwhile the government of South Africa through its Vice President admits that although the administration of mining rights was not perfect, it had significantly improved in the past two years.²⁰⁷ Motlanthe said that the government is committed to providing transparent, accountable and fair regulatory frameworks in the mining industry and also, the government wanted to see industry transformation which included more women in mining and more blacks in mining management and skilled trade. But the challenge is to get there without creating unnecessary uncertainty or costs for mining.²⁰⁸ Contrary to Motlanthe speech, the mining industry transformation has indeed created uncertainty in the foreign investors trust and has caused a decrease in the country's capital investment.

The modern mining industry operates in a global arena where the economic, social and legislative environments play crucial roles.²⁰⁹ While our mining industry currently deals with several challenges, it should reflect continuous improvement, creating improved value for all stakeholders, and sets a positive example for many other industries.²¹⁰

²⁰⁶ In this case ArcelorMittal announced a ZAR9.1 billion (approximately US\$1.24 billion) BEE transaction that will see the formation of a special purpose vehicle owned by ArcelorMittal which will hold all of ArcelorMittal's operating assets. 26 percent of the shares in this subsidiary were to be held by BEE shareholders. 21 percent will be held by an entity known as the Ayigobi consortium, and the other five percent were to be held under Employee Share Ownership Plan ("ESOP"), also a BEE consortium. ArcelorMittal will own the remaining 74 percent of this SPV. At the same time, on 10 August 2010, ArcelorMittal announced that it planned to acquire the entire issued share capital of ICT for ZAR800 million (some US\$110 million). This acquisition is conditional on, inter alia, ICT being awarded a mining right over the residual share. ICT will, irrespective of whether or not this condition is fulfilled, benefit from ArcelorMittal's BEE transaction owing to the fact that it will hold shares in the Ayigobi consortium. The opportunistic acquisition of ICT does very little to promote broad-based BEE, as the majority of ICT's shareholders are either politically connected or already successful entrepreneurs. In addition, it is remarkable that a major transnational corporation could acquire what was little more than a shelf company for US\$110 million, which itself had acquired a prospecting right under somewhat dubious circumstances http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6109 (accessed on 15 April 2012).

²⁰⁷ Genevieve Quintal, Johannesburg, South Africa - April 17 2012 20:44' Motlanthe points at need for mining intervention.' <http://mg.co.za/printformat/single/2012-04-17-motlanthe-points-at-need-for-mining-intervention> (accessed on 18 April 2012).

²⁰⁸ (n207 above).

²⁰⁹ Current challenges and opportunities in the South African mining industry, by DR C J Fauconnier President, Chamber of Mines of South Africa, 1march 2004 Coal train South Africa Conference Cape Town South Africa. 15 <http://www.exxaro.com/PDF/docs/coALTRANS%20SOUTH%20AFRICA-2004-03-01-FINAL1.PDF> (accessed on 15 May 2012).

²¹⁰ (n209 above).

In resource-rich developing economies with ambitious transformation and development goals, such as South Africa, investors require regulatory certainty as well as the effective administration of any new regime.²¹¹ This, in turn, requires that laws and policies are clear, definitive and consistently applied, particularly in capital intensive mining industry owing to the significant capital outlays required before mining operations actually commence.²¹² The weaknesses in our mineral regulatory framework as well as poor recording in the processing of prospecting and mining rights are visible in the Lonmin saga which gave rise to great international concern and led to a 5.2 percent decline in Lonmin's share price on 6 August 2010.²¹³

Mining Minister, Susan Shabangu, admittedly said that South Africa's 'ambiguous' minerals legislation would be subjected to a 'major overhaul' and issues relating to Kumba Iron Ore, ArcelorMittal South Africa and platinum miner Lonmin would be dealt with 'immediately' and taken to the Cabinet soon.²¹⁴ The above statement by the Minister gives us hope that positive

²¹¹http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6109 (accessed on 15 April 2012).

²¹²(n 211 above).

²¹³The facts of the Lonmin case are as follows: On 3 August 2010, the DMR ordered Lonmin to immediately cease the mining and disposal of all "associated minerals", in this case, those minerals outside of the platinum group metal classification such as nickel, copper and chrome, on its leased property in the Marikana area in Rustenburg. The DMR's explanation was that Lonmin had never had the right to mine and dispose of these associated minerals and, thus, was doing so illegally. Although Lonmin had successfully applied for the conversion of its platinum group metals old order rights between 2006 and 2008, it only applied, under section 102 of the MPRDA, to extend its new order mining rights to include the right to mine and dispose of associated minerals in December 2009. Under section 102 of the MPRDA, a mining right holder is only allowed to amend or vary its mining right, which includes extending the mining right to include additional minerals, if it has the Minister's written consent to do so. At the time of the DMR's order, Lonmin had not yet been granted the right to mine and dispose of associated minerals under section 102. To add salt into the wound, in March 2009, Keysha Investments 220 (Pty) Ltd, a member of the HolGoun Group of companies had applied for a right to prospect for associated minerals on a portion of Lonmin's mine. According to the DMR, no prior applications had, at that time, been made regarding associated minerals over this property, and thus "the Department had no choice but to process the Keysha application in terms of the 'first come, first served' provisions of the [MPRDA]", and to grant it, which the DMR did in May 2010. Lonmin has a rather different view of the legislative requirements in question, claiming that the conversion of its old order rights included the conversion of the rights to all minerals, including associated minerals, which it had mined and disposed of prior to such conversion. Lonmin argued that, when it applied for the conversion of its old order rights, it did so in good faith with the view that it would be placed in the same position in which it had been prior to the conversion process. The Lonmin issue indicates that the current regulatory regime is unclear about associated minerals. In particular, the MPRDA failed to clarify what procedures mining companies were required to follow for the conversion of their old order rights relating to associated minerals. Prior to the MPRDA and under the Minerals Act, a party authorized to mine any mineral could also mine and dispose of any associated minerals. The MPRDA, however, does not make provision for the prospecting or mining of associated minerals. The DMR appears not to have furthered the MPRDA's transitional provisions. These arrangements are meant to provide a seamless interface between the previous regulatory regime and MPRDA regime. One of their objectives is to ensure continuity of tenure is protected in respect of mining operations. (n 211 above).

²¹⁴<http://www.polity.org.za/article/minister-in-major-overhaul-of-ambiguous-mine-laws-licence-tracking-to-go-public-2010-08-18> (accessed on 15 April 2012).

change is coming with regards to our mining sector in order to restore trust, faith and certainty in the foreign investor's mind. The on-going internal investigation in the Department of Minerals and Resources which had revealed more than 100 cases of apparent administrative irregularities is an indication that the sector is trying to solve the problems which are currently dominating the mining industry.²¹⁵

Furthermore, investors are always wary of corruption in developing countries, and lack of legal certainty may allow "get rich quick" opportunists to manipulate the legal system, as well as those who regulate them, to their own ends.²¹⁶ Again our Minister admits that there is corruption in our mining legal system which led to some of the officials being dismissed. In her capacity, the Minister said, 'there were administrative capacity problems, and there were increasing perceptions of corruption and incompetence, which resulted to two regional office officials being suspended'.²¹⁷

²¹⁵(n 214 above).

²¹⁶http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6109 (accessed on 15 April 2012).

²¹⁷ Minister in 'major overhaul' of 'ambiguous' mine laws, 'license-tracking' to go public, Article by Martin Creamier <http://www.polity.org.za/article/minister-in-major-overhaul-of-ambiguous-mine-laws-licence-tracking-to-go-public-2010-08-18> (accessed on 15 February 2012).

4.3 The effects of the mining regulations on the inflow of foreign investment into the mining sector in South Africa

The history of the development of the Mining Sector in Africa shows that foreign investment has been the only successful investment strategy over the past 150 years.²¹⁸

Before democracy, South African economy, especially in the mining sector was largely based on a model depending on the import of foreign technology and foreign capital for its development.²¹⁹ This model of development worked well when there was a plentiful supply of cheap labor and an overflowing supply of raw minerals. But now the conditions have worsened due to the fact mining had to dig deeper and became more expensive and the introduction of harsh labor and social measures pushed away foreign capital development.²²⁰

Despite South Africa's rich mineral resources, which was estimated at just under \$2.5-trillion in 2010, the mining sector is currently in recession, having contracted during the first three quarters of 2011.²²¹ The mining industry of South Africa is and will always be attractive to foreign as well as national investors because of its abundant natural resources, but over the past years, foreign direct investment has decreased in Africa including South Africa as a result of unclear legislation and political instability, coupled with a poor rate of return and variations in commodity prices.²²² The decline can be linked to regulatory uncertainty regarding mining legislation in South Africa, maladministration, a lack of a broad-based black economic-empowerment (BBBEE) policy, the debate on the nationalization of mines and the establishment of a state-owned mining company.²²³

Sharma submits that, 'ever since the 26 percent scheme for BEE was enforced in South Africa no significant investment has come into the mining sector; instead there has been a flight of private

²¹⁸ OECD Global Forum on international investment Conference on Foreign Direct Investment and the Environment: Lessons to be learned from the mining sector <http://www.oecd.org/dataoecd/44/35/1819511.pdf> (accessed on 15 May 2012).

²¹⁹ www.samda.co.za/downloads/Mining%20feature%20edit.doc (accessed on 20 May 2012).

²²⁰ (n 219 above).

²²¹ Critical time for South Africa's mining industry – Leon, article by Martin Creamer. <http://www.miningweekly.com/article/critical-time-for-south-africas-mining-industry-leon-2012-04-20-2> (accessed on 15 May 2012).

²²² <http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012).

²²³ <http://www.miningweekly.com/article/mining-legislation-and-concerns-to-be-addressed-this-year-2012-02-03> (accessed on 09 May 2012).

capital'.²²⁴ Foreign investment is imperative for South Africa because it affords a chance for South Africa to be a stakeholder on the international level and is a good injection in our economy. Foreign investors through their international linkages and partnerships have a far better global market access in a very sophisticated global market segment which brings good business deals and exposure for the country receiving foreign investment.²²⁵

Real mining fixed investment fell 18.6% in 2004 and a further 16.5% in 2005.²²⁶ Between the first quarter of 2004 and the first quarter of 2006 real mining fixed investment declined by 32.7% and the reasons holding back investment in the sector could well be related to red tape constraints, interpretational uncertainties of the social and labor plans, the Mining Charter, the MPRDA as well as the provision of funding for environmental rehabilitation.²²⁷ The latter has been identified as key constraints to the issuing of conversions of new rights licenses and as a result mining companies are being constrained from investing in new projects because of increasing uncertainty over legal title and mining prospecting rights, These new projects should be fuelling further growth in investment into the mining sector but sadly they seem not to be a positive influence.²²⁸

In 2009, South Africa's mining industry was the largest contributor by value to black economic empowerment (BEE) in the economy but the industry contributed approximately 30% of capital inflows into the economy via the financial account of the balance of payments.²²⁹ The Department of Mineral Resources' (DMR's) new mining cadastral system and the prospect of significant amendments to the Mineral and Petroleum Resources Development Act (MPRDA) are seen to be hindrances to a significantly better future for South African mining.²³⁰

However, the rate of new investment growth is the lowest of any significant mining jurisdiction and negatives continue to dominate at production level with the lowest monthly mine production

²²⁴ www.typepad.com (accessed on 29 May 2012).

²²⁵ (n 218 above).

²²⁶ An official annual report by the Chamber of Mines of South Africa, 2005-2006.11

<http://int.ask.com/web?qsrc=1&o=40004&l=sem&q=Chamber+of+Mines+of+South+Africa%2C+Annual+report+2005-2006> (accessed on 09 May 2012).

²²⁷ (n 222 above).

²²⁸ (n 223 above).

²²⁹ <http://www.southafrica.info/business/economy/sectors/mining.htm> (accessed on 09 May 2012).

²³⁰ Peter Leon 'Critical time for South African mining industry-Leon' 20 April 2012

<http://www.miningweekly.com/article/critical-time-for-south-africas-mining-industry-leon-2012-04-20-2> (accessed on 09 May 2012).

in nearly four years, reports Leon, April 2012. In the face of all this, investors are continuing to avoid South Africa at a time when rival mining jurisdictions remain in power.²³¹

Even though the mining industry's contribution to the country's gross domestic production has declined significantly over the last few years, it still has a big footprint in the South African economy and therefore has a critical role to play and the government has a responsibility to ensure that the industry enjoys regulatory certainty.²³²

4.4 Conclusion

It is submitted that the Mining Charter has ambiguous provisions and some weaknesses. The aim of the Charter is to enforce transformation and empower previously disadvantaged people, economically and socially. The objectives of the MPRDA share the same views as the Charter in terms of Section 2 (h) which provides for the promotion of social and economic development to give effect to the Constitutional principle. The conditions of economic empowerment of mining right holders are written in the mining rights and so become conditions thereof. Section 47 of the MPRDA states that, where right holders breach the MPRDA or any condition of such right, the Minister may revoke the rights. The Minister must follow due process before she may consider a revocation of rights. The conditions embodied in the Act have negative implications on foreign investors. Instead of investors thinking about profits they end up worrying about how they will go about complying with the promotion of social and economic development of the host state people.

The Kumba, as well as the Foresti saga portray a problem of maladministration in the mining industry. In addition, the Lomnin 'incident' on poor recording in the processing of prospecting and mining rights reflects weaknesses in the mining regulatory framework in South Africa.

In closing, foreign investment decreased in South African mining sector since the 26 percent scheme for BEE was enforced. The new mining cadastral system, red tape constrains, interpretational uncertainties of the social and labour plans and the Mining Charter are seen as the reasons which are holding back investment in the sector.

²³¹(n229 above).

²³²<http://www.miningindaba.com/press/news-and-press/> (accessed on 09 May 2012).

5. Chapter five

5.1 Conclusions and Recommendations

5.1.1 Summary of the findings

It is evident from the findings of this study that the mining industry in South Africa has come a long way since its inception to its current form. The industry has survived different political regimes with various regulations passed and implemented. The mineral wealth of South Africa belongs to her people and the state is the custodian thereof. This portrays a significant departure from the Roman-Dutch principles of private ownership and exploitation of mineral resources.

Returning to the question(s) posed at the beginning of this study, it is now possible to state that:

The legal environment of the mining industry in South Africa is mostly influenced by the political regime of the current ruling party. During the period of colonization there was a close relationship between mining laws and land laws (property law). Before apartheid, property law principle came into play in determining mining rights in South Africa. This principle stated that the minerals of a particular land belong to the owner of that land. Therefore, British took control of the mines in South Africa.

During apartheid, when the National Party government was in power various legislations were passed especially in the mining industry, and those legislation favoured non-blacks. Mining, for black population meant job security with petty wages in the land which they once owned and this presented a major socio-economic repercussions.

After apartheid, government had to redress past inequalities in various sectors of the economy including the mining industry. This was done by introducing mining regulations aimed at promoting black economic empowerment.

This study has shown that foreign investment has in fact decreased in South Africa since the introduction of the Mining Charter through the conversion of old mining rights to new mining rights which are supposed to be in line with the MPRDA. Problems with regards to maladministration in conversion of the mining rights as well as possible corruption activities are illustrated by this paper in the Lomnin saga, ICT/ Arcelor Mittal case and the Foresti case.

The present study confirms the previous findings by various academics and hopes to contribute additional evidence that suggests that amendments need to be made in the mining regulation (the Mining Charter as incorporated in the MPRDA) in South Africa. Against all odds, glimmer of hope is flickering through the promises by government which this paper has illustrated in chapter four. The fact that Minister Shabangu and Vice president Motlanthe admits that there are problems that need to be addressed immediately and effectively in the mining regulation is a sign that not all hope is gone in the mining sector in South Africa.

Government is aware of the problems within the mining sector and believes that state involvement would secure the socio-economic development of South Africans. Talks of nationalisation of mining in South Africa have created more uncertainty in the minds and hearts of foreign investors. Meanwhile, government promises to provide transparent, accountable and fair regulatory frameworks, whether or not the latter is true, the nation will wait and see.

5.1.2 Conclusions

The most obvious conclusion to emerge from this study is that the Charter hinders the flow of foreign capital investment in the mining industry. Investors are now reluctant to invest in the mining industry in South Africa because the industry is overregulated which brings in the lack of certainty as laws keep changing within the sector.. The ambiguities, maladministration as well as incidents of corruption within the sector are the reasons holding back the investors trust to invest in the South African mining industry.

From an empowered company point of view, the new framework basically means that there are a number of benefits it will receive such as access to government funding and preferential procurement status. But a company doing business in South Africa cannot avoid its equity obligations under the BEE Act or a plethora of other laws dealing with employment equity. A company operating in South Africa therefore finds itself faced with a social responsibility in spite of its over-arching intention of making a profit. The profit it makes is therefore allocated for local development; therefore, it may not have enough funds to invest in future mining operations.

It is submitted that, the mining regime of South Africa is not doing enough to encourage the inflow of foreign capital into the sector as it does with the promotion BEE system which benefits a certain group of individuals.

5.1.3 Recommendations

It is clear from the above facts that the Mining Charter which serves as the regulatory framework in the mining industry in South Africa has some weaknesses. The MPRDA which is supposed to be complemented by the Mining Charter, was relatively clear when published, however, the revisions to the Charter are impacting on the MPRDA and are removing that clarity.²³³

The racial quotas established by the government within the Mining Charter places racial classification of each applicant at the centre of selection process instead of the workers ability to do the job. In other words, one of the mining companies' most important decisions in hiring workers will be dependent upon non-business related criteria which are likely to lead to severe effects at the managerial level.

South Africa should adapt and take lessons from the global 'best practices' philosophies which specifically addresses the institutional reforms in government departments responsible for mining in order to develop the policy and legal frameworks to manage the administrative, fiscal, environmental and investment risk regimes optimally and transparently.²³⁴

Investment in South Africa should be protected and a legacy needs to be saved for the next generation. It is submitted that investors require regulatory certainty and effective administration which requires that laws and policies are clear, definitive and consistently applied. The mining industry in South Africa has a big problem with regards to issues of its legal regime. Both the Mining Minister Susan Shabangu as well as the South African Vice President, Kgalema Motlanthe, admitted that there are problems which need to be addressed immediately and effectively. In a country like South Africa which lacks developed jurisprudence in the mining

²³³<http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012).

²³⁴OECD Global Forum on international investment Conference on Foreign Direct Investment and the Environment: Lessons to be learned from the mining sector, 11 <http://www.oecd.org/dataoecd/44/35/1819511.pdf> (accessed on 15 May 2012). The best practice philosophies policies developed by the World Bank have been successful in shaping the role, capacity and intervention of the State with respect to the core competencies and functions to manage the mining sector in a responsible fashion.

sector, credit should be given to the DMR for trying to enforce new mining legislation in order to bring equity and equality within the nation. Surely, some mistakes will be encountered but care must be taken not to damage our trust on foreign investors because they also bring capital investment which South Africa, as a nation need in order to boost her economy. South Africa cannot function in isolation and cannot rely on national investment alone; therefore, the government should play a facilitating role by lowering political risks with regards to managing the allocation of mining licenses.²³⁵ The government of South Africa should try and make laws that attract and not hinder the movement of capital into the country especially in the mining sector. Policies that have adverse effects like the Mining Charter drag down investment and they tend to remove the ability to withdraw capital from an investment.

Government should bring back certainty, faith and assurance to foreign investors by making available the licensing data in order to enable easy access on information on the status of exploration and mining licenses whether by putting the necessary information in mining website or mining publications in order to enable transparency.

As it is clear that there is a lack of developed jurisprudence to assist with interpretation of the law in the mining industry in South Africa, the MPRDA as well as the Mining Charter, should be revisited to amend the grey areas professed by the cases such as the Lomnin case, to give a clear clarification of the letter of the law. Section 11 of the MPRDA currently provides that the ‘Minister’s written consent is required for the cession, transfer or sale of prospecting or mining rights or an interest in such rights’. The above statement gives the Minister excessive power to grant mining or prospective rights which appear to be burdensome for a single body administratively as well as logically. For a big industry such as the mining sector in South Africa, there should be different administrative bodies assigned to inspect mining rights applications. This will not only remove the burden from the Minister’s office but will also remove the suspicions of corruption within the office.

Also, this paper has pointed out the importance of finding the balance between uplifting historical disadvantaged people through the BEE system and the promotion of foreign capital in South Africa. The results of this study support the idea that the BEE is the right way of

²³⁵ n 39 above, pg. 6

redressing the past inequalities in the mining sector in South Africa but the crux of the matter is problems within the internal system in government as well as neglecting the promotion of foreign investment inflow. Currently, the BEE system mostly benefits a certain group of people instead of benefiting the whole South African citizens and this is a source of concern. A future study investigation of how to curb the ‘BEE plague’ would be very interesting and further work needs to be done to establish whether there is a possible way to balance the inflow of foreign investment while promoting the BEE system.

The need to connect policy amendments to international players on an ongoing basis is vital and if done effectively and on an ongoing basis, the mining sector in South Africa will attract much needed capital investment to raise the industry and the economy as a whole.²³⁶

Instead of a plethora of certification bodies, the government needs to set up a solitary, authoritative body which should be mandated to provide not just a final level of black ownership, but take into account other important issues, for example foreign investment inflow.

The concepts of economic participation, social upliftments and sustainable development are somehow intertwined in the mining industry and should be addressed along the same lines. As Badenhorst says, ‘to neglect one of these concepts is to ignore the other.’

²³⁶ ‘Let’s work together to make the most of our rich resources’
www.samda.co.za/downloads/Mining%20feature%20edit.doc (accessed on 20 May 2012).

Bibliography

Books

Badenhorst, PJ & Mostert, H (2011) Mineral and Petroleum law of South Africa; Commentary and Statutes: Juta

Dale, MO (2011) South African Mineral and Petroleum Law: Commentary; LexisNexis: Butterworths

Dale, MO Current developments in mineral law in South Africa (1994) 1994 JENRL 226 227

Franklin, BLS & Kaplan, M The mining and mineral laws of South Africa (1982) Durban: Butterworths

Klager, M (2011) 'Fair and equitable treatment' in international investment law Cambridge: Cambridge University Press

Plaatjie, ST (1916) Native life in South Africa London: PS King

Price Waterhouse World Firm LTD (1990) Doing business in South Africa Price Waterhouse World Firm LTD

Sornarajah, M (1994) The international law on foreign investment Cambridge: Cambridge University Press

Sornarajah, M (2004) The international law on foreign investment Cambridge: Cambridge University Press

Sornarajah, M (1986) The pursuit of nationalised property Dordrecht: Nijhoff

Tudor, I (2008) The fair and equitable treatment standard in the international law of foreign investment Oxford University Press

Reference to chapters in books

Juillard, P ‘The imbalance of international investment law’ in Karl P (ed) (2009) *The yearbook on International Investment Law & Policy* New York: University Press

Phakathi, T ‘Self-directed work teams in a post-apartheid gold mine: perspective from the rock face’ in E Webster & K Von Holt (eds) *Beyond the apartheid workplace: studies in transition* (2005) 1

Badenhorst PJ, ‘The Revesting of State-held Entitlements to Exploit Minerals in South –Africa: Privatization or Deregulation?’ 1991 (1) TSAR 113.

Journal articles

Canwood, FT and Minnitt, RCA ‘A historically perspective on the economics of the ownership of mineral rights ownership’ (1998) 98 *The Journal of the South African Institute of mining and metallurgy*

Faruque, AA ‘Mapping the Relationship between Investment Protection and Human Rights’ (2010) *The Journal of World Investment & Trade*

Tita, A ‘Investment Insurance in International Law: a Restatement on the Regime of Foreign Investment” (2010) *The Journal of World Investment & Trade*

Mavroidis, PC ‘Right Back Where We Started From (or Are We?) (2011) *The Journal of World Investment & Trade*

Kriebaum, U ‘Regulatory takings: Balancing the interests of the investor and the State’ (2007) 8 *The Journal of World Investment & Trade* 717

Haugeneder, F ‘Corruption in Investor-State Arbitration’ 10 (2009) *The Journal of World Investment & Trade* 323

Gazzini, T 'General principles of law in the field of Foreign Investment' 10 (2009) The Journal of World Investment & Trade 100

Thesis and dissertations

Unpublished: K Malunga 'The altered anatomy of an international transaction in South Africa- the impact of equity laws' unpublished Paper, University of the Witwatersrand, 2.

Unpublished: HM Van den Berg 'Mineral rights under development: A comparative study of the evolving nature of mineral rights in South Africa and Namibia' unpublished dissertation, University of Cape Town, 2009 27.

Websites

Reports and papers

- Claire Tucker and Sandra Gore ‘Getting the Deal Through - Mining 2011 South Africa’ 10 July 2011
http://www.bowman.co.za/LawArticles/Publications/GettingTheDealMining2011SouthAfrica_1.pdf (accessed on 15 March 2012)
- Wikipedia ‘Black Economic Empowerment’
http://en.wikipedia.org/wiki/Black_Economic_Empowerment (accessed 12 March 2012)
- Lebo Mogotsi, Director, Lebone Resources (Pty) Ltd ‘Challenges facing the South African Gold Mining Industry’ http://www.lbma.org.uk/assets/alch38_safrica.pdf (accessed 14 February 2012)
- Jessica Hannah ‘Constraints to SA’s Mining Industry’ 11 February 2011
<http://www.miningweekly.com/article/sa-mining-laws-impact-on-foreign-investment-2011-02-11> (accessed 14 March 2012)
- Cremear Media Reporter ‘South Africa’s mining production down, 4.6%’ 27 January 2012 <http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012)
- Platinum Limited ‘Mining legislation: South African mining law’
<http://www.platmin.com/p/legislation.asp> (accessed 12 March 2012)
- Projects IQ ‘Mining in South Africa’ <http://www.projects iq.com/mining-in-south-africa.htm> (accessed 12 March 2012)

- Country facts ‘Advantages and disadvantages of gold mining in South Africa’ <http://www.kwintessential.co.uk/articles/south-africa/Advantages-and-Disadvantages-of-Gold-Mining-in-South-Africa/401> (accessed on 13 March 2012)
- Manus Booyesen, Bruce Dickinson, Warren Beech, Rita Spalding, Kenneth Coster, Kate Collier and Hendré Human ‘Mining and Mineral Law’ http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6146 (accessed 27 March 2012)
- Martin Creamer ‘Minister in ‘major overhaul’ of ‘ambiguous’ mine laws, ‘licence-tracking’ to go public’ 18 August 2010 <http://www.polity.org.za/article/minister-in-major-overhaul-of-ambiguous-mine-laws-licence-tracking-to-go-public-2010-08-18> (accessed on 15 April 2012)
- Bernice Barker ‘A nose of new mineral deposits: the ore sniffing dogs transforming mine locations’ <http://www.mining-technology.com/features/feature99877/> (accessed on 29 May 2012)
- Peter Leon ‘Quo Vadis the South African mining industry?’ 1 September 2010 http://www.moneyweb.co.za/mw/action/media/downloadFile?media_fileid=8821 (accessed on 18 May 2012)
- Report prepared for the ANC Policy Institute ‘Maximising the developmental impact of the people’s mineral assets: State intervention in the minerals sector’ 17 February 2012 <http://www.anc.org.za/docs/reps/2012/simsreport.pdf> (accessed on 25 May 2012)
- Wikipedia ‘Mining industry of South Africa’ http://en.wikipedia.org/wiki/Mining_industry_of_South_Africa (accessed on 16 April 2012)
- South African government information ‘About SA History’

<http://www.info.gov.za/aboutsa/history.htm> (accessed on 16 April 2012)

- Britannica Academic Edition 'South Africa's mining industry'
<http://www.britannica.com/EBchecked/topic/555568/South-Africa/44076/Gold-mining>
(accessed on 16 April 2012)
- Alister Clark Think Africa Press 'South African miners fight for justice' 18 May 2011
<http://thinkafricapress.com/south-africa/south-african-miners-fight-justice> (accessed on 16 April 2012)
- Timothy SizwePhakathi 'Self-work-directed work teams in a post-apartheid gold mine: perspectives from the rock face' 28 April 2006 <http://ccs.ukzn.ac.za/files/Post-apartheid%20Gold%20Mine.pdf> (accessed on 25 May 2012)
- Geraldine Martin and Kevin Durrheim 'Racial Recruitment in post-apartheid South Africa: dilemmas of private recruitment agencies'
<http://www.pins.org.za/pins33/Martin%20&%20Durrheim.pdf> (accessed on 25 May 2012)
- Mbedi information Services 'Mining in South Africa- overview'
<http://www.mbedi.com/indy/ming/af/sa/p0005.htm> (accessed on 23 May 2012)
- Alistair Boddy-Evans 'Pre-Apartheid Era Laws: Mines and Works Act No. 12 of 1911'
<http://www.africanhistory.about.com/od/preapartheidlaws/g/No12Of11.htm> (accessed on 26 April 2012)
- South African History on line 'The Natives land Act was passed'
<http://www.sahistory.org.za/dated-event/native-land-act-was-passed> (accessed on 26 April 2012)
- Mongabay 'South Africa: The Economy'

http://www.mongabay.com/reference/country_studies/south-africa/ECONOMY.html

(accessed on 23 March 2012)

- Altus Strydom ‘The Surveyor’s Role in the Registration of Mineral Rights’
http://www.africageodownloads.info/3a_020_strydom.pdf (accessed on 03 May 2012)
- Government Gazette ‘Mining Titles Registration Amendment Act 24 of 2003’ 26 November 2003 <http://www.info.gov.za/view/DownloadFileAction?id=68000> (accessed on 03 May 2012)
- ATNS ‘Mineral and Petroleum Resources Development Act, 2002 (South Africa)’ 10 October 2002 <http://www.atns.net.au/agreement.asp?EntityID=4282> (accessed on 30 April 2012)
- EsmarieSwanepoel ‘MPRDA amendments do little to clear up dump confusion – Matjila’06 April 2009 <http://www.miningweekly.com/article/mprda-amendments-do-little-to-clear-up-dump-confusion---matjila-2009-04-06> (accessed on 14 April 2012)
- Marian L. Tupy ‘Well-Intended South African Mining Charter Is Recipe for Disaster’ 02 December 2002 <http://www.cato.org/publications/commentary/wellintended-south-african-mining-charter-is-recipe-disaster> (accessed on 10 May 2012)
- Andrew Friedman ‘Flexible Arbitration for the developing world: Piero Foresti and the future of bilateral investment treaties in the global South’
http://www.law2.byu.edu/ilmr/articles/winter_2010/BYU_ILMR_winter_2010_2_Arbitration.pdf (accessed on 11 May 2012).
- Mail and Guardian online ‘Motlanthe points at need for mining intervention in South Africa’ 17 April 2012 <http://mg.co.za/printformat/single/2012-04-17-motlanthe-points-at-need-for-mining-intervention> (accessed on 18 April 2012).
- DR C J Fauconnier President, Chamber of Mines of South Africa ‘Current challenges and opportunities in the South African mining industry’ 1 March 2004

<http://www.exxaro.com/PDF/docs/coALTRANS%20SOUTH%20AFRICA-2004-03-01-FINAL1.PDF> (accessed on 15 May 2012).

- ‘OECD Global forum on international investment, Conference on Foreign Direct Investment and the Environment: Lessons to be Learned from the Mining Sector’ 7 - 8 February 2002; James Bond and Monika Weber-Fahr ‘Attracting Foreign Direct Investment in Mining: The Role of Reliable Environmental Frameworks and Competent Institutions’ <http://www.oecd.org/dataoecd/44/35/1819511.pdf> (accessed on 15 May 2012).
- SAMDA ‘Let’s work together to make the most of our rich resources’ www.samda.co.za/downloads/Mining%20feature%20edit.doc (accessed on 20 May 2012).
- Martin Creamer ‘Critical time for South Africa’s mining industry – Leon’ 20 April 2012 <http://www.miningweekly.com/article/critical-time-for-south-africas-mining-industry-leon-2012-04-20-2> (accessed on 15 May 2012)
- Creamer Media Reporter, edited by: Martin Zhuwakinyu ‘South Africa’s mining production down 4.6%’ 27th January 2012 <http://www.miningweekly.com/article/south-africas-mining-production-down-46-2012-01-27> (accessed 14 March 2012)
- Reggie Sikhakhane ‘Mining legislation and concerns to be tackled this year’ 03 February 2012 <http://www.miningweekly.com/article/mining-legislation-and-concerns-to-be-addressed-this-year-2012-02-03> (accessed on 09 May 2012)
- Chamber of Mines of South Africa, Annual report 2005-2006 <http://int.ask.com/web?qsrc=1&o=40004&l=sem&q=Chamber+of+Mines+of+South+Africa%2C+Annual+report+2005-2006+> (accessed on 09 May 2012).

- South Africa Info ‘Mining and minerals in South Africa’, 30 May 2012
<http://www.southafrica.info/business/economy/sectors/mining.htm> (accessed on 09 May 2012).
- Mining Indaba ‘2013 Mining Indaba Review’ 08 March 2012
<http://www.miningindaba.com/press/news-and-press/> (accessed on 09 May 2012).

Online case study

- Kumba case study:
http://www.kumba.co.za/reports/kumba_ar2011/sustainability/ov_case_corruption.php
(accessed on 30 May 2012)
- ICT / ArcelorMittal case study
http://www.webberwentzel.com/wwb/action/media/downloadFile?media_fileid=6109 (accessed 27 March 2012)
<http://mg.co.za/article/2011-09-27-arcelormittal-ends-talks-on-kumba-bee-deal> (accessed on 30 May 2012)