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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

PART ONE: NATURE AND CONTENT OF RIGHTS ACKNOWLEDGED BY THE REVISED TRANSITIONAL PROVISIONS*

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Builders and takers of this world
At the gates
of Verwoerd's watchtower of the North
chosen like Zeus from an iron bird in the lonely skies
never really intended for the wars of academia
a wise man
known as Mike the Fearless
from across the dead and living seas
escaping from the fascists
told me that there are
but two cultures in this world:
the take culture
and the build culture
And so I have learnt
from Michael the Righteous
this state of nature
and hibridian, as always
our laws and nature
perhaps something in between
The builders of this world
will be regulated
the takers of this world
shall pay in many ways
caught between Lucifer
and the deep blue seas
said the joker to the thief

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1 Introduction

The transitional measures of the Mineral Development Draft Bill of 2000 ("the Bill"), which was published\(^1\) for public comment were subjected to severe criticism from various quarters.\(^2\) In this regard, for instance, Badenhorst and Malherbe\(^3\) argued from a constitutional perspective that the Bill was seriously flawed and that various aspects thereof may have been unconstitutional. Particular aspects that enjoyed attention were: (i) the abolition of the rule *cuius est solum eius est usque ad caelum et ad inferos* applicable to ownership of unsevered minerals and the transfer of ownership of such minerals from the owner of the land to the state; (ii) the expropriation without compensation of mineral rights, prospecting and mining rights, as a result of the conversion of existing property rights to rights vested in the state; (iii) the expropriation without compensation of "older order rights" as a result of their expiry, and the possibility that an application by the existing holder may be refused, and the rights be granted to another person; (iv) the expropriation without compensation of "old order rights" and their conversion to inferior and insecure rights (not registrable limited real rights)\(^4\) granted by the Minister of Minerals and Energy and subject to the control of the minister; and (v) the imposition of a "reverse onus" on a holder of "old order rights" to convince the minister that the grant of the right in question to another person would not be in the public interest.

The transitional measures contained in Schedule II to the Mineral and Petroleum Resources Development Act, 28 of 2002\(^5\) ("the MPRDA") were accordingly largely rewritten\(^6\) before its enactment. The nature of prospecting rights, mining rights, exploration rights or production rights were elevated to limited real rights.\(^7\) The "reverse onus" provision was omitted. Provision is now made for compensation upon proof of "expropriation of property".\(^8\) However, the question as to the constitutionality of the transitional arrangements remains. It has, in fact, gained renewed significance in light of the amendments introduced, and the focus on economic empowerment and the state's custodianship of natural resources. This contribution is an attempt to provide a detailed analysis of the implications of the transitional arrangements for the

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\(^{1}\) GN 4577 in *GC* 21840 of 2000-12-18.


\(^{5}\) 28 of 2002, GN 1273 in *GC* 23922 of 2002-10-10.

\(^{6}\) See Badenhorst "Transitional arrangements in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002: Crossing a narrow Bridge?" 2002 *Obier* 250.

\(^{7}\) s 5(1).

\(^{8}\) Item 12 to Schedule II.
nature and content of prospecting rights, mining rights and mineral rights in the South African context, and to test these implications against section 25 of the Constitution, the constitutional property clause.

Our analysis is structured into two parts. Part one sets out the categories of rights acknowledged by the transitional provisions, the nature and content of "old order rights" \(^9\) as compared to rights of the new order, and the requirements for transition of "old order rights" to new order rights. This leads the way to an inquiry, in part two, regarding the constitutionality of the transitional arrangements as concerns "old order rights." In this first part of our analysis a brief overview of the revised transitional measures incorporated in the MPRD Act is provided. The nature and content of these rights are analysed. Then the rights of the new order are considered. A comparison points out the differences brought about by the shift in the basis of mineral rights holding as a result of the MPRD Act.

11 Broad tenet of the transitional measures incorporated into the MPRD

The MPRD Act, with its improved transitional provisions, will come into operation on a date to be fixed by the President by proclamation in the Government Gazette.\(^10\) The Act now introduces some of the most far-reaching changes into South African law. As part of its transitional arrangements, the black empowerment provisions of the Act contribute to the transition of "old order rights" into new order rights.\(^11\) It provides for the transformation of the minerals industry by redressing historical and social inequalities in tasking the minister within six months from the coming into effect to develop a broad-based socio-economic empowerment Charter.\(^12\) This Charter has to "set the frameworks, targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry, and to allow such South Africans to benefit from the exploitation of the mining and mineral resources"\(^13\). The Charter has to prescribe the manner in which the objectives of the MPRD Act\(^14\) are to

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\(^9\) Rights regarding petroleum exploration and production will not be discussed.

\(^10\) S 111(1).

\(^11\) See para 3 below.

\(^12\) S 100(2)(a).

\(^13\) S 100(2)(a).

\(^14\) The objectives of the MPRD Act are to: (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic; (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources; (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa; (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; (e) promote economic growth and mineral and petroleum resources development in the Republic; (f) promote employment and advance the social and economic welfare of all South Africans; (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations; (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic
be achieved. The minister is statutorily obliged to develop the Charter, and hence also the policy underlying administrative decisions to be taken in this regard. This function must be distinguished from the minister’s power to adopt regulations in terms of the MPRD Act.

The MPRD Act has not yet come into operation. Nevertheless, the Department of Minerals and Energy, the Chamber of Mines, the South African Mining Development Association and the National Union of Mine Workers have already entered into an agreement entitled the “Broad Based Socio-Economic Empowerment Charter for the Mining Industry” (the “BBSE Agreement”) “as called for in terms of the Mineral and Petroleum Resources Development Act; 2002”. It is assumed that this agreement represents the Charter envisaged by the Act, especially since it has been published as such on the website of the Department of Minerals and Energy. A so-called scorecard to be used in conjunction with the Charter has recently been finalised. At present the BBSE Agreement constitutes an agreement between the parties only, and accordingly, as long as the latter has not entered into force, it has no legal status in terms of the MPRD Act. It remains necessary, however, to keep in mind that eventually the relevant provisions in the adopted Charter will, together with the transitional arrangements of the MPRD Act, contribute to the transformation of the minerals industry. For the moment, the focus remains on the categories of rights affected by the envisaged transformation.

1.2 Categories of “old order rights” affected by the transitional arrangements of the MPRD Act

The transitional arrangements of the MPRD Act recognise a number of so-called “old order rights” which are usually bundled together, although the various rights in a bundle may be vested in different persons and may be created at different stages. The definitions of the old order rights are poorly drafted and should accordingly be read with what

\textsuperscript{15} S 100(2)(b).
\textsuperscript{16} S 107.
\textsuperscript{17} On 1 October 2002.
\textsuperscript{19} Badenhorst “Saving the pieces of the Mineral Law system: keeping the baby and the bathwater” to be published in 2003 Obiter contends that the content of the Charter in terms of the new Act will probably be the same as the existing “Charter”.
\textsuperscript{22} S 100.
\textsuperscript{23} Item 1(v) read with items 1(iv), (iii) and (ix) of Schedule II.
\textsuperscript{24} See 2.3 below.
\textsuperscript{25} See further Badenhorst 2003 Obiter.
apparently pass as "categories" of rights, permissions and consents listed in the respective tables at the end of Schedule II to the Act in which the transitional arrangements appear. The rights, permissions and consents listed in these tables should be regarded as categories of "old order rights". These categories of "old order rights" are listed below. Priority should be accorded to the first right, permission or consent mentioned within a category (indicated in bold below), which should be read to include the other rights, permission or consents.

(a) Mineral right.
(b) Mineral right with a prospecting permit or mining authorisation.
(c) Consent to prospect, together with a mineral right and with or without a prospecting permit.
(d) Consent to mine, together with a mineral right and with or without a mining authorisation.
(e) Prospecting lease, prospecting permit, prospecting licence or prospecting permission referred to in section 44 of the Minerals Act 50 of 1991, together with a mineral right and with or without a prospecting permit.
(f) A right to dig or mine or a claim licence referred to in section 47(1) or 47(5) of the Minerals Act, together with a mineral right and with a mining authorisation.
(g) Permissions to prospect or mine in terms of former apartheid laws, together with a mineral right and with a prospecting permit or mining permit.
(h) A temporary permit to continue with prospecting operations or a temporary permit to continue with mining operations.

Depending on whether active prospecting or mining was taking place upon commencement of the MPRD Act, a distinction is made between "old order prospecting rights" and "old order mining rights", on the one hand, and "unused old order rights" on the other hand. An "old order prospecting right" is defined as "any prospecting lease, permission, consent, permit or licence and the rights attached thereto, listed in [Table 1 to Schedule II], in force immediately before the date on which this Act took effect and in respect of which prospecting is being conducted." An "old order mining right" means "any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right, listed in [Table 2 to Schedule II], in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted." In turn, an "unused old order right" means "any right, entitlement, permit or licence listed in [Table 3 to Schedule II], in respect of which no prospecting or mining was being conducted immediately before this Act took effect."
The MPRD Act replaces most of these rights with “new order substitutes”, provided that certain procedures are followed in terms of the Act. Detail on the specific substitutes for particular rights will be provided below. It is, however, necessary first to indicate in general that the new order introduced by the Act envisages in section 3(1) that minerals and petroleum resources are the common heritage of all the people of South Africa. The state is made the custodian thereof for the benefit of all South Africans. The Minister of Minerals and Energy is entrusted with wide discretionary powers by section 3(2) to grant, refuse, control, administer and manage prospecting rights, mining rights, mining permits, retention permits and permission to remove and dispose of any minerals.

The implications of section 3 of the MPRD Act can only become apparent once a more specific meaning has been attached to this section's provisions. Various possibilities may be considered: First, although keeping in mind that the common law, along with mining legislation since 1871, vested the right to mine some minerals in the state, it has been suggested that section 3(1) of the MPRD Act abrogates the cuius est solum rule of the common law, which entails that a landowner is owner of the minerals upon his/her land. This would amount to a deprivation of property that would need to be tested against the constitutional property provisions. The rule of interpretation endorsed by the MPRD Act, which states clearly that in so far as the common law is inconsistent with the Act, the latter will prevail, could provide support for the view of abrogation of the cuius est solum rule by the MPRD Act.

Second, the legislature's attempt in formulating section 3(1) reminds of the position espoused in the law of the sea. The relevant resources are vested in the “people of South Africa”, whilst the state is merely the custodian thereof for the benefit of all the people. The position as in the law relating to the sea may, however, be distinguished from the position

29 The concept “mineral” is defined in s 1 of the Act. The vesting in the state does not apply in respect of sand, stone, rock, gravel or clay used for farming or for affecting improvements to land: s 106(3).
30 The concept of “petroleum” is defined in s 1.
31 s 3(1).
32 An early example of the reservation of ownership of unsevered minerals by means of statutory decree, may be found in s 2 of Law 1 of 1883 of the old Zuid-Afrikaansche Republiek. The section reserved ownership and the right to mine precious stones and precious metals in favour of the state. Dale An Historical and Comparative Study of the concept and acquisition of Mineral Rights (1979) 181-185 pointed out that this section was not only contrary to the cuius est solum rule, but it also amounted to an expropriation of unsevered minerals, rendering the mineral rights worthless. This section was, however, repealed by section 90 of Law 8 of 1885. The repeal thereof, presumably resulted in the revesting of ownership of such stones and metals in the landowner. This section was not in line with the other Zuid-Afrikaansche Republiek legislation. It could probably be ascribed to poor draftsmanship rather than an attempt to reserve ownership of unsevered minerals per se to the state. It is however conceded that in s 1 of Law 17 of 1893, s 1 of Law 14 of 1897 and s 1 of the Precious and Base Metals Act 1908 the word “ownership” is also used in relation to unsevered minerals. Those sections are, however, correct in terms of the cuius est solum rule, in so far as base minerals are concerned, if the entitlements to exploit such minerals are still included in the complete ownership of the land.
34 Badenhorst 2002 Obiter 257-258.
35 s 4(2).
concerning mineral and petroleum resources, in that the deep seabed was formerly regarded as either *terra nullius* or *terra communis*, whereas minerals always belonged either to private individuals or the state, where applicable.

Third, it may be suggested that section 3(1) by itself probably has no noteworthy consequences for proprietary distribution in South Africa. It is not really significant whether ownership of unsevered minerals is vested in the state or the “people of South Africa.” The more important question concerns the persons in whom specific rights to prospect or mine minerals are vested. It could probably be accepted therefore that the language of section 3(1) is merely an example of the social-democratic rhetoric frequenting a broad range of more recent legislative measures, without the section actually conveying any rights to the state. Accordingly, section 3(1) by itself most probably does not result in an outright, full-scale nationalisation of mineral resources. Its implications for the imposition on private property only becomes relevant when this provision is read alongside section 110 of the MPRD Act, which repeals or amends all the “old order” rights, subject to the transitional provisions of Schedule II. We proceed from the premise that this third interpretation of section 3(1) will enjoy most support.

Unlike the position in mining laws prior to the Minerals Act 50 of 1991, the right to prospect and the right to mine minerals are not expressly reserved for the state. It is, however, achieved implicitly, in so far as such a right to prospect and the right to mine may legally only be granted if such right is vested in the grantor, according to the Roman maxim *nemo plus iuris ad alium transferre postest quam ipse habet*. As will be indicated, the rights to prospect and mine were vested in the holders of mineral rights (prospecting rights or mining rights). In order to enable the state to grant the right to prospect or mine, an *ex lege* transfer of these rights had to precede the granting of rights in terms of the Act. The idea of an *ex lege* transfer is also supported by the absence of an intention on the part of the existing holders of mineral rights to transfer the rights or their entitlements to the state. In this context, the question of expropriation arises. This issue will be discussed in the second part of this article. The power of the minister to grant rights of exploitation is not explicitly made subject to the transitional measures contained in Schedule II to the new Act. As has been suggested above, however, the transitional

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37 With the abrogation of the *cuius est solum* rule ownership of unsevered minerals has become possible.
38 This golden rule of the law of property entails that no one can transfer more rights to another than what he/she holds. It constitutes one of the general requirements for the transfer of real rights.
39 See 211 infra.
arrangements of Schedule II need to be read alongside section 3 of the MPRD Act, from which the minister's powers are more apparent.

For purposes of comparing the "old order" and "new order" rights and assessing the impact of the constitutional property clause on the transitional arrangements in the MPRD Act, the discretionary powers of the minister in the conversion of old order rights are particularly relevant. The basis upon which rights to mineral resources will be held in future is affected by the fact that the new Act obliterates the idea of private ownership of mineral rights and replaces it by a system of governmental permissions and grants. The following paragraphs provide an overview of the nature and content of old order rights, before proceeding to an assessment of the extent to which the MPRD Act change the existing order.

2 Old order rights

2.1 Nature and content of old order rights

Regarding the nature of the different categories of "old order rights" listed in 1 2 above, a distinction ought to be made between common law rights, statutory prospecting or mining rights and statutory authorizations (by virtue of the police power of the state) to exercise a right. The right or authorization indicated in bold in 1 2 above will be discussed first.

2.1.1 Common law rights

The following common law rights are recognised:

2.1.1.1 Mineral right

A mineral may be defined as a limited real right that entitles its holder to enter the land to which the mineral right relates and prospect for minerals, and if minerals are found to mine the minerals and to dispose thereof. The content of a mineral right comprises the following entitlements:

(a) The entitlement of exploitation. This entails use of the land for the purposes of exploitation of minerals to which the mineral rights relate. It includes: (i) the entitlement to enter the land for purposes of prospecting for and mining of minerals; (ii) the entitlement to prospect for minerals; and (iii) the entitlement to mine the minerals.

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The entitlement of disposition. This refers to the ability to decide what may and what may not be done on the land for purposes of the exploitation of minerals.

(c) The ability to alienate the right. This entails the entitlement to cede the mineral rights or grant prospecting or mining rights in respect of the land to another person.

(d) The entitlement of encumbrance. This entails the ability to grant a limited real right (such as a usufruct or mortgage bond) with regard to the mineral right.

(e) The entitlement to resist any unlawful interference with the exercise of the mineral right.

(f) All ancillary entitlements that are directly necessary for the enjoyment of the mineral right granted.

(g) A reversionary interest. This amounts to the (minimum) entitlement to regain any of the above entitlements if they have been transferred for a fixed period and the period has lapsed or terminated, or the entitlement to exercise an entitlement which has been restricted, after removal of the restriction.

For the sake of further reference, entitlements (b)-(g) will collectively be referred to as "secondary entitlements."

Presently, mineral rights are capable of being transferred by registration of the cession thereof in the deeds registry. The holder of mineral rights may grant a prospecting right against payment of prospecting money by virtue of a prospecting contract. Similarly, a mining right may be granted, against payment of royalties upon conclusion of a notarial mineral lease, to a mining company. Prospecting contracts and mineral leases are likewise capable of registration. The title of mineral rights subsists in perpetuity. Mineral rights may secure a loan by registration of a mortgage bond.

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42 *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 520D-E.


44 Upon registration of cession, the reversionary entitlement is also transferred together with the other entitlements.

45 The existence of this entitlement explains why a mineral right, just like ownership, has the characteristic of elasticity.

46 S 3(1)(m) and 16 of the Deeds Registries Act 47 of 1937.

47 Formalities in terms of s 2(1) of the Alienation of Land Act 68 of 1981 have to be complied with.


49 S 3(1)(q) of the Deeds Registries Act 47 of 1937.

50 S 3(1)(m) and s 77(1) of the Deeds Registries Act 47 of 1937.

51 As to other characteristics of mineral rights, see Badenhorst *Mineral Rights* 1-24 to 2-25.

52 S 3(1)(e) and 50(1) of the Deeds Registries Act 47 of 1937; and see also s 71(5) and (6). See in general Badenhorst *Minerale* 479-482.
2112 Prospecting right

A consent to prospect can take the form of a prospecting contract. A prospecting contract is an agreement by which a prospecting right is granted with an option to: (a) purchase the complete ownership of land or a mineral right; or (b) enter into a mineral lease.

It was held in Vansa Vanadium SA Ltd v Registrar of Deeds, in defiance of existing precedent to the contrary, that a prospecting contract reflected in the deeds registry does not create a real right. The correct position is, however, that conclusion of a prospecting contract gives rise to the creation of two distinct personal rights, namely a so-called "prospecting right" and the right to claim registration of the prospecting right. Upon registration of the prospecting contract the said personal rights are terminated and a prospecting right, which is real in nature, is created. A registered prospecting right is real because the object of the right is land, and the origin of the right is registration. The real right is transferred and accepted in terms of the real agreement. Furthermore, the right amounts to a subtraction from the *dominium*: The prospecting right burdens either the landownership itself or the (severed) mineral right, diminishing its content. If the parties then have the intention to bind successors in title, the nature of the prospecting right as real should be beyond doubt. A prospecting right has as its content the entitlement to enter the land for purposes of prospecting and the entitlement to prospect. In addition the holder has, within the parameters of such a prospecting right, secondary entitlements comparable to those of the mineral right holder. Prospecting rights may be transferred by registration of a notarial cession of a prospecting contract.

The right in terms of an option to purchase ownership of land or the mineral right, or to enter into a mineral lease does not, however, amount

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53 See Bonade v Minister van Mineraal en Energiesake 2002 JDR 0769 (NC) par 9.
54 See definition of "prospecting contract" in s 102 the Deeds Registries Act.
55 794G 795H-I/J.
56 In Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town and Mines, Ltd 1903 TS 499 510 it was decided that a prospecting contract, which granted a right to prospect (and mine) created a real right. Heyl *Grondregistrasie in Suid-Afrika* (1977) 76 regards a prospecting right as a personal servitude. According to Van der Merwe *Sakereg* (1989) 435 and Jones & Nel *Conveyancing in South Africa* (1991) 435 registration of a prospecting contract results in its operation as against third parties. See further Badenhorst & Olivier "Die aard van regte ingevolge 'n prospekteerkontrak - Vansa Vanadium SA Ltd v Registrar of Deeds" 1997 TSAR 583 594.
58 Badenhorst & Olivier 1997 TSAR 593-594.
59 See Badenhorst & Olivier 1997 TSAR 593-594.
60 s 3(1)(q) of the Deeds Registries Act 47 of 1937.
to a real right. The right of option has as its object performance, namely to keep open the substantive offer to sell the ownership or mineral rights or to enter into a mineral lease.

2113 Mining right

Consent to mine can take the form of a mineral lease. A mineral lease is a notarial contract in terms of which the lessor confers on the lessee (namely, the miner) the right to mine for consideration, and to dispose of the minerals so mined for the lessee's own benefit and account. A mining right by virtue of a mineral lease is regarded as a real right. A mining right has as its content the entitlement to prospect and mine. A mining right may be transferred by registration of a cession of a notarial mineral lease. Mining rights may secure a loan by registration of a mortgage bond under the Deeds Registries Act.

212 Statutory rights to prospect or mine

The following statutory prospecting or mining rights, recognised in terms of the transitional provisions of the Minerals Act, may be distinguished:

2121 Prospecting lease, prospecting permit or prospecting permission in terms of section 44 of the Minerals Act

A prospecting lease, prospecting permit or prospecting permission granted or issued in terms of mining laws prior to the Minerals Act,

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61 Kotze v Civil Commissioner of Namakwa 1900 17 SC 37; Lazarus and Jackson v Wessels, Oliver and Coronation Freshfield Estates, Town and Mines Ltd 1903 TS 499 510; Henderson Consolidated Corporation Ltd v Burnard 1903 TS 33 34; cf Vansa Vanadium SA Ltd v Registrar of Deeds 20-21. However, the “option” is also regarded as an “interest in land” for purposes of the Alienation of Land Act by Franklin & Kaplan Mineral Law 16-20; Lowe, Dale et al Notary 220; Van Rensburg & Treiman The Practitioner's Guide to the Alienation of Land Act (1984) 68; De Jager Alienation of Land 1982 80; Kurt The Law of Sale and Lease (1946) 86. See further Badenhorst Mineral 670-692.

62 See the definition of an option contract by Van der Merwe et al Contract 58.

63 See Renade v Minister van Mineral en Energiesake 2002 JDR 0769 (NC) par 9.

64 In terms of s 3(1) of the General Law Amendment Act 50 of 1956 a mineral lease has to be in notarial form to be valid. An underhand mineral lease is void: Puls v Leslie Chrome (Pty) Ltd 1962 4 SA 784 (W) 781A-B; Nortje v Pool NO 1966 3 SA 96 (A) 111A 126-127; Belville-Inery (Edins) Bpk v Continental China (Pty) Ltd 1976 3 SDR 383 (C) 385H-388G; Routy v Secundaor Sand BK 1989 1 SA 902 (T) 904G-H; Malan v Strauss 1994 4 SA 179 (NC) 189D-F; see Lowe, Dale et al Notary 235; Badenhorst & Van Heerden 1989 TSAR 455-457.

65 Lowe, Dale et al Notary 233.

66 S 3(1) of the General Laws Amendment Act 50 van 1956; Badenhorst Mineral 707-711.

67 S 3(1)(m) of the General Laws Amendment Act 50 of 1956.

68 Sa 3(1)(m) and 77 of the Deeds Registries Act 47 of 1937.

69 S 3(1)(e), 50(1) read with definition of “immovable property” in s 102, Deeds Registries Act 47 of 1937.

70 Namely, a prospecting lease, prospecting permit or prospecting permission granted or issued in terms of (i) s 4 or 6 of the Precious Stones Act 73 of 1964; (ii) s 7(2)(a), (b) or (c), 13,14, or 16 of the Mining Rights Act 20 of 1967; (iii) s 4 of the Mineral Laws Supplementary Act 10 of 1975; (iv) s 47 of the Nuclear Energy Act 92 of 1982. The provision of the Mining Right Act regarding the granting of a mining lease for natural oil (in terms of s 23(1)(g) remained in force until the prospecting lease granted in terms of s 14 of the Mining Rights Act had lapsed upon expiry of the expiration date or within two years if no expiry date was determined (s 44(8)(a)).
remains in force, subject to the terms and conditions under which it was granted or issued or deemed to have been granted or issued.\textsuperscript{71} As statutory prospecting rights, the content of the rights were determined by the statutory grant. In broad terms it contained the entitlement to enter upon land for prospecting purposes, the entitlement to prospect and the secondary entitlements within the parameters of the grant.

2 1 2 2 A right to dig or mine or a claim licence referred to in section 47(1) or (5) of the Minerals Act

An existing right to dig or mine or a claim licence granted or acquired in terms of mining legislation prior to the Minerals Act\textsuperscript{72} remains in force subject to its terms and conditions.\textsuperscript{73} For purposes of the Minerals Act, the holder of a mining right is, during its existence, deemed to be the holder of the mineral right.\textsuperscript{74} As a statutory mining right, the content of the right is determined by the terms of the statutory grant. In broad terms and within the parameters of the specific grant, the rights could have as their content both the entitlement of exploitation and the secondary entitlements.\textsuperscript{75}

A mining right, which could be ceded, transferred, let, sublet, tributed, subdivided, amended or mortgaged immediately prior to the commencement of the Minerals Act, could be dealt with in this manner.\textsuperscript{76} Such dealings are registrable in the Mining Titles Office, if they were previously so registrable.\textsuperscript{77} Statutory mining rights may secure a loan by registration of a mortgage bond in the Mining Titles Office.\textsuperscript{78}

Tributing takes place by virtue of an agreement. A "tributing agreement" is a notarial deed whereby the holder of a mining title

\textsuperscript{71} S 44(1)(a) of the Minerals Act. The provisions of s 44(1)(a) were only applicable in respect of a prospecting permit issued in terms of s 7(2)(b) of the Mining Rights Act (see previous fn) if a prospecting area was pegged and reported prior to commencement of the Minerals Act by virtue of such prospecting permit and in accordance with s 8 of the Mining Rights Act (s 44(1)(c).

\textsuperscript{72} Namely a right to dig or mine (i) in terms of s 4 of Law No 1 of 1883 (Tvl), or a corresponding provision of a prior law; (ii) by virtue of a certificate referred to in s 3 (1) (a) or a mining referred to in s 3 (1) (b) of the Precious Stones Act 73 of 1964; (iii) in terms of s 13, 13A, 17, 21, 52, 68, 74, 89 or 126 (2) of the Precious Stones Act, excluding any right referred to in subs 47(5) (a) and (b) of the Minerals Act; (iv) in terms of s 25 or 42 of the Mining Rights Act 20 of 1967; (v) by virtue of a certificate in terms of s 57 and permission granted under s 58 read with s 56 of the said Mining Rights Act; (vi) in terms of s 59, 68, 75, 83, 88, 93 (4) (as far as it relates to a right to dig or to mine granted or acquired under s 75 of the Precious and Base Metals Act 35 of 1908 (Tvl), 144 (1) (e), 160, 161 or 188 (2) of the Mining Rights Act, excluding any right referred to in subsection 47(5) (e) of the Minerals Act; (vii) in terms of s 3 of the Tiger's-Eye Control Act 77 of 1977; (viii) in terms of s 47 or 83 (9) of the Nuclear Energy Act 92 of 1982. A mining right acquired by virtue of a claim licence. Itos 35 of the Precious Stones Act or s 48 of the Mining Rights Act was also preserved for an indefinite period by s 47(1)(g). In Category 4 of Table 2 reference is also made to a right to dig or mine referred to in s 47(5) of the Minerals Act, namely a right to dig or mine acquired in terms of ss 20 and 35 of the Precious Stones Act and s 48 read with s 56 of the Mining Rights Act or a corresponding provision of a prior law.

\textsuperscript{73} S 47(1)(a); Benade v Die Minister van Mineraloe-en Energiweke 2002 JDR 0769 (NC) 8 12 14.

\textsuperscript{74} S 47(1)(e).

\textsuperscript{75} Itos 47(2) a holder of a mining right has the same surface use rights as a holder of mineral rights.

\textsuperscript{76} S 47(1)(b).

\textsuperscript{77} S 47(1)(b).

\textsuperscript{78} Statutory rights as mining titles: s 5(1)(h) of the Mining Titles Registration Act 16 of 1967; and see also ss 31-40.
grants the right to mine in a specific area as defined in the agreement. This includes the right to recover and dispose of minerals lawfully won as a result of such mining for the grantee's own benefit and account. These rights are subject to the terms and conditions upon which the mining title has been granted, and to the payment to such holder of a royalty.\textsuperscript{79} In form and substance a tributing agreement amounts to a mining lease, even where the mining title in respect of which it is granted is itself a mining lease.\textsuperscript{80} A tributing agreement also qualifies as a "right to mine referred to in section 47 of the Minerals Act".\textsuperscript{81}

2123 Permissions to prospect or mine in terms of former apartheid laws

Most of the land and mineral rights in Bophuthatswana and Venda vested in the Governments of Bophuthatswana and Venda, respectively. In terms of sections 16(1) of the similarly worded Bophuthatswana Land Control Act\textsuperscript{82} and the Venda Land Control Act\textsuperscript{83} no person could prospect or mine for minerals\textsuperscript{84} on land in respect of which the mineral rights were held by a citizen or held in trust for a tribe or community, except with the written permission of the Minister of Economic Affairs. South Africa's Interim Constitution\textsuperscript{85} incorporated, among others, the territories of Bophuthatswana and Venda into the provinces of the new South African state.\textsuperscript{86} The laws pertaining to use of minerals in these territories, specifically sections 16(1) of the two acts, remained in force, subject to the Constitution,\textsuperscript{87} until they were amended by proclamation\textsuperscript{88} to the effect that the Minister of Minerals and Energy had to grant the written permissions. The MPRD Act repealed section 16 of both Acts.\textsuperscript{89}

After 8 November 1991, mineral rights owned by the Government of Lebowa vested in the Lebowa Mineral Trust (the LMT).\textsuperscript{90} In terms of

\textsuperscript{79} S 1(xxiii) of the Mining Titles Registration Act 16 of 1967; Lowe Dale et al \textit{Notary} 237.

\textsuperscript{80} Franklin & Kaplan \textit{Minerals Law} 661. A tributing agreement is also viewed as analogous to a mineral lease (Lowe, Dale \textit{Notary} 237) or a lease of the right to mine which the holder of the mining title holds (Dale \textit{Mineral Rights} 290; Kaplan "Mining and Minerals" Butterworths \textit{Forms and Precedents – Commercial Transactions} Vol 6 140; see Graham v Local and Overseas Investments (Pty) Ltd 1942 AD 95 107).

\textsuperscript{81} A "mining right" is defined in s 1 of the Minerals Act not including a right to dig or mine but also a tributing agreement or sub-grant.

\textsuperscript{82} 39 of 1979.

\textsuperscript{83} 16 of 1986.

\textsuperscript{84} For this purpose minerals were deemed to include "all metals and ores of metals, precious or base, precious stones, and all clays, stone, earths, coals, oils or other mineral substances of whatever nature which may be dug or extracted or separated from the ground" (s 16(2)).

\textsuperscript{85} Act 200 of 1993.

\textsuperscript{86} S 124(1).

\textsuperscript{87} S 229.


\textsuperscript{89} S 110.

\textsuperscript{90} S 12(1); \textit{Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust} 1994 4 SA 375 (T) 377H; \textit{Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd} 2001 2 All SA 388 (T) 389g-h.
section 15 of the Lebowa Mineral Trust Act\(^{91}\) no person could prospect for or mine minerals\(^{92}\) on land in respect of which the mineral rights vested in the LMT without the written permission of the Minister of Economic Affairs and Technology (or another cabinet minister acting in his/her stead).\(^{93}\) In terms of section 235(6) of the Interim Constitution, the executive authority previously vested in the Minister of Economic Affairs and Technology and the Chief Minister in terms of the LMT Act was vested in the President of the Republic of South Africa.\(^{94}\) In order to remove any possible legal uncertainty regarding the trustee of the LMT and its constitutionality, the administration of the LMT Act was assigned by cabinet to the Minister of Minerals and Energy Affairs.\(^{95}\) The LMT Act was repealed on 30 September 2001 by the national government in terms of the Abolition of Lebowa Minerals Trust Act 2000.\(^{96}\)

Land in the so-called rural areas vested in the government. In terms of section 51(3) of the Rural Areas Act no prospecting for or mining of metals, precious stones, natural oil or any other minerals could be undertaken on any land\(^{97}\) within a "board area"\(^{98}\) except with the consent of the Minister of Local Government, Housing and Agriculture: House of Representatives.\(^{99}\) The minister in question was by proclamation\(^{100}\) replaced by the Minister of Land Affairs as executive authority for purposes of section 51(3). The administration of section 51(3) was assigned by proclamation\(^{101}\) to the Minister of Minerals and Energy. The cabinet, however, resolved that the application of section 51(3) had to be undertaken in consultation with the Minister of Land Affairs.\(^{102}\) The Transformation of Certain Rural Areas Act 94 of 1998 repealed the Rural Areas Act.\(^{103}\) All mineral rights referred to in section 51(1) and (2)

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\(^{91}\) 9 of 1987.

\(^{92}\) For purposes of s 15, "minerals" included "all ores of minerals, all clays, stone, earths and other mineral substances of whatever nature which may be dug or extracted or separated from the ground" (s 15(3)). The concept "mineral" is also defined in s 1.

\(^{93}\) Definition of "Minister" in s 1.

\(^{94}\) Proc R3 in GG 16952 of 1996-02-02; Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust 381B-C.


\(^{96}\) S 7(1); Proc 46 in GG 22691 of 2001-09-28. In Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa 2002 1 BCLR 23 (T) it was decided that the applicant (acting on behalf of the people of the Northern Province as beneficiaries of the LMT) did not have the necessary locus standi to bring an action for an order striking down the Abolition of the Lebowa Mineral Trust Act as unconstitutional (27A-H). The court held further that no rights of the inhabitants of Lebowa/ Northern province had been infringed (27H-28H). See further Badenhorst & Vrancken "Do mineral rights constitute constitutional property? Lebowa Mineral Trust Beneficiaries Forum v The President of the RSA" 2001 Obiter 496.

\(^{97}\) It is s 51(1) if the provisions of this Act were applicable to land, such land was deemed to be unalienated State land.

\(^{98}\) A "board area" is defined in s 1(v).

\(^{99}\) Definition of "Minister" in s 1(xiv).


\(^{101}\) R 4/1996 Notice 16952 GG 16952 of 1996-02-02.


\(^{103}\) S 10.
of the Rural Areas Act were vested in the state. Prospecting for or mining of minerals on land situated in areas affected by this Act could only be undertaken with the written consent of the Minister of Minerals and Energy in the form of a prospecting permit or mining authorization. The MPRD Act repeals the said sections of the Rural Areas Act.

2.1.3 Statutory authorization to exercise rights

The following statutory authorizations to exercise common law mineral rights, prospecting rights or mining rights are recognised:

2.1.3.1 Temporary prospecting permit

The regional director could, pending any application for a prospecting permit, have issued a temporary permit authorizing the continuation of prospecting operations on the land where these operations were previously authorized under a prospecting permit that has subsequently lapsed. The temporary permit could, therefore, not have been issued in vacuo.

Table 1 of Schedule II to the MPRD Act does not mention this category of underlying common law rights or statutory prospecting rights.

2.1.3.2 Temporary mining authorization

The regional director could, pending any application for a mining authorization, issue a temporary authorization for the continuation of mining operations on the land where these operations were previously authorized under a mining authorization that had subsequently lapsed. The temporary mining authorization could, therefore, not have been issued in vacuo.

Table 2 of Schedule II to the MPRD Act does not mention this category of underlying common law rights or statutory mining rights.

2.2 Exercise of old order rights

No person could exercise the common law or statutory prospecting or mining rights by prospecting or mining before a prospecting permit.

\[\text{References:} 104 \ S \ 6(1). \ 105 \ S \ 6(2)(a). \ 106 \ S \ 110. \ 107 \ S \ 10. \ 108 \ \text{Kotze v Meepo Ya Sechaba Mining BK (NC 2002-03-15 Case no 171/2002, unreported). See further Badenhorst "Vereistes vir 'n tydelike permit ter voortsetting van prospektsaamhede - Kotze v Meepo Ya Sechaba Mining BK 171/2002" 2002 Otter 186.} \ 109 \ S \ 10. \ 110 \ \text{Cf Kotze v Meepo Ya Sechaba Mining BK (2002-03-15 Case no 171/2002 - unreported).} \ 111 \ \text{In terms of s 1 a "person" meant any person as defined in s 2 of the Interpretation Act 33 of 1957.} \ 112 \ S \ 6 of the Minerals Act 50 of 1991.\]
or mining authorization\textsuperscript{113} were obtained from the Regional Director of the Department of Mineral and Energy Affairs.\textsuperscript{114} These rights are in the nature of a licence to exercise an already acquired right.\textsuperscript{115} Prospecting or mining may not commence until the Regional Director has approved an environmental management plan.\textsuperscript{116}

2.3 Bundling of rights

A “holder” of an “old order right” is defined as the “person to whom such right was or is deemed to have been granted or by whom it is held or is deemed to be held, or such person’s successor in title before [the MPRD] Act came into effect.”\textsuperscript{117} This definition leaves open the possibility that there may be more than one right holder under the “old order” with regard to the same minerals.\textsuperscript{118} As has been pointed out, the common law rights, statutory prospecting or mining rights and the statutory authorizations (that is prospecting permits or mining authorizations) mentioned above are often bundled together within the categories. This bundling of different types of rights and authorizations is reminiscent of the Roman fasces\textsuperscript{119} of old. The common law and statutory rights and authorizations metaphorically form a bundle of sticks, the first-mentioned right being the axe, whilst everything is bound together with a rope labelled “old order right” (with its respective sub-categories).

The problem with the fasces approach is that different rights and authorizations may be vested in different persons. As indicated before, in order to make some sense of the legislature’s poor definitions of the different “old order rights”, it is submitted that priority should be accorded to the first right or authorization mentioned (indicated above\textsuperscript{120} in bold) in the categories to the tables. Accordingly a common law mineral right, prospecting right, mining right or statutory prospecting or mining right or a temporary permit or authorization to prospect or mine may qualify as an “old order right”. If it is accepted that the first right in a mentioned category acts as trigger for categorization, the holder of the right indicated in bold would be the holder of the “old order right” for purposes of the transitional arrangements. The consequence of the fasces approach here is that other rights and authorizations in the bundle are deemed to be part of the old order right. The axe and sticks of the fasces

\textsuperscript{113} S 9 of the Minerals Act 50 of 1991.
\textsuperscript{114} S 5(2). Balmorel Investments (Edms) Bpk v Minister van Mineraal- en Energiessake 1995 S BCLR 1104 (NC) 1110 A/B.
\textsuperscript{115} Kaplan & Dale Minerals Act 48. The authors correctly draw an analogy with an owner of a car holding a driver’s licence to drive the vehicle.
\textsuperscript{116} S 39(1).
\textsuperscript{117} Item 1(0).
\textsuperscript{118} For instance, in the case of mineral rights which have been sold but not registered upon introduction of the MPRD Act, the seller holds the mineral right whilst the purchaser is the person to whom such right is granted or the seller’s successor in title.
\textsuperscript{119} See further Van Zyl Geskiedenis en Beginsels van die Romeinse Privaatre (1977) 14 n 30.
\textsuperscript{120} See 1 2 supra.
share the same fate: rights and authorizations are terminated or converted together as a bundle.

3 New order rights

Upon introduction of the MPRD Act, holders of “unused old order rights” would have the exclusive right to apply for a prospecting right or a mining right, as the case may be, in terms of the Act, within a one-year window period. The state, acting through the minister of the Department of Minerals and Energy, may grant prospecting rights and mining rights to such holders or to other applicants. Upon application to the department, if the prescribed requirements for a prospecting right or a mining right are met, it has to be granted by the minister.

The minister has to refuse to grant a prospecting right if (a) the application does not meet the prescribed requirements; or (b) granting thereof will (i) result in an exclusionary act; (ii) prevent fair competition; or (iii) result in the concentration of the mineral resources under the control of the applicant. Applications for a prospecting right or mining right received on the same day are treated as having been received at the same time, but the minister is obliged to give preference to applications from historically disadvantaged persons.

A holder of a prospecting right or mining right has the duty to lodge the said right for registration at the Mining Titles Office within 30 days after approval of the environmental management programme or granting of a renewal of a prospecting right or mining right by the minister. A prospecting right or mining right is thus registered in the Mining Titles Office. In the absence of an application, an “unused old order right” will cease to exist upon the expiry of the one-year or extended period. Upon granting of a prospecting right or mining right and registration thereof in the mining titles office, the “unused old order right” is also terminated. A new order prospecting right is valid for a specified period which may not exceed five years. A new order mining right is valid for the specified period which may not exceed 30 years.

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121 Item 8(2).
122 S 3(2)(a). This must be read subject to the transitional provisions in Schedule II to the MPRD Act.
123 See further as 16(1) and (2), 17(1) and 17(4).
124 See further as 22(1) and (2) and 23(1) and (2).
125 S 17(1) and 23(1), respectively.
126 To s 1 an “exclusionary act” means any “act or practice which impedes or prevents any person from entering the mineral and mining industry, or from entering any market connected with that industry, or from making progress within such industry or market”.
127 S 17(6).
128 S 17(6).
129 S 23(6).
Upon application by a holder of an “old order prospecting right” during a two-year window period, the minister is obliged to convert the “old order prospecting right” into a new prospecting right if the holder of the “old order prospecting right” has complied with the requirements of the MPRD Act. Upon application by the holder of an “old order mining right” during a five-year window period the minister is obliged to convert the “old order mining right” into a new mining right if the holder has complied with the requirements of the MPRD Act.

Within 90 days of the conversion of the prospecting right or mining right, the holder has to lodge the converted prospecting right or mining right for registration in the Mining Titles Office. Simultaneously with registration the “old order prospecting right” or “old order mining right” has to be deregistered at the Deeds Office or Mining Titles Office. Upon conversion of the “old order prospecting right” or “old order mining right” and the registration of the converted right, the “old order prospecting right” or “old order mining right” is terminated. If the holder fails to lodge the “old order prospecting right” or “old order mining right” for conversion before the expiry of the two-year or the five-year interim period, the “old order prospecting right” or mining right will also be terminated.

No person may prospect or mine for any mineral without: (i) a prospecting right or mining right; (ii) an approved environmental management programme; and (iii) notifying and consulting with the owner or lawful occupier of the land. A prospecting right or mining right is a limited real right in respect of the mineral and the land. A holder of a prospecting right or mining right is entitled to enter the land to which such right relates together with his or her employees, and to bring onto the land any plant, machinery and equipment and build, construct and lay down any surface, underground or under-sea infrastructure which may be required for the purposes of prospecting or mining. The holders of such rights are furthermore entitled to prospect or mine for their own accounts on or under the land for the mineral for which such right has been granted. They may also remove and dispose of any such mineral found during the course of prospecting or mining, and subject to the National Water Act, use water from any natural spring, lake, river or stream, situated on, or flowing through the land or from any excavation previously made and used for prospecting or mining.

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134 See further Item 6(2) and (3).
135 See further item 7(2) and (3).
136 Item 6(5) of Schedule II.
137 Item 7(5) of Schedule II.
138 Item 6(5) of Schedule II.
139 Item 7(5) of Schedule II.
140 Item 6(7).
141 Item 7(7).
142 Item 6(8).
143 Item 7(8).
144 S 5(4). Approval of an environmental management programme takes place ito s 39(4).
They may sink a well or borehole required for use relating to prospecting or mining on the land. Finally, such holders may carry out any other activity incidental to prospecting or mining as long as it does not contravene the provisions of the MPRD Act.\textsuperscript{147}

A holder of a prospecting right or mining right is also entitled to other rights that may be granted to, acquired by or conferred under the MPRD Act or any other law.\textsuperscript{148} A holder of a prospecting right acquires the exclusive right to apply for, and be granted upon compliance with the provisions of the MPRD Act: (i) a renewal of the prospecting right; (ii) right to dispose of minerals found during prospecting; and (iii) a mining right.\textsuperscript{149} Upon application at the office of the regional manager and upon compliance with prescribed requirements\textsuperscript{150} the minister may renew a prospecting right once for a period not exceeding three years.\textsuperscript{151} A prospecting right is accompanied with various statutory duties.\textsuperscript{152}

The holder of a mining right has the exclusive right to apply for and be granted, upon compliance with the requirements of the MPRD Act, a renewal of the mining right.\textsuperscript{153} Upon application at the office of the regional manager and upon compliance with the prescribed requirements,\textsuperscript{154} the minister may renew the mining right for further periods, each of which may not exceed 30 years at a time.\textsuperscript{155} A mining right is accompanied with various statutory duties.\textsuperscript{156}

A prospecting right or mining right may only be amended by ministerial consent.\textsuperscript{157} The minister is empowered upon compliance with the provisions of the MPRD Act to cancel or suspend a prospecting right or mining right under certain circumstances. These include the situations where the right holder is conducting any prospecting or mining operation in contravention of the MPRD Act, breaches any material term or condition of such right is contravening the approved environmental management programme, or has submitted inaccurate, incorrect or misleading information in connection with any matter required to be submitted under the MPRD Act.\textsuperscript{158}

A prospecting right or a mining right (or an interest in any such right) is only transferable with the written consent of the minister.\textsuperscript{159} The

\textsuperscript{145} S 5(1).
\textsuperscript{146} 36 of 1998.
\textsuperscript{147} S 5(3).
\textsuperscript{148} S 5(2).
\textsuperscript{149} S 19(1). Permission to remove minerals has to be acquired under s 20.
\textsuperscript{150} See further ss 18(1)-(3).
\textsuperscript{151} S 18(3) and (4).
\textsuperscript{152} See further ss 19(2) and 21(1) and (2).
\textsuperscript{153} S 25(1).
\textsuperscript{154} See further ss 24(1)-(3).
\textsuperscript{155} S 24(4).
\textsuperscript{156} See further ss 25(2) and 28(1) and (2).
\textsuperscript{157} S 102.
\textsuperscript{158} S 47(1).
\textsuperscript{159} S 11(1).
prohibition also applies to the transfer of a controlling interest in a company or close corporation holding such right or interest, except in the case of change of controlling interest in listed companies. The consent has to be granted if the transferee is capable of complying with all the obligations of the transferor. The consent is not required for encumbrance by mortgage as security to obtain a loan or guarantee for the purpose of financing a prospecting right or a mining right project by a bank or financial institution, if the mortgagee undertakes in writing that any sale in execution will be subject to ministerial consent. Transfer or encumbrance by mortgage has to be lodged for registration in the Mining Titles Office within 30 days of such action.

4 Comparison of old order and new order rights

In order to assess the extent to which deprivations and expropriations of property as foreseen by the constitutional property clause are at stake in the context of the transitional arrangements of the MPRD Act, it is necessary to undertake a “before and after” comparison of “old order rights” and new prospecting and mining rights. In drawing a comparison between the old order and the new order, a distinction may be drawn between (i) situations where the holder of the “old order right” would be successful with his or her application for, or conversion to, a prospecting right or mining right; (ii) situations where the holder of the “old order right” would be unsuccessful with his or her application for, or conversion of rights; and (iii) situations where the holder chooses not to apply for conversion at all.

4 Successful applications and/or conversions

In cases where the application or conversion would be successful, a comparison has to be drawn between the old order right and the new prospecting or mining right with regard to content and characteristics to determine whether any existing deprivations pass constitutional scrutiny. Due to the broad range of rights and conversions possible, it is impossible within the scope permitted for this contribution to deal separately and in detail with each and every possibility that may arise. Hence, only four examples of varying degrees of imposition on existing property rights are provided.

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160 S 11(1).
161 S 11(2).
162 S 11(3). Even though a prospecting right is deemed to be a limited real right (s 5(1)), it is unclear whether such right is immovable or movable for purposes of the object of real security.
163 S 11(4).
4.1.1 Conversion of unused old order mineral rights to new order prospecting/mining rights

If a holder of an (unused) mineral right is successful with his or her application for a prospecting right and/or mining right, a limited real right registered in the deeds office is exchanged for a limited real right or rights registered in the mining titles office. Arguably, the new statutory right or rights are lesser in content than the common law mineral right because secondary entitlements such as alienation and encumbrance are restricted by the requirement of ministerial consent. The new prospecting right, even though linked with an exclusive right to acquire a mining right, would only include the entitlement of mining upon acquisition of such mining right by compliance with the requirements of the MPRD Act. Unlike a mineral right which subsists in perpetuity, the new prospecting and/or mining right will depend on compliance with the MPRD Act for continued existence. In short, similar though lesser rights may be acquired.

4.1.2 Conversion of rights in terms of a mineral lease or prospecting contract

Where a holder of a mining right by virtue of a mineral lease is successful with his or her conversion application, a limited real right registrable in the deeds office is converted into a limited real right registrable in the mining titles office. The new statutory right or rights are more or less equal in content, even though secondary entitlements such as alienation and encumbrance are restricted by the requirement of ministerial consent. The duration of the mineral lease is of course dependent upon the agreement of the parties. The duration of the original mineral lease may, for instance, have extended until the minerals had been fully exploited, whilst the new term of the mining right is for a statutory period and subject to the discretion of the minister to terminate the mining right upon non-compliance with the requirements of the MPRD Act. Upon such conversion, the holder of the underlying mineral right loses not only the mineral right but also the right to claim payment of further (contractual) royalties, except in two instances.\footnote{To Item 11 of Schedule II, if a community is already receiving royalties or discontinuance will cause undue hardship to a person or a person is using it for social upliftment, such communities or persons may under prescribed circumstances continue to receive contractual royalties.} Contractual royalties not falling within these two categories will disappear into thin air, as the state will become entitled to royalties in terms of the MPRD Act.\footnote{\textsection 3(2)(b).}

If a holder of a prospecting right by virtue of a prospecting contract is successful with a conversion application, a prospecting right (registrable in the deeds office) is converted into a limited real right (registrable in the mining titles office). If the prospector is successful with an application for
a mining right, the option in terms of the prospecting contract is exchanged for a statutory mining right. However, the option could have involved stronger rights (common law mineral right) and the terms of the mineral lease could have been settled and consequently could have been better than the terms of the new mining right. Upon conversion the holder of the underlying mineral right would no longer be eligible to receive prospecting moneys from the prospector. What has been said above regarding the comparison between the mining right by virtue of a mineral lease and the new order mining right applies mutatis mutandis.

4.1.3 Conversion of rights in terms of statutory mining leases

If a mining right by virtue of a (statutory) mining lease is converted into a mining right a more or less equal right is acquired except possibly in respect of its duration and the increase in statutory duties with which to comply.

4.1.4 Conversion of a temporary mining authorization into a mining right

If a holder of a mere temporary authorization to continue with mining is successful with an application for a mining right, a licence (in terms of the police power) is converted into a new mining right. In this instance a licence is converted into a limited real right. As indicated before, underlying common law or statutory rights are not mentioned in this category. It is assumed (on no solid legal basis) that by analogy the fasces approach would also apply.

In the instances where lesser entitlements are acquired upon successful applications and/or conversions, it amounts to a deprivation of such entitlements. The question arises whether such deprivation constitutes an expropriation of property in terms of the provisions of the MPRD Act for which compensation would be payable. The same question arises as to the loss of prospecting moneys or contractual royalties by the holders of underlying mineral rights.

4.1.5 Conversions and the constitutional property clause

If "old order" rights are converted into new order rights upon application, the imposition on property rights may not always be obvious. As appears from our discussion above, however, in most instances of conversion an attenuation of the rights at hand takes place. Accordingly, the increased role of ministerial consent in the acquisition and retention of new order rights and the limited duration of most of the new order rights have far-reaching effects. The obvious question in this regard is whether the conversions and concomitant content restriction upon such rights amount to (justifiable) deprivations of property under the constitutional property clause. But before this kind of deprivation can be assessed, it must be determined at which point in the process the deprivation occurs. In some individual cases, the conversions may
amount to such severe deprivations that the issue of constructive expropriation may arise, in which case invalidation of the particular conversions, or payment of compensation in the alternative, must be determined. These matters will be considered in part two of our article.

4.2 Unsuccessful applications and/or conversions

It is self-evident that in the situation where an application for new rights or conversion of old order rights is unsuccessful, the holder loses his or her old order rights upon termination thereof in terms of the MPRD Act.166 In this context, it must be determined whether impositions of this nature on existing property rights are permitted under the Constitution, and whether they qualify as expropriations. If this is the case, the question of payment of compensation arises. If they are not treated as expropriations, the issue to be determined is whether they amount to excessive regulation of private property, and can accordingly be struck down on account of their unconstitutionality. These issues will be dealt with in part two of our discussion.

4.3 No application for conversions

Upon failure to apply for new rights or conversion of old order rights, the holder also loses his or her old order rights upon termination thereof after a period of grace as provided by the transitional provisions.167 Thus the question of expropriation and compensation arises in this context as well. Further, the question as to the exact point at which a possible expropriation might occur needs to be considered. It may also be asked whether the “lazy” “old order right” holder, who does not apply for conversion, may at all be eligible to rely on expropriation in order to obtain redress for rights lost on account of a refusal to abide by the prescribed procedure for reapplication in the MPRD Act. The question further arises whether failure to comply with the procedure for conversion under the transitional arrangements may count against such a holder in a subsequent claim for compensation for expropriation of property in terms of the MPRD Act. These issues will be dealt with in part two of our contribution.

OPSOMMING

Wysigings aan die onlangs uitgevaardigde Wet op Ontwikkeling van Minerale en Petroleum Hulpbronne noodsaak 'n herbeskouing van die oorgangsbeplings van die Wet. Hierdie bydrae het ten doel om die aard en inhoud van die regte wat deur die oorgangsbeplings geraak word, te analiseer, en die effek van die oorgangsbeplings op sodanige regte teen die grondwetlike cientdomsklousule te toets. Die analise is gestruktureer in twee aparte aflwerings. Meegaanende deel oen behels 'n vergelyking van “ou ordo” regte, soos beskryf in die oorgangsbeplings, met die

166 See 3 supra.
167 See 3 supra.
nuwe regte wat deur die Wet in die lewe geroep word. Na 'n besproking in breë trekke van die wyshings aan die Wet direk voor uitvaardiging, word die aard en inhoud van die sogenaamde "ou orde" regte bespreek. 'n Onderkundig word getref tussen regte wat voortspruit uit die gemeenerg, regte met 'n oorsprong in vroeëre wetgewing, en statutêre magtigings. Die implikasies van die oorgangsmaatreëls op die sogenaamde "opbindeling" van regte word ook oorweeg. Daarna word die aard en inhoud van die "nuwe" regte soos voorsien deur die Wet bespreek. In die vergelyking wat daarop volg, blyk dit dat die gevolge van die oorgangsbeplings, vir soever dit relevante is in 'n ondersoek op grond van die grondwetlike eiendomsklausule, as volg gekategoriseer kan word: (i) Waar aansoeke onder die oorgangsbeplings vir omskakelings van ou orde regte na nuwe regte onsuksesvol is, sal die inhoud van die nuwe regte, vergelyk met die voorafgaande regte van die ou orde, bepaalde wees in die vraag na grondwetlikheid van die oorgangsbeplings; (ii) Waar aansoeke vir omskakeling onsuksesvol is, moet vasgestel word of die klaarblyklike ontbinding van eiendom neerkom op 'n ontsiening, en of daar voldoen word aan die standaarde gestel deur die eiendomsklausule vir sodanige inbreuke op eiendom; en (iii) Waar geen aansoek vir omskakeling gebring word nie, is die vraag of die klaarblyklike ontbinding neerkom op 'n ontsiening, en of die voormalige houer se besluit om nie aansoek te doen vir omskakelings nie, 'n laterale aanspraak op vergoeding of selfs 'n beroep op die eiendomsklausule in die algemene uitskakel. Dalk twee van die artikel sal in meer besonderhede op laasgenoemde kwessies ingaan.