The Mineral and Petroleum Resources Development Act, 2002 (the "New Act") was promulgated to make provision for equitable access to, and sustainable development of, the nation’s mineral and petroleum resources. The New Act provides a dispensation which entirely replaces that created by the Minerals Act, 1991 (the "Minerals Act") and vests the State, as opposed to private property owners, with custodianship of South Africa’s resources.

The provisions of the New Act are not yet in force, but it contains a number of transitional arrangements which those engaged in mining and prospecting in South Africa should take note of, in order to effectively plan for the new dispensation.

Schedule II to the New Act ("Schedule II") contains the provisions which will govern the transition from the dispensation created under the Minerals Act to the dispensation envisaged by the New Act. The Schedule provides for the treatment of pending prospecting and mining applications, the continuation of existing rights, and for the continuation of royalty payments in limited circumstances.

The Continuation of Existing Rights

The New Act recognises the rights that mining companies currently have as "old order rights" and distinguishes, inter alia, between so-called "old order mining rights" and "unused old order rights".

Section 1(iii) of Schedule II provides that "old order mining rights" include:

1. the common law mineral right, together with a mining authorisation obtained in connection therewith in terms of section 9(1) of the Minerals Act;

2. a consent to mine granted in terms of section 9(1)(b) or 9(2) of the Minerals Act and the common law mineral right attached thereto, together with a mining authorisation issued in connection therewith in terms of section 9(1) of the Minerals Act;

3. a right to dig or mine or a claim license referred to in section 47 of the Minerals Act and the common law mineral right attached thereto, together with a mining authorisation issued in connection therewith in terms of section 9(1) of the Minerals Act;

4. a right to dig or mine referred to in section 47(5) of the Minerals Act and the common law mineral rights attached thereto, together with a mining authorisation issued in connection therewith in terms of section 9(1) of the Minerals Act;

5. any permission to mine in terms of the Bophutatswana Land Control Act, 1979, the Venda Land Control Act, 1986, the Lebowa Minerals
Trust Act, 1987, the Rural Areas Act, 1987 or the Transformation of
Certain Rural Areas Act, 1998, together with the common law mineral
right and a mining authorisation in terms of the Mineral Act; and

6 a temporary authorisation or permit authorising the continuation of a
mining operation on land comprising the subject of a mining
authorisation or permit,

in respect of which mining operations are being conducted immediately before
the New Act is enacted into law.

Any such old order mining right in force on the date immediately before the
New Act is enacted into law, continues in force for a period of five years,
subject to the terms and conditions on which it was originally granted (see
section 7(1) of Schedule II).

During the five year period referred to above, the holder of such a right must
lodge the right for conversion with the Regional Manager in whose region the
land in question is situated, together with:

1 particulars of the holder of the mineral rights, which will be prescribed
   by regulation;

2 a sketch plan or diagram depicting the mining area for which the
   conversion is required, which may not be larger than the area for which
   the old order mining right is held;

3 the name of the mineral or group of minerals for which the old order
   mining right is held;

4 an affidavit verifying that the holder is conducting mining operations on
   the area of the land to which the conversion relates and setting out the
   period for which such mining operations were conducted;

5 a statement setting out the period for which the mining right is
   required, substantiated by a mining work programme;

6 a social and labour plan, the format and content of which will still be
   prescribed by regulation;

7 information as to whether or not the old order mining right is
   encumbered by any mortgage bond or any other rights registered at the
   Deeds Office or Mining Titles Office;

8 a statement setting out the terms and conditions applicable to the old
   order mining right;

9 the original title deed in respect of the land to which the old order
   mining right relates, or a certified copy thereof;
the original old order right and the approved environmental management programme or certified copies thereof; and

an undertaking that, and the manner in which, the holder will substantially and meaningfully expand opportunities for historically disadvantaged persons to enter the mineral industry and will promote and advance the social and economic welfare of all South Africans (see section 7(2)(a)-(k), Schedule II).

If the holder of the old order right complies with the above requirements in respect of each old mining right it holds, and if it:

1 has conducted mining operations in respect of the right in question;
2 indicates that it will continue to conduct such mining operations on conversion of the right;
3 has an approved environmental management programme; and
4 has paid the conversion fee, which will be prescribed by regulation,

then the Minister of Minerals and Energy ("the Minister") must convert the old order mining right into a mining right in terms of the New Act (see section 7(3), Schedule II, read with Chapter 4 of the New Act).

The holder of the erstwhile old order mining right must lodge the converted mineral right at the Mining Titles Office for registration and simultaneously at the Deeds Office or the Mining Titles Office for deregistration of the old order mining right, as the case may be, within 90 days from the date on which he received notice of conversion (see section 7(5), Schedule II).

Within 14 days of the application having been accepted, the Regional Manager is obliged to make known that an application for a mining right has been received in respect of the land in question, and call upon interested persons to submit their comments regarding the application within 30 days of the date of the notice (see section 10 of the New Act). If a person objects to the granting of the mining right, the objection is referred to a committee for consideration and to advise the Minister thereon (see section 10(2) of the New Act).

Thus, where any person owns properties in respect of which it has concluded mineral leases with other miners, which miners have conducted mining operations on those properties, those miners, and not the owner of the land, are in a position to apply for the conversion of their current rights into rights in terms of the New Act.

Unused old order rights include mineral rights under the common law in respect of which:
1 no prospecting permit or mining authorisation was issued in terms of the Minerals Act;

2 a prospecting permit or mining authorisation was issued in terms of the Minerals Act;

3 a consent to prospect was issued in terms of section 6(1)(b) or 6(3) of the Minerals Act in respect of which a prospecting permit was issued in terms of section 6(1) of the Minerals Act;

4 a consent to prospect in terms of section 6(1)(b) or 6(3) of the Minerals Act in respect of which no prospecting permit was issued;

5 a prospecting lease, prospecting permit, prospecting license or prospecting permission referred to in section 44 of the Minerals Act and the common law mineral right attached thereto in respect of which a prospecting permit was issued in terms of section 6(1) of the Minerals Act;

6 a prospecting lease, prospecting permit, prospecting license or prospecting permission referred to in section 44 of the Minerals Act and the common law mineral right attached thereto in respect of which no prospecting permit was issued in terms of section 6(1) of the Minerals Act;

7 a consent to mine issued or granted in terms of section 9(1)(b) or 9(2) of the Minerals Act and the common law mineral right attached thereto in respect of which a mining authorisation was issued in terms of section 9(1) of the Minerals Act;

8 a consent to mine issued or granted in terms of section 9(1)(b) or 9(2) of the Minerals Act and the common law mineral right attached thereto in respect of which no mining authorisation was issued in terms of section 9(1) of the Minerals Act;

9 a consent to mine issued or granted in terms of section 9(1)(a) or 9(2) of the Minerals Act and the common law mineral right attached without a mining authorisation issued in terms of section 9(1) of the Minerals Act;

10 a right to dig or mine referred to in section 47 of the Minerals Act and the common law mineral right attached thereto, together with a mining authorisation obtained in connection therewith by virtue of section 47(1)(e) of the Minerals Act; and

11 any permission to prospect or mine in terms of the Bophutatswana Land Control Act, 1979, the Venda Land Control Act, 1986, the Lebowa Minerals Trust Act, 1987, the Rural Areas Act, 1987 or the Transformation of Certain Rural Areas Act, 1998, together with the
common law mineral right and a prospecting permit or mining permit issued in terms of the Minerals Act,
in respect of which no prospecting or mining was being conducted immediately before the New Act is enacted into law.

Any unused old order right in force immediately before the New Act is enacted into law continues in force subject to the terms and conditions on which it was granted, for a period not longer than one year from the date on which the New Act is enacted into law (see section 8(1), Schedule II). Within this one year period, the holder of an unused old order right has the exclusive right to apply for a prospecting right or a mining right (section 8(2), Schedule II). On expiry of the one year period, the old order right ceases to exist.

Accordingly, should any person therefore possess any unused old order rights, it must apply for a prospecting right or mining right in respect of those rights as soon as possible after the New Act is enacted into law. Therefore, where such rights have been used in the past, but are not used immediately prior to the New Act being enacted into law, it will still be necessary for the holder of such a right to apply for mining rights or prospecting rights and to utilise those rights in order to retain them.

Pending Prospecting and Mining Applications

Any application for a prospecting permit, mining authorisation, consent to mine, or permission to remove and dispose of any mineral lodged by any person (but not finalised immediately before the New Act comes into force) will be deemed to have been lodged in terms of the provisions contained in the New Act and not the provisions contained in the Minerals Act (see section 6, Schedule II).

Should any required information be missing from the application (see paragraph 2.2.4), the Regional Manager appointed by the Minister will request this information from the relevant person, and that person will have 90 days to submit the outstanding information. The information will be that required in terms of the New Act, and not the information currently required in terms of the Minerals Act (see section 6(5), Schedule II).

The same rules apply to any environmental management programme submitted for approval immediately prior to the New Act coming into force as law.

Royalty Payments

Royalty payments made in terms of the Minerals Act and in terms of private agreements may only continue once the New Act has come into force if those payments are made to a community, which furnishes the Minister with such information as may be required, or to natural persons where:
the discontinuation of the payment of such royalty will cause undue hardship to the person concerned; or

the natural person uses the royalty for social upliftment.

Any recipient of a royalty who wishes to qualify for the relief granted under these provisions must, however, apply within a period of five years from the enactment of the New Act to the Minister, who will determine what royalty may be payable and on what terms and conditions.