Holding the Charter is not the same as holding the **mineral rights**

The intention behind the Minerals Bill (and labour's view of the Bill) is that it would lead to transformation. ***Timothy Bruinders*** *argues that it is now no longer clear that the bill in its final form will lead to real transformation of the industry and achieve socio-economic change for workers and communities.*

In terms of the common law, minerals and strategic mineral resources constitute property. That is because they are found on, in or under land. According to our common law[1], the owner of a piece of land or property owns the minerals and mineral resources on, in or under that property[2]. Landowners hold the property rights by virtue of registered title deeds kept by the Deeds Registry. If the rights to minerals have been severed from ownership of the land, then the registered holder of the certificate of mineral rights kept by the Deeds Registry owns the mineral rights[3]. The right to a mineral includes the right to mine. The holder of the mineral right in a property has the right to go upon the property, search for minerals and if any are found, to sever them from the property (mine) and carry them away[4].

Since the discovery of diamonds in the old Cape Province and gold in the Transvaal Boer Republic during the latter part of the nineteenth century the right to mine and ownership of mineral rights was governed by various pieces of legislation and the common law as interpreted by judges.

Despite the common law however, until 1 January 1992, the right to mine precious stones such as diamonds, precious metals such gold and platinum (as opposed to base minerals) has always been reserved for the state alone. This was true from the time before the country became a Union in 1910.

Who holds the right to mine?

Reservation to the state of the right to mine and dispose of precious metals and stones was achieved through legislation[5]. Both before and after the establishment of the Union, the norm was that the state did not itself mine precious metals and stones. Instead it granted mainly mining companies the right to mine for these classes of minerals by way of a variety of mining titles kept in the registry of the Office of Mining Titles[6]. Private individuals or companies who held the rights to precious metals and stones under the common law, could not mine these classes of minerals without a mining title granted by the state for which royalties or fees were paid.

The state held and controlled the right to mine for precious metals and stones and, of course, natural oil, throughout the most rampant years of imperialist expansion and the rise of the national bourgeoisie in the mining industry. That was until 1 January 1992 when the Minerals Act, Act No 50 of 1991 came into effect. It was passed with indecent haste and its passage through Parliament was a lot smoother than that of the new Mineral and Petroleum Resources Development Bill. With the spectre of an ANC government lurking on the horizon after 1 February 1990, the Minerals Act sought to undo a property regime and mining practice more than a hundred years old. It took

away the right to mine precious metals and stones from the state and, as with base minerals, vested that right in the common law holder of the mineral right to precious stones and metals. Since 1992, the registered holder of a mineral right (regardless of the class of mineral) is entitled to prospect or mine for that mineral[7], subject only to obtaining an authorisation to prospect or mine from a Regional Director of the Department of Mineral and Energy.

An authorisation to prospect or mine is simply a regulatory permit issued subject to administrative rules and principles. It is issued to mining companies who comply with administrative, regulatory and environmental requirements. The holder of an authorisation merely holds the administrative permission, subject to notice to the landowner[8], to begin or carry on a mining operation, in much the same way as the holder of a liquor licence is permitted to begin or carry on the business of a bottle store.

Holders of mineral rights include a variety of private individuals and companies such as farmers, landowners, individuals who hold registered certificates of mineral rights and companies who own farms or mines. Under the Minerals Act they exercise the right to mine all minerals themselves. Should they not want to mine they may nonetheless transfer the right to mine to another person, usually a mining company. This is done by way of a mineral lease for which the mining company pays a rental and royalties in the form of an agreed amount sum of money for every ton of ore mined.

Mineral leases are a lucrative source of income for holders of mineral rights who do not themselves want to mine. The burgeoning wealth of the Royal Bafokeng Nation (RBN), which owns platinum rights in much of the platinum rich land in the North-West Province, has been earned from royalties. Currently, Implats pays royalties of 22% of mining taxable income, subject to a minimum annual royalty of 1% of gross revenue from platinum group metals mined from mining lease areas to which the RBN holds the mineral rights[9].

Purpose of the new Bill

The ostensible purpose, object and scope of the Bill are to redistribute South Africa's mineral and petroleum resources and related economic wealth, by vesting all mineral rights (not merely the right to mine) in the State[10]. According to s3 (1) of the Bill, the State is the custodian of all mineral and petroleum resources, which are described as the 'common heritage of all the people of South Africa'. The Bill expropriates mineral rights (including the right to mine) from private individuals and companies. As was the position before 1992 with precious metals and stones, the State itself does not intend to mine. What is contemplated is that the State, acting through the Minister of Minerals and Energy, will grant rights and permits to prospect and mine minerals and exploration and production rights to drill for oil. The Minister may levy fees or royalties in return for the grant of a permit or right.

It is through the Minister's power to grant rights and permits to mine and carry out oil exploration that the Act envisages that the Minister will redistribute our mineral and petroleum resources. Take the right to mine. Section 22 of the Bill requires persons who want to mine to apply to the Minister for a mining right. Section 23 provides that the Minister must grant a mining right if that will further the defined objects of the Bill and the objective of the Charter[11]. The objects[12] include:

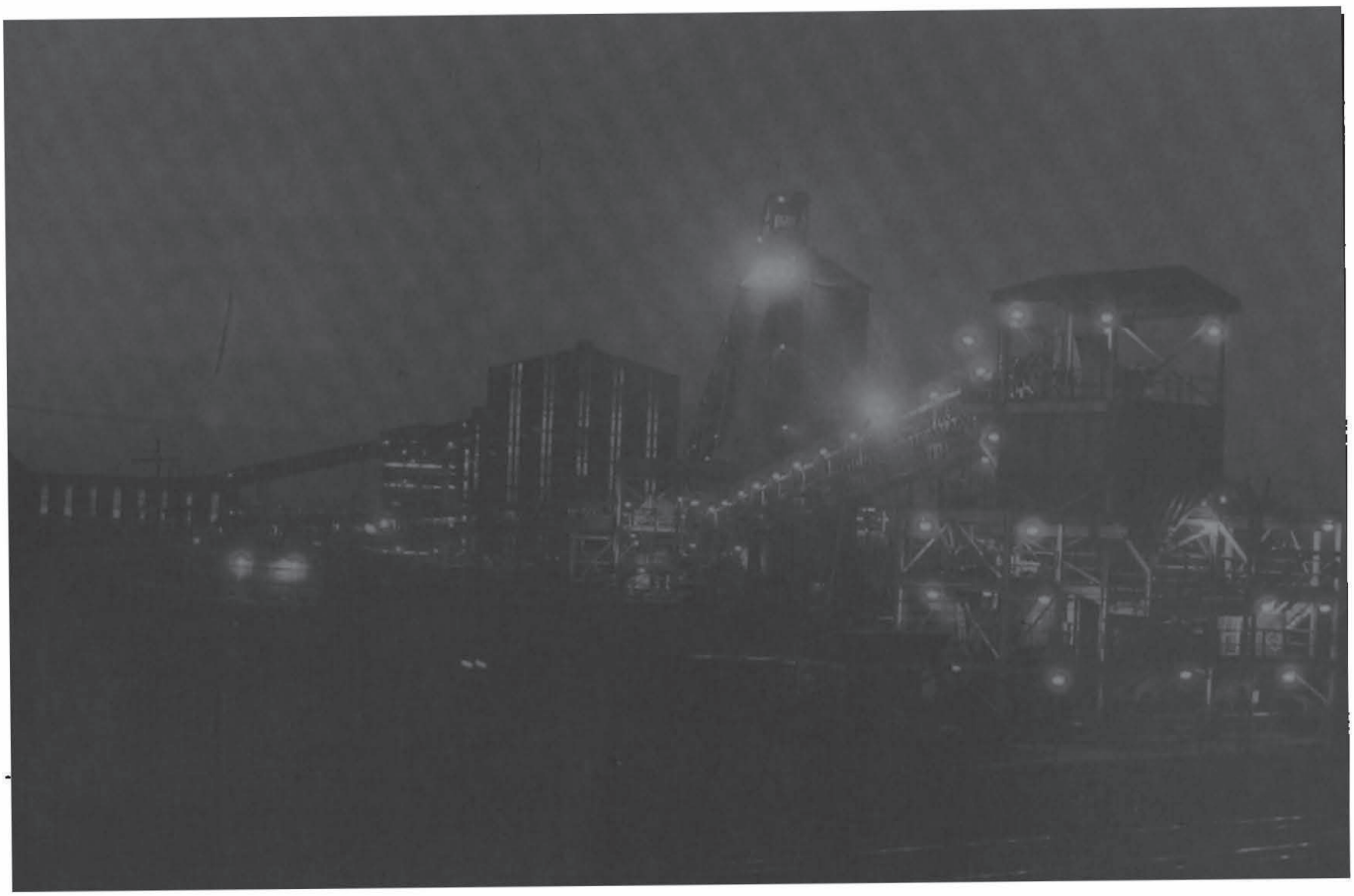
- the expansion of opportunities for historically disadvantaged persons to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources: and
- to promote employment and advance the social and economic welfare of all South Africans.

The objective of the mining charter, as contemplated in the Bill, is demonstrably to promote 'transformation' of the minerals and petroleum industries. The minister's power to promote transformation by 'redistributing' the right to mine is confined by s23 (1) of the Bill. It provides that she must grant mining rights if applicants also comply with the seven other requirements imposed by s23 (1) of the Bill. These include requirements relating to optimal mining, access to financial resources, technical ability to conduct the proposed mining operation optimally, financial, social and labour plans, mining work and environmental programmes and the ability to comply with the Mine Health and Safety Act.

Will communities benefit from the bill?

The romantic notion of armies of diggers emerging from the townships, applying for prospecting and mining rights and setting up claims so that they too might share in our mineral and petroleum heritage, sits rather uncomfortably with the Bill. The idea is clearly to prise open shareholdings in existing mining companies and to make these available for redistribution to the fairly closed category of black businessmen and women on the empowerment treadmill.

Forgotten communities on or near mineral-rich land who think that the Bill is meant to make them as wealthy as the RBN are in for a surprise. They do not get mineral rights. Without mineral



rights they cannot earn royalties. Nor can they conclude mineral leases obliging mining companies to embark upon public spending on infrastructure, housing, clinics, schools and the like. The royalties paid under the Bill are paid to the Minister and go into the national coffer, where ultimately the Minister of Finance decides how to spend it and on what. This view might appear too sceptical for those who argue that the Bill nevertheless provides for the redistribution of mining rights to the previously disadvantaged. It does. But it is simply naive to expect the Bill to bring wealth to dispossessed communities. Those communities who are brave enough to apply for a mining right will have to negotiate the maze of requirements imposed by s23 (1) without the necessary financial muscle or strategic and technical know-how.

One of the objects of the Bill is to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating. The RBN has achieved socio-economic development in its area because it holds the platinum rights. Presumably the social and labour plans, which applicants for mining and production rights must submit, are meant to provide for socio-economic development. But apart from the requirement that the Minister consult with interested and affected parties (section 10) there is no real mechanism in the Bill which allows communities to even begin to dictate the nature and extent of public spending in their areas by mining companies. That is not the thrust of the Bill. What the Bill and charter contemplate is that communities will take shares in mining companies or ventures.

Shares however, are not the same as mineral or mining rights. Nor do they provide earnings as easily as mineral leases. Unlike royalties, which are usually paid monthly, quarterly or annually, shares do not provide a steady cash flow. When they do, it is miserly. Dividend earnings are generally on the low side. And communities in rural areas (which is where mining takes place) need cash for, or the contractual commitment to, public spending in their areas. Depending on how the royalty agreement is structured, holders of mineral rights can earn royalties regardless of turnover or profits reflected on balance sheets. Earning profits does not necessarily mean that shareholders are paid dividends. Depending on the nature of the share, dividends might not be paid at all. And the price of shares is subject to the vagaries of the market. Holding onto a share to sell it later might not pay off. All of this of course presupposes that communities have access to debt financing required to buy equity in mining multinationals and companies worth billions of rand

and, with high levels of foreign ownership. Purchasing foreign shareholdings means exporting capital out of the country. And that has to be done with money, which communities do not have!

How people friendly are the Minerals Bill and Charter?

Neither the Bill nor the Charter expropriates or nationalises shareholdings in mining companies. The use of the name 'charter' evoking as it does the material promises of the Freedom Charter, is misleading. Government has ratified a charter on black empowerment in mining, which, in its final form, is asking for the transfer of 15% of the industry into black hands in the next five years, increasing to 26% over the subsequent five years. This will take place on the 'willing seller/buyer' basis. Access to finance will allow you to take advantage of the Charter. Poor communities do not have access to finance and do not have the collateral for easier access to finance.

Section 100 of the Bill calls for the development of a 'broad based socio-economic empowerment Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources'. Those in the union movement, for example, who read s100 to mean the development of a social and labour plan, which radically restructures the mining industry to benefit workers, must be perplexed by the drama, which has folded in the media around the charter. There has not been a word about improving the quality of life and safety of mineworkers. The controversy has been limited to the slice of the shareholding in mining companies available to black capitalists. The Charter approved by the Cabinet pays lip service to socio-economic empowerment with feel-good, fuzzy undertakings about social uplift, training and bettering the lives of workers. What is absent from the Charter is the obligation to contribute to social spending. ■

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1 The common law relating to property is an amalgam of Roman-Dutch and English law as developed by the judiciary.
2. Neebe v Registrar of Mining Rights 1902 TS 65 at 85
3 Rocher v Registrar of Deeds 1911 TPD 311 at 315 See, Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295 AD at 315 Ex Parte Pierce 1950 (3) SA 628 (O) at 633H
4 Van Vuren v Registrar of Deeds 1907 TS 289 at 294 Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A) at 508G-H
5 See the 'Gold Laws' of the Boer Republics and Union, of the Colonies and the Mining Rights Act 1967 of the RSA.
6 These included, mining leases, claims, concessions, agreements and certificates.
7. Sections 6 and 9 of the Minerals Act govern the issue of authorisations to prospect and mine
8 Section 54 of the Minerals Act
9 Financial Mail, 6 September 2002
10 See the Preamble, sections 2(a) (b) (c), (d), 3. 100 of the Bill and paragraph 1 3 6 1 of the White Paper on A Minerals and Mining Policy for South Africa
11 Section 23(1)(h) The Charter is provided for in s100 (2) of the Bill
12 Sections 2(d) and (f) of the Bill