

# SA's mining industry in decline: An analysis

Address by Peter Leon Partner and Co-Head of Mining, Natural Resources and Environmental Law, Webber Wentzel, Chair, Mining Law Committee, International Bar Association to Miners from the Frontiers Conference, Macquarie Connections - Macquarie Capital (Europe) Limited, Grange St. Paul's Hotel, London, September 1 2010

*Quo Vadis the South African mining industry?*

## Introduction

Although I am delighted to be here today and am grateful to our Macquarie hosts for the opportunity, which has brought me to you via Kazakhstan, I doubt whether this invitation would have been extended six months ago when South Africa was on the verge of hosting a highly successful World Cup, which astonished the world, and the South African mining industry was rapidly recovering from the 2008/2009 financial crisis. Harold Wilson once famously remarked that a week was a long time in politics. Fortunately, or unfortunately, the lead times in the mining industry are somewhat longer!

I will attempt today to analyse how the South African mining industry finds itself in such a difficult position. The events of the past six months have shown how a lack of regulatory certainty as well as question marks over security of tenure can bedevil any mineral regulatory regime. In South Africa's case, concerns about crony capitalism, the rule of law, threats of industrial action, as well as the ongoing debate on the nationalisation of mines have all contributed to increasing perceptions of sovereign risk.

This, of course, is thrown into vivid relief by the recent events surrounding ArcelorMittal, Kumba and the ironically named Imperial Crown Trading, as well as the Lonmin / Keysha Investments saga which I will deal with in more detail.

The reputation of the industry is not, however, unsalvageable. The optimist in me would like to believe that it may yet regain its footing, and recent developments, including the Department of Mineral Resources' ("DMR's") proposed amendments to South Africa's Mineral and Petroleum Resources Development Act ("MPRDA"), appear to confirm this. Of course, the proof of this is in the doing and only the next year will tell whether government is serious about mineral regulatory reform.

A reformed mineral regulatory regime must, however, introduce *real* reform and turn around the negative perceptions which currently beset South African mining.

## Evidence of the mining industry's decline

The South African mining industry, now the fifth largest in the world, accounts for over five percent of South Africa's GDP, and provides employment to some 500 000 workers directly and a further 500 000 indirectly. South Africa's *in situ* mineral resources are estimated at US\$ 2.5 trillion - the largest in the world.

By any standards, this is a staggering inheritance. Despite this, during the twentieth century's longest and most sustained commodity boom, the mining industry has perversely declined in size, showing a one percent negative growth rate, measured in value add to GDP, between 2001 and 2008. Indeed, the mining industry was smaller in 2009 than at the outset of democracy in 1994. This is in stark contrast to the rest of the world. Between 2001 and 2008, the global mining industry grew by just under five percent per annum.

The Fraser Institute's 2009/10 survey of mining companies notes that, during the past decade, South Africa has steadily fallen in the "policy potential index" rankings from a position of 27 out of 47 ranked jurisdictions in the 2002/2003 survey, to 61 out of 72 in the 2009/2010 survey. Granted, in the Fraser Institute's 2009/2010 mid-year mining survey, South Africa's ranking improved, but this did not take into account the ArcelorMittal / Kumba / ICT issue, or the Lonmin / Keysha Investments saga. In fact, the improved ranking appears to be attributable to the recent concerning mining taxation developments in Quebec, Nevada and Chile, as well as Australia.

### **Why the mining industry's decline?**

#### **South Africa's current public service strike**

Before I delve into the main focus of these remarks, it would be remiss of me not to mention the current 'open-ended' public service strike that has recently engulfed South Africa. As you may know, South Africa's public servants, who number approximately 1.3 million, have been engaged in a protected strike over the last two weeks. Trade unions, led by the Congress of South African Trade Unions ('COSATU'), part of South Africa's governing alliance, are demanding an 8.6 percent wage increase and a R1 000 housing allowance, backdated to 1 April 2010. The government, however, has now offered public servants a 7.5 percent wage increase and an R800 housing allowance. The South African Reserve Bank's statistics suggest that the public sector wage bill has been increased by an average of 6.5 percent above inflation every year for the past eight years. In 2008 and 2009, the public sector wage bill increased by 12.1 percent and 18.7 percent respectively despite inflation rates of 11.5 percent in 2008, and 7.1 percent in 2009. Against this, South Africa's unemployment rate currently sits at 25.3 percent.

The public servants' strike now threatens to spread to the mining sector: the National Union of Mineworkers, South Africa's largest mining trade union, announced on Friday, 27 August 2010, that its members would participate in a one day solidarity strike tomorrow. The strike is making headlines all over mining sector news, and understandably so. Industrial action has already had a serious impact on South Africa's mining industry this year. In the second quarter of 2010 widespread strikes contributed in part to a 20.8 percent annual fall in South Africa's mining output, further slowing South African economic growth to an annualised 3.2 percent.

#### **The upheaval of South Africa's previous mineral regulatory regime**

Perhaps the most significant contributor to the mining industry's current travail was the introduction of the MPRDA in May 2004.

It was, and I think most people will agree, imperative that South Africa's first democratic government developed a new mineral regulatory framework to address the apartheid government's past exclusionary practices against black South Africans, which were effected across all sectors of the economy - not least the mining industry - with its terrible history of migrant labour, unsafe working conditions, labour repression and economic exclusion.

In order to address these and related socio-economic issues, the MPRDA was passed by Parliament in 2002 and brought into force on 1 May 2004.

Prior to the MPRDA, South Africa's mining sector was governed by the 1991 Minerals Act, a product of the reformist De Kierk administration. The Minerals Act revived the common law principles of mineral rights ownership, which had previously been eviscerated by the apartheid government. Under the common law, the owner of land was the owner of the whole of the land, including the minerals in the soil.

The Minerals Act established a system of licensing and statutory authorisations as a pre-requisite for the exercise of all mineral rights. These statutory controls merely *regulated* the *exercise* of mineral rights, now referred to as "old order" (pre-MPRDA) rights, and did not impact on the common law principles of the ownership, acquisition or substantive content of mineral rights.

The MPRDA repealed the Minerals Act and the common law to the extent that either was in conflict with the MPRDA. It abolished the property law based system of the Minerals Act, and introduced a fundamentally different regulatory regime - one of administrative law based on conditional state licences.

Accordingly, landowners no longer owned the mineral rights to the mineral resources on their property. These now fall under the public test doctrine of "state custodianship", under which the state, acting through the Minister of Minerals and Energy (now the Minister of Mineral Resources("the Minister")), holds mineral rights in "custody" for "the benefit of all South Africans", and is empowered to "grant, issue, refuse, control, administer and manage" rights to minerals.

The MPRDA thus required all mining companies to apply to the DMR for a prospecting or mining right, which is both time limited and conditional in nature, whether the company owns the relevant land or not.

In order to facilitate the introduction and establishment of the new mineral law regime, Schedule II to the MPRDA created "transitional arrangements", under which holders of pre-MPRDA old order mining rights had the opportunity to apply to convert these rights into "new order" mining rights by 30 April 2009. Similarly, holders of old order prospecting rights had the opportunity to convert these rights to new order prospecting rights by 30 April 2006. Holders of *unused* old order rights had until 30 April 2005 to apply for "new order" rights. On any one of these dates, the respective old order rights simply ceased to exist. Thus, if the holder of an old order right failed to convert its old order right or apply for a new order right by these dates, it would have no right to the minerals that previously formed the subject of its old order right.

The MPRDA's upheaval of South Africa's mineral law regime is fundamental to an understanding of what has followed,

Mineral rights now have a lesser inherent value under the MPRDA than they did under the erstwhile Minerals Act. It is arguable that the implementation of the MPRDA may even amount to the indirect or creeping expropriation of the ownership rights of old order mineral right holders. Factors that support this argument are: the MPRDA's extinction of all privately owned common law mineral rights; the statutory removal of the landowner's right of control, and the replacement of absolute rights of ownership with conditional and time-bound state licences (which *cannot* be transferred without Ministerial consent and are subject to Ministerial suspension or cancellation),

Recently, holders of unused old order rights who failed to meet the application deadline for new order rights under the MPRDA, claimed before the South African High Court that this resulted in the compensable expropriation of their unused old order rights. Government then excepted to the claimants' claim. In determining whether the exception was valid, the High Court held:

*"[In] short it is my interpretation of the [MPRDA] that it admits that holders will be deprived of their rights and that such deprivation coupled with the [s]tate's assumption of custody and administration of those rights constitute expropriation thereof."*

### **Other factors contributing to the mining industry's decline: lack of regulatory certainty and maladministration**

The promulgation of the MPRDA in 2004 and the repeal of the Minerals Act were followed by an unhappy combination of regulatory uncertainty and inefficient administration.

As is well known, in resource-rich developing economies with ambitious transformation and development goals, such as South Africa, investors require regulatory certainty as well as the effective administration of any new regime. This, in turn, requires that laws and policies are clear, definitive and consistently applied, particularly in the high risk, capital intensive, mining industry owing to the significant capital outlays required before mining operations actually commence.

Further, investors are always wary of corruption in developing countries, and lack of legal certainty may allow "get rich quick" opportunists to manipulate the legal system, as well as those who regulate them, to their own ends.

There are, unfortunately, many examples of legal uncertainty in the current mineral regulatory regime. The MPRDA, the backbone of this regime, is fraught with vague provisions, which I will describe shortly. So too is the Mining Charter, an ancillary document aimed at providing a framework for the promotion of Black Economic Empowerment ("BEE") in the mining industry.

The Mining Charter, like the MPRDA, came into effect on 1 May 2004. It requires, among other things, that mining companies demonstrate that 15 percent and 26 percent of their assets, whether through equity, attributable units of production, collective schemes or partnerships, are owned by Historically Disadvantaged South Africans ("HDSAs") by May 2009 and May 2014, respectively.

The Charter has been the subject of criticism as it is written in vague, non-legal language and, except for equity divestiture, it does not set out measurable objectives, nor how its aims and objectives are to be achieved by stakeholders. The implementation of the Mining Charter has thus led to uncertainty. Compliance with the Charter has a direct impact on the conversion as well as the grant of mining rights and may, on a discretionary basis, have an impact on the grant and conversion of prospecting rights.

The government has indicated that it intends to review the Charter. This was initially intended to take place by September 2010, but is now likely to happen towards the end of this year.

I should mention, at this point, that the DMR's processing of mining and prospecting right applications takes longer than almost all of South Africa's competitors. More than 90 percent of mining right applications take more than a year to process; some even up to five years. According to the DMR, some 6 567 applications for new prospecting licenses were received between May 2004 and May 2007, but only 43 percent of these were awarded by the beginning of 2008. Only 24 percent of applications for mining rights had been awarded over the same period of time. From June to November 2007, only one out of 1163 prospecting right applications was approved, and five out of 453 mining right applications. During the 2008/2009 financial year and as at the end of March 2009, the DMR had received approximately 20 000 mining and prospecting right applications, of which 28.9 percent were approved and 18 percent rejected. However, according to the DMR's annual report for the 2008/2009 financial year, the backlog in respect of processing applications for prospecting rights had been eradicated.

I mentioned earlier that the MPRDA itself is replete with uncertainties. These, as well as an inefficient and seemingly erratic administrative system, can best be illustrated by three recent examples, which may well be familiar to you. These are, of course: the Kumba / ICT saga, the acquisition of ICT by ArcelorMittal, and the Lonmin issue, which placed South Africa under an unfavourable international media spotlight shortly after its successful hosting of the FIFA 2010 soccer World Cup.

### **(I) The Kumba / ICT Debacle**

The facts of this matter are, briefly, the following: Kumba Iron Ore Limited ("Kumba"), the majority shareholder in the Sishen Iron Ore Company ("Sishen"), held a 78.6 percent undivided share in an old order mining over the iron ore and manganese ore mined at the Sishen mine. ArcelorMittal South Africa Limited ("ArcelorMittal") held the residual 21.4 percent undivided share in the same right ("the residual share"). These rights were granted under the Minerals Act. Under the MPRDA's transitional provisions, Sishen duly converted its 78.6 percent undivided share in the Sishen mine mining right into a new order right on 12 May 2008. ArcelorMittal, on the other hand, inexplicably failed to do so, and thus its residual share ceased to exist. This share, it would appear (although the law is unclear in this regard), reverted to the state as custodian of the nation's natural resources.

Sishen then immediately applied for a mining right for the residual share which ArcelorMittal had forfeited. This application was physically lodged on 30 April 2009 owing to the fact that 1 May 2009, the first day after ArcelorMittal's residual share ceased to exist, was a public holiday

(on which the offices of the DMR were closed). Under an agreement with DMR officials at the Kimberley and Pretoria offices of the DMR, Sishen's application was forward stamped "1 May 2009".

The first day on which Sishen's application could be considered by the DMR regional office was 4 May 2009, the first working day after the May 1 public holiday. The Regional Manager accepted Sishen's application by way of a letter dated 15 May 2009. This letter, however, stated that there was a competing application for the residual share, which was lodged on the same day. This competing application, it later transpired, was for a *prospecting right over the entire Sishen mine*, lodged by ICT. Some of ICT's shareholders have links to the governing African National Congress. This fact alone raises concern.

What subsequently transpired likewise raises concerns about the administration of South Africa's mineral regulatory regime, as well as the degree to which political connectivity may play in this. According to media reports, as well as Kumba's recent judicial review application, ICT's application for a prospecting right appears *not* to have been lodged on the same day as Sishen's application. ICT purportedly lodged its application on 4 May 2009, as indicated by the DMR stamp on its application form. The application itself, however, was signed on 5 May 2009. In addition, an applicant for a prospecting right is required under the MPRDA to lodge, as part of its application, plans regarding the land to which the application relates. ICT's plans regarding the Sishen mine property appear to have been dated on either 8 or 9 May 2009. In the circumstances, it does not appear possible for ICT to have lodged a complete and valid prospecting right application on 4 May 2009. The ICT application thus could never have been in "competition" with Sishen's application. Sishen accordingly objected to ICT's application.

ICT's application for a prospecting right was, despite Sishen's objection and its apparent irregularities, *granted in part* by the DMR deputy director-general on 30 November 2009. This partial grant in turn related to the 21.4 percent residual share forfeited by ArcelorMittal. In essence, ICT was granted a prospecting right which differs materially from the one for which it applied.

Kumba lodged an internal appeal with the Minister on 1 March 2010. The Minister subsequently announced, in a statement on 17 August 2010, that she had refused the appeal.

On 21 May 2010, Kumba lodged a judicial review application in the High Court to set aside the Minister's decision to grant ICT a partial prospecting right. This application is currently pending and is likely to be heard early next year.

Kumba has argued in its judicial review application that ICT's prospecting right application patently failed to comply with the requirements of the MPRDA. This is because, amongst other things, at the time of ICT's application, Sishen held a mining right for the same mineral and land (ie the converted 78.6 percent undivided share in the Sishen mining right). Under the MPRDA, the Regional Manager may only accept an application for a prospecting right if it fulfils the requirements for lodgement and only if no other person holds a mining right for the same minerals over the same portion of land. ICT's application met neither of these conditions and the Regional Manager was accordingly obliged to refuse to accept it, let alone grant it.

Media reports over the past week have indicated that Kumba has alleged, in its supplementary affidavit in the judicial review that ICT extracted and used key data from portions of Sishen's application for a mining right over the long weekend of 1 - 4 May 2009. Kumba has apparently argued that ICT's application contained copies of the title deeds of farms, which form part of the Sishen mine, which were extracted from Sishen's application. In addition, ICT's application was seemingly incomplete as six of the requisite documents were not lodged by ICT on 4 May 2009. What is more concerning is that Kumba has alleged that the then deputy director-general, Jacinto Rocha, granted the ICT prospecting right contrary to the express written views of two senior officials in the DMR's head office, namely the director responsible for licensing and legal compliance as well as the chief director responsible for mineral regulation, both of whom recommended that the ICT application be refused.

### **(ii) Crony capitalism - The ICT/ ArcelorMittal transaction**

A rather eye-opening development unfolded on 10 August 2010, when ArcelorMittal announced a ZAR9.1 billion (approximately US\$1.24 billion) BEE transaction. The BEE deal will see the formation of a special purpose vehicle owned by ArcelorMittal which will hold all of ArcelorMittal's operating assets. 26 percent of the shares in this subsidiary will be held by BEE shareholders. 21 percent will be held by an entity known as the Ayigobi consortium, and the other five percent will be held under Employee Share Ownership Plan ("**ESOP**"), also a BEE consortium. ArcelorMittal will own the remaining 74 percent of this SPV.

The Ayigobi consortium is led by Sandile Zungu, the chair of President Zuma's BEE advisory council. The consortium in turn is 75 percent held by "strategic partners", including ICT shareholders and Mabengela Investments. The latter is led by President Jacob Zuma's son, Duduzane Zuma.

At the same time, on 10 August 2010, ArcelorMittal announced that it planned to acquire the entire issued share capital of ICT for ZAR800 million (some US\$110 million). This acquisition is conditional on, *inter alia*, ICT being awarded a *mining right* over the residual share. ICT will, irrespective of whether or not this condition is fulfilled, benefit from ArcelorMittal's BEE transaction owing to the fact that it will hold shares in the Ayigobi consortium.

Besides revealing an alarming degree of crony capitalism, the opportunistic acquisition of ICT does very little to promote broad-based BEE, as the majority of ICT's shareholders are either politically connected or already successful entrepreneurs. In addition, it is remarkable that a major transnational corporation could acquire what was little more than a shelf company for US\$110 million, which itself had acquired a prospecting right under somewhat dubious circumstances.

### **(iii) The Lonmin issue**

The Lonmin saga likewise reveals the weaknesses in the South African mineral regulatory framework, as well as the DMR's poor record in the processing of prospecting and mining rights. Of greater concern, however, is the insight that this provides into security of tenure under the current system.

The Lonmin issue gave rise to great international concern and led to a 5.2 percent decline in Lonmin's share price on Friday, 6 August 2010.

On 3 August 2010, the DMR ordered Lonmin to immediately cease the mining and disposal of all "associated minerals", in this case, those minerals outside of the platinum group metal classification such as nickel, copper and chrome, on its leased property in the Marikana area in Rustenburg. The DMR's explanation was that Lonmin had never had the right to mine and dispose of these associated minerals and, thus, was doing so illegally.

Although Lonmin had successfully applied for the conversion of its platinum group metals old order rights between 2006 and 2008, it only applied, under section 102 of the MPRDA, to extend its new order mining rights to include the right to mine and dispose of associated minerals in December 2009.

The DMR, in its media statement of 10 August 2010, observed that "a number of major companies realised the need to [apply for the inclusion of associated minerals in their existing mining rights under section 102 of the MPRDA] in addition to lodging applications for the conversion of their old order rights to new order rights. Companies which did so, are now, under the new dispensation, in a position to conduct their operations as they did prior to the commencement of the MPRDA, as the [s]tate has granted them the right to mine for associated minerals." The DMR further stated that it had been "puzzled by the fact that Lonmin chose not to apply for the inclusion of these minerals earlier".

Under section 102 of the MPRDA, a mining right holder is only allowed to amend or vary its mining right, which includes extending the mining right to include additional minerals, if it has the Minister's written consent to do so.

At the time of the DMR's order, Lonmin had not yet been granted the right to mine and dispose of associated minerals under section 102.

To make matters worse, in March 2009, Keysha Investments 220 (Pty) Ltd, a member of the HolGoun Group of companies controlled by Sivi Gounden, the former director general of Public Enterprises, had applied for a right to prospect for associated minerals on a portion of Lonmin's mine. According to the DMR, no prior applications had, at that time, been made regarding associated minerals over this property, and thus "the Department had no choice but to process the Keysha application in terms of the 'first come, first served' provisions of the [MPRDA], and to grant it, which the DMR did in May 2010.

Lonmin has a rather different view of the legislative requirements in question, claiming that the conversion of its old order rights included the conversion of the rights to *all* minerals, including associated minerals, which it had mined and disposed of prior to such conversion. Lonmin argued that, when it applied for the conversion of its old order rights, it did so in good faith with the view that it would be placed in the same position in which it had been prior to the conversion process.

On the face of it, the DMR's decision to grant Keysha's prospecting right application is not unlawful, as it appears that Lonmin did not have the right to mine and dispose of associated

minerals in respect of that particular portion of land. There are, however, a number of questions regarding the DMR's argument, as well as its grant of Keysha's application.

First, the Lonmin issue indicates that the current regulatory regime is unclear about associated minerals. In particular, the MPRDA failed to clarify what procedures mining companies were required to follow for the conversion of their old order rights relating to associated minerals. Prior to the MPRDA and under the Minerals Act, a party authorised to mine any mineral could also mine and dispose of any associated minerals. The MPRDA, however, does not make provision for the prospecting or mining of associated minerals.

The DMR appears not to have furthered the MPRDA's transitional provisions. These arrangements are meant to provide a seamless interface between the previous regulatory regime and MPRDA regime. One of their objectives is "to ensure continuity of tenure is protected in respect of...mining. ..operations".

Another noteworthy element of this saga is that it is clear that the DMR has always known that Lonmin has mined and disposed of associated minerals. This is evidenced by the fact that, under Lonmin's mining work programme, compliance with which was a term of Lonmin's converted mining rights, the Minister imposed a positive obligation on Lonmin to dispose of all minerals recovered from the mine. As evidence of the fulfilment of this condition, Lonmin submitted monthly returns to the DMR identifying the tonnages of all the different minerals mined on the property (including the associated minerals), as well as the products produced. Further, Lonmin continues to pay, as it has always done, royalties to the government for the associated minerals that it mines and of which it disposes. This is contrary to the DMR's assertion that it only became aware of Lonmin's mining and disposal of associated minerals when it conducted routine inspections prior to deciding whether or not to grant Lonmin's section 102 application.

Another issue is the fact that, in May 2009, Lonmin objected to, and appealed against, Keysha's prospecting right application. This objection, made to the then DME, was referred to the Regional Mining Development and Environmental Committee ('REMDEC) for resolution. The DMR has yet to consider Lonmin's appeal and, despite the fact that the REMDEC proceedings have not been finalised at the time, it granted Keysha's prospecting right application in May 2010.

Then there is the worrying role of HolGoun's principal and erstwhile Lonmin board member, Sivi Gounden. Gounden resigned from the Lonmin board in October 2009 after his company had applied for a prospecting right in direct competition with Lonmin. His wife, Vanessa Gounden, is one of the directors of Keysha. Vanessa Gounden was previously the head of human resources at the National Intelligence Agency. The other director of Keysha is Miriam Sekati, who chairs the Intelligence Services Council, the human resources arm of the Department of State Security. Sivi Gounden's connections likewise raise questions as to how Keysha was aware of Lonmin's alleged failure to apply for new order rights regarding associated minerals.

Lonmin has taken the DMR's decision to grant Keysha's prospecting right application on judicial review. As regards the DMR's order of 3 August, the DMR, in a letter to Lonmin of 11 August 2010, rescinded its order and confirmed that Lonmin's section 102 application has been approved, except with regard to the portion of Lonmin's leased property which is subject to

Keyshas prospecting right. In plain English, this means that none of this should have happened had the DMR processed Lonmin's application more expeditiously.

Even if all these issues come to nought, and the DMR's decision is justified, it is troubling that the Department did not engage more effectively with Lonmin when it ordered it to cease the mining and disposal of associated minerals, and only belatedly granted Lonmin's section 102 application after significant market disturbance, negative media publicity and considerable damage to South Africa's reputation as an investment destination.

### **What the case studies show**

The licensing issues I have just outlined are concrete examples of the current problems facing South Africa's mineral regulatory regime:

First, South Africa does not have a publicly accessible register containing the details of existing prospecting or mining rights, or pending applications for such rights, and details of the land to which these rights and applications relate. What South Africa needs to implement is a cadastre (or mining title) system similar to those found in Chile, Madagascar, Mozambique, Ghana and many other mining jurisdictions;

2. Second, crony capitalism and opportunism have emerged as a significant problem. In part, this is because of vague legislative requirements and high levels of administrative discretion. These factors have also allowed the security of tenure of mining rights to be undermined.

In particular, the MPRDA does not contain clear time frames for decisions and, of equal concern, the manner in which the Act's aims and objectives are to be met. Many technical terms are not defined, which has led to different interpretations within different regional offices and a resultant lack of certainty regarding the application of the Act.

Owing to the unclear provisions of the MPRDA, the DMR has broad discretion in accepting and processing applications for various rights. The subjective interpretation of unclear provisions is antithetical to security of tenure. In addition, the length of time taken in processing applications goes well beyond what is reasonable.

Issues of administrative weaknesses in the DMR, capacity problems, as well as lack of transparency in the licensing system pose further problems. The Minister herself, in a media statement of 17 August 2010, has acknowledged as much. This, at least, indicates that the first hurdle to regulatory reform has been overcome: acknowledgement that there is a problem.

3. Although it could be argued that there exists very little precedent in the correct application of the MPRDA, a relatively new piece of legislation, the DMR has, in the unhappy Kumba/ICT and Lonmin sagas, shown a poor understanding of the rule of law. The rule of law is the bedrock of South Africa's Constitution, as the Constitutional Court has consistently emphasised its importance in South Africa's democracy. In the Kumba case, this led to ICT being awarded a prospecting right over an existing mine and in preference to Sishen's application for a mining right over the same land and for the same mineral.

## **Nationalisation of South Africa's mines**

It would be remiss of me to discuss South Africa's mining industry without mentioning the recent proposals regarding the nationalisation of South Africa's mines. Nationalisation of mines is not a new debate in South Africa. However, with the renewed energy of the ANC Youth League behind this issue, it has become the subject of legitimate concern.

A lot has been said regarding the nationalisation of mines in South Africa, most of which is speculative. What I can say is that the debate has now moved forward to the agenda of the ANC's National General Council meeting, which will be held in Durban on 20 to 24 September 2010. Despite the opposition of the government's senior leadership to the proposal, including the President, it remains to be seen what will emerge from Durban, and, more importantly, the ANC's five yearly elective conference in Bloemfontein in December 2012.

## **The way forward**

I have not painted a happy picture in this address, but I hasten to add all is not lost.

Government has not ignored what is going on in the industry. On the contrary, it has announced some very important steps in the hope of bringing stability to it.

The tripartite Mining Industry Growth, Development and Employment Task Team (or MIGDETT) was established in December 2008 to achieve two critical outcomes: first, to help the mining industry manage the negative effects of the global economic crisis and to save jobs and, second, to position the industry for growth and transformation in the medium to long term.

Much to my surprise, I was invited, earlier this year, to participate in the MIGDETT competitiveness task team.

At the March 2010 Drakensberg mining summit, the Minister announced that MIGDETT, would review and make recommendations regarding issues such as competitiveness, infrastructure, sustainable development, beneficiation and transformation in the mining industry, as well as other concerns arising out of the Mining Charter. The summit led mining industry stakeholders to recognize that it is essential that issues of industry transformation, as much as its competitiveness, need be addressed in developing a way forward.

Following the summit, the key mining stakeholders, representing government, business and labour, agreed to develop a strategy for sustainable growth and meaningful transformation in the mining industry, taking into consideration MIGDETT's recommendations. On 30 June 2010, the industry stakeholders signed a stakeholders' strategic declaration in Pretoria on the transformation of the mining industry, or what we refer to as "the declaration", which is essentially the forerunner of the Mining Charter review.

The declaration has a number of positive aspects. In particular, the fact that it is a "government, labour and business joint venture" is a positive development for the mining sector. Further, the declaration has a broader focus than the Mining Charter, as it aims to promote *both* the

competitiveness of the mining industry *as well as* its transformation. The declaration also deals with fundamental issues neglected by the Mining Charter, and commits to the negotiation and implementation of significant amendments of the MPRDA. This leads me to my next point.

As I mentioned earlier, the Minister announced on August 17 that the government was aware of the increasing negative sentiment towards South Africa's mining industry, in particular, its regulatory framework. The Minister admitted that the MPRDA contained 'a number of ambiguities'; that there is a lack of transparency in and access to the DMR's licensing data; that the DMR is plagued by administrative capacity problems, and that there is a growing perception of maladministration within the DMR.

In order to address these issues, the Minister announced that the MPRDA would be substantially amended in 2011. The fact that government is for the first time prepared to admit that there is a problem and has undertaken to fix it is clearly a most welcome sign.

The Minister also announced an overhaul of the regional offices of the DMR, the introduction of a publicly accessible web-based system of licensing data to enable companies to track the progress of their licence applications, and, from 1 September 2010, the imposition of a moratorium on the lodging and acceptance of prospecting right applications.

This moratorium is intended to give the DMR the opportunity to conduct a comprehensive audit of all licences granted since the promulgation of the MPRDA; to put its database in order and prepare a new licence data system. Further, the Minister has promised that all cases of "double-granting of licences' will be resolved by November.

It is clear from this announcement that the DMR is well aware of the problems that currently beset the regulatory regime and is now attempting to take a pro-active stance to remove these blockages. Of course, it remains to be seen whether these measures will be implemented as promised; whether the redrafted MPRDA will improve on its predecessor; how it will be implemented; whether the proposed reforms, the moratorium in particular, will harm the industry rather than stabilise it, and finally, whether these steps collectively will be sufficient to change sovereign risk perceptions.

It is concerning that the Kumba and Lonmin sagas unfolded in part after the formation of MIGDETT, the summit and the signing of the declaration. The dissonance between what is promised and what subsequently transpires on the ground, so to speak, is something which foreign investors would not have overlooked.

## **Conclusion**

This is a critical time for South Africa's mining industry. The Kumba and Lonmin sagas have undoubtedly caused considerable collateral damage to South Africa's reputation as a safe investment destination.

At the same time, the Ministers announcement of August 17 has provided some much needed encouragement. She has stated on the record that the DMR aims to stamp out corruption and

incompetence within its own ranks, and that amendments to the MPRDA, to ensure that regulatory uncertainties are a thing of the past, will be proposed in the short term.

It is now up to government, and, I might add, the mining industry itself, which is so often too tentative in its government interactions, to turn adversity into opportunity. By so doing, South Africa's mining industry could well be placed on a new path to attract the investment that its treasure trove of mineral resources so richly deserves.