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EXPROPRIATIONS BY VIRTUE OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT: ARE THERE SOME MORE TREES IN THE FOREST?

Agri South Africa and Van Rooyen v Minister of Minerals and Energy cases no 55896/2007 and 10235/2008 (NGP) (unreported 06-03-2009)

"Some agrarians are starting to chip away the pillars of the bridge. The custodians are trying to maintain the aedilitian bridge."

Introduction

At issue in this decision was (a) whether it was possible for holders of "unused old order rights" to prove that their rights had been expropriated by the Mineral and Petroleum Resources Development Act 28 of 2002; and (b) what procedure is to be followed by an expropriatee in order to enforce payment of compensation in a court of law.

I wish to acknowledge the comments and suggestions of Ernie van der Vyver. I, however, remain responsible for the correctness of the end product.

From the sketch of the "bridge on the river kwai" in 2002 Obiter 250 280.
Prior to 1 January 1992 the basic policy regarding the exploitation of the mineral resources of South Africa was between the two absolutes of complete state monopoly and unfettered private enterprise (Franklin and Kaplan The Mining and Mineral Laws of South Africa (1982) 1). On 1 January 1992 the right of prospecting for natural oil and the right of mining for and disposing of natural oil, precious minerals and precious stones, which were reserved to the state in pre-Union and Union mining laws, were revested in the common law holders of mineral rights (s 5(1) of the Minerals Act 50 of 1991). This shift in policy was construed as a form of privatisation of mineral rights (Badenhorst “The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation?” 1991 TSAR 113). The compensation payable for expropriation of a mineral right in terms of the Expropriation Act 63 of 1975 was also amended on 1 May 1992 to make specific provision for payment of compensation of market value of a registered mineral right and actual financial loss caused by the expropriation (s 11(a) of the Expropriation Amendment Act 45 of 1992).

That redistributive reform of the South African mineral law system would lead to some form of expropriation has always been foreseen. (See Badenhorst, Van der Vyver and Van Heerden “Proposed nationalisations of mineral rights in South Africa” 1994 Journal of Energy and Natural Resources Law 287.) Act 28 of 2002 not only created a new mineral law order but also made provision for a transition by holders of rights to minerals from the old order to the new order. (See Badenhorst “Transitional arrangements in terms of the Mineral and Petroleum Resources Development Act 28 of 2002: crossing a narrow bridge?” 2002 Obiter 250.) The expropriation of holders of so-called “old order rights” due to the transitional measures has already occurred, and the constitutionality of these measures have been investigated before. (See Badenhorst and Mostert “Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause: an analysis in two parts” 2003 Stell LR 377 and 2004 Stell LR 22; Badenhorst and Mostert Mineral and Petroleum Law of South Africa (2004) 25-19 et seq.)

In his analysis of the property clause, Van der Walt (Constitutional Property Law (2006) 370 et seq) also describes Act 28 of 2002 as an example of the reform initiatives of the government. Van der Walt’s commentary focuses on the extent to which the act complies with the reform objectives of the government in terms of the constitution. In his examination of the impact of the new dispensation on existing rights to minerals, he draws a distinction between the “larger issue” of the importance of large-scale reform of mineral law and the “smaller individual issues” as to how individuals are affected. His argument is that criticism of the new system should not focus on individual injustice and that criticism about individual injustice should not lead to a rejection of systemic reform (384-392). On a metaphorical level Van der Walt’s analysis was seen as one which focuses on the forest rather than the trees within the forest (Badenhorst and Mostert “Artikel 3(1) en (2) van die Mineral and Petroleum Resources Development Act 28 van 2002: ‘n herbeskouing” 2007 TSAR 469 487). Whereas it is agreed that, systemically, the purpose and objectives of Act 28 of 2002 are acceptable, the opinion was expressed that future scrutiny of the act will focus instead on the metaphorical trees (individual instances) rather than the forest (the system) (2007 TSAR 490).

The focus by the court in the Agri SA decision on one of the trees rather than the forest is to be welcomed.
2 Facts

The plaintiffs, Agri South Africa and Van Rooyen, were holders of coal and clay rights, respectively, over properties prior to the commencement of the act on 1 May 2004. (Due to the similarity of their particulars of claim and identical exceptions thereto both cases were decided together by the court.) The plaintiffs claimed that their mineral rights were expropriated in terms of section 5 of the act read with sections 2, 3 and 4 and that they were entitled to compensation as contemplated in item 12 of the transitional arrangements in schedule II of the act. The claims were lodged with the regional manager in terms of regulation 82A(1) of the act. The director-general determined in terms of regulation 82A(4) that the plaintiffs did not have valid claims for compensation. The plaintiffs did not appeal the decision of the director-general to the minister of minerals and energy. By virtue of regulation 82A(6A)(a) read with regulation 82A(7) the plaintiffs applied to court in terms of section 14 of the Expropriation Act 63 of 1975 for the determination of compensation to which they are entitled as a result of the expropriation. (See par 1, 2 and 3.) Based upon the open market value of coal rights Agri SA claimed R750 000 as compensation (par 2). Van Rooyen in turn claimed to be entitled to R600 000 for the clay rights (par 3). The defendants excepted to their claims as being vague and embarrassing and that in any event ex facie the particulars of claim they had not exhausted their internal remedies and were accordingly barred from instituting action against the defendant (par 1). The first exception was that the provisions in the act relied upon by the plaintiffs do not provide for compensation of the plaintiff’s rights and that insufficient facts had been alleged to apprise the defendant of exactly what the plaintiffs’ claims were, thus rendering the particulars of claim vague and embarrassing (par 4). The second exception was based on the plaintiff’s statement that they did not appeal against the decision of the director-general of the department of minerals and energy determining that they do not have valid claims. The argument was that they failed to exhaust their internal remedies in terms of the act (par 4).

3 Decision

According to Hartzenberg J, section 25 of the constitution of 1996 is the starting point of the exercise (par 5). In essence, section 25 provides that no one may be deprived of property arbitrarily and otherwise than in terms of a law of general application. Expropriation has to be for public purposes or in the public interest. Expropriation is subject to compensation, the amount whereof and the mode and time of payment, if not agreed upon by the parties, to be determined by a court of law. The amount of compensation has to be just and equitable taking into account, inter alia, the market value of the land and the principle that property is not limited to land. The commitment to land reforms and reforms to bring about equitable access to natural resources was also mentioned by the court (par 6).

In order to decide the legal issues identified above, the following modus operandi was stated by Hartzenberg J:

“It will be necessary to compare the rights of mineral right holders before 1 May 2004 with their rights, as regulated by the Act, thereafter, and to investigate whether the Act did not expropriate vested rights. If the answer is positive it is to be ascertained whether provision has been made for the payment of compensation by the expropriator. If the answer to that question is also positive the
3.1 Expropriation

As to the first question, the court held that expropriation of mineral rights of the holders of "unused old order rights" took place upon commencement of Act 28 of 2002 (see par 17). As will be indicated, the question of whether expropriation of rights of the holder of mineral rights had taken place upon commencement of the act is answered by application of a before-and-after analysis. For purposes of the determination of the quantum of compensation to be paid, regulation 82A(3) requires that the claimant must indicate the difference in nature and content between the expropriated property and the "old order rights" which have been preserved or the rights acquired in terms of the act. (As to earlier examples of the application of a "before and after" comparison of "old order rights" and new rights, see Badenhorst 2002 Obiter 275-278; Badenhorst and Mostert 2003 Stell LR 396-399.)

The following features of mineral rights prior to 1 May 2004 were identified by the court or inferred from its citation of dicta from case law:

(a) mineral rights either formed part of ownership of land or could be separated from ownership of land;
(b) mineral rights could be vested in someone other than the owner of land;
(c) mineral rights were freely transferable and capable of passing to the heirs of the mineral right holder;
(d) mineral rights were real rights, namely quasi-servitudes;
(e) a holder of a mineral right was entitled to go upon the property to which the right relates, prospect for minerals, and mine and remove the minerals;
(f) unsevered minerals remained the property of the owner of land until severance of the minerals from the land by the mineral right holder;
(g) in the case of irreconcilable conflict between the exercise of a mineral right and ownership of land, the interest of the latter is subordinated to the interest of the mineral right holder;
(h) the holder of a mineral right was under no duty to exploit the mineral rights, even if exploitation would be for the public benefit;
(i) if unable to exploit mineral rights, the holder could sell it to, for instance, a mining house or others for handsome amounts;
(j) mineral rights were valuable assets having a commercial value; and
(k) mineral rights could further be fragmented into shares, prospecting rights or mining rights to particular minerals (see par 7-9).

In the after-analysis part, sections 2 to 5 of the act and the "transitional arrangements" contained in schedule II of the act were taken into account. According to Hartzenberg J these four sections of the act did not acknowledge any existing holding of mineral rights: "Insofar as they have not been exploited they simply disappear in thin air" (par 11). In terms of section 4 of the act the only way to acquire new rights was to obtain them from the state. Therefore, the court was of the view that it would have been futile to acquire an unused old order right that existed before 1 May 2004 and use it as a launch pad to acquire rights in terms of the act (par 11). The effect of these provisions of the act would have been to extinguish old order rights. Such expropriation would have taken place without provision for compensation. That would have been in conflict with section 25 of the constitution and would have rendered the act unconstitutional (see par 11).
The transitional arrangement, however, needs to be taken into account because it gives rights to holders of "old order rights", and in particular to holders of "unused old order rights" (par 11). The court found that both plaintiffs were holders of "unused old order rights" (par 12). Hartzenberg J was of the view that schedule II saves the act from being declared unconstitutional (par 12). The court, therefore, regarded an analysis of schedule II necessary to see what rights are conferred on the holder of "unused old order rights". Item 8 of schedule II deals with the processing of "unused old order rights". An "unused old order right" remains valid for not longer than one year from commencement of the act. The holder has the exclusive right to apply for a prospecting right in terms of section 16 and a mining right in terms of section 22 of the act. The "unused old order right" remains valid until the application is granted or refused. Unless an application for a prospecting right or a mining right is brought the "unused old order right" ceases to exist after the one year period (par 14).

The court indicated that the legal position of the holder of an "unused old order right" had been changed drastically by the act. The holder, who previously was under no duty to exploit minerals, had only one year within which to bring an application for a prospecting right or a mining right (par 14). Such an application is not a mere formality due to some of the requirements that have to be met in order to be successful:

(a) Payment of a non-refundable fee.
(b) An environmental management plan has to be submitted in the case of the application for a prospecting right. An environmental impact assessment has to be conducted and an environmental assessment programme and environmental management programme have to be submitted in the case of the application for a mining right. This involves studies over a period of time and incurring of costs.
(c) The applicant must have access to financial resources to the satisfaction of the minister to conduct prospecting operations or mining operations optimally (par 15). (As to additional requirements, see Badenhorst and Mostert Mineral and Petroleum Law of South Africa 15-5 and 15-6 and 16-4 to 16-5.)

Item 8 of schedule II is perceived by the court as merely an opportunity to holders of affected "unused old order rights" to mitigate their damages. If the holder has the necessary financial resources, like for instance a mining house, the holder can apply for the necessary permission to exploit the rights (par 17). The court pointed out that not all holders of "unused old order rights" would be in a position to bring such an application or would necessarily be successful (par 15). If the holder does not have the financial resources the opportunity afforded by the schedule is more apparent than real (par 17). Failure by a holder of "unused old order rights" to apply for a prospecting right or a mining right is perceived by the court as a defence afforded to the minister against a claim for compensation on the basis that the holder acted unreasonably by not having obtained similar rights (par 17). It is not something which the minister can rely on to maintain that the holder has not been deprived of his rights (par 17).

The court clearly distinguishes between an administrative expropriation in terms of section 55(1) of the act and expropriations in terms of various provisions of the act (par 16). Item 12(1) by necessary implication recognises the latter form of expropriation (par 16). Hartzenberg J held: "What item 12 of the schedule allows a claimant to do is to assert that he has been expropriated and to prove it in a court of law" (par 22). The court found that an expropriation in terms of such other provisions of the act has taken place in the case of holders of "unused old order rights" (see par 16).
The court took note that holders of "old order rights" were not formally expropriated in terms of section 55(1) of the act (par 16). Apart from the relief afforded by the transitional arrangements, the rights of holders of "old order rights" have been extinguished by the coming into operation of the act and the state is now at liberty and obliged to administer those rights (par 16). The court interpreted the act as admitting "that holders will be deprived of their rights and that such deprivation coupled with the State's assumption of custody and administration of those rights constitute expropriation thereof" (par 17). In terms of section 3(1) and (2) of the act the state is the custodian and administrator of the mineral resources for the benefit of all South Africans. The court concluded that it is possible for holders of "old order rights" to prove that their rights have been expropriated (par 19).

3.2 Claim to compensation

As to the second question, the court held that the act affords holders of "unused old order rights" a right to claim compensation. Section 55(2) and in particular regulation 82A(7) of the act make some of the provisions of the Expropriation Act 63 of 1975 applicable to such claims (par 19; for a discussion of these provisions of the Expropriation Act, see Badenhorst and Mostert Mineral and Petroleum Law of South Africa 25-34 - 25-34B).

3.3 Procedure

As to the procedure to be followed to institute a claim, it was argued by the respondent that an administrative decision having been made by the director-general cannot be ignored and remains valid until set aside, bearing in mind that an unlawful administrative decision produces valid legal consequences for as long as it is not set aside. It was further argued that no person may apply to court for a review of an administrative decision until that person has exhausted his or her remedies in terms of section 96(1) of the act (par 20).

The court indicated that the submission may have been a good one, but for the provisions of regulation 82A(6A), which was later introduced into the regulations by Government Notice R 1203 of 30 Nov 2006 (par 21; as to the background to reg 82A, see Badenhorst and Mostert Mineral and Petroleum Law of South Africa 25-30). The court decided that this regulation in fact authorised the following three instances where a claimant may institute action in court without taking further steps:

(a) If the claimant lodged a claim in terms of regulation 82A(1) and the director-general has informed him in terms of regulation 82A(4) that he has no valid claim and the claimant has not appealed the decision of the director-general, in terms of regulation 82A(5).

(b) If the claimant having been informed by the director-general that he has no valid claim has appealed against the decision to the minister in terms of regulation 82A(5) and section 69 of the act and the minister has confirmed the decision.

(c) If the claimant's claim has been recognised by the director-general or by the minister, on appeal to him or her, and no agreement as to the amount of compensation could be reached within 180 days. The court indicated that regulation 82A(6)(b) specifically provides that in the absence of agreement the amount is to be determined by court (par 21).

The court found that the cases of the plaintiffs fell directly within the ambit of regu-
lalion 82A(6A)(a) (par 21). According to the court, if regulation 82A(6A) had not been introduced into the act's regulations, the fact that a claimant did not have direct access to court, and first had to exhaust administrative remedies, may have jeopardised the constitutionality of the act (par 22). The court held that the right of appeal is the review of an administrative decision. The court explained that if the appeal is upheld by the minister, the minister's decision is also an administrative decision. If an application is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 against the minister's decision the application is still an application for the review of an administrative decision (par 22).

4 Summary

The rights of holders of “unused old order rights” are expropriated by the provisions of sections 2 to 5 of the act which extinguishes these rights. Item 8 of the transitional arrangements in terms of schedule II of Act 28 of 2002 provides an opportunity to an expropriatee to mitigate damage caused by expropriation by applying for a prospecting right or mining right. Failure to mitigate damage in terms of item 8 does not change the deprivations of mineral rights that has taken place. It merely affords the minister a defence against a claim for compensation on the basis that the holder acted unreasonably by not having obtained similar rights. A before-and-after comparison of the rights of holders of “unused old order rights” with their rights as regulated by the act on 1 May 2004 shows that an expropriation had taken place, even with rights being granted in terms of item 8. Item 12 of schedule II of the act allows a claimant to assert that he has been expropriated and prove it in a court of law. A claim for compensation has to be lodged with the director-general who must within 120 days determine whether the claimant has a valid claim or not, and inform the claimant of his or her determination with written reasons for such determination. A claimant has the right to appeal against the administrative decision of the director-general to the minister. The right of appeal is the review of an administrative decision. The claimant does not first have to exhaust administrative remedies. The claimant also has the right not to appeal against the administrative decision. In terms of regulation 82A(6A) of the act's regulations the claimant can directly institute action in court if: (a) the director-general has informed him that the claim is not valid and no appeal has been made to the minister; (b) the director-general's decision that the claim is not valid is confirmed upon appeal to the minister; or (c) the claim is recognised by the director-general or the minister as valid but no agreement as to the amount of compensation could be reached within 180 days. The constitutionality of the act may have been in jeopardy if “unused old order rights” had been extinguished by sections 2 to 5 of the act without compensation and the claimant did not have direct access to court to claim compensation for expropriation and first had to exhaust administrative remedies. Schedule II of the act and regulation 82A(6A) respectively save the act in those respects from being declared unconstitutional.

5 Discussion

The court did not regard it necessary to decide what exactly constitutes expropriation (par 18). What really happened on 1 May 2004 to “old order rights” still requires legal clarification. The relevant date to evaluate whether or not a holder of an “unused old order right” has suffered any losses and has a claim for compensation is 1 May 2004, being the date when the act took effect. That date is also the date of
expropriation. In its exposition of the facts the court states that the plaintiffs were holders of respective mineral rights until 30 April 2004 (par 1). Not all former holders of “old order rights” will have claims for compensation against the state. In particular, it should be noted that some holders of “unused old order rights” are unlikely to have suffered any losses and will therefore not have any claim for compensation. A failure to have applied for a prospecting right or a mining right under the act could be a good indication that as at 1 May 2004 the relevant mineral rights had no value.

Where a person paid for the mineral rights which he held under a separate cession of mineral rights, it is highly likely that he will suffer an actual financial loss due to the mineral rights being expropriated. (For instance, in the present case Agri South Africa was the holder of coal rights by virtue of a cession of mineral rights, which were acquired on 2 Oct 2001 for an amount of R1 048 800 (par 2).)

A slightly different approach, but one that has basically the same result, is to consider whether the expropriated rights had any market value on 1 May 2004. If mineral rights had a market value, the expropriation thereof would have resulted in a monetary loss to the holder of such rights and the holder would be entitled to compensation. (For instance, in the present case Van Rooyen sold 30 hectares of the clay rights in the property for R1 300 000, whilst the remaining clay rights, worth R600 000, were retained (par 3).) Mineral rights have been a commodity which has been traded in the open market for many years and the more information available about the mineral involved, the more likely it will have a market value. (See in this regard Van der Vyver Teoretiese Beskouing van die Bepaling van die Markwaarde van Mineraleregte as ’n Komponent van die Vergoeding Betaalbaar ingevolge die Onteieningswet 63 van 1975 (1986 diss University of the Witwatersrand).)

Apart from the expropriation identified by the court in the case of holders of “unused old order rights” who did not apply for new prospecting rights or mining rights, expropriations in terms of the act could also take place in the case of minerals in the following instances:

(a) if holders of “old order prospecting rights” or “old order mining rights” fail to apply for conversion to prospecting rights or mining rights within the stipulated periods;

(b) upon conversion of the “old order prospecting right” or “old order mining right” and registration of a prospecting right or mining right with a lesser content;

(c) upon granting of a prospecting right or a mining right with a lesser content in the case of an “unused old order right”;

(d) upon refusal of an application for a prospecting right or mining right or conversion to a prospecting right or mining right, by the minister;

(e) if, upon the granting of a prospecting right, mining permit or mining right, the use of the land for the purposes of the content of these rights or permits is expropriated from the owner of the land;

(f) when a prospector by virtue of a prospecting contract (holding a prospecting permit) (i) converts the “old order prospecting right”; (ii) fails to do so; or (iii) the application for conversion of the “old order prospecting right” is refused, the underlying mineral right is expropriated;

(g) when a lessee by virtue of a mineral lease (holding a mining authorisation) (i), converts the “old order mining right” into a mining right; (ii) fails to do so; or (iii) the application for conversion of the “old order mining right” is refused, the underlying mineral right is expropriated; and

(h) if holders of mineral rights or other rights were excluded on 1 May 2004 from

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the transitional provisions in the sense that they did not become holders of 
"old order rights". (See Badenhorst, Mostert and Dendy "Mineral and petro-
leum" XVII LAWSA re (2007) par 68.)

These instances need to be examined by the courts.

6 Conclusion

The court bravely ventured into the metaphorical forest of expropriation in relation
to Act 28 of 2002 and clearly identified the loss of holders of "unused old rights"
as an important instance of expropriation, the right to claim compensation and the
procedure that needs to be followed with expropriation. What exactly happened on
1 May 2004 to "old order rights" still requires legal clarification. Determining com-
ensation for such expropriations and identification of other instances of expropria-
tion by virtue of Act 28 of 2002 by the courts are expected in future. An interesting
new chapter in transition to the new mineral law order has started.

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Erratum

ML Vessio (sien 2009 TSAR 274) bevestig dat sy nie 'n kandidaat nie maar 'n
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