

**A LEGAL ASSESSMENT OF THE IMPACT OF OWNERSHIP OF
MINERAL RIGHTS ON COMMUNAL OR RURAL LAND
OCCUPIERS**

by

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(MINI-) DISSERTATION

Submitted in (partial) fulfillment of the requirements for the degree of

Qualification

In

Master of Laws in Development & Management Law

In the

**FACULTY OF MANAGEMENT AND LAW
(School of law)**

at the

UNIVERSITY OF LIMPOPO

Supervisor: Prof Theo Scheepers

2011

DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of **Master of Laws in Development & Management Law** has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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01 June 2011

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Chapter 1

1. 1 Introduction

Large deposits of minerals including platinum, coal, copper, chrome, etc, have been discovered in rural areas of the North West, Mpumalanga and Limpopo provinces. These areas are mostly occupied by rural communities under traditional leadership. Some of the areas are described as the poorest of the poor due to their rural nature and underdevelopment, despite the presence of rich minerals deposits. Various mining companies have been granted prospecting and mining rights to extract the minerals. Mining activities have impacted negatively on these communities, affecting their ploughing, grazing and residential land.

Custody of all minerals in South Africa vests in the state, in terms of the Mineral and Petroleum Resources Development Act 28 of 2002¹, (MPRDA). The state has regulatory² powers to grant mineral rights to applicants³. Mining rights may be granted to any applicant, even on rural or communal land occupied by communities, sometimes, from time immemorial. Communities are occupying such land for communal use, for example, residence, grazing and farming. Custody and regulation of mineral rights by the state applies equally to rural land as it does to privately owned land.

1. 2 Purpose of the study

This study concentrates on rural and communal land ownership, occupied by communities as undivided entities, and how the land is impacted upon by ownership of mineral rights. This type of land tenure applies in most cases to rural communities. Occupation does in this form not amount to ownership of the land. In most cases the state owns the land in trust for use by communities. Many rural communities occupy land in this form of tenure. The research examines the approach being adopted by

¹ s110 read with schedule II

² s 3(1)

³ s 3(2)

mineral rights holders in exercising their rights to extract minerals, also the role played by government in mining, on communal land.

The stage for mining on rural communal land was set up by the Land Acts of 1913 and 1936⁴, as will be seen later. Communities occupying this land, some since time immemorial, are not conversant, or aware that they are not the registered owners of the land. They regard the land as belonging to them from their forefathers. That the state is the owner is somewhat absurd and illogical to them. No amount of persuasion can convince them that they are not owners of the land, because of the occupation thereof.

MPRDA provides that the mineral rights holder should consult with the owner or occupier of land, of his or her intention to prospect or to mine on the land. The situation at present, in rural areas is that mining rights have already been granted by the state to individuals or companies long before the promulgation of the MPRDA. The consultation envisaged by the Act⁵ does not appear to be of any effect or benefit to occupiers of land in respect of which mineral rights have been granted previously. One can argue that only the state as the registered owner of the trust land was consulted during the process of the application for mineral rights. One can further argue that members of the occupying communities were never informed or assisted to apply for mineral rights on the land they were occupying.

This argument may be deducted from the provision of section 5(4) (c) which states that;
*(4) No person may prospect for or remove, mine, conduct technical co-operation operation, reconnaissance operation; explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without
(c) notifying and consulting with the land owner or occupier of the land in question.*

Use of the words *owner or occupier* may be interpreted to mean that notification of either may be sufficient. It would be different if the section said *owner and occupier*. If applicant for mineral rights notifies the Minister of Land as the registered owner of rural

⁴ The Natives Land Act 27 of 1913 and the Natives Land and Act 18 of 1936

⁵ s 16(4)(b) MPRDA

land, he or she shall have complied with the requirement of the Act. He or she is not necessarily compelled to notify also the occupiers of rural land. This explains the fact that in most instances rural communities come to know of the matter when the mineral rights holder tries to enter the land to extract minerals.

1.3 The Problem

By virtue of being rural and largely illiterate, it appears that government was supposed to make a conscious and serious intervention on behalf of these communities. This study shows that conflicts between the communities and the mineral rights holders are in essence caused by the land tenure system application to trust land, which government has failed or is unable to undo. Mineral rights holders bear the brunt of dealing with communities in situations which are not necessarily of their own making.

The major cause of conflict between communities and mineral rights holders is the fact that rural or communal land is not registered in the names of the communities or individuals living in them. The land is registered in the name of the state and held in trust by the Minister of Land Affairs, for use by communities.

1.4 Objective

The objective of this research is to highlight:-

- the continuing apartheid land arrangements on communal or rural land in a democratic South Africa.
- the need to protect the property rights of the minority groups and consideration to maintain the economic balance.
- the dilemma that government finds itself in, being trapped in a wrong land policy.

1.5 Outcomes

The outcomes of this study will be to highlight the practical dilemma of the various role players and to suggest what needs to be done to rectify the situation.

1.6 Methodology

This is a desktop study which focuses on the theoretical and analytical method, comparing current land tenure system prevailing in rural land, and the legal requirements for acquiring mineral rights in the land. It evaluates the *defacto* and *dejure* situations in rural areas and the impact of mineral rights holding in these areas.

Chapter 2

OVERVIEW OF THE LAW GOVERNING RURAL LAND TENURE

This chapter provides an overview of the law governing the problem experienced by rural land owners or occupiers in South Africa, and their inability to access mineral rights in the land they occupy. The problem has been exacerbated by lack of a meaningful land tenure development among rural communities since the colonial days in South Africa. The problem has crossed over into the democratic dispensation which started in 1994.

Rural areas have for many years been largely excluded from the development processes. In the past few years mining activities started in these areas, especially in Limpopo and the North West. The confrontations between the mining companies and communities exposed this serious underdevelopment in the rural areas. The chapter will provide an overview of the law governing the problem experienced by rural land owners and their inability to access mineral rights in their land.

The ushering in of the democratic dispensation in South Africa in 1994, necessarily had to review and repeal a litany of apartheid laws, including several land tenure laws. Ownership of land by the previously disadvantaged persons was among the items high on the agenda of the Convention for a Democratic South Africa (CODESA)⁶ in Kempton Park.

2.1 The Natives Land Act 27 of 1913

The Act provided for the acquisition of land by *natives* only within certain *scheduled areas*, and forbade acquisition in others. It imposed territorial segregation, specifically to get rid of African land ownership and share-cropping⁷. Davenport and Hunt⁸ state that the reserves or locations were established as places of refuge to which the dispossessed could go, or as labour pools for the benefit of new white occupiers. Charles van Onselen,

⁶ Text of Declaration of Intent signed by the majority of the South African political parties in December 1991

⁷ DL Carey Miller with Anne Pope: Land Title in South Africa Juta 2000 (at page 20)

⁸ TRH Davenport and KS Hunt, *The Rights to the Land (Cape Town 1974 (2))*

*The Seed in Mine (1996)*⁵⁰, quoted by Carey Miller⁹ states that the Act was to eventually confine 80 percent of the country's population to the ownership or occupancy of 13 percent of land. Davenport and Hunt identify the Act as the *first pillar of segregation*. This Act was repealed by Chapter 1 of the Abolition of Racially Based Land Measures Act 108 of 1991.

2.2 The Natives Land and Act 18 of 1936

This Act was subsequently renamed the Development Trust and Land Act 18 of 1936. It promoted farming by putting emphasis on supervised trust tenure system by Africans. The trust tenure removed control of land from the chiefs and placed it in the hands of departmental officials. These officials literally administered chieftaincy by approving or disapproving the allocation of land by the chiefs in the trusts. They were the ones who issued permissions to occupy sites by members of the community. The system of trust farms, which affects rural villages, still exists today. The democratic dispensation, through the Interim Constitution Act of 1994¹⁰ and the final Constitution Act of 1996¹¹, as well as a number of other land development acts are unable to dismantle the trust land tenure system established by the abovementioned Acts. This Act was also repealed by Chapter 1 of the Abolition of Racially Based Land Matters Act 108 of 1991.

2.3 The Bantu Homelands Citizenship Act 26 of 1970

This Act introduced a system which deemed black South Africans to be citizens of one or the other homeland territories in accordance with their ethnic groups. The effect was to strengthen the rural tenure system and to remove them from the South African citizenship. This Act was also repealed by Chapter 1 of the Abolition of Racially Based Land Matters Act 108 of 1991.

Vast mineral deposits of platinum, coal, diamond, nickel, chrome and others were subsequently discovered in the rural areas of the former homelands. When democracy was introduced in South Africa, rights to most minerals in trust farms had already been

⁹ Miller et al (at page 20)

¹⁰ The Interim Constitution Act 200 of 1993

¹¹ Act 108 of 1996

given to individuals or companies other than the occupiers of the farms. Mineral rights holders had the right to mine and remove minerals from the land. The mineral rights holder actually has a better right than the occupiers (tribes), to go on to the land and extract the minerals.

2.4 The Common Law Principles

A principle of our common law is that owner of land is the *dominus* of the whole land including the air space above and everything below the surface ¹²(*cuius est solum est usque ad caelum et ad inferos*). The *cuius est solum* principle is a Roman Dutch Law principle hence it forms part of our common law. The principle is effective if the owner of the land is also the owner of the minerals below it. In the case of rural land one would say, if occupiers of trust land were also registered owners of minerals, the *cuius est solum* principle would apply.

This common law rule was repealed by section 3(1) of the MPRDA¹³ which provides that *Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans*. Section 4(2) of the same Act goes further to say that *in so far as the common law is inconsistent with the MPRDA, the Act prevails*.

The problem arises out of a legal system in South Africa, which permits separation of title to land from that to mineral rights in the land. This separation is recognised by the common law, statutory law and case law.¹⁴

A right to minerals can be subtracted from the land ownership by severing it from the title to the land.¹⁵ This severance can be done also in respect of communal or trust land. The occupiers being communities are in most cases not aware of such severance and to whom the right to the minerals has been granted. In almost all cases rights to minerals have invariably been granted to persons other than the occupiers, that is, the tribes living on

¹²BLS Franklin and M Kaplan (*The Mining and Mineral Laws of South Africa Durban Butterworths 1982*)

¹³ Act 28 of 2002

¹⁴ Nolte v Johannesburg Investment Co Ltd 1943 AD 295 (at 315)

¹⁵ Webb v Beaver Investments (Pty) Ltd. and another, 1954 (1) SA (TPD), (at page 34 C – H and page 35 A.)

such land. This is the point where one would have expected that government should have intervened to inform occupiers of trust land, of the pending applications for mineral rights in their land.

MO Dale¹⁶ and his co-writers are of the view that surface owner includes also the state. Registered owners include trustees, liquidators, judicial managers, administrators, executors, guardians, tutors, curators and spouses. Lawful occupiers include lessees, holders of rights of usufructs or inhabitants, guests, invitees and holders of rights under any legislation, which relies on possession, dispossession or occupation. Dale et al are further of the view that *consultation with the land owner or lawful occupier...*, does not mean the obligation to consult with the owner and lawful occupier.¹⁷ This therefore, means that consultation with the owner, in the case of communal or trust land being the Minister (state), and not with communities occupying it, may be sufficient.

¹⁶ MO Dale, L Bekker, FJ Bashall, M Chaskalson, C Dixon, GL Grobler and CDA Loxton South African Mineral and Petroleum Law, Butterworths 2006 (at page 68)

¹⁷ Dale et al (at page 69)

Chapter 3

DE FACTO OWNERS AND DE JURE OWNERS OF LAND

3.1 De facto owners

De facto ownership of land in rural areas is that black communities occupied these areas, some before colonialism, and some were forcefully removed from their land by colonial legislations, for example the Natives Land Act 27 of 1913 and the Natives Land Act 18 of 1936, to make way for the European settlers. Black communities were governed by customary laws under traditional leaders and were allocated ploughing and grazing land through a customary system. The land so allocated could be inherited by the successors from generation to generation. Where the land did not have an owner, perhaps due to lack of successors or to the fact that it had been abandoned, it reverted back to the chief or headman for re-allocation.

People who own land in this manner always regard themselves as rightful owners of land, largely by virtue of long occupation thereof. Communities would resist any interference by outsiders or government in their land. A curious situation is that land so occupied was never registered in the name of communities or individuals occupying it. This situation largely exists today as it did in 1913 and even before. It continues despite the emergence of a democratic dispensation in South Africa. *De facto* situation therefore is that occupiers of rural land regard themselves as owners thereof.

3.2 De Jure owners

De jure situation is that ownership of all land in South Africa must be registered in title to a specific person, (natural or juristic). Ownership of most rural land is registered in the name of the Minister of Land Affairs in trust, for the benefits and use of communities occupying it. Some farms are registered in the name of the traditional authorities for the benefits of the villages under such authority. Registration of rural land in the name of the Minister or traditional authority brings about a complication which causes conflicts in rural areas. The registration of land in the name of the Minister does not necessarily make specific reference to communities occupying the land. This gives the Minister the

sole right to deal with the land as he or she pleases, for example, to grant mineral rights to any person who applies in it, without any regard to *de facto* occupiers.

De facto occupier would then claim that they have a better right to the land by virtue of long occupation, whereas the Minister's powers are founded on registration of the land in terms of the law. Registration in the name of the Minister therefore means that government is the owner of the land.

This anomalous situation regarding ownership of rural land has escaped even the property clause (section 25 (1) – (6)) of the Constitution Act 108 of 1996, which provides that:

25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the properties;

(c) the market value of the property;...

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

When the Minister grants rights to mineral to a company, on land occupied by a community, the *de jure* situation is that the minister's action does not amount to

expropriation as the land is registered in his or her name. The *de facto* situation, however, as far as the communities are concerned, the granting of mineral rights amounts to expropriation without compensation or redress. MPRDA, it appears does not do enough to assist communities occupying rural land, hence a need identified by Government, mining houses and communities for its amendment.

In the view of the communities occupying rural land, *de jure* situation therefore works harshly against *de facto* situation.

Chapter 4

STATUTORY LAW AND CASE LAW

4.1 Statutory Law

4.1.1 The Abolition of Racially Based Land Measures Act 108 of 1991

This Act repealed the Black Land Act of 1913 and the Development Trust and Land Act 18 of 1936 the Bantu Homelands Citizenship Act 26 of 1970 as well as other related racially based land laws. The repeal of these Acts however, did not undo the tenure system which had been entrenched by the said laws. The trust land tenure system still continues unabated as it did before they were repealed. Post democratic land reform acts such as the Development Facilitation Act 67 of 1995, The Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour tenants) Act 3 of 1996, the Communal Property Association Act 28 of 1996, The Interim Protection of Informal Land Rights Act 31 of 1996 and the final Constitution are all suggesting some form of land tenure development, but none suggests the undoing or upgrading of the trust land tenure system.

4.2 The Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA)

Section 5(2) of the MPRDA¹⁸ provides that *(2) the holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to or acquired by or conferred upon such holder under this Act or any other law.* Section 5(3) provides that *(3) Subject to this Act; any holder of a prospective right, a mining right, exploration right or a production right may –*

- (a) Enter the land to which such right relates together with his or her employees and may bring on to that land any plant machinery, or equipment and build, construct or lay down any surface, under ground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be.*

¹⁸ Act 28 of 2002

- (b) *Prospect, mine, explore, or produce as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted.*
- (c) *Remove and dispose of any such minerals found during the course of prospecting, mining, exploration or production, as the case may be.*

4.3 Mineral rights holder has a better right

From this statutory provision it can clearly be seen that the mineral rights holder has a better right than the occupier or owner of land. On the other hand occupiers (tribes) feel they have a better right by virtue of long occupation of such land. The holder of mineral right may (a) enter, (b) prospect, mine for minerals or explore, or produce petroleum, (c) remove and dispose of a mineral or petroleum found during the course of prospecting, mining, exploration or production, (d) use water as specified in the National Water Act... (e) carry out any other legal activity incidental to prospecting, mining, exploration or production purposes.¹⁹ Section 16 (4) of the MPRDA provides for *(b) notification in writing and consult with the land owner or lawful occupier and any other affected party and submit the results of the consultation within thirty days from the date of notice.* Section 1 of the MPRDA defines *owner* in relation to land, *(ii) if it is land owned by the state means that the state together with the occupant thereof...*

The mineral rights holder may therefore enter communal land and explore, remove minerals, use water as is necessary and carry out any other legal activity incidental to mining. At this point it does not appear the tribes have any substantial input to the activities of the mineral rights holder on the land they occupy. The mineral rights holder may have consulted with the state as the registered owner of the trust land, and in some cases with the chief of the area concerned. But in most cases the affected communities, it appears are not consulted until they see the actual mining activities begin.

Mining operations may entail taking away grazing and arable land of the communities. In some cases communities have to be relocated to other areas to give way to mining

¹⁹ P J Badenhorst, H Mostert, M Carnelly, R T Stein and M van Rooyen: *Mineral and Petroleum Law of South Africa Juta 2004 (at 13-21-22)*

activities. In instances like these communities would normally resist any mining activity by the mineral rights holder. This may sometimes result in acts of violence, damage to property and general lawlessness within the community.

4.4 The Common Law position re-emphasized

Section 4(1) of the MPRDA provides that to the extent that the common law is inconsistent with the Act, the Act prevails. Here, the legislature is trying to move away from the traditional presumption in the interpretation of statutes that a statute should derogate as little from the common law as possible.²⁰ It does not appear however, that there has been any significant change from the common law in regard to mining on rural land. The common law was stated in the case of *Hudson v Mann and another*,²¹ where the court held that *The Principles underlying the decisions appeared to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derived title through him. In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploration. The solution of a dispute in such a case appears to me to resolve itself into a determination of a question of fact, viz, whether or not the holder of the mineral rights acts “bona fide” and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forgo ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner. The fact that the use to which the owner of the surface rights puts the property is earlier in point of time cannot derogate from the rights of the holder of the mineral rights.*

The right of entry in the land by the mineral rights holder, as stipulated by section 5(3) of the MPRDA, should be read with section 54 (1) of the same Act, which provides that if the surface owner or occupier –

²⁰ Budenhorst et al (at page 13-2)

²¹ 1950 (4) SA 485 (T) (at 488 D)

- (a) *Refuses to allow such holder to enter the land*
- (b) *Places unreasonable demands in return for access to the land and or*
- (c) *Cannot be found in order to apply for access,*

all give weight to the common law approach as stated in *Hudson v Mann*²².

4.5 Case Law

A recent case which, one would say clarifies the modern approach to the conflict between mineral rights holder and surface rights owner or occupier, is that of *Anglo Operations v Sandhurst Estates (Pty) Ltd.*²³ In this case the judge approved the decision in *Kakamas Bestuursraad v Louw*²⁴ which equated the exercise of mineral rights to a servitude, and secondly that the *servituted* rights must be exercised *civiliter modo*. He rejected the English law principle that *The right to have the surface of land in its natural state supported by the subjacent minerals is a right of property and not of easement; and that a lease or conveyance of the minerals, even though accompanied by the widest of working ... carries with it no power to let down the surface ...*²⁵ The judge in the Sandhurst case rejected the decision in *Coronation Collieries vs Malan*²⁶ and *London and South Africa Exploration Co v Rouliot*²⁷ and said that this English law principle did not form part of our law. He emphasised that the principle was a judge made law which did not form part of the Roman- Dutch Law.

It means therefore that the position now, in terms of case law is as it was in 1950, (*Hudson v Mann*), which was decided during the height of the land segregation era. The democratic dispensation in South Africa did not bring about any new approach by the courts to the problem of land tenure in rural areas.

In *Alexkor LTD and Another v The Richtersveld Community and Others 2004(5) (CC) 460*, the Constitutional Court made a landmark decision regarding land claimed by a

²² fn 21 supra

²³ 2006 SCA 146 (RSA)

²⁴ 1960 (2) SA 202 (A) 216H – 217C

²⁵ *Coronation Collieries v Malan* 1911 TPD 577

²⁶ *Coronation Collieries supra* (at page 590-5910

²⁷ (1891) 8 SC 75

previously dispossessed community. The decision was courageous in that it concluded that the concept of dispossession in section 25(7) of the Constitution and section 2 of the *Interim Protection of Informal Land Rights Act 31 of 1966* (IPILRA), is a much broader concept than the definition of a *right in land* given in the IPILRA.²⁸

The court confirmed the decisions of the Supreme Court of Appeal and the Land Claims Court that the real character of the title that the Richtersveld community possessed in land was a right of communal ownership under indigenous law. The court said the content of that right included the right to exclusive occupation, use of water, grazing and hunting and to exploit natural resources which included mining. The court confirmed that this right existed prior to the land annexation by the British Crown in 1847. It concluded that prior to annexation the Richtersveld community had a right of ownership in the land under the indigenous law.

This decision is important in that it confirms that communities in rural land can claim their rights under indigenous law which existed even before the annexation era and the Apartheid land Acts, where they had a good case.

²⁸ At page 44 par 88

Chapter 5

DEFINING AND IDENTIFYING PROBLEMS

5.1 The Problem at community level

The problem of *trust land* started in the pre-Union era, especially in Natal and the Transvaal when the white governments in the Colonies placed land owned by Africans in the hands of white trustees to the exclusion of any meaningful system of direct ownership.²⁹ Instead of developing and upgrading the system of land ownership in the rural communities, the colonial governments capitalised on the communal nature of the rural communities, and have put large numbers of black people in trust farms and reserves.

The problem manifests itself when mineral rights holders attempt to extract the minerals from communal land. In most instances the occupiers would not know anything about ownership of mineral rights on the land they have occupied for a long period. These communities would have established large villages with households, kraals, grazing and farming land, through the assistance of traditional leaders. In such cases the issues of mineral rights holding do not play an important role to these communities. Any disturbance by the mineral rights holder is viewed with hostility. When the holder of mineral rights tries to extract the minerals, it is then that communities become aware, for the first time, of the imminent rights of the holder. They are therefore taken by surprise and regard the mineral rights holder as an intruder in their land.

5.2 Reaction by communities

The normal reaction in such cases has been for the communities to refuse the mineral rights holder access to their farm. On the other hand, the mineral rights holder would feel he or she has a better right in terms of the law and would insist to go on to the land. In

²⁹ Miller et al (at page 18)

several instances, this sparked violence, as it was the case around some platinum mines in Rustenburg, Mokopane and Burgersfort. The risk is that the mineral rights holder's machinery may be damaged and communities may be divided, accusing one another of colluding with the mineral rights holder. The mineral rights holder's reaction would normally be to invoke section 54 (1) of the MPRDA and inform the relevant Regional Mining Manager that the occupier of the land – (a) *Refuses to allow such holder to enter the land.*

(b) *Places unreasonable demands in return for access of the land or*

(c) *Cannot be found in order to apply for access.*

Rural communities on communal land are mostly poor, with no infrastructural facilities such as water, electricity, schools, clinics, roads etc.

When they see the mineral rights holder entering their land, they would normally regard him or her as someone who was coming to alleviate their plight; they then put extensive developmental demands. The demands immediately become unreasonable in terms of section 54 (1)(b) of the MPRDA. Whereas communities see the activities of the mineral rights holder as an opportunity, the holder sees the community as a threat and a stumbling block towards his income and profit.

5.3 Reaction by government through the Regional Mining Manager

When the Regional Manager comes in at this stage probably, there would have been confrontations and running battles between occupants of the land and the mineral rights holder. The intervention by the Regional Manager does not usually become effective as he or she would be compelled to show the community that in terms of the MPRDA the mineral rights holder has to be given access and that any denial thereof may be regarded as unreasonable and therefore punishable. The intervention by government through the Regional Manager at this stage becomes too late and inadequate, especially if one considers the fact that there may have not been any meaningful prior consultation with the affected community, regarding mineral rights holding. On communal land, be it trust land or any land held or occupied in terms of any law for communal use, government

should play a leading role in educating the affected communities, and even assisting them in regard to how they may apply for mineral rights on their land.

It is supposed to be clear from the beginning to the communities that they have a right to apply for the minerals, like everybody. They should actually be assisted and encouraged to apply so that they may have a real sense of ownership of the mining activities around them. Even if the mineral rights holder is an outsider, they should know their role and benefit from the whole mining activity. At present the negotiations of extracting minerals on rural land are started by the mineral rights holder. This stage is too late for proper consultation and negotiations with communities. In some cases, extraction of minerals requires relocation of some villages to areas away from mining activities.³⁰

5.4 Relocation of rural villages

As already mentioned, some mining activities require communities to relocate from areas they have occupied for many years, to new areas. The reason for relocation in most cases may be that villages are sitting on minerals or that they are too close to the mining activities, that mining may become hazardous to them and their properties. Relocation is very emotional, sensitive and difficult where villagers have established themselves for many years.

Villages are more effectively structured than informal settlements. A cultural fibre is very strong in rural villages because of their communality and inter-dependence. Theodore E. Downing³¹ regards relocations to be mining induced displacements and re-settlements. This is quite true because relocation does not start with the affected communities, but with mineral rights holders. It is the mines that plan and rehearse the relocation strategies before they are taken to the communities for approval.

³⁰ Relocation of Ga-Pila community from Sandsloot farm to Sterkwater farm in Mokopane in 2001, Relocation of Ga-Puka and Ga-Sekhaolelo villages in Mokopane from Zwaartfontein and Overijssel farms to Armoede and Rooibokfontein farms in 2007.

³¹ Theodore E. Downing (Mining, Minerals and Development No. 58 of April 2002 – Avoiding New Poverty: Mining induced Displacements)

When communities are involved, they may not have sufficient time to comprehend the magnitude of what the relocation involves. Downing³² maintains that relocations will be a significant issue *as rich mineral deposits are found in areas with relatively low land acquisitions ... that are being exploited with open cast mining and allocated in regions of high population density... with poor definitions of land tenure and politically weak and powerless populations, especially indigenous peoples.* The effects of relocations are loss of physical and non-physical assets such as homes, communities, productive arable land, grazing land, cultural sites, social structures and cultural identities. The purpose of mining is profit making and therefore there is always a risk of under-financing of relocations.

5.5 The risks of relocations

Downing quotes the World Bank Group's policy on relocation that the *Bank experience indicates that voluntary resettlements under development projects, if unmitigated, often give right to severe economic, social and environmental risks: productive systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environment where their productive skills may be less applicable and the competition for resources great; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost.*

A society which has existed for many years can quickly be disrupted and destroyed by relocation. The cause of collapse or near collapse of relocation negotiations can be attributed to the fact that, as the relocation unfolds, communities, (even if they were part of the initial negotiations) find that relocation involve more than they had thought or imagined, such as exhumation of graves, demolition of houses etc. Some of members of the community may start to withdraw from the relocation agreements and become divided. As they divide, the risk of violence and infightings are heightened. They often accused one another of being bribed or co-opted by the mineral rights holder. This is

³² Downing (fn, 23 at page 3)

usually the stage where government starts to be seriously involved because of possible instability of the mining activities and the community's day to day life.

5.6 Inadequate intervention by government

Interventions by the government are more to quell down the situation than to negotiate the future for communities and the mining companies. Mariaan Olivier³³ wrote to indicate this form of intervention by government that *Mining Company Anglo Platinum said that negotiations with communities around its Potgietersrus operation, which refuse to be relocated to make way for mining, were continuing. This comes as hundreds of angry members of the Ga-Puka and Ga-Sekhaolelo communities blocked roads in the villages earlier this week to prevent the start of the relocation of around 1000 people to new villages near Anglo Platinum's PP Rust mine ... The differences over the relocation were between the Section 21 companies that represent community interests during the relocation and the Community Development Committees formed earlier this year to oppose the Section 21 company representation ... Other parties attending and facilitating the discussions were the PP Rust mine and the Motlhotlo village relocation project team, the office of the Premier of Limpopo, the Mogalakwena municipality and the South African Police Services.*

Government is always aware, through the Department of Minerals and Energy, as to who has been granted mineral rights and which communities are affected. When the mineral rights holder applies for a mining license in terms of section 22 (1) (g) of the MPRDA, it requires that *a social and labour plan* must be supplied. From the social and labour plan, government is having an opportunity to consult and educate communities in time, of possible effects of mining activities in their land. Government is further having the powers to suggest relevant changes in the social and labour plan, in a manner that would be accepted by communities.

³³Mining Weekly published 30 May 2007: Talks continuing into PP Rust relocations Anglo Plat (at page 1)

5.7 Negotiations left to mineral rights holders and communities

At present such negotiations are left to mineral rights holders and communities concerned. Communities would under such circumstances, obviously negotiate from a powerless stand point and may agree to terms which may not be favourable to them. On the other hand, the mineral rights holder normally experiences problems with communities after he or she had already started with the mining process. One may be persuaded to say that government throws the communities and the mineral rights holders to the deep end, that they should see how to finish.

The mineral rights holder, at this stage shall have put his or her mining plan in place. Instead of starting with mining he or she would start to be engaged in long negotiations on social issues, which he or she would have not foreseen. The negotiations would become frustrating and costly to both the mineral rights holder and the community. The situation in the village would become very volatile. When government intervenes to quell uprisings in the communities it would start by involving the police force to try to bring the situation under control. This stage would not be an ideal one to discuss issues relating to land tenure and the benefits to communities, from the mining activities.

It is true that mining brings some visible development in the communities by virtue of its social responsibility. This usually comes in the form of infrastructural facilities such as electricity, roads, water supply, schools, health services etc. It further brings employment to the affected communities, as well as training and bursaries for students and mining workers. The development projects however, do not amount to equity sharing of profits. The occupiers of communal land believe they are entitled to equity over and above the developmental projects. The MPRDA does not prescribe sharing of profits as a requirement for granting of mining or prospecting rights. The mineral rights holder is however, not compelled in terms of the law to share proceeds of the minerals with communities.

Chapter 6

UNDERLYING ELEMENTS OF THE DILEMMA

6.1 Perpetuating aspects of the apartheid order

One would have expected that all unfair and racially based legislative arrangements would be repealed and discarded in the new democratic dispensation. Whereas the 1913 and 1936³⁴ Land Acts have been repealed, the situation of dispossession in rural areas created by these Acts, remains unscathed by the new land development acts, such as The Abolition of the Racially Based Land Measures Act 108 of 1991, The Development Facilitation Act 67 of 1995, The Restitution of Land Rights Act 22 of 1994, the Communal Property Association Act 28 of 1996 and the Constitution Act 108 of 1996.

The era of white usurpation of land started with the arrival of the Dutch East India Company in the Cape Colony in the seventeenth century. It continued with the Great Trek in the eighteenth century.³⁵ *By the twentieth century the combination of a strong expanding capitalist economy and system of land tenure in which the primary feature was outright ownership made it possible – indeed, easy-for the dominant political and economic group to assume and maintain overall control over rights to land. The politically and economically disempowered African people were only accorded limited rights by concession.*³⁶ The economic circumstances did not work to protect black people but in favour of the white people. The cutoff date of land dispossession stipulated by section 25(7) of the Constitution, to be the 19 June 1913, did not necessarily mean that dispossessions started in 1913 by the Natives Land Act 27 of 1913. This Act was referred to as the first pillar of apartheid because it applied to all provinces after various provincial ordinances on land were repealed.

The land tenure situation which now exists in the rural communities was put in place by the original colonialist powers. The land on which rural communities have been settled, largely belong to the state. Fourteen years after the inception of democracy it does not

³⁴ The Natives Land Act 27 of 1913 and the Natives Land Act 18 of 1936

³⁵ Miller et al (at page 8)

³⁶ Miller et al (at page 10-11)

appear that the state, as the title holder is intending, in the near future to transfer ownership to individuals staying in these farms. These communities remain vulnerable and some of them end being caught up in the problems of mineral rights holding by non villagers.

6.2 Failure of the Development Acts

The new land development acts and the Constitution Act do not suggest tempering with the trust or communal land arrangement. The case law also reverts to the common law situation as stated in *Hudson v Mann*³⁷, and confirmed in the recent case of *Anglo Operations v Sandhurst*.³⁸ The land tenure on rural or communal land, it appears is going to remain as it is for some time to come.

Terrence Mokale and Professor Theo Scheepers³⁹ confirm that urban development processes are mainly driven by the private sector, because it can not be done by the government alone. The reason is that government does not have enough resources to do development alone. This is the case in urban areas where land title is not a problem. In the case of rural land, development becomes even more difficult because of lack of land holding rights. Mokale and Scheepers⁴⁰ correctly sum it up that *for the Municipality who must develop its area; this hangover from apartheid is a reality on the ground long after the introduction of the White Paper on Land Development and Planning...*

Under the Communal Land Rights Act of 2004, the legislature tries to strengthen ownership of land by communities, by providing that such land may be registered in the Deeds Office in the name of the community. It is however, still not possible to give rights to land to individuals in the community, while it is also difficult for the community to take undivided decisions on all issues of development. In such cases the traditional leadership is often in control and large areas of land become unused, with no hope of

³⁷(fn 21) supra

³⁸(fn 22) supra

³⁹ T Mokale and T Shceepers (Prof): An Introduction To The Developmental Local Government System In South Africa: A Handbook For Councilors and Officials: Designworx Corporate 2006 (at page 139 – 140)

⁴⁰(fn 37) supra (at page 142)

development due to lack of funding. Restitution of land is always without ownership of mineral rights, as they remain to be regulated by the state.

The ANC National Policy Document⁴¹ proposes the use of mineral wealth of the country to promote sustainability and development of local communities. Its vision of rural development and land reform is a *need for a comprehensive and clear rural development strategy, which builds the potential for rural sustainable livelihoods...* It however, does not suggest any strategy which should be followed to improve land ownership in the rural areas. Rural communities on communal land therefore, continue to be adversely affected by the mineral rights holding on such land.

6.3 Restitution of land maintains the apartheid situation

Section 1 of the Restitution of the Land Right Act 22 of 1994 defines *restitution of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices*. The right in land is further defined as *any rights in land whether registered or unregistered ...* Occupiers of rural land are having unregistered rights to their land. They claim their rights from long occupation of the land. Even though their rights are unregistered, in terms of section 1 of the Restitution of Land Rights Act, it was not supposed to be an impediment to their claim to mineral rights on their land. One would be compelled to argue that they need to be treated equally like any other person having privately registered rights on land, especially where negotiations concern mineral rights on the land.

In the case of privately owned farms, the mineral rights holder would negotiate directly with the farm owner and settle on a good benefit to the farm owner. The price for the farm would immediately be influenced by the presence of minerals on it. The problem in rural farms however, is that restitution returns the apartheid status quo instead of conferring meaningful real right. Restitution of land, whilst not very helpful to benefit the previously dispossessed persons, is painstakingly slow. The Business Report⁴² quotes

⁴¹ ANC Conference of 27 – 30 June 2007 (at page 1)

⁴² dated 14 January 2008 (at page 15)

the Center for Development Enterprises that only 3 to 4 percent of previously owned land has been transferred to the historically disadvantaged groups.

6.4 Economic considerations

On the other hand, one cannot turn a blind eye to the fact that government had to do a balancing act between economic consideration and addressing the injustices of the past. The land reform policies put in place by government had to be subject to the economic feasibility. Government avoided the Zimbabwean style of land grabbing which destroyed its economy. Carey Miller⁴³ correctly states that *In respect of agricultural land the position is more complex because agricultural production – including, of course, production to feed the nation – is affected by the size of the units of farm land. This is however, not to say that small holder agriculture is without potential, although, of course, the historically dominant South African attitude – probably reflecting a significant strand of ulterior motive – was that its potential was limited.* In the large rural part of South Africa traditional land holding still exists. The role of customary law is recognised. Section 211 (3) of the Constitution provides *that the courts must apply customary law when that law is applicable.* Practice of customary law in respect of land ownership appears to be disadvantaging rural communities by denying them individual ownership of land

Carey Miller continues to express a strong view that *this factor has obvious potential implications for a redistribution programme; at very list it may mean an existing social pattern of land holding inconsistent with the concept or redistribution on a basis of according to individual rights in land. For this reason, possible reform alternatives to traditional system of land holding probably need to be by way of tenure reform.*⁴⁴

⁴³ Miller et al (at page 402)

⁴⁴ Miller et al (at page 403)

6.5 Compromise by political parties

When the Interim Constitution was agreed upon, a compromise was made by the negotiating parties to recognise property rights which had been acquired during apartheid⁴⁵ period. Section 25 (5) of the final Constitution also confirms the protection of the `existing rights. This compromise means that all prospecting or mining rights which existed on rural land during the apartheid era continue to be protected. The compromise effectively disables rural communities to make any effective claim to minerals on the land they occupy. The White Paper on South African Land Policy⁴⁶ states that redistribution is a process which makes it possible *for the poor and disadvantaged people to buy land with the help of a Settlement / Land Acquisition Grant.*

The Development Facilitation Act 67 of 1995 does not assist the occupiers of rural land to attain a new or better right than it was the position before and after 1913. Peter Rutsch & Fred Jenkin⁴⁷ are of the view that the Development Facilitation Act, *instead of tinkering with old apartheid legislation, addressed the reality of landless, rural people and made provision for swift development and settlement of persons upon State – owned land or land made available by the owner.* This view respectfully, appears not to be correct because, as far as the impact of mineral rights holding on communal land is concerned the development acts have not even started to tinker with the apartheid setup, let alone to provide for swift development. Rural communities have become victims of the economic compromise.

6.6 Rural areas are risky to economic investment

Private business enterprises regard rural areas as high risk areas with no guarantee to business tenure. Development of rural land is therefore largely left to government alone and the latter does not cope with the huge backlog of underdevelopment, left behind by the past regimes. Government has inherited a complex system of land development laws from the former homelands and the TBVC states. It is supposed to formulate a uniform

⁴⁵ G Budlender, J Latsky and T Roux : Juta's New Land Law: Juta 1998 (at page 1 – 4)

⁴⁶ April 1997 IX (at page 4.1)

⁴⁷ The New Land Law of South Africa : Juta 1992 (at page 38)

land reform system for the whole country and in some cases finds it very difficult as it is compelled to recognise the colonial boundaries and land demarcations. Budlender, Latsky and Roux⁴⁸ correctly point out that development planning needs to start somewhere and cannot wait for the crafting of a complete overhaul of the previous system.

6.7 Government unprepared to deal with rural land tenure problem

The different and complex land tenure systems make it difficult to formulate a good system that will alleviate the problems in rural communities. Government is compelled to try to strike a delicate balance between the competing interests of the communities and the mineral rights holders. Government avoids implementing a sweeping change on the communal land tenure system which may antagonize some of the traditional leaders, who may feel that their powers have been eroded by giving individuals a greater say in matters of land. Also, it may affect the rights of mineral rights holders if they are compelled by law to give a share of their profit to communities. They may argue that their property rights have not been protected.

When government regulated all minerals through the Mineral and Petroleum Resources Development Act (MPRDA), it should have, in the same breath given specific directions as to how mining was to be conducted in rural areas. It appears government underestimated the gravity of conflicts which were to result from these areas. The land reform programme in South Africa, especially in rural communities is an ongoing problem which requires urgent attention. A gap still exists as to how best rural land ownership could be upgraded. The White Paper on Land Reform⁴⁹ rejected the restoration of the dispossessed land. Its view was that *the government is of the opinion that a programme for the restoration of land, to individuals and communities who were forced to give up their land on account of past policies or other historical reasons would not be feasible. Apart from the vast potential for conflict inherent in such a programme, overlapping and contradictory claims to land, as well as other practical problems, would*

⁴⁸ Budlender et al (at page 2A-9)

⁴⁹ Tabled in Parliament in March 1991

*make its implementation extremely difficult, if not impossible ... An attempt to return to the previous order will only disrupt the country's pace of development to the detriment of all*⁵⁰. The ANC and other revolutionary parties rejected the White Paper, that it was a ploy to maintain the status quo. The proposition of the White Paper was interestingly later maintained and followed by the ANC led government.⁵¹

It appears further that government does not have a clear view of how it intends to upgrade the trust land tenure system, albeit gradually. Events as triggered by mining in rural land are fast overtaking whatever progress government may be making. The impact of mineral rights on communal land appears to have caught government off guard.

Mineral and Petroleum Resources Development Act⁵² repealed all previous mineral laws to include previously disadvantaged persons to participate in the core business of mining. Rural communities, with their unique lack of land ownership are not specifically protected by this Act. They continue to remain vulnerable when minerals are found on their land. MPRDA did not provide them with a good platform to negotiate on a better footing with the mineral rights holder. This lack of a meaningful reform has caused the villagers to appear to be squatters in their own land, despite the fact that they have occupied the areas for a long time.

⁵⁰ White Paper (fn 48) B-91 paragraph A2-11

⁵¹ Miller et al (at page 245)

⁵² Act 28 of 2002

Chapter 7

ATTEMPTS BY GOVERNMENT TO REMEDY THE PROBLEM

After the inception of the new democratic dispensation in South Africa, disparities on land ownership became one of the major problems that government had to deal with. The urgency to address the land issue was also heightened by *land grabbing* process by the Zimbabwean government from white farmers. A number of statutes were promulgated to tackle the land problem in South Africa.

7.1 The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)

Section 1 of the Act defines a community as *a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, or custom or law*. It is clear that the definition includes all trust land occupied by communities. Section 104 of the MPRDA specifically tries to assist communities on matters relating to mining. In terms of section 104 (1), a community may lodge an application with the Minister to obtain a preferential right to prospect on land which is registered in the name of the community or which it occupies. This preferential right should also apply to communities in rural areas, who have occupied the land for reasonable long period of time, even if such land is not necessarily registered in the name of the community. Most of the trust farms occupied in this manner are not registered in the names of the communities occupying them.

When applying for a preferential prospecting right, the community must proof the following:

- (a) *that the right will be used to contribute towards the development and social upliftment of the community*
- (b) *that the envisaged benefits of prospecting will accrue to the community and*

(c) *that the community has access to the technical and financial resources to exercise such right.*⁵³

The community must further submit a development plan indicating how the prospecting right would be exercised.⁵⁴ This requirement would be very useful if communities had an equal opportunity with all other applicants for prospecting and mining rights. They would stand a better chance of succeeding in the application by virtue of *preferential* powers by the Minister. But as it is, presently, the *preferential* clause in the MPRDA is more academic than practical, as rights to minerals on most rural land are already in the hands of private companies or individuals.

The Bafokeng Tribe near Rustenburg, unlike other tribes in South Africa, purchased land together with the mineral rights, and registered it in trust. The first transfer of land for them occurred in 1883 and was followed by a number of others.⁵⁵

In 1977 the trusteeship of land held on behalf of Bafokeng was transferred from the State President of the Republic of South Africa to the Chief Minister of Bophuthatswana by Government Notice R347 of 1977. The distinguishing factor in the Bafokeng case was that trusteeship on their land included also the mineral rights on it. To safeguard their rights to minerals section 16(1) of the Bophuthatswana Land Control Act, 39 of 1979 provided that *except with the written permission of the Minister of Economic Affairs of Bophuthatswana, and not withstanding anything in any other law, no person could prospect or mine for minerals on land in respect of which the mineral rights were held by a citizen or citizens, or held in trust for a tribe or community.*⁵⁶

The Bophuthatswana Land Control Act was repealed by The Abolition of Racially Based Land Measures Act 108 of 1991. Bophuthatswana was re-incorporated into the Republic

⁵³ s104 (2) (a)-(c)

⁵⁴ s104 (2)(d)

⁵⁵ President of Bophuthatswana v Milsell Chrome Mines (PTY) Ltd, 1996(3) SA 831, at 838-839

⁵⁶ Dale et al, SchII-223

of South Africa in 1994 in terms of section 229 of The Constitution of the Republic of South Africa Act 200 of 1993. The mineral rights of Bafokeng were already secured.

7.2 Assistance to Historically Disadvantaged Persons

Section 12(2) of the MPRDA provides that the Director General may facilitate assistance to any historically disadvantaged person to conduct prospecting operations. Historically disadvantaged persons would include a community as a unit. Individual members of the community were historically and directly disadvantaged by being placed in small areas of land through the apartheid system. When facilitating the assistance to historically disadvantaged persons, Regional Director takes into consideration all relevant factors which include –

- (a) the need to promote equitable access to the nation's mineral resources;*
- (b) the financial possession of the applicant;*
- (c) the need to transform the ownership structure of the minerals and mining industry; and*
- (d) the extent to which the proposed prospecting project needs the following objectives of the MPRDA,⁵⁷ namely to:*
 - (a) promote equitable access to the nation's mineral resources to all the people of South Africa,*
 - (b) substantially and meaningfully expand opportunities for historically disadvantaged persons including women, to enter the mineral industry and to benefit from the exploitation of the nation's mineral resources;*
 - (c) promote economic growth and mineral resources development in South Africa;*
 - (d) promote employment and advance social and economic welfare of all South Africans; and*
 - (e) ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.⁵⁸*

⁵⁷ s12(3) (a)-(d)

⁵⁸ s12 (3) (d) read with (2) (c) – (f)

As stated earlier, the MPRDA would have been a good enabling statute to previously disadvantaged persons if holding of the old order mineral rights was specifically revisited to include occupiers of communal land. The problem is that rights which were obtained in terms of the common law are still applicable and enforceable today as stated in *Hudson v Mann*,⁵⁹ and confirmed recently in *Anglo Operations v Sandhurst*.⁶⁰ One would for instance, not know how the Regional Director would promote equitable access to mineral and financial resources, or transform ownership structure of the mineral and mining industry in rural areas if such rights have already been allocated to someone else in terms of the common law. This dilemma was largely left to companies working within the affected communities. It becomes difficult to measure whether or not what the companies have done for the communities in terms of Social and Labour Plan is sufficient to comply with the requirement of the Act or to the satisfaction of communities.

The objectives of the MPRDA are clearly good in that it wanted to change the situation regarding access to minerals, to make it applicable to all South Africans including the occupiers of rural land. Section 2 (c), (d) and (i) of the Act provides as follows;

2. The objects of this Act are to –

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

The objectives seek to ensure that where mining takes place within rural communities, such areas should benefit by inclusion of the benefits in the mine's Social and Labour Plan. The problems that the mines in rural areas sometimes encounter are related to the

⁵⁹ (fn 21) supra

⁶⁰ (fn 22) supra

fact that one mine may be required to develop too many rural villages around it. This results in extreme expenditures by mining companies which may affect their profit.

Parliament further tried to reach the objectives of the MPRDA by passing the MPRDA Amendment Act 49 of 2008. Section 17 (4A) of the Amendment Act provides that *If the application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.*

The Amendment Act aimed to expand the opportunities available to the communities to actively participate in the mining industry. This means the Minister for Mineral Resources will need to be convinced by the *active participation* of the community before he/she could grant an application for prospecting, mining and for conversion of the old order rights.

The IPILRA as amended by the Land Affairs General Amendment Act 61 of 1998 specifically provides that rural communities occupying state land be regarded as co-owners of the land for purposes of the Mineral Act. It provides that;

2 (b) The holder of an informal right in land shall be deemed to be an owner of land for the purposes of section 42 of the Minerals Act, 1991 (Act No. 50 of 1991).

Deprivation of informal rights to land

2. (1) subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.

(3) *Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.*

(4) *For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.*

Section 2 of the Communal Land Rights Act 11 of 2004 also states that;

(1) *This Act applies to -*

(a) *State Land which is beneficially occupied and State Land which –*

(c) *land acquired by or for a community whether registered in its name or not; and*

(d) *any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution.*

It can be seen that all the above acts are trying to deal with the land redistribution problem in South Africa. Rural communities still need a lot of attention in this regard.

7.3 Prohibition on Mining

Section 48 (1) (a) – (d) prohibits mining on certain land. In terms of this section the Minister may prohibit mining on land comprising a *residential area or used for public or government purposes*. It sometimes happens that if a village was too close to the mining operations, it may be relocated to a safer place, away from the mining activities.⁶¹ Probably the Minister exercises his or her discretion to allow for relocation of villages as residential areas, as envisaged by section 48. The suspicion however, may be that the Minister does not regard villages as *residential areas* to the level envisaged by section 48. One would still wonder why the Minister does not use his or her discretion to prohibit mining on land occupied by communities as residential areas, and by so doing prevent the relocation of villages. This is left solely to mineral rights holders and communities. The

⁶¹ (fn 28) supra

Minister should be the one to level the playing field for the conflicting interests of the parties involved.

Up to so far the Minister has never prohibited the relocation of a village from a communal or trust land. There is no clear policy by government as to how, and at what minimum requirements villages should be relocated. The prohibition or restriction on mining, stated by section 48 is not readily applicable to communal or rural land. It may appear in every instant that rights of the mineral rights holder supersede those of the villagers. Mining activities become massive, for optimal extraction of minerals in compliance with section 50 of the MPRDA. Another main purpose of relocating communities, beside the profit motive is to comply with the *integrated environmental management plan*. Mining companies are compelled to see to it that communities are not affected by pollution air, water, noise, dust pollution or hazardous material. The problem however, is that, after mining has been completed and the mineral rights holder has left, communities are left with ugly rock dumps and large holes covering their land. The land can no longer be used for the former purpose such as farming, grazing or residence.

7.4 Broad Based Economic Empowerment (BEE)⁶²

The Broad Based Economic empowerment is a general policy document drafted by the Department of Trade and Industry to address the economic disadvantages of black people caused by the apartheid regime. The Broad Based Economic Empowerment Act⁶³ (BEE Act) was passed as an enabling statute. Its main objectives are to expand the opportunities for the historically disadvantaged persons in general. Its application became relevant also in the mineral and petroleum industries. Black people were mainly excluded from these industries. The strategy of the document is defined as *an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that managed, own and control the country's economic, as well as*

⁶² South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, March 2003

⁶³ Act 53 of 2003

*significant decreases in income in equalities.*⁶⁴ The document relies on direct empowerment and preferential procurement.⁶⁵

Four years after the promulgation of the BEE Act, it is still not clear how economic transformation by way of ownership and preferential procurement in mining, by the rural communities will be achieved. The difficult question to be answered is whether mining activities in a rural community should empower the community collectively through traditional leadership or as individuals. The problem is even made worse by continuous disputes of chieftaincy in some communities. Communities may further complain that the royal traditional houses are misappropriating funds and not benefiting the entire community. This fear, by members of the community may be valid in some cases. A sense of ownership of minerals and economic transformation envisaged by the Act becomes removed from an ordinary member of the community.

It is true that the affected communities may get upliftment in the form of employment, infrastructure, health services etc, but it does not amount to actual economic empowerment envisaged by the Act as it does not involve participation in the core business of mining. This is a problem that frustrates government, mining companies and communities equally. The source of the problem is still traceable back to the 1913 and 1936 land acts. There is lack of a robust approach by government to give clear guidelines on ownership of land in rural areas.

In line with the BEE Act, the MPRDA provides for transformation of the mineral industry by redressing historical and social inequalities by requiring the Minister to develop a broad based socio-economic empowerment Charter.⁶⁶ The Charter must set how the promotion of equitable access to mineral and petroleum resources to all South Africans, as stated in Regulation 2 of the MPRDA can be achieved.

The provisions of the BEE Act and the Charter in the MPRDA are applicable to all people in South Africa. They do not specifically provide for rural land tenure. Their

⁶⁴ paragraph 3.2.2 of the strategy document on BEE Act

⁶⁵ Badenhorst et al (paragraph 23.2.1)

⁶⁶ s100 (2) (9)

implications in rural communities, therefore, become only theoretical and without any impact.

7.5 Conversion of old order rights

MPRDA gives window periods of between one and five years to convert the old order mining rights to comply with changes brought about by the Act. It also provides security of tenure in respect of newly acquired rights, that is, new applications. Section 4(2) of the MPRDA provides that where the common law is inconsistent with the Act in respect of the old order rights, the Act prevails. The purpose of the transitional arrangements by the Act is, among others, that the rights to minerals to comply with the socio-economic empowerment of the historically disadvantaged persons. An application for conversion of an old order mining right must be accompanied by a plan, a mining work programme and a social labour plan.⁶⁷ The problem however, is created by the fact that all South Africans have equal rights to all minerals in the country.

The affected persons, mostly in rural tribal land, do not necessarily have any preference over the rest. If the Social and Labour Plan submitted by the mineral rights holder reflects, to the satisfaction of the Regional Manager for mining, that it had catered for previously disadvantaged persons, including women and the disabled, the Regional Manager would most likely grant the application. It is not an issue if the people so empowered are not directly affected by the mining activities. On paper the application complies with the legal requirements but when the holder of mineral rights starts to mine, his activities may be disrupted by the local community members and may frustrate the whole mining exercise.

It would be appropriate if the Department of Minerals and Energy satisfy itself first, by getting the feelings and views of the affected communities and to address whatever concerns they might be having, before it grants the application. This would make it simpler for the mineral rights holder to be accepted as a business neighbour and partner by community. As it is now, communities feel left out of the discussions of core business

⁶⁷ Regulation 2 (2) of the MPRDA Regulations

of mining. The BEE principle therefore does not necessarily alleviate the impact that mineral rights holding has on communal land.

7.6 Restitution of Land Rights

Restitution of land is governed by the Restitution of Land Rights Act 22 of 1994. The Act has its basis in the interim Constitution Act 200 of 1993, which provided that *an Act of Parliament shall provide for matters relating to the restitution of land rights*. The Interim Constitution established the Commission on Restitution of Land Rights. Section 1 of the Act defines restitution as -

- (a) the restoring of a right in land; or*
- (b) equitable redress.*

Restitution of a right in land is described in the Act as the *return of a right in land or portion of land dispossessed after 19 June 1913*. Section 25 (7) of the final Constitution also strengthens the Restitution of Land Act by providing that *a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress*. It is notable that the Restitution of Land Rights Act and the Constitution Act put the cutoff date for claims for restitution as the 19 June 1913. This is clearly done to try to address the damage of dispossessions of land by the Natives Land Act 27 of 1913 and the Natives Trust and Land Act 18 of 1936.

Some communities have applied to the Commission for Land Restitution to be restored to the land they were dispossessed of. Some have applied through their chiefs and some as groups of people who had occupied the specific portion of land before. When applications are granted, the Commission finds itself in a dilemma of actually restoring the land to the people to pre- 1913 position of trust land instead of coming up with a modern land tenure system. While government is trying to address the damage done by the apartheid Acts, it is at the same time compelled to fall back to the same setup of trusts farms. Title to land may be given to the whole community as a unit, but still, there would not be any individual holding of land rights. Restoration of land does not have any

bearing on holding of the mineral rights in such land. Holding of mineral rights still has to be applied for, in respect of the same land because the state is the regulator of all minerals.

Government finds itself trapped by land ownership arrangements of the past, largely because of the length of time it prevailed until 1994. Restitution of land does not create a real right to the land. The occupiers still remain so-called beneficiaries and will never become owners.⁶⁸ This is the reason there has not been much development in the rural areas, in terms of infrastructure, health facilities and industry. Private enterprises regard them as high risk areas with no guarantee for future business success.

Despite the Broad Based Socio-Economic Empowerment clause in the MPRDA, the conversion of the old order mining rights, assistance to the historically disadvantaged persons and the Broad Based Empowerment Act,⁶⁹ the anticipated mineral rights holding arrangements show a lack of impact and desire of government to strengthen land ownership for rural communities. Rural areas appear to be no man's land until they are claimed by the mineral rights holder to extract minerals. The rights of the occupying community become insignificant.

⁶⁸Miller et al (at page 325)

⁶⁹ Act 53 of 2003

Chapter 8

CONCLUSIONS AND RECOMMENDATIONS

8.1 Conclusions

An overview of the law governing Land tenure in the rural areas shows that the development of land ownership in these areas has been a problem from the colonial days up to this stage in the democratic South Africa. The government, when granting mineral rights is moving on the premise that the *de jure* situation of registering rural land in the name of the Minister carries more weight than the *de facto* situation of the communities occupying the land. The disputes on land have brought conflicts between communities, mineral rights holders as well as the government.

MPRDA has gone a long way to try to address the problems of mineral rights holding on rural land. Both the 2002 Act and the Amendment Act of 2008 are worded in such a way that mineral rights holders are taking rural communities as BEE partners to comply with set future BEE targets. The problem which surfaces is that it appears only a few individuals are benefiting on the BEE acquisitions instead of the larger community members

Whereas private property owners can be expropriated in terms of the MPRDA, rural communities cannot be expropriated or forcefully removed as during the Apartheid era. ESTA prohibits any such forceful removals of rural communities. Rural communities have and can however, be relocated with their consent. In practice, mining companies have found this option to be an extremely expensive one

The issue of *consultation* defers markedly between private land owners and rural communities. In practice consultation with private land owners is nothing but *informing* land owners of the proposed commencement of prospecting or mining on the land in question, whereas a consultation process is followed with rural communities. In practice mining can simply not commence without consultation and the consent of the rural

community, as aggrieved rural communities have managed to halt many mining activities in the past and present.

8.2 Recommendations

- Government should have a relook at ownership of land in the rural areas and move away from communal ownership to individual ownership. A start may be to ensure that the sites on which rural communities have built houses and the ploughing fields should at least be registered in the names of the individual household owners.
- Government should transfer land belonging to it to rural communities to alleviate congestion in these areas, and should further acquire as much land as possible to distribute to the rural communities.
- The courts should follow the decision of the Constitutional Court in the Alexkor case in relevant cases, to assert the rights of rural communities in terms of indigenous law which existed even before the British annexation and Apartheid Land Legislations.
- Where mining takes place in a rural community, Government should assist with the required technical skills and funding to equip them to participate effectively in mining on their land. The affected community should be given preference to acquire some rights to minerals.

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