

## Legislative changes have created uncertainty

THE mining industry faces a plethora of legislative changes, however, while this has created some uncertainty among local and international investors, the sector is expected to continue to thrive.

This is the opinion of Morne van der Merwe, Director at Werksmans Incorporating Jan S. de Villiers who points to a long track record of resilience.

Among those changes are the new regulations accompanying the Mineral and Petroleum Resources Development Act (MPDA), the Mining Charter, the most recently published Codes of Good Practice, and the new Royalty Act.

He concedes, "Certain aspects of these laws and regulations are controversial and contradictory and undoubtedly need to be further debated among all role-players and stakeholders.

"Indeed, the Minister of Minerals and Energy, Susan Shabangu, has publicly acknowledged the need for further discussion and clarification.

"Speaking at the 2010 Mining Indaba in Cape Town the Minister noted that there were concerns among stakeholders around amendments to the Development Act.

"Of particular importance for deal makers and players in the *mergers and acquisitions* field are the proposed amendments to section 11 of the MPDA.

"In their current form, there will be further governmental involvement in transactions in the mining sector as well as more uncertainty and delays in the imple-

mentation of transactions in this sector."

He says it is common knowledge that the Minister is disappointed with the pace and impact of transformation in the mining industry over the past 10 years. She has laid the blame for this at the door of fronting, as well as an over-emphasis in the industry on equity ownership.

Hence, the focus of the amendments in section 11 is on expanding the ambit of Ministerial consent for transactions that will change the shareholding of mining companies holding prospecting or mining rights.

"As section 11 currently stands, the consent of the Minister of Minerals and Energy is required when disposing of a controlling interest in any unlisted company or close corporation that holds prospecting or mining rights. The modified section 11 seeks to broaden the scope of Ministerial consent by bringing listed companies into the equation.

"If approved, the Minister's consent would be needed when any change of shareholding is envisaged, whether in a listed or unlisted entity holding mining or prospecting rights.

In other words, the amendment means consent would be required for any change of shareholding in relation to private companies and a change of control in relation to public companies," he elaborates.

The main issue of concern to investors, says Van der Merwe, is that there appears to be no definitive time period within which the

Minister must provide written consent. A corollary to this is that should no consent be given, the parties to the transaction may not proceed.

"In essence, this means that most transactions in the mining sector would require section 11 approval in addition to other regulatory approvals such as those relating to the Competition Act and exchange control."

"That would, in turn, have a profound impact on the industry, ultimately creating further possible backlogs in the commencement of prospecting activities and in developing new mining operations, and in general slowing down M&A activity in the mining sector," he warns.

More cause for concern for mining investors is the apparent contradictions between the most recently published Codes of Good Practice and the Mining Charter, particularly in regard to the scorecard on broad-based and black economic empowerment guidelines.

"The Codes, issued in April, are supposed to support, inform and elaborate on the Mining Charter and the Act. Rather than being seen as a supporting document, however, the Codes appear to be an attempt to establish new and overriding legislation.

"Again, this development can probably be attributed to the Minister's frustration over the perceived slow pace of transformation in mining. At the same time, industry's puzzlement over how the Codes and the Charter fit together is understandable.