

## **Nationalisation of water and minerals**

### **Privatisation**

Former President Mandela and other officials have given periodic assurances that nationalisation is no longer on Government's agenda. Instead, Government intends to liberalise the economy and privatise state enterprises. This position has been repeated in official macroeconomic policy documents such as those of GEAR and the October 1998 White Paper on A Minerals and Mining Policy for South Africa, which says (1.1.1.iv):

As articulated in its macroeconomic strategy, Government has committed itself to a continuing process of economic liberalisation, thus strengthening the competitive capacity of the economy, fiscal and tariff reform and bureaucratic deregulation. These are essential steps towards enhancing the country's competitiveness, attracting foreign direct and portfolio investment and creating a climate conducive to business expansion.

Various privatisation, outsourcing and public-private sector partnership initiatives have been completed or started. There have been calls to speed up the process to attract needed foreign investment more rapidly, and calls to slow down the process in case it affects security of existing jobs. Recognising and balancing valid arguments and vested interests from all sides, Government has proceeded at a measured pace.

The pace cannot satisfy everyone but the direction is generally perceived to be forward, towards the greater economic freedom needed for private-sector wealth-creation and growth. These are desirable in themselves and also to facilitate Government's redistribution and development plans.

### **Nationalisation**

However, there are some contradictory policy developments. Of these the two most disturbing are the recent nationalisation of water rights, and the proposed nationalisation of mineral rights.

There appears to be a lack of appreciation in official circles of how the international community sees such dramatically retrogressive steps. However re-named, disguised, rationalised and mitigated by special provisions, these acts of nationalisation are recognised for what they are and for their inevitable effects.

The rhetoric in defence of nationalisation is always the same, and water and minerals are not special cases. In every case nationalisation increases uncertainty, malinvestment, inefficiency and misallocation of resources.

Private property rights are the fundamental underpinnings and foundations of free enterprise and a market economy. In itself, and as a harbinger of further such assaults on property rights, nationalisation profoundly discourages foreign observers, especially since the rest of the world is privatising.

An indicative current example is Government's attack, again against its own declared policy, on the intellectual property rights of pharmaceutical companies. Good intentions are not at issue. What matters is that the international investment community pays keen attention to such evidence of Government's lack of commitment to the fundamental rules of the global market. Yet drug patent rights are a minor issue in comparison with water, minerals and various other components of physical property rights which may be usurped in future.

These nationalisations are not expropriations for Government use after constitutionally-required compensation. Instead Government intends to expropriate water and minerals without compensation then transfer them to other selected private users at State-determined prices. With such precedents, Government could proceed to enforce the sale to favoured clients of privately-owned shares, businesses, houses and ‘family silver’ at State-determined prices.

### **Water and mineral rights are property rights**

Use of available water is part of land’s utility and value, in the same sense as use of air and wind, the right to walk on and dig and develop land, and rights to enjoy, hold, sell, let or mortgage it. Each curtailment of property rights, such as rates and zoning, affects property values, usually negatively. In many cases, land has little or no residual value without the certainty of its water.

Nationalising water rights without compensation reduces property rights and land values, both in particular and in general. As yet this has been widely ignored but banks and mortgage-holders will feel the effects of reduced land security as new water management legislation takes effect.

Minerals are no less part of land’s utility. In South Africa, land rights and mineral rights have been recorded separately. Mineral rights were often willed to separate heirs and seen as of little or no immediate value. Their ownership is now frequently unclear, with Deeds Offices and the Council for GeoScience maintaining only inadequate and incomplete records.

Many mineral rights are held by private individuals, tribal communities and small businesses. That most are currently of little value and have owners who are hard to trace is no reason for Government to expropriate them without compensation.

### **Motivations for nationalisation**

Although the ANC’s long historical commitment to nationalisation was repudiated by Mr Mandela, a carry-over effect is evident. In some Government circles there is evidently a powerful ideological reluctance to forge ahead with privatisation or to abandon plans for nationalisation. The intention may not be to delay reconstruction, development, investment and growth, but that is the result.

It appears that Government condoned and authorised water nationalisation because of a correct perception that the Department of Water Affairs and Forestry had done a fairly good job of extending water delivery to millions of formerly unserved people.

So the innocuous-sounding “key proposal” in the White Paper on a National Water Policy to (p3)

confirm and formalise the status of the nation’s water resources as an indivisible national asset

was upheld when the National Water Bill was “frog-marched” into law in July 1998 and established the National Government (page 18) as

the public trustee of the nation’s water resources.

Likewise it appears that Government may condone and authorise minerals nationalisation because of a correct perception that access to minerals is being hampered by the current inadequacy of records of mineral rights in Deeds Offices and the Council for GeoScience.

So the assertion in the White Paper on a Minerals and Mining Policy that (1.3.6.1.ii)

Government's long-term objective is for all mineral rights to be vested in the State for the benefit of and on behalf of all the people of South Africa

may also be upheld by the passing of a Minerals and Mining Bill during 1999.

It is hardly part of "a continuing process of economic liberalisation" to address real problems of supply and distribution of water and minerals by the destructive and market-unfriendly device of nationalisation without compensation.

### **Perceived victims and beneficiaries**

Some may think that white owners of large farms will be the main victims of water nationalisation, and that black would-be owners of small farms will be the main beneficiaries. In fact, the longer-term uncertainty involved in obtaining temporary water rights from officials who can exercise discretion will affect small farmers at least as much as larger ones.

Some may also think that large white-owned mining houses will be the main victims of minerals nationalisation, and that black would-be owners of small mining operations will be the main beneficiaries. In fact, the large mining houses are able (and would doubtless prefer) to negotiate single favourable terms with Government rather than with countless private individuals who must first be identified and found.

Government penalises intended beneficiaries such as private individuals, small businesses and tribal authorities by nationalising their mineral rights without compensation, and also removes the comparative advantage which small would-be miners have at present by being willing to locate a few owners of mineral rights. The unintended consequences will be a greater concentration of mining in the hands of large mining houses, and a reduction in mining.

### **Foreign precedents**

The White Paper makes implausible claims that South Africa and the USA are among few major mining countries with private ownership of mineral rights, and that in most other countries the right to minerals is vested in the Government. A cursory enquiry by staff at the Free Market Foundation makes it immediately clear that many countries, including former Commonwealth countries, have private mineral rights and thriving mining sectors like South Africa. Private ownership of mineral rights works.

### **Market-like approaches**

In countries such as Chile and Australia the Government does own mineral rights but provides de facto permanent title to mining companies. This market-like restoration of some certainty and security-of-tenure reduces the damage of Government ownership and permits a mining industry to exist. It is likely that privatising minerals in such countries would lead to more efficient resource allocation and the economic growth, which follows privatisation of state assets in general.

Even Government concedes the supremacy of market approaches, and has wisely made it clear that it prefers to leave farming, forestry, mining and other business activities to private enterprise. Reasonable comment by business has prompted various modifications to proposed legislation in attempts to mitigate the more obviously harmful consequences of nationalisation with devices such as renewable short-term licenses to simulate security of tenure. This is rather as if Government were to nationalise all housing then offer 99-year leasehold in the hope of encouraging house-painting and tree-planting. If you must nationalise, it limits the damage.

Big-business representatives have specific sectoral interests and must concern themselves with accommodation rather than confrontation. Legislators either did not hear, or ignored, argument and advice to take the logical step to 'leave well alone', align themselves with government policy, and abandon nationalisation plans altogether.

The result may not be 'the worst of both worlds', but it must carry enormous and entirely unnecessary bureaucratic costs of establishing and administering pseudo-markets in nationalised water and minerals.

### **Transitional costs**

Established countries cannot make an unconstrained choice between regimes of privately-owned or Government-owned mineral rights. South Africa has the former regime, and nationalising mineral rights has various immediate and longer-term costs.

One significant immediate cost should be just and equitable compensation for expropriation as required by the Bill of Rights. Clearly Government is unable to justify or afford such compensation, which might run to hundreds of billions of rands. This is why nationalisation without compensation, otherwise known as theft, has removed private water rights and is proposed for mineral rights. This approach has its own costs, not only to the uncompensated former owners of the rights, but to the country's reputation and future growth. South Africa's people cannot afford such costs either.

### **State allocation of resources**

Some claim that Government can be a more egalitarian allocator of resources than private ownership. By definition, Government can never achieve the balanced 'Pareto-optimal' satisfaction of myriad individual needs, which the market mechanism allows, since this depends on the free choices of all participants. Some maintain, however, that Government can "know better" and "do better", intervening to redress past wrongs without causing "too much" market disruption and discriminatory hardship.

This supposition is contradicted by Government's poor performance both in keeping track of mineral rights and in granting mining licenses over the large share of South African mineral rights already held by Government. This poor performance mirrors similarly poor Government performance in the tracking, husbandry and development of State-owned land, housing, buildings and other property. It emphasises the wisdom of current Government policy to progressively privatise state assets.

### **Undermining the Constitution**

A Constitution should permanently confine Government action within pre-agreed limits. The water bill and proposed minerals legislation, like various other recent legislation, demonstrate an alarming willingness by Government to propose and adopt legislation known to be probably unconstitutional. Government appears to see the Constitution as an irksome constraint to be edged around.

Any nation faces a profound problem when Government becomes the primary agent for undermining and actively assaulting the Constitution. A continuous message is being sent out that the Constitution is bad. This was confirmed when the ANC's General Secretary stated that, if the necessary two thirds majority is obtained in the next election, the ANC will amend the Constitution.

### **A better approach**

It is predictable that nationalising mineral rights will involve sharp practices, false claimants, and shambolic last-minute rushes to meet deadlines. There will follow either the gross immorality of an enforced cut-off or a protracted process of restitution for errors and omissions.

Instead, Government should recognise and uphold the primacy of property rights in their broadest sense, at every opportunity.

If a national record is deemed to be an essential public service, the deeds registry system should be updated to improve the quality of records of ownership of mineral rights.

### **Mobilising mineral rights**

How to mobilise mineral rights whose owners are temporarily untraceable is a problem, which is not specific to minerals. Suitable approaches already exist regarding land, bank accounts, safety deposit boxes, and other property with missing owners. Such property remains private property, and there is no good reason for Government or any other body to appropriate it on a 'finders, keepers' basis.

If the owner is not found during 'due diligence' inquiry and advertising, the State should appoint (or act as) an agent in lieu of the missing owner, authorising mining and utilising resources in good faith and holding the proceeds in trust.

If, by proscription after an agreed (long) period, a specific minerals right is finally transferred to the State, it should then be privatised forthwith by auction or other method.

### **Further reading**

O'Malley, T (1998) *Privatisation: A UK Success Story*, FMF Monograph 21, Johannesburg.

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