This is the published version:


Available from Deakin Research Online:

[http://hdl.handle.net/10536/DRO/DU:30021560](http://hdl.handle.net/10536/DRO/DU:30021560)

Every reasonable effort has been made to ensure that permission has been obtained for items included in Deakin Research Online. If you believe that your rights have been infringed by this repository, please contact drosupport@deakin.edu.au

**Copyright**: 2004, International Bar Association
Contents

Editorial
Francis N Botchway and Mirian Kene Kachikwu

New South African Mineral and Petroleum Resources Development Act: Shaping a New Investment Environment to Reflect a Diverse Society
F T Cawood

Environment Protection in Africa: a Panorama of the Law and Practice
David M Dzidzornu

Diamonds and Civil Conflicts in Africa – the Conflicts in Central Africa and West Africa
Mirian Kene Kachikwu

Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources of the Democratic Republic of the Congo
Paul Asiimwe

Privatisation and State Control – the Case of Ashanti Goldfields Company
Francis N Botchway

Exodus of ‘Mineral Rights’ from the South African Mineral Law
P J Badenhorst

Comment: The New Constitution of Kenya and Natural Resources
Comment: The African Union and Natural Resources
Comment: Mining in the Forest Reserve

Books
Bibliography
General Index

The views expressed in this Journal are those of the contributors, and not necessarily those of the International Bar Association.
Exodus of ‘Mineral Rights’ from South African Mineral Law*

By P J Badenhorst†

Transformation of the mineral law system as part of the new political dispensation in South Africa has long been foreseen. Subsequent to a Green and White Paper, as policy documents, the Department of Minerals and Energy published a Mineral Development Draft Bill 2000 for public comment. This eventually culminated in the acceptance by Parliament of the Minerals and Petroleum Resources Development Act 28 of 2002, which came into operation on 1 May 2004. The Act will transform the mineral law system and the mining industry in general. In this article the phasing-out by the Act of the historical notion of ‘mineral right’ is examined. It is argued that the Act will lead to an exodus of the notion of mineral rights and will replace it with less secure prospecting rights and mining rights which, albeit real in nature, will depend on compliance with provisions of the Act and the exercise of discretion by the Minister.

Introduction

With the dawn of a new political dispensation in the 1990s in South Africa, transformation of the mineral law system was foreseen.1 As part of the political process the African National Congress (ANC) released its draft ANC Mineral and Energy Discussion Document during November 1994. In 1998, having consulted with interest groups, the new ANC Government released a Green Paper2 and White Paper3: Minerals and Mining Policy for South Africa. A Mineral

---

* Based on an earlier commentary on the Mineral Development Draft Bill 2000 entitled ‘Mineral Rights: Year Zero Commeth?’, published in [2000] Obiter 119. Owing to the substantial revision of the Minerals and Petroleum Resources Development Act 28 of 2002, a new commentary is justified. This article was, however, submitted before commencement of the said Act. The Mining Titles Act 16 of 1967 has also been amended by Act 24 of 2004 to make provision for registration of mineral and petroleum titles. The Mineral and Petroleum Royalty Bill has not yet been finalised.

† P J Badenhorst BLC LLB (Prot) LLM (Wits) LLM (Yale) LLB (Prot) is Professor of Law, University of Port Elizabeth, South Africa, and legal consultant at Bowman Gilfillan. He can be contacted by e-mail at pj.badenhorst@upe.ac.za.


Development Draft Bill 2004 was published for public comment. The constitutionality of the proposed Bill was questioned in the light of either the property clause in section 25 of the Constitution of 1996 or the general limitation clause, read with section 25(8) of the Constitution. A substantially revised Mineral and Petroleum Resources Development Act 28 of 2002 ("the Act") was approved by Parliament and came into operation on 1 May 2004.

This article will focus on the impact of the Act on the notion of mineral rights in the mineral law system. A brief overview of the nature, content and characteristics of mineral rights will first be given to enable a comparison with the new order advocated by the Act. Related rights, such as prospecting rights and mining rights, will also briefly be touched on. In addition, the transitional provisions between the old and new order will be examined.

**Existing order: ancien régime?**

A mineral right may be defined as a limited real right that entitles its holder to go on the land to which the mineral right relates and prospect for minerals and, if minerals are found, to mine the minerals and to dispose thereof. The tremendous development of mining in South Africa after the discovery of diamonds and gold in the 19th century created the need for the recognition of an independent mineral right, which would provide sufficient security of tenure for mining companies. The idea of the possibility of separating mineral rights from ownership of land was attributed to the British practice in the Cape Colony of granting Crown land to subjects, subject to a reservation of mineral rights in favour of the Crown. The practice of separate registration of mineral rights had come to be recognised in the Transvaal long before 1925. Innes CJ, when confronted in *Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town, and Mines, Ltd* with the theoretical problem of identifying and classifying mineral rights, confessed to having at first experienced considerable difficulty in finding an appropriate juristic niche in which to place this right. The reluctance of Judge Innes was ascribed to the perceived peculiarity of the notion of mineral rights to South Africa and the absence of such a concept in Roman-Dutch law. Recognition of the notion of a mineral right may be found in the *concilia* of Paul de Castro, a medieval scholar, but this did not have an impact on South African law.

---


common law. During the second half of the 19th century within the broader framework of property law, the notion of a mineral right developed on home ground through case law and legislation.

It has always been accepted that mineral rights are limited real rights. Mineral rights have traditionally been classified as quasi-servitudes, personal quasi-servitudes and real rights analogous to a servitude. Alternatively, mineral rights have also been classified as real rights sui generis. In Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd Schutz JA accepted that the label of quasi-servitudes had remained, because mineral rights did not exactly fit into the traditional classification of servitudes. The concept of a servitude as a limited real right provided a necessary vehicle for the development of the concept of mineral rights.

The concept of a mineral right had developed against the backdrop of a fundamental principle of the law of property, namely that the owner of the land is the owner (dominus) of the whole of the land, including the air space above it and everything below it. The consequences of this fundamental principle of property law are the following:

(a) the owner of the land is the owner of all the minerals in it, until the minerals are extracted or separated from the land;
(b) transfer of ownership of minerals not yet severed from the land is impossible;31
(c) horizontal layers of the land and of the minerals in them cannot be separately owned;32
(d) the holder of mineral rights is only entitled to extract minerals from the vertical block underlying the surface of the immovable property, as demarcated;33
(e) once the minerals have been separated, they become movable things and form the subject of separate ownership;34 and
(f) mineral rights may, however, be separated from the ownership of land at any time prior to severing the minerals themselves.35

A mineral right has as its content the following entitlements:36
(a) mineral exploitation, which entails the entitlement to use the land for purposes of the exploitation of minerals to which the mineral rights relate. The entitlement includes the following: (i) the entitlement to enter on the land for purposes of prospecting for and mining of minerals; (ii) the entitlement to prospect for minerals; and (iii) the entitlement to mine the minerals;37
(b) disposition, which entails the entitlement to decide what may and what may not be done on the land for purposes of the exploitation of minerals;
(c) alienation, which entails the entitlement to cede the mineral rights in respect of the land to another person;
(d) encumbrance, which entails the entitlement to grant a limited real right (such as a usufruct, mortgage bond or a mineral lease) with regard to the mineral right;
(e) resistance, which entails the entitlement to resist any unlawful interference with the exercise of the mineral right;
(f) ancillary entitlements, which entails all other entitlements that are directly necessary to the enjoyment of the mineral right;38

and
(g) reversionary entitlement,39 that is, the entitlement to regain any of the above entitlements if they have been transferred for a fixed period and the period has lapsed or terminated, or the entitlement to exercise an entitlement which has been restricted, after removal of the restriction.41

The following characteristics of mineral rights may be distinguished:42
(a) Mineral rights confer limited control over property, because only entitlements of mineral exploitation may be exercised.
(b) The exercise of the entitlements of mineral exploitation by the holder of a mineral right may be suspended by the granting of a limited real right in respect of mineral rights.

31 Le Roux v Loewenthal: 1905 TS 742 at 745; and De Deur Mineral Rights, supra n 23 at 82.
32 Coronation Collieries Malan, supra n 20 at 591; Dale, Mineral Rights, supra n 23 at 83-4 and Franklin and Kaplan, Mineral Laws, supra n 8 at 5.
33 Dale, Mineral Rights, supra n 23 at 84.
34 Trojan Exploration Co v Rustenburg Platinum Mine Ltd, supra n 8 at 5091-510.
36 Dale, Mineral Rights, supra n 23 at 88.
38 Confirmed by s 5(1) of the Mineral Act 50 of 1998.
39 Hudson v Mann 1950 SA 485 (T) at 488; and Trillo Exploration Co (Pty Ltd) v Rustenburg Platinum Mine Ltd, supra n 8 at 520D-E.
40 On registration of cession the reversionary entitlement is also transferred together with the other entitlements.
41 The existence of this entitlement explains why a mineral right, just like ownership, has the characteristic of elasticity.
42 Badenhorst, Mineral Rights, supra n 8 at 2-24 to 2-25.
Due to its elasticity, a mineral right expands to its original form on termination of the limited right.

Mineral rights are rights in respect of the property of someone else (\textit{itura in aliena}) if the holder of mineral rights is not the owner of the land to which the mineral rights relate.

Mineral rights seem to be rights in respect of your own property (\textit{itura in rei sua}) if the holder of mineral rights is also the owner of land to which the mineral rights relate.

The maxim \textit{nemini res sua servit} (namely, nobody can constitute a servitude over his or her own property) does not apply to mineral rights.

Mineral rights are constituted in favour of the holder in his personal capacity.

Mineral rights are transferable.

Mineral rights may be alienated separately from the land to which they relate.

Subject to statutory restrictions, mineral rights are divisible.

Mineral rights need not be exercised with the preservation of the substance of the land (\textit{salva rei substantia}).

Mineral rights may themselves be the objects of other limited real rights such as usufruct, mortgage and a mineral lease.

A title of mineral rights subsists in perpetuity.

Mineral rights continue to exist even if there are no minerals in the land.

Mineral rights may be sold and are ceded by registration of such cessions in the Deeds Office. Holders of mineral rights are entitled to prospect and mine for minerals. The right to prospect for minerals could be granted to another by means of a prospecting contract. The right to mine could be granted to another by means of a notarial mineral lease.

Prospecting contracts and mineral leases may be registered in the Deeds Office. In order to exercise mineral rights, prospecting rights or mining rights, it is necessary to obtain a prospecting permit for prospecting, or a mining authorisation for mining, from the Regional Director of the Department of Minerals and Energy. In addition, an environmental management programme must be approved.

The novel concept of a mineral right with which Paul de Castro and Innes CJ were, respectively, confronted during the Middle Ages was, however, held that a prospecting contract registered in the Deeds Office does not create a real right. See Dale [1996] AS 412 at 423-424; and Nel, \textit{Prospekseerregte}, \textit{supra} n 44 at 551-552. See, however, Franklin and Kaplan, \textit{Mineral Law}, \textit{supra} n 8 at 16-21; Badenhorst and Olivier, ‘Die Aard Van Regte Ingovolge ‘n Prospekseerkontrak’’ [1997] TSAR 583 at 586-589; and Badenhorst, ‘Mining and Minerals’, Vol 18 LAWSA (original text by Franklin) 1999 (first reissue) at 14-15. Before registration respective personal rights are created.

50 Section 3(1)(g) of the Deeds Registries Act \textit{supra}.

51 Section 3(1)(m) and s 77(1) of the Deeds Registries Act \textit{supra}.

52 See n 47 above. In terms of s 3(1) of the General Law Amendment Act 50 of 1956 a mineral lease, registered in the deeds office, is enforceable as against third parties.

53 Section 6(1) of the Minerals Act \textit{supra}.

54 Section 9(1) of the Minerals Act \textit{supra}.

55 Section 39(1) of the Minerals Act \textit{supra}.
and in 1903 in the *Lazarus and Jackson* decision, is today a highly sophisticated and developed concept and as such fully integrated within the modern property law system.

**New order: the Act**

The Act will change the common law principles regarding mineral law (for instance the notion of a mineral right). It is prescribed by the Act that in so far as the common law is inconsistent with the Act, the Act will prevail. The provisions of the common law that are changed by the Act are the following.

**Ownership of unsevered minerals**

The State is made the custodian of ‘mineral resources’ for the benefit of all South Africans. The heading of this section refers to ‘Custodianship of the nation’s mineral resources’. In effect, ownership of minerals not yet severed from the land is vested in the State. The word ‘custodianship’ as used in the Act is a misnomer in that what the Act proposes is not mere custodianship, but an actual vesting in the State. One of the objectives of the Act is to give effect to the universally accepted right of the State to exercise sovereignty over all mineral resources. The words ‘custodianship’ and ‘sovereignty’ are mutually exclusive.

**Right to prospect and right to mine**

The State, acting through the Minister of Minerals and Energy, *inter alia*, has the right to grant prospecting rights and mining rights. The right to prospect and the right to mine minerals are not expressly reserved for the State. It is achieved implicitly, insofar as such a right to prospect and the right to mine may legally only be granted if such right is vested in the grantor (*nemo plus iuris ad alium transferre postest quam habet*). As indicated before, the rights to prospect and mine were vested in the holders of mineral rights, prospecting rights or mining rights. To enable the State to grant the right to prospect or mine, an *ex lege* transfer of these rights must have preceded a granting of rights in terms of the Act. (This is of course not applicable where the State itself is the holder of mineral rights.)

The vesting of the right to prospect and mine by section 3(2)(a) of the Act should be seen against the background of prior mining legislation. The right of prospecting for natural oil and the right of mining for natural oil, precious metals and precious stones were (prior to the Minerals Act 50 of 1991) vested in the State. This philosophy of vesting the right to prospect and mine certain minerals in the State can be traced back to Southern African legislation since 1871. The right of prospecting and mining for base minerals was vested in the holder of the right to base minerals. The last-mentioned vesting by

---

56 Supra.
58 Section 4(2).
59 Section 3(1); and see also s 2(b).
61 Section 2(a).
62 Chamber’s Memorandum, Part 3, chap para 2222.
63 Section 3(2)(a). The equivalent rights to petroleum are not discussed in this article.
65 See heading ‘Existin; order: ancien régime?’ supra.
66 Section 2(1)(a) of the Mining Rights Act 20 of 1964 and s 2 of the Precious Stone Act 73 of 1964.
68 Section 2(1)(b) of the Mining Rights Act supra.
legislation since 1895 was a confirmation of the common law position. In addition, the right to prospect precious metals, base minerals and precious stones on 'alienated state land' were, prior to the Minerals Act, reserved in favour of the owner of the land. This type of reservation in favour of owners of land can be traced back to earlier legislation.

In terms of section 5(1) of the Minerals Act, the vesting of the right to prospect natural oil and the right to mine natural oil, precious metals and precious stones were repealed and not re-enacted. The common law rights of holders of all mineral rights were therefore revived. The effect of section 5(1) of the Minerals Act was also explained within the context of the privatisation of rights previously held by the State. Owners of alienated state land were, in terms of transitional measures, protected and on compliance with certain provisions were deemed to be holders of mineral rights. Viewed against the historical background of mining legislation, the vesting (or to some extent re-vesting) of the right to prospect and mine 'minerals' in the State is only possible by re-enactment and change of the common law. This would be achieved by section 3(2)(a) of the Act.

Mineral rights

Except for the transitional arrangements in the Act, the Act will terminate the notion of and use of mineral rights.

Prospecting rights and mining rights

The State, acting through the Minister of Minerals and Energy, may grant, refuse, control, administer and manage prospecting rights, mining rights, mining permits, retention permits and permission to remove and dispose of any mineral. The Minister may, in consultation with the Minister of Finance, determine the fee and consideration payable for the granting of such rights.

A prospecting right or mining right is a limited real right in respect of the mineral and the land to which such right relates. The content of a prospecting right and a mining right is circumscribed by the Act. No person may prospect or mine for any mineral without:

- entering the land to which such right relates together with his or her employees, and may bring onto the land any plant, machinery and equipment and build, construct and lay down any surface or underground infrastructure which may be required for the purposes of prospecting or mining, as the case may be;
- subject to the National Water Act 36 of 1998, use water from any natural spring, lake, river or stream, situated on, or flowing through, the land or from any excavation previously made and used for prospecting or mining purposes, or sink a well or borehole required for use relating to prospecting or mining on the land; and
- carry out any other activity incidental to prospecting or mining operations which does not contravene the provisions of the Act. A holder of a prospecting right or mining right is also entitled to other rights that may be granted to, acquired by or conferred under the Act or any other law.
(a) a prospecting right or mining right, as the case may be; and (b) an approved environmental management plan or environmental management programme.84

Application for a prospecting right has to be lodged at the office of the Regional Manager of the Department of Minerals and Energy, in whose region the land is situated, in the prescribed manner with payment of a prescribed non-refundable application fee.85 On non-compliance with the requirements, the applicant has to be notified in writing within 14 days.86 On compliance with the requirements,87 the Regional Manager has to accept the application,88 make the application known to interested parties for their comments,89 instruct the applicant to submit an environmental management plan and to consult with interested and affected parties.90 If the prescribed requirements are met, the Minister has to grant a prospecting right.92

A prospecting right is exercised subject to its prescribed terms and conditions.93 A prospecting right becomes effective on the date of approval of the environmental management plan.94 A prospecting right is valid for a specified period which may not exceed five years.95 If a prospecting right is refused on non-compliance with the requirements,96 the Minister has to advise the applicant within 30 days in writing and provide reasons for the decision.97

A holder of a prospecting right acquires the exclusive right to apply for, and be granted on compliance with the provisions of the Act:
(a) a renewal of the prospecting right;
(b) a mining right; and
(c) a right to dispose of minerals found during prospecting.98

On application at the office of the Regional Manager and on compliance with prescribed requirements99 a prospecting right has to be renewed by the Minister once, for a period not exceeding three years.100

(b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme; (c) the prospecting will not result in irreparable pollution, ecological degradation or damage to environment; (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996; and (e) the applicant is not in contravention of any relevant provision of the Act; (s 17(1)). The Minister may, having regard to the type of mineral, request the applicant to give effect to the objective to expand opportunities for historically disadvantaged persons to enter the mineral industry and to benefit from the nation's mineral resources: (s 17(4).

84 Section 5(4). Approval of an environmental management plan takes place in terms of s 39(4).
85 Section 16(1).
86 Section 16(3).
87 The requirements are the following: (a) the requirements in s 16(1) regarding, the place, manner of application and payment of the fee; s 16(2)(a); and (b) no one may be holding a prospecting right, mining right, mining permit or retention permit for the site, mineral and land: s 16(2).
88 See s 16(2).
89 See s 10(1). The regional manager has to refer objections to the granting of the prospecting right to the Regional Mining Development and Environmental Committee considering the objections and advise the Minister thereof: s 10(2).
90 See s 16(4).
91 The requirements are as follows: (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
92 See s 17(4).
93 See s 17(6).
94 Section 17(5). Approval of an environmental management programme takes place in terms of s 39(4).
95 Section 17(6).
96 Section 17(2).
97 Section 17(3).
98 Section 19(1). A permission to remove minerals is acquired in terms of s 20(2).
99 The application has to be lodged in the prescribed manner with the prescribed non-refundable application fee (s 18(1)) and must: (a) state the period for which the renewal is required; (b) be accompanied by a detailed report reflecting the prospecting results, the interpretation thereof and the prospecting expenditure incurred; (c) be accompanied by a report reflecting the extent of compliance with the requirements of the approved environmental management plan, the rehabilitation to be completed and the estimated cost thereof; and (d) include a detailed prospecting work programme for the renewal period (s 18(2)). The holder of the prospecting right must comply with the: (a) terms and conditions of the prospecting right and must not have contravened any relevant provision of the Act; (b) prospecting work programme; and (c) requirements of the approved environmental management plan (18(3)).
100 Section 18(3), (4).
A holder of a prospecting right has the duty to:

(a) lodge the prospecting right for registration at the Mining Titles Office within 30 days after approval of the environmental management plan or grant of a renewal of a prospecting right by the Minister;

(b) commence with prospecting activities within 120 days after approval of the environmental management programme;

(c) continuously and actively conduct prospecting operations in accordance with the prospecting work programme;

(d) comply with the terms and conditions of the prospecting right and the provisions of the Act;

(e) comply with the requirements of the approved environmental management plan;

(f) pay the prescribed prospecting fees to the State;

(g) pay royalties in respect of minerals removed and disposed of during prospecting;

(h) keep records of information and data in respect of prospecting and

(i) submit progress reports and data, in the prescribed manner, regarding prospecting and at the prescribed intervals, to the Regional Manager.

Application for a mining right has to be lodged at the office of the Regional Manager, in whose region the land is situated, in the prescribed manner with a non-refundable application fee. On non-compliance, the applicant has to be notified in writing. On compliance with the requirements, the Regional Manager has to accept an application for a mining right. Make the application known to interested parties for their comments and instruct the applicant to conduct an environmental impact assessment and submit an environmental programme. If the prescribed requirements are met, the Minister has to grant a mining right. A mining right is exercised subject to its prescribed terms and conditions. A mining right becomes effective on the date on which the environmental management programme is approved. A mining right is valid for the specified period, which may not exceed 30 years. If a mining right is not exercised, it lapses.
right is refused on non-compliance with the requirements,\textsuperscript{122} the Minister has to advise the applicant within 30 days in writing and provide reasons for the decision.\textsuperscript{123}

A holder of a mining right has the exclusive right to apply for and be granted, on compliance with the requirements of the Act, a renewal of the mining right in respect of the mineral and mining area in question.\textsuperscript{124} On application at the office of the Regional Manager and on compliance with the prescribed requirements,\textsuperscript{125} the mining right may be renewed by the Minister for further periods, each of which may not exceed 30 years at a time.\textsuperscript{126}

A holder of a mining right has a duty to:

(a) lodge the right for registration at the Mining Titles Office within 30 days after approval of the environmental programme\textsuperscript{127} or grant of a renewal of a mining right;\textsuperscript{128}
(b) commence with mining operations within one year after approval of the environmental programme;\textsuperscript{129}
(c) actively conduct mining in accordance with the mining work programme;\textsuperscript{130}
(d) comply with the terms and conditions of the mining right and the provisions of the Act;\textsuperscript{131}
(e) comply with the requirements of the approved environmental management programme;\textsuperscript{132}
(f) comply with the requirements of the prescribed social and labour plan;\textsuperscript{133}
(g) pay the State Royalties;
(h) keep records of information and data in respect of the mining and processing of minerals;\textsuperscript{134} and
(i) submit to the Director-General: (i) prescribed monthly returns with accurate and correct information and data; (ii) an audited annual financial report or financial statements reflecting the balance sheet and profit and loss account, and (iii) an annual report detailing the extent of the holder’s compliance with the objectives to expand opportunities for historically disadvantaged persons and to promote employment and advance social and economic welfare of all South Africans.\textsuperscript{135}

A prospecting right or mining right or an interest in any such right is only transferable with the written consent of the Minister.\textsuperscript{136} The prohibition also applies to the transfer of a controlling interest in the holder of any such right or interest, except in the case of a change of the controlling interest in a listed company.\textsuperscript{137} The consent has to be granted if the transferee is capable of complying with all

\begin{itemize}
  \item \textsuperscript{122} Section 23(3).
  \item \textsuperscript{123} Section 23(4).
  \item \textsuperscript{124} Section 25(1).
  \item \textsuperscript{125} The application be lodged in the prescribed manner with the prescribed non-refundable application fee (s 24(1)) and has to: (a) state the period for which the renewal is required; (b) be accompanied by a report reflecting the extent of compliance with the requirements of the Act; (c) the rehabilitation of the site completed and the cost thereof; and (d) a detailed mining work programme for the renewal period (s 24(2)). The holder must have complied with the terms and conditions of the mining right and must have contravened any provision of the Act; (e) mining work programme; (f) the requirements of the social and labour plan; and (g) the requirement of the approved environmental management programme (s 24(3)).
  \item \textsuperscript{126} Section 24(4).
  \item \textsuperscript{127} Section 25(2)(a) read with s 23(5).
  \item \textsuperscript{128} Section 25(2)(a) read with s 24(3).
  \item \textsuperscript{129} Section 25(2)(b) read with s 23(5).
  \item \textsuperscript{130} Section 25(2)(c).
  \item \textsuperscript{131} Section 25(2)(d).
  \item \textsuperscript{132} Section 25(2)(e).
  \item \textsuperscript{133} Section 25(2)(f).
  \item \textsuperscript{134} Section 28(1).
  \item \textsuperscript{135} Section 28(2) read with s 2(4)(f). In terms of s 1 a “historically disadvantaged person” means "(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect or by unfair discrimination subsequent to the Constitution taking effect, which persons contemplated in paragraph (a) own and control a majority of the issuing capital or members' interest and are able to control a majority of the members' votes".
  \item \textsuperscript{136} Section 11(1).
  \item \textsuperscript{137} Section 11(1).\end{itemize}
the obligations of the transferee. The consent is not required for encumbrance by mortgage bond if the mortgagee is a bank or financial institution and undertakes in writing that any sale in execution will be subject to Ministerial consent. Transfer has to be registered within 30 days at the Mining Titles Office.

In the case of small-scale mining, provision is made for the application of a mining permit. The period for which such permit is valid may not exceed a period of two years, is only once renewable for three periods, each of which may not exceed one year and is not transferable.

Applications for a prospecting right, a mining right or a mining permit received on the same day are treated as having been received at the same time, but the Minister has to give preference to applications from historically disadvantaged persons.

Retention permit

The Act also makes provision for the application of a retention permit which may be granted on compliance with the requirements of the Act for a specified period, which may not exceed three years. The Minister is empowered to refuse to issue the retention permit under certain circumstances. For instance, the Minister’s view on whether the mineral can be profitably mined will determine the fate of the application for a retention permit. On the issuing of a retention permit the terms and conditions of a prospecting right are suspended.

A holder of a retention permit may apply for renewal of this retention permit and has the exclusive right to be granted mining rights in respect of the retention area. This holder incurs statutory duties and the retention permit is not transferable or may not be encumbered by a mortgage bond.

Cancellation and suspension of rights

The Minister is empowered to suspend or cancel a prospecting right, mining right, mining permit or retention permit under certain conditions. In terms of s 35(2) effect has to be given to the environmental management plan, retention fees have to be paid and prescribed six monthly progress reports have to be submitted to the Regional Director.

138 Section 11(2).
139 Section 11(3).
140 Section 11(4).
141 See section 27.
142 Section 27(8)(a).
143 Section 27(8)(b).
144 Section 9.
145 See s 31.
146 The requirements entail that the holder of the prospecting right has: (a) prospected on the land to which the application relates; (b) completed the prospecting activities and a feasibility study; (c) established the existence of a mineral reserve which has mining potential; (d) studied the market and found that the mining of the mineral in question would be uneconomical due to prevailing market conditions; and (e) complied with the relevant provisions of the act: s 32(1).
147 Section 32(4).
148 If, on the information supplied by the applicant and research conducted by the Minerals and Mining Development Board (established in terms of s 57), on the request of the Minister, it is established that: (a) the mineral resources to which the application related can be mined profitably; (b) the applicant has not completed the prospecting activities and feasibility study; or (c) the issuing of a retention permit will result in an exclusionary act; (ii) prevent fair competition; or (iii) result in the concentration of mineral resources in the hands of the applicant (s 33).
149 Ibid.
150 Section 32(2).
151 Section 34.
152 Section 35(1).
153 In terms of s 35(2) effect has to be given to the environmental management plan, retention fees have to be paid and prescribed six monthly progress reports have to be submitted to the Regional Director.
154 Section 36.
155 Section 47(1).
circumstances, provided the prescribed procedures are followed. On recommendation of the Minerals and Mining Development Board, the Minister may also suspend or cancel a mining right if the holder fails to take corrective measures to ensure that optimal mining of mineral resources does take place.

Environmental management programme

Every applicant for a prospecting right, mining right or mining permit has to lodge an environmental management plan for approval by the Minister before prospecting or mining may be commenced. An applicant for a mining right has to conduct an environmental impact assessment and submit an environmental management programme. The discussion of the extensive environmental provisions falls beyond the scope of this article.

Transitional provisions towards the new order

A distinction can be drawn between pending applications on commencement of the Act and so-called ‘old order rights’.

Pending applications

Any applications submitted in terms of the Minerals Act, which are pending on commencement of the Act, will still be treated in terms of the Minerals Act.

‘Old order rights’

The following ‘old order rights’, recognised in Schedule 11 to the Act:

(a) ‘unused old order right’, for example a mineral right;

162 For instance: (a) prospecting permits, mining authorisations, consents to prospect or mine, permissions to remove and dispose of minerals (item 3(1)) of schedule II of the Transitional measures); or (b) an environmental management programme (item 3(3)). If the above application in (a) does not meet the requirements of the Mineral and Petroleum Development Act, the Regional Manager has to direct the applicant to submit the outstanding prescribed information (item 3(4)). If the application for an environmental management programme does not meet the requirements of the Minerals and Petroleum Development Act, the Regional Manager has to direct the applicant to submit the outstanding prescribed information (item 3(4)).

163 Item 1(iv). The so-called ‘old order rights in respect of petroleum’ will, however, not be discussed in this article.

164 An ‘unused old order right’ means ‘any right, entitlement, permit or licence listed in Table 3 to this Schedule respect of which no prospecting or mining was being conducted immediately before this Act took effect’ (item 1(b)

165 These requirements the following, namely, if the holder: (a) is conducting a prospecting or mining operation in contravention the Act; (b) breaches any material term or condition such right or permit; (c) is contravening the approved environmental management programme; (d) has submitted misleading, incorrect or inaccurate information in connection with any matter required to be submitted in the Act (s 47(1)).

157 See ss 47(2)-(5).
158 See s 31.
159 See s 39(2).
160 Section 39(1).

Continued over.
(b) ‘old order prospecting right’,\(^{165}\) for example a prospecting permit coupled with the underlying mineral right; and

(c) ‘old order mining right’,\(^{166}\) for example a mining authorisation coupled with the underlying mineral right.

A distinction is drawn between an ‘unused old order right’ on the one hand, and an ‘old order prospecting right’ and an ‘old order mining right’ on the other hand, on the basis of whether ‘prospecting or mining was conducted immediately before the Act took effect’. If no prospecting or mining took place the right, entitlement, permit or licence will qualify as an ‘unused old order right’. On the other hand, if prospecting was being conducted immediately before the commencement of the Act, the prospecting lease, permission, consent, permit or licence and the rights attached thereto will qualify as an ‘old order prospecting right’. If mining operations were being conducted immediately before the commencement of the Act, the mining lease, consent to mine, permission to mine, claim licence or mining authorisation would qualify as an ‘old order mining right’.

This distinction is important, because the active prospector or active miner would receive preference to and exclude the holder of ‘unused’ mineral rights insofar as transitional rights are concerned. One of the objectives of the transitional measures is indeed to ‘ensure that security of tenure is protected in respect of prospecting, exploration,
mining and production operations which are being undertaken.\textsuperscript{167} The grouping of the mineral rights, prospecting rights, mining rights, statutory rights and statutory permission to exercise them is important because they become one right for the purposes of conversion into a new right or termination.

\textit{Unused old order right}

On commencement of the Act, an existing ‘unused old order right’ remains valid for one year, subject to its terms and conditions.\textsuperscript{168} This is the only security of tenure offered to a holder of a mineral right to land in respect of which no prospecting or mining was being conducted immediately before the commencement of the Act. The transitional measure also purports to give the holder of ‘an old order right’ an opportunity to comply with the Act.\textsuperscript{169} Accordingly, the holder of an ‘unused old order right’ is granted the exclusive right to apply for a prospecting right or a mining right, as the case may be, in terms of the Act, within the one-year period.\textsuperscript{170} During lodgement of such an application, the ‘unused old order right’ remains valid until such time as the application for a prospecting right or mineral right, as the case may be, is granted and dealt with in terms of the Act, or is refused.\textsuperscript{171} In the absence of an application, an ‘unused old order right’ will cease to exist on the expiry of the one-year period.\textsuperscript{172}

\textit{Old order prospecting right}

On commencement of the Act, an existing ‘old order prospecting right’ remains valid for two years, subject to its terms and conditions.\textsuperscript{173} A holder of an ‘old order prospecting right’ has to lodge the prospecting right for conversion (within the two-year period) at the office of the Regional Manager in whose region the land in section 9(1)(b) or 9(2) of the Minerals Act and the common law mineral rights attached thereto together with a mining authorisation issued in connection therewith in terms of section 9(1) of the Minerals Act; Category 3: A right to dig or mine or a claim licence referred to in section 47 of the Minerals Act and the common law mineral rights attached thereto together with a mining authorisation obtained in connection therewith under section 47(1)(e) in terms of section 9(1) of the Minerals Act; Category 4: A right to dig or to mine referred to in section 47(5) of the Minerals Act and the common law mineral rights attached thereto together with a mining authorisation obtained in connection therewith in terms of section 9(1) of the Minerals Act; Category 5: Any permission to mine in terms of section 16(1) of the Bophuthatswana Land Control Act, 39 of 1979, section 16(1) of the Venda Land Control Act, 6 of 1986, section 15 of the Lebowa Minerals Trust Act, 9 of 1987, section 51(1) of the Rural Areas Act (House of Representatives), 9 of 1987, or section 6 of the Transformation of Certain Rural Areas Act, 94 of 1998, and the common law mineral right attached thereto and a mining authorisation in terms of the Minerals Act; Category 6: A temporary authorisation or permit authorising the continuation of a mining operation on the land comprising the subject of mining authorisation or permit, as provided for in section 10 of the Minerals Act.'

\textsuperscript{167} Item 2(a).
\textsuperscript{168} Item 8(1).
\textsuperscript{169} Item 2(b).
\textsuperscript{170} Item 8(2).
\textsuperscript{171} Item 8(3).
\textsuperscript{172} Item 8(4).
\textsuperscript{173} Item 6(1).
The Minister has to convert the 'old order prospecting right' into a new prospecting right if the holder of the 'old order prospecting right' has complied with the requirements of the Act. Terms and conditions applicable to the 'old order prospecting right' are void if they are in conflict with any of the provisions of 'the Constitution' or the Act. Within 90 days of conversion of the prospecting right, the holder has to lodge the converted prospecting right for deregistration of the 'old order prospecting right' at the Deeds Office or the Mining Titles Office. Simultaneously with deregistration, the new prospecting right has to be registered at the Mining Titles Office. If a mortgage bond has been registered, the converted prospecting right has to be registered at the Mining Titles Office subject to such mortgage bond. The Registrar has to make such endorsements on every relevant document and such entries in his or her registers as may be necessary, without payment of transfer duty, stamp duty, registration fees or charges. On conversion of the 'old order prospecting right' and the registration of the converted prospecting right, the 'old order prospecting right' is terminated. If the holder fails to lodge the 'old order prospecting right' for conversion before the expiry of the two-year interim period, the 'old order prospecting right' will also be terminated.

'Old order mining right'

On commencement of the Act, an 'old order mining right' remains valid for five years, subject to its terms and conditions. A holder of an 'old order mining right' has to lodge the mining right for conversion within the five-year period at the office of the Regional Manager in

---

174 Item 6(2). The following has to be submitted together with the application: (a) the prescribed particulars of the holder; (b) a sketch plan or diagram depicting the mining area for which the conversion is required; the area may not be larger than the area for which he or she holds the old order prospecting right; (c) the name of the mineral or group of minerals for which he or she holds the old order prospecting right; (d) an affidavit verifying that the holder conducted prospecting operations on the land to which the conversion relates immediately before the Bill took effect and setting out the periods during which such prospecting operations had been conducted; (e) a statement setting out the period for which the prospecting right is required, substantiated by a prospecting work programme; (f) information as to whether or not the old order prospecting right is encumbered by any mortgage bond or other right registered at the Deeds Office or Mining Titles Office; (g) a statement setting out the terms and conditions which apply to the old order prospecting right; (h) the original title deed in respect of the land to which the old order prospecting right relates, or a certified copy thereof; and (i) the original old order right or a certified copy and all prospecting information and the results thereof; and (j) all prospecting information and the results thereof (item 6(2)).

175 Namely the holder of an 'old order prospecting right': (a) has complied with the requirements of item 6(2), listed in the previous footnote; (b) has conducted prospecting operations in respect of the right in question; (c) indicates that he or she intends to continue to conduct such prospecting operations on the conversion of such right; (d) has an approved EMP; and (e) has paid the prescribed conversion fee (item 6(3)).

176 Item 6(4).
177 Item 6(5).
178 Item 6(5).
179 In terms of either the Deeds Registries Act or the Mining Titles Registration Act.
180 Item 6(6).
181 Item 6(6).
182 As to what is encompassed by an 'old prospecting right', see n 165 above.
183 Item 6(7).
184 Item 6(8).
185 Item 7(1).
whose region the land in question is situated.\textsuperscript{186} The Minister has to convert the ‘old order mining right’ into a new mining right if the holder of the ‘old order mining right’ has complied with the requirements of the Act.\textsuperscript{187} Terms and conditions applicable to the ‘old order mining right’ are void if they are in conflict with any of the provisions of the ‘Constitution’ or the Act.\textsuperscript{188} Within 90 days of conversion of the mining right, the holder has to lodge the converted mining right for deregistration of the ‘old order mining right’ at the Deeds Office or the Mining Titles Office.\textsuperscript{189} Simultaneously with deregistration, the new mining right has to be registered at the Mining Titles Office.\textsuperscript{190} If a mortgage bond has been registered\textsuperscript{191} over the ‘old order mining right’, the converted mining right has to be registered at the Mining Titles Office subject to such mortgage bond.\textsuperscript{192} The Registrar has to make such endorsements on every relevant document and such entries in his or her registers as may be necessary, without payment of transfer duty, stamp duty, registration fees or charges.\textsuperscript{193} On conversion of the ‘old order mining right’ and the registration of the converted mining right, the ‘old order mining right’\textsuperscript{194} is terminated.\textsuperscript{195} If the holder fails to lodge the ‘old order mining right’ for conversion before the expiry of the five-year interim period, the ‘old order mining right’ will also be terminated.\textsuperscript{196}

**Impact on the notion of mineral rights**

The underlying common law mineral rights will be terminated on:

(a) expiry of the one-year transitional period if the holder of an ‘unused old order right’ did not apply for a new prospecting right or mining right;

(b) refusal or granting by the Minister of a new prospecting right or mining right to the holder of an ‘unused older order right’;

- mining work programme; (f) a prescribed social and labour plan; (g) information as to whether or not the old mining right is encumbered by any mortgage bond or other right registered at the Deeds Office or Mining Titles Office; (h) a statement setting out the terms and conditions which apply to the old order mining right; (i) the title deed in respect of the land to which the old order mining right relates, or a certified copy thereof; (j) the old order right, the approved EMP or certified copies thereof; and (k) an undertaking that, and the manner in which the holder will give effect to the objective to expand opportunities for historically disadvantaged persons in the mineral industry and to benefit from mineral exploitation and to promote employment and advance social and economic welfare of all South Africans (item 7(2) read with s 2(d) and (f) of the Act).

\textsuperscript{186} Item 7(2). The following have to be submitted together with application: (a) the particulars of the holder; (b) the sketch plan or diagram depicting the prospect for which the conversion is required; the area may be larger than the area for the holder holds the old mining right; (c) the names of the mineral or group of minerals for which he holds the old order mining right; (d) an affidavit that the holder conducted mining operations on the area to which the conversion relates immediately before Bill took effect and specify the periods during which the mining operations had conducted; (e) a statement setting out the period during which the mining right is required to be substantiated.

\textsuperscript{187} Item 7(3). Namely, if the holder of the ‘old order mining right’: (a) has complied with the requirements in item 6(2) in the previous footnote; (b) has conducted mining operations in respect of the right in question; (c) indicates that he or she intends to continue to conduct such mining operations on the conversion of such right, an approved environmental management programme; and (d) has paid the prescribed conversion fee (item 7(3).

\textsuperscript{188} Item 7(4).

\textsuperscript{189} Item 7(5).

\textsuperscript{190} Item 7(5).

\textsuperscript{191} In terms of either the Deeds Registries Act or the Mining Titles Registration Act.

\textsuperscript{192} Item 7(6).

\textsuperscript{193} Item 7(6).

\textsuperscript{194} As to what is encompassed by an ‘old order mining right’, see n 166 above.

\textsuperscript{195} Item 7(7).

\textsuperscript{196} Item 7(8).
(c) expiry of the two-year transitional period if the holder of an ‘old order prospecting right’ did not apply for conversion to a new prospecting right;
(d) expiry of the five-year transitional period if the holder of an ‘old order mining right’ did not apply for conversion to a new mining right; or
(e) granting or refusal by the Minister of an application for the conversion of an ‘old order prospecting right’ or an ‘old order mining right’ into a new prospecting right or a new mining right, respectively.

This will lead to the eventual exodus of the notion of mineral rights from South African mineral law.

Even if new prospecting or mining rights are acquired, a mineral right registrable at the Deeds Office which exists in perpetuity is exchanged for a prospecting right, linked to a mining right (on compliance with the provisions of the Act) or a mining right which depend for their continued existence on compliance with the provisions of the Act and the discretion of the Minister. It is conceded that the new prospecting right and mining right have been elevated to limited real rights, 197 registrable at the Mining Titles Office. 198 Even though such rights are more secure than envisaged before, continued existence thereof is linked to time units and compliance with the provisions of the Act.

Constitutional compensation

We 199 and other critics 200 of the first Bill 201 argued that the Bill was seriously flawed and quite possibly unconstitutional, inter alia, because of the expropriation without compensation of ‘old order rights’ and their conversion to inferior and insecure rights (namely, non-registrable limited rights granted by the Minister and subject to the control of the Minister). As seen before 202 prospecting rights and mining rights in terms of the Act have been elevated to registrable limited real rights. As indicated, 203 mineral rights will be lost and only on the granting of new prospecting rights or mining rights will be exchanged for limited real rights dependent for their existence on compliance with the provisions of the Act.

Conceding that some form of expropriation without compensation will take place on implementation of the transitional measure, the legislature made provision for a claim of compensation. 204 Such a claim has to be lodged with the Director-General of the Department of Minerals and Energy within five years from the date of commencement of the Act. 205 Payment of compensation is, however, not stated as an objective of the transitional measures. 206 This compensation has to be seen separately from the general power of the Minister to expropriate property for the purpose of prospecting or mining 207 If the above losses can be construed as ‘expropriation of property’, the claimant will have to take certain steps 208 in order to 

---

197 Section 5(1).
198 A prospecting right (s 19(2)(a)) or a mining right (s 25(2)(a)) or a conversion of a prospecting right (item 6(5)) or a mining right (item 7(5)) has to be registered at the Mining Titles Office.
200 Chamber’s Memorandum, Introduction.
201 See n 4 above.
202 See ‘Impact on the notion of mineral rights’ above.
203 Ibid.
204 Item 12(1).
205 Item 12(3).
206 See Item 2.
207 See section 55.
208 Namely, (a) prove the extent and nature of actual loss and damage suffered by him or her; (b) indicate the current use of the property; (c) submit proof of ownership of such property; (d) give the history of acquisition of the property in question and price paid for it; (e) detail the nature of such property; (f) prove the market value of the property and the manner in which such value was determined; and (indicate) (g) the extent of any State assistance and benefits received in respect of such property’ (Item 12(2)).
be successful with a claim for compensation.

The amount of compensation and the time and manner of payment have to be agreed on by those affected, and/or decided or approved by a court. Such compensation has to be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected. In determining such 'just and equitable compensation' it is provided that all relevant factors must be taken into account.

Space does not permit a discussion of the provision for compensation, the property clause and general limitation clause of the Constitution. What is more important is an acknowledgment that mineral rights, prospecting right and mining rights are 'property' for the purposes of the property clause and that compensation is payable on 'expropriation' of such rights.

Conclusion

For more than a century, the notion of mineral rights as separate limited real rights was recognised in South African law. The practice of registering separate mineral rights existed in 19th-century deeds registration. The concept of a mineral right was developed and refined by the courts as part of property law by drawing an analogy with the concept of a servitude. The notion of a servitude has existed since Roman times. The notion of a mineral right also made the granting of lesser rights, such as prospecting rights (in terms of a prospecting contact) and mining rights (in terms of a mineral lease) possible.

The notion of separate mineral rights (and prospecting and mining rights) provided the legal foundation for the development of one of the most successful mining industries in the world. It provided security of tenure, security for investors in mining companies and real security for banks. Whether the Act will accomplish the same remains to be seen.

The Act will lead to an exodus of the notion of mineral rights, a trustworthy legal vehicle, and replace it with prospecting rights and mining rights, which, albeit real in nature, are less secure dependence on compliance with provisions of the Act and the exercise of a discretion by the Minister. During the interim period an enormous amount of registrations will have to take place in the (revived) Mining Titles Office. Mineral law will be removed from the safe realm of property law and will have to be resolved in the arena of administrative law; with an endless litigation against the State being foreseen.

209 Section 25(2) Constitution read w 12(3).
210 Section 25(3) Constitution read w 12(3).
211 The following are listed: (a) the cur of the property; (b) of the acquisition or the property; (c) the value of the property; (d) the extent of the acquisition; (e) the capital improvement property; (f) the purpose of expropriation (s 25(3) Constitution); (g) the obligation to redress the results of past racial discrimination in the allocation of and access to mineral (and petroleum) resources (item 11(2) Constitution); (h) the obligations of the State to redress the results of past racial discrimination in the allocation of and access to mineral (and petroleum) resources (item 11(2)(c); (d) the provisions of s 25(8)) Constitution (item 11 and (i) whether the pt concerned will continue to benefit from the use of property in question c (item 11(2)(d)). The Constitution does not permit a discussion of the provision for expropriation of property clause may not impede the right of the State to achieve land, water related reform, in order to redress the results of past racial discrimination that any departure from the provisions of the property clause is in accordance with the provisions of the limitation clause in s 3 of the Constitution.

212 Section 25(3) of the Constitution read with Item 12(3).
214 See, however, Lebowa Mineral Trust Beneficiaries Forum v The President of the RSA 2002 (1) BCLR 28G-H 31D-E where it was incorrectly decided that 'mineral rights' are not 'property' for purposes of the Constitution. For a criticism of the decision, see Badenhorst and Vrancken, 'Do Mineral Rights Constitute "Constitutional Property"?' Lebowa Mineral Trust Beneficiaries Forum v The President of the RSA [2001] 0i 496.
215 See further section 6.