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CLOSURE OF PROSPECTING RIGHTS, MINING RIGHTS AND MINERAL RIGHTS IN TERMS OF APARTHEID LEGISLATION*

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SUMMARY

The Mineral and Petroleum Resources Development Act 28 of 2002 transforms the entire mineral law system and provides for broad-based economic empowerment. In addition, the Act rids us of provisions in apartheid laws pertaining to prospecting and mining by providing for the transition, during a period of grace, of these rights into new prospecting or mining rights. This article will attempt to provide the background to the closure of these rights. The said rights exist within the new constitutional dispensation alongside the Minerals Act 50 of 1991. The closure of the prospecting and mining rights in terms of apartheid laws can be seen as a final chapter in consolidation of the various mineral law systems which existed during and even after apartheid.

1 INTRODUCTION

The Mineral and Petroleum Resources Development Act 28 of 2002 has been accepted by Parliament. The Act will come into operation on a date to be fixed by the President by proclamation in the Government Gazette. The Act transforms the entire mineral law system and is one of the most

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* The comments and suggestions of Prof J Pienaar of the University of Stellenbosch are acknowledged. I, however, remain responsible for the end product.
1 GN 1273 in GG 23922 of 2002-10-10.
3 As to the new Act, see: Badenhorst “Transitional Arrangements in terms of the Mineral and Petroleum Resources Development Act 28 of 2002: Crossing a Narrow Bridge?” 2002 Obiter 250; and Badenhorst and Mostert “Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act, 28 of 2002 and the
important pieces of legislation providing for broad-based economic empowerment thus far. In addition, the Act rids us of remnants of the apartheid era, namely mineral rights, prospecting rights and mining rights granted in terms of apartheid legislation, by providing for the transition, during a period of grace, of these rights into new prospecting or mining rights. This article will attempt to provide the background to the closure of these rights that exist in the new constitutional dispensation alongside the Minerals Act 50 of 1991.

During the apartheid era, the mining and mineral laws of the Republic of South Africa, as they existed at the date of “independence” of Bophuthatswana, Transkei, Ciskei and Venda, continued to apply in these states and were not affected by any other legislation promulgated in the Republic of South Africa after the independence of the respective states. After independence the respective states either retained those statutes and/or adopted new statutes.

In terms of the Self-governing Territories Constitution Act 21 of 1971 the legislative assemblies of the non-independent self-governing territories had the right to legislate on certain matters, but not with regards to prospecting and mining. The said legislative assemblies, however, acquired the power to make laws on “land and mineral matters” that were consistent with the Self-governing Territories Constitution Act 21 of 1971. More specifically, as from 31 December 1986, the legislative assemblies of the self-governing territories were empowered to amend or repeal existing land and mineral legislation, as well as to adopt new legislation in respect of mineral matters. In terms of Proclamation R228 of 1986, land and rights mentioned in schedules thereto, and formerly held by the South African State or the South African Development Trust, were vested in the legislative assemblies of self-governing territories. The legislative assembly of Lebowa availed itself of the opportunity by enacting the Lebowa Mineral Trust Act 9 of 1987. In the former self-governing territory of KwaZulu, the Kwazulu-Natal Ingonyama Trust Act 3 of 1994 was adopted.

Constitutional Property Clause: An Analysis in Two Parts” to be published in 2003 3 Stell LR and 2004 1 Stell LR.


5 For instance the Bophuthatswana Land Control Act 39 of 1979 (B), the Venda Land Control Act 16 of 1986 (V) and the Diamond Control Act 11 of 1981 (T).

6 S 30 and schedule 1; Franklin and Kaplan 792.


8 GG 10560 of 1986-12-24.

Apartheid legislation also applied within certain rural areas.  

The Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) replaced the former four provinces, four independent states and six self-governing states with nine new provinces. Subject to the provisions of the Constitution, all laws that had been in force in any area that formed part of the national territory immediately prior to the commencement of the Constitution remained in force in such area until repealed or amended by a competent authority.

As indicated, the provisions of the apartheid laws pertaining to prospecting and mining continued to operate alongside the Minerals Act and their different fates will now be discussed in more detail.

2 BOPHUTHATSWANA LAND CONTROL ACT

The Bophuthatswana Land Control Act 39 of 1979 was introduced *inter alia* to control the acquisition of land in Bophuthatswana.

In terms of section 16(1) of the Act, no person could prospect or mine for minerals on land in respect of which the mineral rights were held by a citizen(s) or held in trust for a tribe or community, except with the written permission of the Minister of Economic Affairs. Section 16(1) was amended during 1995 by proclamation to the effect that the Minister of Minerals and Energy had to grant the written permissions.


3 VENDA LAND CONTROL ACT

The Venda Land Control Act 16 of 1986 was introduced *inter alia* to control the acquisition of land in Venda.

In terms of section 16(1) of the Act no person could prospect or mine for minerals on land in respect of which the mineral rights were held by a
citizen or held in trust for a tribe or community, except with the written permission of the Minister of Economic Affairs. Section 16(1) was amended during 1995 by proclamation\(^{17}\) to the effect that the Minister of Minerals and Energy had to grant the written permissions.

The Mineral and Petroleum Resources Development Act 28 of 2002 repealed section 16(1) of the Venda Land Control Act.\(^{18}\)

### 4 LEBOWA MINERAL TRUST ACT

On 8 November 1991 the Lebowa government promulgated the Lebowa Mineral Trust Act.\(^{19}\) The Lebowa Mineral Trust (LMT) was established as a body corporate with perpetual succession.\(^{20}\) From 8 November 1991 all “government-owned mineral rights” vested in the LMT.\(^{21}\) “Government-owned mineral rights” were defined as “all mineral law rights transferred to the Government of Lebowa by or in terms of Proclamation R 228 of 1986 and all such mineral rights which may subsequently be transferred to or acquired by the Government”\(^{22}\). A subsequent transfer of mineral rights did take place in terms of Proclamation R 28 of 1992.\(^{23}\) For purposes of mineral rights, the LMT was deemed to be a private holder of mineral rights in terms of the Mining Rights Act 20 of 1967.\(^{24}\) This position prevailed in Lebowa until the repeal of the LMT Act. The reason for this is that it had been decided in *Government of the Republic of South Africa v Government of Kwazulu*\(^{25}\) that the government of a self-governing territory was not a mere instrument of the South African State, and consequently what was State land in the past, had become “private land” for purposes of the Mining Rights Act and the Precious Stones Act 73 of 1964.\(^{26}\) The Lebowa Mineral Trust Act preserved other existing rights.\(^{27}\)

The affairs of the LMT were administered by the Chief Minister of Lebowa as Trustee, who was authorised to delegate his powers and functions as

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\(^{17}\) GN 67 in GG 16511 of 1995-09-07.

\(^{18}\) S 110, Schedule 1.

\(^{19}\) See Badenhorst and Vrancken “Do Mineral Rights Constitute ‘Constitutional Property’? *Lebowa Mineral Trust Beneficiaries Forum v The President of the RSA 5313/2001 (TPD)* unreported” 2001 Obiter 496 499.

\(^{20}\) S 2(1).

\(^{21}\) S 12(1); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 4 SA 375 (T) 377H; and *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2001 2 All SA 388 (T) 389g-h.

\(^{22}\) S 1.


\(^{24}\) S 14 of the LMT Act.

\(^{25}\) 1983 1 SA 164 (A) 205F-206D.

\(^{26}\) Kaplan and Dale 42.

\(^{27}\) See s 17.
trustee to the Minister of Economic Affairs and Technology of Lebowa.\textsuperscript{28} A Board was established\textsuperscript{29} to advise the trustee and the Minister of Economic Affairs and Technology, \textit{inter alia}, on mineral rights in Lebowa.\textsuperscript{30} The Board was government-appointed and its tenure existed at the pleasure of the Government.\textsuperscript{31}

The LMT had to be administered “for the material benefit, and moral welfare of Lebowa and its inhabitants”.\textsuperscript{32} The LMT had as its objectives:\textsuperscript{33}

\begin{enumerate}
\item to take over from the Lebowa Government all government-owned mineral rights in respect of land situated in Lebowa;
\item acquire mineral rights in Lebowa from holders of mineral rights;
\item to hold all trust-owned mineral rights for the benefit of Lebowa;
\item to ensure the optimal exploitation of the mineral resources of Lebowa, which included beneficiation and processing of any material extracted in the course of mining operations;
\item to conduct surveys or to cause surveys to be conducted in order to determine the existence and extent of mineral resources in Lebowa;
\item if required, to hold mineral rights as trustee on behalf of a private person or association of persons;
\item to provide for the replacement of exhausted mineral deposits by other development;
\item for the purpose of optimal exploitation of mineral resources, to grant authority to third parties to prospect and mine on land in respect of which mineral rights vest in the Trust;
\item the maximal utilisation of local manpower, services and goods in the mineral industry;
\item to guard against damage to the environment due to prospecting and mining operations; and
\item to collect information regarding mineral resources in Lebowa and the viability of the exploitation thereof at any given time.
\end{enumerate}

Apart from other powers granted, the LMT was empowered to acquire mineral rights in Lebowa.\textsuperscript{34}

\textsuperscript{28} S 2(3).
\textsuperscript{29} S 5.
\textsuperscript{30} S 6(1)(2).
\textsuperscript{31} \textit{Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd supra} 392i-j.
\textsuperscript{32} S 2(2)
\textsuperscript{33} S 3.
\textsuperscript{34} C A(,..\)
In terms of section 15 of the Lebowa Mineral Trust Act no person could prospect for or mine minerals on land in respect of which the mineral rights vested in the LMT, without the written permission of the Minister of Economic Affairs and Technology (or other Cabinet Minister acting in his stead). If the LMT held the mineral rights in trust for a tribe, community or person, such prospecting or mining could only take place with ministerial permission, given in consultation with the tribe, community or person. Ministerial consent to prospect or mine did not exempt the holder of permission from compliance with legislation governing the exploitation of mineral resources in Lebowa. A change in the use of the surface of land in a manner which may adversely affect mining development on land in respect of which mineral rights vested in the LMT, could only take place with ministerial consent.

In terms of section 235(6) of the interim Constitution, the executive authority which had previously vested in the Minister of Economic Affairs and Technology, as well as in the Chief Minister in terms of the LMT Act, vested during 1996 in the President of the Republic of South Africa. Legislative and executive power in the functional area of mining vested in Parliament and the national executive respectively, and not in the provincial governments.

In order to remove any possible legal uncertainty regarding the trustee of the LMT and its constitutionality, the administration of the LMT Act was assigned by Cabinet to the Minister of Mineral and Energy Affairs. As a result, any reference to either the Chief Minister or the Minister of Economic Affairs and Technology, was to be taken to be a reference to the Minister of Mineral and Energy Affairs.

The LMT Act was repealed on 30 September 2001 by the national government in terms of the Abolition of Lebowa Minerals Trust Act 67 of

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35. For purposes of s 15, “minerals” included “all ores of minerals, all clays, stone, earths and other mineral substances of whatever nature which may be dug or extracted or separated from the ground” (s 15(3)). The concept “mineral” was defined in s 1 as “any base mineral, precious metal or natural oil as defined in the Mining Rights Act ... any precious stones as defined in the Precious Stones Act ... and any source material as defined in the Nuclear Energy Act, 1982 ...”

36. Definition of “Minister” in s 1.

37. S 15(2).

38. S 15(4).

39. See further s 16.

40. Proc R3 in GG 16952 of 1996-02-02; and Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust supra 381B-C.

41. S 126 read with Schedule 6.


43. Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust (supra) 381D-E.
2000. Upon said repeal, the LMT was abolished and mineral rights (including obligations of the LMT relating to mineral rights) were vested in the State (that is, the national sphere of government). As holder of such mineral rights, the State could dispose of or deal with such rights in the same manner as any other private holder of mineral rights. The Registrar of Deeds had to make the necessary entries and endorsements in terms of the Deeds Registries Act 47 of 1937 to give effect to such vesting. All (other) assets, liabilities, rights and obligations of the LMT vested in the State on 30 September 2003. Any legal act under the Lebowa Minerals Trust Act or by the LMT prior to the repeal of the Lebowa Mineral Trust Act, remains in force.

The Minister of Mineral and Energy Affairs is empowered to authorise any officer or employee of the Department of Mineral and Energy Affairs in writing to exercise or perform any power or duty conferred or imposed in terms of the Abolition of the Lebowa Minerals Trust Act.

In Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa it was decided that the applicant (acting on behalf of the people of the Northern Province as beneficiaries of the LMT) did not have the necessary locus standi to bring an action for an order striking down the Abolition of the Lebowa Mineral Trust Act as unconstitutional. The court held further that no rights of the inhabitants of Lebowa or Northern Province had been infringed.

5 RURAL AREAS ACTS

In terms of section 51(3) of the Rural Areas Act 9 of 1987 no prospecting for or mining of metals, precious stones, natural oil or any other minerals could be undertaken on any land within a board area, except with the consent of the Minister of Local Government, Housing and Agriculture: House of
Representatives. The Minister could, after consultation with the board of management, impose certain conditions. The Minister of Land Affairs replaced said Minister during 1994 by proclamation as executive authority for purposes of section 51(3). During 1996 the administration of section 51(3) was assigned by proclamation to the Minister of Mineral and Energy Affairs. The cabinet resolved, however, that the application of section 51(3) had to be undertaken in consultation with the Minister of Land Affairs.

The Transformation of Certain Rural Areas Act 94 of 1998 repealed the Rural Areas Act. All mineral rights referred to in sections 51(1) and (2) of the Rural Areas Act were vested in the State. Prospecting for or mining of minerals on land situated in a board area could only be undertaken with the written consent of the Minister of Mineral and Energy Affairs in the form of a prospecting permit or mining authorization. The Minister could only have consented after consultation and with approval of the entity concerned, and this approval could not be unreasonably withheld.

When granting such consent the Minister of Mineral and Energy Affairs had to impose such fees, restrictions and conditions as he or she deemed fit with reference to certain criteria.


6 KWAZULU-NATAL INGONYAMA TRUST ACTS

In the former KwaZulu self-governing territory, land and mineral rights were transferred to the Ingonyama Trust by the introduction of the KwaZulu-Natal Ingonyama Trust Act 3 of 1994 (KZ) on 24 April 1994. The Act, formerly an Act of the KwaZulu Legislative Assembly, was given the status of a Schedule I.
National Act, namely the KwaZulu-Natal Ingonyama Trust Act, due to the fact that is now administered by the Minister of Agriculture and Land Affairs of the National Government or any other Minister designated by the President. The KwaZulu Ingonyama Trust Amendment Act 9 of 1997 has subsequently amended the Act.

The Act makes provision for the establishment of the Ingonyama Trust as a corporate body. The Ingonyama is the trustee of the Ingonyama Trust. The Trust is to be administered subject to the provisions of the Act by the Ingonyama and the KwaZulu-Natal Ingonyama Trust board. The Trust has to be administered for the benefit, material welfare and social wellbeing of the members of the tribes and communities, established in a district and the residents of such district.

Land and real rights (including mineral rights), which had been vested in the Government of KwaZulu prior to the commencement of the KwaZulu-Natal Ingonyama Trust Act, were vested and transferred to the Ingonyama as trustee of the Ingonyama Trust for and on behalf of the abovementioned tribes and communities. Such transfers took place free of transfer or stamp duties, but subject to existing rights or obligations over the land. The Registrar of Deeds is empowered to make the necessary endorsements and entries in his or her records in the Deeds Office.

The Mineral and Petroleum Resources Development Act has not repealed the KwaZulu-Natal Ingonyama Trust Act.

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68: Editorial note to Act 3 of 1994 (KZ) in Butterworth's Statutes of SA.
70: S 2(1).
71: S 2(3).
72: S 2(3). See further s 2A.
73: As contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 and referred to in the second column of the Schedule to Act 3 of 1994 (KZ).
74: Referred to in the first column of the Schedule to Act 3 of 1994 (KZ).
75: S 2(2). See further s 3(2).
76: The land includes land (a) situated in the area for which the Legislative Assembly of KwaZulu was established into the Self-Governing Territories Constitution Act 21 of 1971; and (b) acquired under Proc R232 in GG 10560 of 1998-12-24 and Proc R28 in GG 13906 of 1992-03-31 or any other law.
77: S 3(2)(1)(a).
78: S 3(3).

CONTINUED RELEVANCE OF REPEALED PROVISIONS

Schedule II of the Mineral and Petroleum Resources Development Act 28 of 2002, provides as follows:

(a) a permission to prospect in terms of (i) section 16(1) of the Bophuthatswana Land Control Act, (ii) section 16(1) of the Venda Land Control Act, (iii) section 15 of the Lebowa Mineral Trust Act, (iv) section 51(1) of the Rural Areas Act (House of Representatives), or (v) section 6 of the Transformation of Certain Rural Areas Act, and in respect of which prospecting is being conducted, as well as a mineral right and prospecting permit, is deemed to be an "old order prospecting right";  

(b) a permission to mine in terms of (i) section 16(1) of the Bophuthatswana Land Control Act, (ii) section 16(1) of the Venda Land Control Act, (iii) section 15 of the Lebowa Mineral Trust Act, (iv) section 51(1) of the Rural Areas Act (House of Representatives), or (v) section 6 of the Transformation of Certain Rural Areas Act, and in respect of which mining operations are being conducted, as well as a mineral right and mining authorization, is deemed to be an "old order mining right";  

(c) a permission to prospect or mine in terms of (i) section 16(1) of the Bophuthatswana Land Control Act, (ii) section 16(1) of the Venda Land Control Act, (iii) section 15 of the Lebowa Mineral Trust Act, (iv) section 51(1) of the Rural Areas Act (House of Representatives), or (v) section 6 of the Transformation of Certain Rural Areas Act, and in respect of which no prospecting or mining is being conducted, as well as a mineral right and prospecting permit or mining authorization, is deemed to be an "unused old order right"; and  

(d) the mineral rights held by the Ingonyama Trust and prospecting or mining rights granted by the Trust qualify as the respective categories of "old order rights".

The abovementioned "old order rights" are subject to the transitional arrangements contained in Schedule II to the Act (to which all old order rights in general are subject). The transitional arrangements have been discussed on a previous occasion and the reader is referred thereto. These transitional arrangements entail in a nutshell that "old order rights" are

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80 Definition of "old order prospecting right" in Item 1(iv) of Schedule II to the Mineral and Petroleum Resources Development Act read with Category 4 in Table 1.
81 Definition of "old order mining right" in Item 1(iii) of Schedule II read with Category of Table 2.
82 Definition of "unused old order right" in Item 1(ix) read with Category 11 in Table 3.
83 See Badenhorst 2002 Obiter 268-281
capable of being converted into new order prospecting or mining rights upon application for granting of or conversion to such rights.

8 CONCLUSION

Prospecting or mining rights granted in terms of the provisions of apartheid laws are deemed to be "old order rights" for the purposes of transitional measures contained in the Mineral and Petroleum Resources Development Act. Upon compliance with the transitional measures, these old order rights are capable of being converted into new order prospecting rights and mining rights. Upon conversion of these rights, remnants of provisions in apartheid laws pertaining to minerals will disappear.

Mineral rights held by the Ingonyama Trust and prospecting or mining rights granted by the Trust are subject to the transitional arrangements and would qualify as the respective categories of old order rights capable of conversion into new order rights. The Ingonyama Trust will have to be vigilant to ensure that conversion of all its mineral rights takes place during the periods of grace.

The closure of the prospecting and mining rights in terms of apartheid laws can be seen as a final chapter in consolidation of the various mineral law systems which existed during and even after apartheid.