FOR OLD TIME’S SAKE, MEANING OF A “MINERAL”? 

Armstrong v Sehadew Oree t/a Oree’s Cartage and Plant Hire 2004 3 SA 152 (SCA)

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Introduction

Franklin and Kaplan1 in their monumental work stated that there is probably no aspect in mining law, which has attracted more judicial and academic discussion than the meaning of the concept “mineral.” Since the publication of their book, the judicial and academic discussions on the topic have continued unabated.2

Usually the legislature assists in providing a definition of “mineral” in statutes dealing with minerals and mining.3 If the meaning assigned to the

2 For such judicial contributions see: Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein 1983 3 SA 191 (O); 1985 4 SA 773 (A); Roets v Secundior Sand BK 1989 1 SA 902 T; Van Waveren v Swart 1994 1 SA 579 (T); Malan v Strauss 1994 4 SA 179 (NC); Elandsrand Gold Mining Co Ltd v JF Uys 1994-02-01 TPD Case no 9915/93; Trojan Exploration Co (Pty) Ltd v AFC Investments Limited 1994-08-16 TPD Case no 7077/91; Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines 1996 4 SA 499 (A); Rand Mines Ltd v Potgieter’1994-09-19 TPD Case no 9540/93; Rand Mines Ltd v Government of the Province of the Northern Transvaal 1994-09-15 TPD Case no 10128/93; Rand Mines Ltd v President of the RSA 1996 3 SA 425 (B); Minister of Land Affairs v Rand Mines Ltd 1998 4 SA 303 (SCA); Kameelfontein Boerdery CC v Worldwide Expo (Pty) Ltd 2002 3 SA 248 (T); Stadraad van Alberton v Briti BK 2003 5 (SCA) 157.


3 See s 1 of the (repealed) Minerals Act 50 of 1991. The most recent examples are the definition of “mineral” and “petroleum” in section 1 of Mineral and Petroleum Resources Development Act 28 of 2002.
concept "mineral" is, however, not defined within a particular statute, the intention of the legislature has to be ascertained by means of rules of construction. The legislature's failures to define the meaning assigned to the word "minerals" in the phrase "right to minerals" in section 3(1) of the General Law Amendment Act 50 of 1956 ("GLA Act") and section 3(1)(m) of the Deeds Registries Act 37 of 1947 ("Deeds Registries Act") have over the years received the attention of the courts. The first instance deals with formalities prescribed for the validity of a mineral lease, namely notarial execution (formalities provision), whilst the second instance deals with the registrability of a mineral lease (or cession of mineral rights) in the deeds office (registration provision). I have discussed the case law regarding the formalities provision and the registrability provision on a previous occasion and do not wish to repeat the same. It is recommended as background reading prior to reading this discussion.

In terms of section 3(1) of the GLA Act a mineral lease has to be in notarial form in order to be valid and has to be registered in the deeds office to be enforceable against third parties. Accordingly, an underhand mineral lease is wholly void.

The opportunity was afforded to the supreme court of appeal to decide on the meaning of a "mineral" in terms of section 3(1) of the GLA Act. Simplified, at issue in Armstrong v Sehadew Oree t/a Oree's Cartage and Plant Hire was whether an oral agreement, whereby the right to the sand on a particular erf has been granted by the appellant to the respondent, was a mineral lease for purposes of section 3(1) of the GLA Act. More specifically, the question was whether parliament intended section 3(1) of the GLA Act to apply to ordinary sand so that a "lease" relating thereto has to be attested by a notary public. The parties had entered into a notarial lease in 1991 in respect of a specific property, but from 1995 the appellant orally granted permission to the respondent to remove extra sand from another erf, as if the earlier notarial agreement also applied to this erf. It was accepted as common cause in the case under discussion that the extra sand was not paid for.

A new mineral law order has since been introduced with the commencement on 1 May 2004 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRD Act"). Section 3 of the GLA Act

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4 Badenhorst 2000 Obiter 1 et seq.
6 2004 3 SA 152 (SCA) 158B.
7 158J.
8 154J.
9 155J.
10 158A-B.
is *inter alia* repealed by section 110 of the MPRD Act. Section 3(1)(m) of the Deeds Registries Act has suffered the same fate. Except for the purposes of the transitional measures for which the MPRD Act makes provision, mineral lease as developed from the common law, its formalities and its registrability in the deeds office will *prima facie* disappear. Thus in a sense, the decision in *Armstrong* seems like the last word in one of the chapters of mineral law. As will be shown below, the meaning of “minerals,” however, remains important for clarification of old order law, the parameters of “old order rights” during the period of transition for which the MPRD Act makes provision, and future interpretation of the term “mineral.”

## 2 Decision in *Armstrong*

It was accepted by the supreme court of appeal in *Armstrong* that the appellant could not have a cause of action in respect of the extra sand based on the notarial agreement. It was held that in the absence of a definition of the expression “mineral” in section 3(1) of the GLA Act, the normal meaning of the word had to be ascertained in the context in which it is used. Farlam JA held that, unless there is something in the contextual scene which leads one to the belief that parliament, when the GLA Act was passed, intended ordinary sand to be covered, it must be accepted that “lease” contracts relating to ordinary sand are not influenced by section 3(1) of the said Act. The supreme court of appeal decided that ordinary sand is not a “mineral” for purpose of section 3(1) of the GLA Act. Accordingly the oral agreement whereby the right, title and interest in and to sand on an erf was given to a person, was found not to be a “lease of . . . rights to minerals in land” for purposes of section 3(1) of the Act. The court accepted that the appellant succeeded in establishing on a contractual basis payment in terms of the oral agreement at a price determined in accordance with the price structure in the notarial agreement.

As authority in *Armstrong*, Farlam JA relied on his treatment of the meaning of the expression “mineral” in *Minister of Land Affairs v Rand Mines Ltd* after his consideration in *Rand Mines finale* of case law since 1895. The court concluded in the *Rand Mines finale* that the South African case law does not regard ordinary clay, sand and stone as falling within the scope of the normal meaning of the term “minerals.” In

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12 See Schedule II of the MPRD Act.
13 156D.
14 Par 23.
15 159D.
16 159C-D.
17 159G.
18 159G-H read with 156B.
20 329I-J. See also *Armstrong* 159C.
Armstrong, Farlam JA also approvingly added Kameelfontein Boerdery CC v Worldwide Expo (Pty) Ltd\textsuperscript{21} to the list of decisions.\textsuperscript{22}

In the Rand Mines finale decision Farlam AJA also held that Finbro Furnishers v Registrar of Deeds, Bloemfontein \textsuperscript{23} was not authority for the proposition that the ordinary meaning of the word "mineral" was wide enough to include such stone as had a value apart from its mere bulk and weight and which was obtained from the crust of the earth for the purpose of a profit.\textsuperscript{24}

In Finbro it was decided that the legislature had intended a wide meaning to be assigned to the word "mineral" in section 3(1)(m) of the Deeds Registries Act.\textsuperscript{25} According to the (then) appellate division, unless this wide interpretation involves consequences which are manifestly absurd or unreasonable, such wide meaning should be accepted as the true construction.\textsuperscript{26} After having regard to the scope and purpose of section 3(1)(m) of the Deeds Registries Act and case law, the court found that the word "mineral" used in section 3(1)(m) of the Deeds Registries Act was wide enough to include such stone as had a value apart from its mere bulk and weight, and which was obtained from the crust of the earth for a profit in a deed of cession of mineral rights.\textsuperscript{27}

Prior to Finbro, the Cape Provincial Division held in Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd\textsuperscript{28} that kaolin was in fact a mineral and that the lease in question therefore fell within the ambit of section 3(1) of the GLA Act.\textsuperscript{29} Finbro, even though applicable to section 3(1)(m) of the Deeds Registries Act, had an impact on cases dealing with the meaning of "mineral" for purposes of section 3(1) of the GLA Act. In Roets v Secundior Sand BK,\textsuperscript{30} it was held, on authority of Finbro, that sand was a mineral for purposes of section 3(1) of the GLA Act. In Malan v Strauss,\textsuperscript{31} it was held that building sand was a mineral for purposes of section 3(1) of the GLA Act.\textsuperscript{32} The respective mineral leases therefore fell within the ambit of the GLA Act and were held to be invalid for non-compliance with formalities.

Counsel for both sides in Armstrong referred to the Roets and the Bellville-Inry decisions. Counsel for both sides in the Rand Mines finale referred to the Bellville-Inry decision. Neither in Rand Mines finale nor in Armstrong did the supreme court of appeal deal with the decisions

\textsuperscript{21} 2002 3 SA 248 (T).
\textsuperscript{22} Armstrong 159B-C.
\textsuperscript{23} 1985 4 SA 773 (A).
\textsuperscript{24} 32S-G-H.
\textsuperscript{25} 807C. See Radesich & Trichard 1986.THRHR 110.
\textsuperscript{26} 807C-D.
\textsuperscript{27} 808C-D.
\textsuperscript{28} 1976 3 SA 583 (C).
\textsuperscript{29} 588F-G.
\textsuperscript{30} 1989 1 SA 902 (T) 905A. See the discussion of Badenhorst & Van Heerden 1989 TSAR 452; Badenhorst 2000 Obiter 11-12.
\textsuperscript{31} 1994 4 SA 179 (NC) 189E-F.
\textsuperscript{32} See further Badenhorst 1995 Obiter 95; 2000 Obiter 1 12-14.
mentioned above. May one assume that these decisions are overruled by implication by the supreme court of appeal because *Armstrong* is in direct conflict with *Roets* and *Malan*? Interestingly, the court *a quo* in *Armstrong* also found that the oral agreement (in terms of which the appellant conferred on the respondent the right to extract sand) was invalid because it did not comply with section 3(1) of the GLA Act.\(^{33}\)

The facts of *Armstrong* is to some extent reminiscent of *Nortje v Pool*,\(^{34}\) where it was accepted that an underhand mineral lease for kaolin was invalid as it had not been attested by a notary in terms of section 3(1) of the GLA Act.\(^{35}\) In *Armstrong* there was an *indebitum* which was even tangible,\(^{36}\) namely sand. In the court *a quo* the appellant's claim based upon enrichment was upheld.\(^{37}\) It was found that the appellant's claim which had been upheld by the magistrate amounted to a *condictio indebiti*. It was further held that the magistrate erred in upholding the enrichment claim, because the appellant had been grossly negligent in authorising the respondent to undertake sand-winning operations on the erf without ensuring compliance with the prescribed formalities.\(^{38}\) Enrichment was not considered in *Armstrong* because the court’s conclusion that the appellant’s alternative cause of action (based on the oral agreement) was established at trial.\(^{39}\) Had the court followed the case law on section 3(1) of the GLA Act, the question of enrichment of the winner of sand would have been on the cards. Though speculative, the requirements of the *condictio indebiti* seem to have been met\(^{40}\) and a sounder decision could have been reached via this route. It is conceded that an enrichment claim may be less favourable than a contractual claim because the quantum of a plaintiff’s claim is the amount by which he or she has been impoverished or by which the defendant has been enriched, whichever is the lesser.\(^{41}\)

The disregard by the supreme court of appeal of the abovementioned decisions dealing specifically with the meaning of “minerals” for purposes of section 3(1) of GLA Act can be questioned.

It is a pity that the supreme court of appeal did not in *Armstrong*, unlike *Finbro*, consider the scope and objectives of the GLA Act which prescribes formalities for the validity of a mineral lease. For instance, the objective of the Alienation of Land Act 68 of 1981 is to promote certainty regarding transactions for the alienation of land, thereby limiting disputes and discouraging fraud and perjury.\(^{42}\) The legislature must

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\(^{33}\) 157B-C.

\(^{34}\) 1966 3 SA 961(A).

\(^{35}\) 111A-B 126H.

\(^{36}\) See *Nortje* 104G.

\(^{37}\) *Armstrong* 157C.

\(^{38}\) See *Armstrong* [14].

\(^{39}\) *Armstrong* 157F-G.

\(^{40}\) See, however, *Armstrong* 156E-F which seems to suggest that the requirement of “enrichment at the expense of the plaintiff” might have been problematic.


have had similar objectives in mind with section 3(1) of the GLA Act. From early times, legislatures prescribed formalities by which, inter alia, mineral leases could validly be concluded. Non-compliance with formalities always resulted in the agreement being void ab initio. The facts of the Armstrong decision indeed provide an example of uncertainty created by the failure to execute a mineral lease notarially or to amend the existing notarial mineral lease to include the additional erf and the disputes resulting from oral statements and evidence. Although of lesser importance, the fiscus might also have an interest in knowing about the existence of mineral leases because upon receipt of royalties it becomes taxable in the hands of the holders of mineral rights. Transfer duty is also payable on conclusion and registration of a mineral lease in terms of the Transfer Duty Act of 1949. For purposes of publicity of rights in respect of land, it is important that notarial mineral leases be registered in the deeds office to serve as notice to prospective purchasers of the land or creditors of the owner of the land. All these considerations should have been taken into account in the interpretation of section 3(1) of the GLA Act. The reasons for not legally allowing an underhand agreement to win sand may then have been evident.

Prima facie the “restatement” of the Finbro decision in the Rand Mines finale appears to be a contradiction. In an attempt at academic reconciliation of the two locus classici, it was stated that the test for the purpose of section 3(1)(m) of the Deeds Registries Act in Finbro could not be equated with the common parlance meaning of the word “minerals.” In other words, intrinsic value and profitability are relevant for purposes of the section 3(1)(m) of the Deeds Registries Act (statutory meaning), but ordinary clay, sand and stone does not fall within the scope of the normal meaning of the term “minerals.” It is perhaps the safest to state that the court in Finbro held that in the case before it, stone was included as a mineral for purposes of the Deeds Registries Act. The supreme court of appeal has, however, now decided in Armstrong that ordinary sand is not a mineral for purposes of section 3(1) of the GLA Act (statutory meaning). The interpretation of the statutory meaning of a mineral in section 3(1) of the GLA Act is now at odds with the statutory interpretation of “mineral” in section 3(1)(m) of

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43 Wiseman v De Punta 1986 1 SA 38 (A) 48D; see Volksraadbesluit 12 August 1886 read with s 14 of Act 7 of 1883; s 16 of Act 20 of 1895; s 29(1) of Proclamation 8 of 1902 (T); s 51 of Ordinance 12 of 1906 (O); See Geach “Prospecting Contracts” 1970 DRP 181.

44 Taylor and Claridge v Van Jaarsveld and Nellmapius (1886) 2 SAR 137; McDonald v Versfeld (1888) 2 SAR 234; Pearce v Olivier and Others and Noyce (1889) 3 SAR 79; Whitfield's Executors v Solomon 1904 TS 773; Lazarus and Jackson v Wessels, Oliver, and the Coronation Freehold Estates Town and Mines Ltd 1903 TS 499 508; Jolly v Herman's Executors 1905 TS 515 520-521; Munnik Myburgh Asbestos (Kaapsche Hoop) Ltd v The Receiver of Revenue 1927 WLD 98 110; Edwards (Waakraal) GM Co Ltd v Mamogole NO and Bakwena Mines Ltd 1927 TPD 288 305.

45 See 155D-E.

46 See in general Franklin & Kaplan Mining and Mineral Laws 292-295.


the Deeds Registries Act. It should be remembered that the two provisions are similar, in the sense that they refer to "minerals" in the phrase "rights to minerals" without providing a definition of "minerals." The provisions deal with the validity and registrability of the same contract. By implication, apart from a similar common parlance meaning of the concept "mineral," intrinsic value and profitability do not carry the same weight in the formalities provision as in the registration provision. The court missed an opportunity to reconcile the outcomes of the interpretation of the formalities provision and the registration provision. Perhaps the court should have taken the bold step by stating that the criteria of intrinsic value and profitability of minerals are not decisive in determining whether a substance qualifies as a mineral. If one bears the contradictory state of affairs in mind, the court should even have considered over-ruling its decision in Finbro by stating that intrinsic value and profitability of minerals are some, but not the only factors in determining whether a substance qualify as a mineral, if this is what the court really had in mind.

According to the court in Kameelfontein Boerdery CC v Worldwide Expo (Pty) Ltd, the legislature did not attempt to alter the meaning ascribed to the word "minerals," as contained in section 3(1)(m) of the Deeds Act and cases which held that sand had not been a mineral with and since the introduction of the Minerals Act on 1 January 1992. This decision is, however, not free from criticism. The decision dealt with the meaning of the word "mineral" in the context of a notarial mineral lease that has been registered in the deeds office against a mineral right.

In addition to relying on case law, the court in Armstrong accepted the following:

"If ordinary sand is to be regarded as a 'mineral' under the Act, it would clearly lead to absurd results, because sand would often be purchased, dug up and loaded by a party in circumstances where the requirement and cost of a notarially executed 'lease' would exceed the value of the sand."

It seems as if the intrinsic value and profitability of the sand is weighed against the legal costs of executing a notarial mineral lease. The court accepted the submission made by appellant's counsel that the legislature could not have contemplated the absurd result where a notarial mineral lease would cost ten times the value of the sand. When absurdity of results is taken into account and one thinks about the third reason advanced in Finbro for overruling Ex parte Erasmus, one experiences a feeling of déjà vu. These reasons were the following: firstly, Hoexter JA

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49 2002 3 SA 248 (T) 250A-B.
50 See further Badenhorst 2002 TSAR 795.
51 249A-B.
52 Par 25.
53 159F-G.
54 806I-808F.
55 1968 4 SA 788 (T).
was of the view that in the construction of section 3(1)(m) of the Deeds Registries Act the court in Erasmus erred in that it failed to rely upon the tenor of definitions of the word in statutes preceding the Deeds Registries Act; secondly, the factor of intrinsic value of the substance was not weighed by the judge in dismissing the application; thirdly, the reasons advanced by Rabie J were held not to be correct. Rabie J decided in Erasmus that for the purposes of the Deeds Registries Act, the word “mineral” had to be construed in its narrow sense, thereby excluding stone and sand. He reasoned that, if the word in that sub-section were to bear its widest meaning, a lessee of mineral rights would be entitled to remove all the top soil on the property and so render worthless the right of the owner of the land. Rabie J found that any suggestions that the rights of the lessee were so extensive were untenable and irreconcilable with the tendency of our law to maintain a balance between the competing claims of the owner and the lessee of the mineral rights. The court in Erasmus decided that neither at the promulgation of the Deeds Registries Act in 1937, nor at the time of the application (1968), did stone and sand fall within the ambit of the ordinary meaning of the word “mineral” for purposes of the sub-section. According to Hoexter JA in Finbro it was unnecessary to postulate the widest meaning of the word in order to reach a conclusion that “mineral” in section 3(1)(m) includes stone. According to Hoexter JA the question was rather whether or not between its broadest and narrowest signification the word “mineral” was susceptible to an intermediate meaning sufficiently wide to encompass stone. Further, an affirmative answer to the last question did not entail any consequences at odds with the tendency of the law to reconcile, as far as possible, the competing claims of the mineral lease holder and the surface owner. Although the law tried to strike such a balance, a situation might well arise in which the conflict of rights is insoluble.

Thus, according to Finbro it would not be absurd to regard stone (if it has intrinsic value and can be profitability marketed) as a “mineral” for purposes of section 3(1)(m) of the Deeds Registries Act, whilst according to Armstrong it would be absurd to regard sand as a “mineral” for purposes of section 3(1) of the GLA Act.

The view in Wiseman v De Pinna of a mineral lease not being a lease strictu sensu was accepted by implication in the Armstrong decision. The court accepted that the oral agreement contained the terms of a mineral

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56 8061.
57 8061-J.
58 See 807F.
59 790E.
60 791D-H; see Finbro 807D-F.
61 792D.
62 807G-H.
63 807H-I.
64 1986 1 SA 38 (A) 47E-48C.
65 Par 9.
lease, as set out in the *Wiseman* decision. The court's admittance that the *essentialia* of a mineral lease were present seems to indicate that the parties intended to enter into a mineral lease in respect of the sand on the erf. This intention of the parties, as indicated in their agreement, should have been given effect to by the court and the non-compliance with formalities ought then to have been scrutinised. The conclusion of a notarial mineral lease earlier by the parties in respect of other property illustrate that the parties were fully aware of the formalities required for the validity of a mineral lease. They seem conveniently to have ignored the formalities in respect of the erf. Earlier in the judgment, the court however, accepted that the oral agreement constituted a sale of sand. Because according to the facts of the case the appellant was not yet the registered owner of the erf, the *merx* was referred to as a *res aliena*. The notion of a *res aliena* is of course out of place in the context of a mineral lease. For purposes of mineral law, the grantor (as owner of land or holder of a mineral right) can only grant rights which are vested in itself. Strictly speaking, even if a notarial mineral lease had been entered in *Armstrong* in respect of the erf, the appellant could not have granted a mining right to the respondent. (As the Romans would have said: *nemo plus iuris ad alium transferre potest quam ipse haberet.*) There seems to be a tendency by the courts to (unintentionally) treat a "sand agreement" as a contract of sale, whereas other "mineral agreements" are treated as examples of mineral leases for which the formality of notarial execution needs to be complied with. A mineral lease is a *sui generis* contract that is peculiar to our mining law with its own *essentialia* and formalities.

3 **Continued relevance of the meaning of "mineral"**

It speaks for itself that for agreements relating to "minerals" or classes of "minerals" to be granted in terms of the MPRD Act, the intention of the parties regarding the ambit of the word "mineral" will have to be determined in accordance with the principle for the interpretation of contracts.

Statutory definitions of minerals are interpreted according to the ordinary principles of interpretation of statutes. For instance, the concept "mineral" itself is defined widely for purposes of the MPRD Act. From the definition of a "mineral" one may deduce that in order for any

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66 158D.
67 As to the *essentialia* of a mineral lease, see Badenhorst *Mineral Rights* 4-3 to 4-4; Badenhorst & Skelton "Sale of (unsevered) Sand: the Sandman and the Tax(wo)man — *Samril Investments (Pty) Ltd v Commissioner for the SA Revenue Service*" 2003 *Obiter* 253 256-257.
68 157I-I.
69 157I-I.
70 Translation: No one can transfer more rights to another than he himself has.
71 See Badenhorst & Skelton 2003 *Obiter* 255-259.
72 See in general Badenhorst 1995 *Obiter* 80.
73 See definition of "minerals" in s 1 of the MPRD Act.
substance to qualify as a mineral for purposes of the MPRD Act the following requirements have to be satisfied:

(a) The substance must either be in solid, liquid or gaseous form; and
(b) the substance has (i) to occur naturally\(^74\) in or on the earth, in or under water; and (ii) to have been formed by, or subjected to, a geological process; or
(c) the substance has to occur in residue stockpiles or residue deposits.

The concept "residue stockpile" is defined as "any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation\(^75\) and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or production right".\(^76\) The concept "residue deposit" means "any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right or production right."\(^77\)

For the sake of clarity it is specifically stated that sand, stone, rock, gravel, clay and soil qualify as minerals. Also included is water taken from the land or sea for the extraction of any mineral from the water. This broad definition is limited somewhat in that water per se, petroleum and peat are expressly excluded from the definition of a mineral. "Soil" was also included in the definition of a "mineral" in the Minerals Act 50 of 1991, but "topsoil" was specifically excluded, and the notion of "topsoil" was later defined in the Minerals Act. In the present definition of a "mineral" in the MPRD Act, "soil" is included but "topsoil" is not accordingly excluded even though the MPRD Act does provide a similar definition of "topsoil."\(^78\) The exclusion of "topsoil" from the definition of "mineral" was overlooked by the legislature and should be rectified. It should be kept in mind that the parameters for application of the provisions of the MPRD Act to different types of operations are determined by the scope of the definition of a "mineral" (and "petroleum").

In its "mineral grab" in section 3(1) of the MPRD Act, the state acquires ownership of inter alia unsevered "minerals." The state did not regard it as absurd to include substances such as sand, stone, gravel, clay and soil. To prevent absurdities (a landowner being deprived from

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\(^74\) As to the meaning of "occurring naturally", see Elandsrand Gold Mining Co Ltd v Uys 18; Badenhorst 1995 TSAR 172 175.
\(^75\) "Mining operation" is defined in s 1 of the MPRD Act.
\(^76\) Definition of "residue stockpile" in s 1.
\(^77\) Definition of "residue deposit" in s 1.
\(^78\) "Topsoil" is defined as follows in s 1: "the layer of soil covering the earth which —
(a) provides a suitable environment for the germination of seed; (b) allows the penetration of water;
(c) is a source of micro-organisms, plant nutrients and in some cases seed; and (d) is not of a depth of more than 0,5 metres or such other depth as the Minister may prescribe for a specific prospecting or exploration area or a mining area".
ownership of the soil of his or her land for gardening or building purposes), exemptions to some of the provisions of the MPRD Act are created. 79

Firstly, any landowner or lawful occupier of land who lawfully takes sand, stone, rock, gravel or clay for farming or for effecting improvements in connection with the land or community development purposes, is exempted from applying for a prospecting right, permission to remove and dispose of a mineral, a mining right or a mining permit. 80 The proviso is, however, added that the sand, stone, rock, gravel or clay is not sold or disposed of. 81 If the definition of a “mineral” in the MPRD Act is read together with the abovementioned exemptions provided for, it will form the boundary between state ownership of “minerals” and (possible) private ownership of “sand, stone, rock, gravel or clay.” Acquisition of such private ownership is only possible if the substances are not sold or disposed of. The meaning of “sand, stone, rock, gravel or clay” in terms of the MPRD Act might in future receive the attention of the courts.

Secondly, the minister may by notice in the Government Gazette exempt any organ of state from the provisions relating to the application of (i) a prospecting right, (ii) permission to remove and dispose of a mineral, (iii) mining right; or (iv) mining permit in respect of any activity to remove any mineral for road construction, building of dams or other purpose which may be identified in such notice. 82 Despite this exemption, the organ of state so exempted has to submit an environmental management plan or environmental management programme for approval by the minister. 83

This case law on the meaning of “mineral” may become relevant again should statutes be adopted in future without defining the concept mineral whilst reference is made to prospecting rights, mining rights or other rights in respect of “minerals” (and the respective rights to “petroleum”). Whilst these decisions may become covered with dust they could one day become useful again.

As indicated in the introduction, sections 3(1) of the GLA Act and 3(1)(m) of the Deeds Registries Act are inter alia repealed by the MPRD Act. 84 Prima facie it seems as if the case law and academic discussions about the meaning of “minerals” for purposes of the formalities and

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79 S 106.
80 S 106(3).
81 S 106(3).
82 S 106(1). The Minister of Minerals and Energy has in GN 762 in GG 7992 2004-06-25 accordingly exempted the Department of Water Affairs and Forestry, National Parks Board, National Roads Agency, National Ports Authority of South Africa, Spoornet and Provincial Governments from the mentioned provisions in the MPRD Act in respect of any activity to remove any mineral for the construction and maintenance of dams, harbours, roads and railway lines and for incidental purposes. Other organs of State are also invited to apply for exemption.
83 S 106(2) refers only to an “environmental management programme”. In the light of s 39(2) an environmental management plan should also be required.
84 S 110.
registration provisions have become only of interest for historical purposes. This is not entirely true.

The categories of "old order rights" recognised in schedule II to the MPRD Act, namely mineral rights, consents to prospect\textsuperscript{85} or mine,\textsuperscript{86} prospecting leases, permits, licenses or permissions, rights to dig or mine, permissions to prospect or mine in terms of apartheid laws and temporary prospecting permits or temporary mining authorisations to continue prospecting or mining, all contain references to minerals or classes of minerals. These concepts will determine the ambit of the "old order right" and will remain relevant upon their conversion into new order rights and registration in the Mineral and Petroleum Titles Office\textsuperscript{87} in terms of the transitional arrangements of the MPRD Act. These crossing of the bridge of transitional arrangements have been discussed elsewhere.\textsuperscript{88}

As indicated above, sand, (stone, rock, gravel, clay and soil) would qualify as a "mineral" in terms of the MPRD Act. Unless a consent to mine\textsuperscript{89} in the transitional arrangements is construed not only as a notarial mineral lease but also "other forms of agreements or consent," the meaning of minerals for purposes of the recognition of old order rights itself (for instance a mining right in terms of a mineral lease), as narrowed down in \textit{Armstrong}, would differ from the wider definition of "mineral" in the MPRD Act. Crossing the bridge of transition might have been made more difficult for holders of "old order rights" to sand, stone, rock, gravel, or clay.

Due to the repeal of the mineral lease, as developed from the common law, by the MPRD Act\textsuperscript{90} notarial execution and registration of mineral leases (and cessions of mineral rights) seem \textit{prima facie} no longer possible. The Chief Registrar's Circular No 7 of 30 April 2004, however, indicates that registration of rights pertaining to minerals and other connected rights will continue to be effected in the deeds registry. The Chief Registrar reasons\textsuperscript{91} that business must continue as usual, interpreting the qualification in section 110 of the MPRD Act as indicating that the transitional period also establishes a period of transition between the deeds registry and the mining and petroleum titles registration office.\textsuperscript{92}

\textsuperscript{85} For instance, in a prospecting contract.
\textsuperscript{86} For instance in a mineral lease.
\textsuperscript{89} In Category 2 of Table 2 and Category 7 of Table 3 to Schedule II of the MPRD Act.
\textsuperscript{90} See s 4(2) of the Mineral and Petroleum Resources Development Act.
\textsuperscript{91} In par 3 1 of the circular.
\textsuperscript{92} Badenhorst & Mostert "A bridge too ghostly to contemplate?" 2004 \textit{De Rebus} 24 26.
If the Chief Registrar's Circular is interpreted strictly, it would mean that, for instance, a mineral lease in existence before commencement of the MPRD Act may still be registered in the deeds office during the duration of the transitional period in terms of the MPRD Act. In other words, parties to such mineral leases are allowed to acquire real rights upon registration in the deeds office to enable them to exercise their transitional rights in terms of the MPRD Act. Mineral leases, entered into after 1 May 2004, would not be valid or capable of registration because holders of mineral rights (or other rights) would no longer be able to grant and transfer their rights. They are only entitled to rights to convert old order rights that are recognised by the transitional measures in terms of the MPRD Act. If the circular is interpreted widely (that is, to continue with registrations of mineral leases irrespective of when the agreements have been entered into), it would mean that reliance is placed upon section 3(1) of the GLA Act and provisions of the Deeds Registries Act (such as section 3(1)(m)) that have been repealed by the MPRD Act. For registration of rights pertaining to minerals in the deeds office the meaning of the term “mineral” would still be important to determine the scope of these rights.

4 Conclusion

The meaning of a mineral for purposes of section 3(1)(m) of the Deeds Registries Act, namely the statutory meaning thereof, was accepted in Finbro as being a meaning wide enough to include such stone as had a value apart from its mere bulk and weight, and which was obtained from the crust of the earth for a profit in a deed ofcession of mineral rights. In the Rand Mines (finale) the Finbro decision was restated as not being authority for the proposition that the ordinary meaning of the word “mineral” was wide enough to include such stone as had a value apart from its mere bulk and weight and which was obtained from the crust of the earth for the purpose of a profit.

In Armstrong it was, however, decided that sand is not a mineral for purposes of section 3(1) of the GLA Act, namely the statutory meaning thereof. The supreme court of appeal in Armstrong applied the restatement of Finbro, regarding the ordinary meaning of “mineral,” to the statutory meaning of “mineral” in section 3(1) of the GLA. This was done with disregard of case law on the point. The history, scope and objectives of the GLA Act, which prescribes formalities for the valid conclusion of mineral leases, were also not considered. Viewed through the glasses of the supreme court of appeal the formalities and registration provisions now appear to be parallel with one another, whilst they are

93 See Badenhorst & Mostert 2004 De Rebus 27.
94 Badenhorst & Mostert 2004 De Rebus 27.
95 Badenhorst & Mostert 2004 De Rebus 27.
96 See Badenhorst & Mostert 2004 De Rebus 27.
not. According to Finbro, it would not be absurd to regard stone (if it has intrinsic value and can be profitability marketed) as a “mineral” for purposes of section 3(1)(m) of the Deeds Registries Act, whilst according to Armstrong it would be absurd to regard sand as a “mineral” for purposes of section 3(1) of the GLA Act (even though on the facts of the case it also had intrinsic value and could be profitably marketed).

The meaning of a “mineral” for purposes of recognition of a mining right by virtue of a mineral lease, as a valid “old order right”, would also be narrower than the meaning of the word mineral for purpose of implementing the transitional measures in terms of the MPRD Act.

Whilst it is true that the ordinary meaning of the word “mineral” is not wide enough to include so called “grey” or “problematic” substances such as stone, rock, gravel, clay and sand, it remains the task of the court to determine whether the legislature in a particular statute intended the normal or some other meaning of the concept “mineral”. As indicated, the meaning of a “mineral” as opposed to sand, stone, rock, gravel or clay in terms of the MPRD Act might again receive the attention of the courts.

I wish to conclude with an image of a camel96 riding of into the horizon of the seemingly never-ending legal chapter of a “mineral”:

Traversing a desert of ordinary sand, the metaphorical camel in its search for the enigmatic fountain of “minerals,” may be travelling in circles, with the intrinsic value and profitability occasionally serving as a compass. An absurdity to a wise man is sensibleness to another man. Because of his layer of cloaks, the wise men did not fully recognise the traveller. At night, a star named after a famous astronaut, may guide the traveller on two old and skew statutory trade routes that are still being used, even though slowly disappearing with the passage of time. The road to the bridge of transition has become a little bit more cumbersome. After all these years, astronomers are still looking at the stars. They will continue to do so in years to come.

OPSOMMING

Hierdie bydrae ondersoek oënskynlik vir oulaas die betekenis van die begrip “mineraal” in die (herroep) artikel 3(1) van die Algemene Regswysigingswet 50 van 1956. Die ondersoek geskied teen die agtergrond van die hoogste hof van appel se beslissing in Armstrong v Sehadow Oree t/a Oree’s Cartage and Plant Hire (2004 3 SA 152 (SCA). In Armstrong het die hof sy herformulering van “mineraal” in die gewone betekenis van die woord in die locus classicus, Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein (1985 4 SA 773 (A)) toegepas op die betekenis van “mineraal” in artikel 3(1) van die Algemene Regswysigingswet. Daar word aangetoon dat die toepassing geskied het sonder inagneming van regspraak wat handel oor artikel 3(1) of ondersoek van die onderliggende beleidsoorwegings daartoe. Voorts word ondersoek of die betekenis van die begrip “mineraal” in artikel 3(1)(m) van die Akteswet en artikel 3(1) van die Algemene Regswysigingswet nou dieselfde eindpunt bereik het. Die slotsom word bereik dat dit nie die geval is nie. Die ongelykhed tussen die histories strydige eindpunte en die betekenis van “mineraal” vir doeleindes van die oorgangsmaatreëls, vervat in die Wet op Ontwikkeling van Mineraal en Petroleum Hulpbronne 28 van 2002 (MPRD Act), as syne ‘n nuwe beginpunt, word terloops aangeraak. Ondanks die herroeping van voormelde artikels deur hierdie wet, bly die histories eindpunte van die wetsartikels, beslissings, soos Armstrong, en die uitwerking daarvan op die betekenis van die definisie van ‘n mineraal in die nuwe wet van belang.

97 See 3 above,
98 This camel first appeared in Badenhorst 2002 TSA R 801.