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Conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?*

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1 Introduction

Owners of land are entitled to use and enjoy their land within the limits imposed by law.1 Holders of rights to minerals are entitled to prospect for minerals and to mine, remove and dispose of such minerals subject to the limitations imposed by law.2 In the course of their operations the holders of rights to minerals are entitled to exercise all such subsidiary or ancillary entitlements, without which they would not otherwise be able effectively to carry out prospecting or mining operations.3 If owners of land and holders of rights to minerals are able reasonably to exercise their respective entitlements without a clash of interests, as a rule, disputes are unlikely to arise.4 The exercising of a right to minerals would almost inevitably lead to a conflict between the right of the owner to maintain the surface of the land and that of the holder of the right to minerals to extract the minerals underneath.5 Conflict in the exercise of those respective entitlements requires a determination of the priority of the rights, and resolution of the conflict between those rights. Rules of conflict resolution between owners of land and holders of rights to minerals are to be found in principles of the common law, as supplemented by remedies provided for in mining legislation.

At the outset, the meaning of the notion of “rights to minerals” for the purposes of this article should be circumscribed. Reference to “rights to minerals” prior to the introduction of the Mineral and Petroleum Resources Development Act 28 of 2004 (hereafter referred to as the act) on 1 May 2004 would include the following categories of rights: (a) common law mineral rights;6 (b) common law prospect-

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

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3 West Witwatersrand Areas Ltd v Roos 1936 AD 62 72; the Hudson case (n 2) 488C-D; the Trojan case (n 2) 520D-E; the Anglo case (n 2) 373C-E and s 5(3)(e) of the act.

4 the Hudson case (n 2) 488D.

5 the Anglo case (n 2) 373H.

ing rights; (c) common law mining rights; (d) statutory prospecting rights; or (e) statutory mining rights. Since 1 May 2004 “rights to minerals” include the following categories: (a) prospecting rights; (b) mining permits; or (c) mining rights. The notion of “transitional rights to minerals” will also be used. This concept refers to “old order rights” as defined and recognised in the transitional arrangements contained in schedule II to the act.

This article focuses on the conflict between owners of land and holders of rights to minerals, the determination of priority of right and the resolution of conflict between the parties. First, the triangular relationship between the owners of land, the holders of rights to minerals, and the state, and the granting of rights to minerals, previously by owners of land, and currently the state, will be shown as a starting point. Recent problems caused by the proliferation of the granting of prospecting rights by the department of minerals are referred to in passing, as they may, in future, lead to an increase in conflicts between owners of land and holders of such rights. Secondly, the applicable common law principles to resolve a conflict arising from the exercise of ownership of land and rights to minerals are set out. Thereupon the modification of these common law principles by legislation, such as the Minerals Act 50 of 1991, will be indicated. The continued applicability of the said common law principles to the current dispensation under the act and the modification thereof will be examined. Due to the absence of a common law claim for damage caused by mining operations and its limited operation in statute, which is perceived as a shortcoming, an example will be provided of such an independent claim in the Australian State of Western Australia. In conclusion, the rules of conflict resolution between owners of land and holders of mineral rights under the present dispensation and the shortcomings thereof will be indicated.

2 Triangle of legal relationships

Exploitation of mineral resources usually involves the holder of rights to minerals, the owner of land and the state forming a triangle of legal relationships. This legal

7 A right granted by virtue of a prospecting contract. See further Badenhorst and Mostert (n 6) ch 4.
8 A right granted by virtue of a notarial mineral lease. See further Badenhorst and Mostert (n 6) ch 5.
9 Statutory prospecting and mining rights were rights granted by the state under the Mining Rights Act 20 of 1967, the Precious Stones Act 73 of 1964 and earlier mining statutes (which were repealed by the Minerals Act 50 of 1991) but preserved in ch VII of the Minerals Act. For a detailed discussion of the granting of these rights in terms of the first mentioned two statutes and preservation of these rights by the Minerals Act, see Franklin and Kaplan The Mining and Mineral Laws of South Africa (1984) ch II and Kaplan and Dale A Guide to the Minerals Act 1991 (1992) 56-74 and 80-120, respectively.
10 In terms of s 3(2)(a) the minister of minerals may inter alia grant prospecting rights, mining permits and mining rights to minerals to applicants. The granting of reconnaissance permissions, permissions to remove minerals and retention permits by the minister will, due to their minimal intrusion, not be discussed in this article.
11 A right granted in terms of s 17 of the act.
12 A right granted in terms of s 27 of the act.
13 A right granted in terms of s 23 of the act.
14 In item 1 of the transitional arrangements the following “old order rights” are distinguished and defined, namely an “old order prospecting right”, an “old order mining right” and an “unused old order right”.
15 See further Badenhorst “The make-up of transitional rights to minerals: something old, something new, something borrowed, something blue …?” 2011 SALJ 000.
triangle should be viewed by comparing the granting of rights and consideration
given before and after the commencement of the act, before the rules of conflict
resolution are examined.

During the dispensation brought about by the Minerals Act, rights to minerals
(and access to land) were granted by the owners of land or holders of mineral
rights. Stated differently, "by the grant of the fish in a man's pond is granted
power to come upon the bank and fish for them". Owners of land obtained com-

pensation for the granting of such rights or legal severance of mineral rights
from ownership of land. The extent of mining and damages caused by mining
was also determined in the process. If mineral rights had been severed earlier
by a predecessor in title, ownership of land was theoretically acquired at a price
minus the value of the mineral rights. Rights to minerals could only be exercised
upon granting by the state of the necessary authorisation to prospect or mine.
Stated differently, only fishing licences were granted by the state. The triangle
was balanced in the sense that holders of rights to minerals directly or indirectly
compensated the owner of the land for such rights, and the role of the state was
to authorise the exercise of such rights if the protective requirements of the act
had been met.

Since the introduction of the act the state grants the rights to minerals, such as
prospecting rights, mining permits and mining rights, in exchange for payment of
prospecting fees and royalties, respectively. Permission is also granted in the
process because the statutory permission is fused into the prospecting right, mining
permit or mining right thus granted. Stated differently, by the state's grant of the fish
in another man's pond (in return for payment of royalties by the fishermen) is granted
power to come upon the bank of the man and fish for them (whilst the man of the pond
may merely watch on). The fishing licence is also provided by the state. Prospecting
or mining is, however, prohibited unless an environmental management programme
or plan is approved, and notification of and consultation with the owner of the land
has taken place. What an owner of land needs to be notified and consulted about is
the intention of the holder of the right to minerals to commence with his prospecting
or mining activities and any work incidental thereto. This consultation is the only
prescribed means whereby an owner of land is to be apprised of the impact the
activities may have on his land. Owners of land are, however, not involved in the
process of granting rights to minerals and are not in a position to protect themselves
from damage caused by mining operations or to claim damages except to the extent
that compensation is provided for in section 54 of the act. It was foreseeable that the
proposed new system of granting of rights to minerals without proper guidelines by

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16 An example given by Broom as cited per Curlewis ACJ in the West case (n 3) 72.
17 s 5(2).
18 s 3(2)(a).
19 s 19(2)(f).
20 s 3(2)(b), 25(2)(g) and 27(7)(e). The levying of royalties took place from 1 March 2010 in terms of the
22 s 5(4) of the act; Meepo v Kotze 2008 1 SA 104 (NC) 1161H 1171; Kowie Quarry CC v Ndlambe
Municipality 2008 JDR 1380 (E) par 18.
23 See the Meepo case (n 22) 115B.
24 the Meepo case (n 22) 114D.
the state may cause problems. The proliferation of prospecting rights granted by regional managers since commencement of the act, and alleged maladministration, has led the minister of minerals to impose a moratorium upon the processing of new prospecting right applications for a period of six months to enable an audit of prospecting rights granted. As will be shown, the proliferation of the granting of prospecting rights may result in an increase in conflicts between owners of land and holders of rights to minerals.

3 Conflict resolution between competing rights

To gain a proper perspective, the relationship and conflict resolution between owners of land and holders of rights to minerals before and after the act will now be examined.

3.1 Prior to the act

During this period the common-law principles regarding the exercise of rights to minerals developed as well as the modification thereof by legislative provisions, such as the Minerals Act.

3.1.1 Common law principles regarding the exercise of rights to minerals

In the _locus classicus_ of _Hudson v Mann_ these common-law principles, as adopted in case law, were clearly formulated. These principles entail that in a case of

25 “The proposed granting of rights by the State on a ‘first come basis’ (almost like candy being dished out by Father Xmas to the first kid on the block) and not on merit will amount to an increase, instead of a decrease in the exercise of discretionary powers by the State. If not exercised in accordance with strict guidelines, such power could open the door to possible abuse” — Badenhorst “A few preliminary comments on the mineral law aspects of: a green paper on a minerals and mining policy for South Africa, 1997” Obiter 143 157.

26 The moratorium followed an outcry over the awarding of prospecting rights over existing mining operations of Kumba Iron Ore Ltd and Lonmin Plc to Imperial Crown Trading and Keysha Investments 220 Ltd, respectively. Selling prospecting rights has turned into a very lucrative business. An audit of all existing prospecting rights was embarked upon, with preliminary findings indicating widespread cases of black economic empowerment fronting and licenses lying idle. To date, 1475 out of 3666 prospecting applications have been audited. See “Prospecting chaos blamed on department. Regulations not enforced with new entrants to mining” http://www.timeslive.co.za/business/article/773399.ece/Prospecting-chaos-blamed-on-department (21-11-2010). See also “Audit reveals prospecting licence chaos” http://www.businessday.co.za/articles/Content.aspx?id=125642 (21-11-2010). The ANC itself has become a beneficiary of the proliferation of prospecting rights. The ANC’s controversial investment and fundraising front, Chancellor House, has secured a lucrative stake in the scramble for South Africa’s mineral wealth – a move critics slate as a shocking conflict of interest. See “ANC mine grab claims” http://www.news24.com/SouthAfrica/Politics/ANC-mine-grab-claims-2011121 (21-11-2010); “South Africa’s ruling party secures diamond, mineral prospecting rights” http://www.bloomberg.com/news/2010-11-12/south-africa-s-ruling-party-secures-diamond-mineral-rights.html (21-11-2010).

28 As to other legislative provisions, see Badenhorst (original text Franklin) in XVIII _LAWSA_ (1999) first reissue) par 36-59.

29 1950 4 SA 485 (T) 488B and 488E.

30 _Coronation Collieries v Malan_ 1911 TPD 577 593; _Coronation Collieries v Malan_ 1911 AD 586 598; Witbank Colliery Ltd v Lazarus 1929 TPD 529 535; Transvaal Property and Investment Co Ltd and Reinhold and Co v SA Townships Mining and Finance Corporation Ltd and the Administrator 1938 TPD 512 519-520; _Nolle v Johannesburg Consolidated Investment Co Ltd_ 1943 AD 295 306 314-317; _Zuurbekom Ltd v Union Corporation Ltd_ 1947 1 SA 514 (A) 531-532; _Douglas Colliery Ltd v Bothma_ 1947 3 SA 602 (T) 610-612.
irreconcilable conflict between the owner of the land and the holder of rights to minerals, the surface rights must be subordinated to mineral exploration. The fact that the use to which the owner of land puts the property is earlier, in point of time, cannot derogate from the rights of the holder of the rights to minerals. These principles require that a holder of rights to minerals must act in good faith and reasonably in the course of exercising his entitlements. The holder of rights to minerals must exercise his entitlements in a manner least onerous or injurious to the owner of the land. The holder of rights to minerals is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interest of the owner of land. The holder of rights to minerals may resist interference with a reasonable exercise of their entitlements either by the grantor or by those who derive title through him. The courts also applied the English lateralse PR support rule, which was accepted in South African property law, to the relationship between owners of land and holders of rights to minerals for purposes of conflict resolution. Due to the rejection during 2006 of this approach by the supreme court of appeal in Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd, to be discussed in 3.2.1 below, this approach of the courts will not be further discussed. The common-law principles did not oblige the holder of rights to minerals to pay compensation to the owner of land for damage caused in the course of prospecting or mining operations, in the absence of any relevant contract or grant obliging him to do so.

Priority of right was thus granted to the holder of rights to minerals and the solution of the dispute resolved itself into a determination of a question of fact, namely, whether or not the holder of the right to minerals acts in good faith and reasonably in the course of the exercising of his entitlements.

3.1.2 Section 42 of the Minerals Act

The common-law principles regarding the exercise of rights to minerals remained applicable, but were supplemented by section 42 of the Minerals Act, which, in turn, was derived from the earlier section 6 of the Mineral Laws Supplementary Act 10 of 1975.

Briefly, provision was made in section 42 of the Minerals Act 50 of 1991 for acquisition by the state of an exclusive right to acquire land that was rendered uneconomic for farming purposes. Such acquisition could take place upon request by the owner of the land (who did not wish to retain the land) or a person entitled

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31 the Hudson case (n 2) 488F.
32 488H.
33 See 488F.
34 488G.
35 488I.
36 488J.
37 See the Coronation case (n 30) 591; Elektrisiteitvoorsieningskommissie v Fourie 1988 2 SA 627 (T) 634A-H; Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 1 SA 350 (T) 364D-3663; Badenhorst and Mostert “Ambit of mineral rights: Paving the way for new order disputes?” 2007 TSAR 409.
38 (n 2) 372A-B.
39 Franklin and Kaplan (n 9) 135; Kaplan and Dale (n 9) 190.
40 the Hudson case (n 2) 488F.
41 See the Nolte case (n 30) 315; the Zaarbekom case (n 30) 532.
42 Kaplan and Dale (n 9) 189. For a discussion of s 6 of the Mineral Laws Supplementary Act, see Franklin and Kaplan (n 9) 227-231.
43 What constitutes “farming purposes” is not indicated in the Minerals Act.
44 See s 42(1)(d)(i) of the Minerals Act.
to mine who intended to mine the land. The mining use had to hinder or prevent farming use before the section could be invoked. If the minister of agriculture was of the opinion that the land should be acquired by the state, the land was deemed to be required for public purposes and the Expropriation Act 63 of 1975 applied to the acquisition. Market value of the land, and an amount to make good any actual financial loss and inconvenience suffered by the owner of land, could be claimed in terms of section 12 of the Expropriation Act. Acquisition by the state was not possible if the owner wished to retain the land, or an agreement was reached between the miner and owner about compensation for damage caused or likely to be caused by mining operations. Provision was also made for the minister of minerals and energy to instruct the miner to negotiate a settlement with the owner for payment of damages caused or likely to be caused by mining operations, if the owner wished to retain ownership of the land. If a settlement was not reached, compensation had to be determined by arbitration or a court. In determining the compensation, the provisions of section 12 of the Expropriation Act applied mutatis mutandis. To the extent that compensation was payable in terms of section 42, it reversed the common-law position about the absence of compensation. An owner of land was, however, debarred from applying to court for an order prohibiting the miner from commencing or continuing with mining operations under certain circumstances. Kaplan and Dale explain the protection of miners by this provision which has been carried into the Minerals Act: “In view of the disruptive effect which the granting of an interdict can have, even if subsequently discharged, the mining industry was prepared (when the Mineral Laws Supplementary Act 10 of 1975 was being drafted) to accept liability for compensation (even though such liability did not under the common law actually exist) as the price for the prevention of disruptive interdicts.” The miner could also have been instructed by the minister to purchase and take transfer of the land if the land is not to be acquired by the state. If consensus about the purchase price cannot be reached, the price could be determined by arbitration or a court, if preferred by the owner. In determining the purchase price the provisions of section 12 of the Expropriation Act applied mutatis mutandis. This meant that, in addition to the market value of the land, there may be included in the purchase price an amount to make good any actual financial loss and inconvenience suffered by the owner of the land. Upon failure by the miner to enter into a written agreement about compensation for damages or a purchase price, the minister could also prevent further mining operations if the minister was satisfied that the failure was due to default on the part of the miner.

45 s 42(1)(a).
46 Kaplan and Dale (n 9) 189.
47 s 42(2).
48 s 42(1)(d).
49 s 42(1)(e).
50 s 42(3).
51 s 42(3)(a).
52 Kaplan and Dale (n 9) 190.
53 s 42(1)(f). See further s 42(6).
54 (n 9) 190.
55 s 42(2)(b). In terms of s 42(7) transfer costs were payable by the miner.
56 s 42(3).
57 s 42(3)(a).
58 Franklin and Kaplan (n 9) 230.
59 See s 42(4)(a).
Thus, priority of right by the holder of rights to minerals, the manner in which the right had to be exercised and resolution of conflicts with the owner of land remained unchanged, whilst the remedies available to the owner of land or holder of rights to minerals were supplemented by section 42 of the Minerals Act.

3.2 The act

Whether the common-law principles regarding the exercise of rights to minerals remained intact will be considered and indicated and the supplementation thereof by section 54 of the act analysed.

3.2.1 Common-law principles regarding the exercise of rights to minerals

These common-law principles were applied to a conflict between the owner of land and the holder of so-called transitional rights to minerals in Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd, albeit formulated with reference to servitutal rights. A dispute between the parties arose when Anglo, the holder of common-law mineral rights, wanted to conduct its mining operations on the farm of Sandhurst Estates by way of open-cast mining. As a first step, the supreme court of appeal regarded it as settled law that a common-law mineral right is in the nature of a quasi-servitude over property. Secondly, it held that the application of the English lateral-support rule to the relationship between owners of land and mineral rights holders was founded in a substructure that cannot be sustained. The correct and preferred approach was that the conflict between the owner of land and the holder of mineral rights should be determined in accordance with the principles developed by our law in resolving the inherent conflict between the holders of servitutal rights and the owners of servient properties. This entailed that a holder of mineral rights is entitled to do anything which is reasonably necessary to remove the minerals from the land. The owner of the land is, thus, bound to allow the holder of the mineral rights to do whatever is reasonably necessary for the purpose of the exercise of his entitlements. The holder of the mineral rights, in turn, is bound to exercise his entitlements civiliter modo, that is, reasonably viewed, in a manner least injurious to the interest of the owner of the land. Because open-cast mining is usually more invasive of the owner's rights than underground mining, it should, according to the court, only be allowed if it is reasonably necessary.

The granting of mineral rights in favour of Anglo did not refer, either expressly or tacitly, to open-cast mining. The default position in the common law in the absence of such reference was stated by the court in contract law parlance: “[A]bsent any express or tacit term of the grant, the mineral rights holder is entitled, by virtue of a term implied by law, to conduct open-cast mining when it is reasonably necessary in order to remove the minerals, provided that it is done in a manner...”

60 (n 2) 368B-G and 373E. See further, Badenhorst “Mineral rights are dead! Long live mineral rights!” 2008 TSAR 156 163-164.
61 371F.
62 372A-B.
63 372I-G.
64 377I-J.
65 See 373A.
66 See 373A and 373G.
67 373F.
68 367C-D.
least injurious to the interest of the surface owner.\textsuperscript{69} In other words, if an owner expressly or implicitly retained the "right to vertical support of the land" a holder of a transitional right to minerals may not conduct open-cast mining. The court found on the facts that Anglo was entitled to conduct open-cast mining and that it would be reasonable to do so under the circumstances.\textsuperscript{70}

It is submitted that the common-law principles regarding the exercise of rights to minerals also apply to rights to minerals granted by the minister of minerals in terms of section 3(2)(a) of the act. In \textit{Joubert v Maranda Mining Company (Pty) Ltd}\textsuperscript{21} the applicant for a mining permit (Maranda) had complied with all the requirements of the act before and after the granting of a mining permit. Briefly, these requirements entail that the regional manager has to notify the applicant to submit an environmental management plan and to consult with the owner of the land and provide results of the consultation to the regional manager within 30 days.\textsuperscript{71} Once the mining permit is granted, mining activities may commence after notification of and consultation with the owner of the land.\textsuperscript{72} Despite such compliance, the owner of the land refused Maranda access to the land.\textsuperscript{73} The court \textit{a quo} granted Maranda an order interdicting and restraining the owner from refusing access to the land.\textsuperscript{74} In an unsuccessful appeal against the court order,\textsuperscript{75} the supreme court of appeal held that the holder of a mining permit has a right in terms of section 27(7)(a) of the act to enter the land in respect of which the mining rights have been granted for purposes of exploiting its rights.\textsuperscript{76} The court was of the view that the right to enter the land solidifies once the mining permit holder has complied with the provisions regarding notification and consultation with the owner of the land.\textsuperscript{77} In subsequent proceedings in \textit{Joubert v Maranda Mining Company (Pty) Ltd},\textsuperscript{78} it was confirmed that in the event of a deadlock, after all consultative avenues between an owner of land and the holder of rights to minerals have been exhausted, the scheme of the legislation anticipates that the holder of a mining permit will be allowed to proceed immediately to exercise the entitlements under the permit. The court observed that it is one of the notable features of mining law that the rights of the owner of land are often subjugated to those of the person with mining rights.\textsuperscript{79} In both decisions the priority of the mining permit is, in effect, confirmed by the court. It is submitted that the exercise of the mining permit (or other right to minerals) has to take place in terms of the common-law principles regarding the exercise of rights to minerals.

3.2.2 Section 54 of the act

The common-law principles regarding the exercise of rights to minerals are not inconsistent with the provisions of the act.\textsuperscript{80} The common-law principles are

\textsuperscript{69} 373G-H.
\textsuperscript{70} See 375G-378E.
\textsuperscript{71} 2010 I SA 198 (SCA) par 14.
\textsuperscript{72} s 27(5)(b).
\textsuperscript{73} s 5(4)(c).
\textsuperscript{74} par 17.
\textsuperscript{75} par 1.
\textsuperscript{76} par 21.
\textsuperscript{77} par 13.
\textsuperscript{78} par 13.
\textsuperscript{79} 2010 2 All SA 67 (GNP) par 47.
\textsuperscript{80} par 57.
\textsuperscript{81} S 4(2) of the act determines that to the extent that the common law is inconsistent with the act, the act prevails.
supplemented by section 54 of the act.\textsuperscript{92} Section 42 of the Minerals Act has not been carried forward into the act. When the provisions of the act are interpreted, (a) a reasonable interpretation which is consistent with the objects of the act is preferred over an interpretation which is inconsistent with such objectives;\textsuperscript{83} and (b) preference should be given to a construction resulting in the most rational balance between the conflicting interests of a holder of a right to minerals on the one hand and that of a landowner on the other hand.\textsuperscript{84} In balancing the interests of the parties, one must further be mindful that core rights enshrined by the bill of rights, namely, to property and the environment, are also involved.\textsuperscript{85}

Section 54 deals with the compensation payable under certain circumstances. A holder of a right to minerals must inform the regional manager if he is prevented from commencing mining operations because the owner\textsuperscript{86} of the land refuses to allow access, places unreasonable demands in return for access to the land, or cannot be found in order to apply for access.\textsuperscript{87} The regional manager must within fourteen days request the owner to make representations about the issues raised by the holder of the right to minerals.\textsuperscript{88} The regional manager must also inform the owner of the rights of the holder of the rights to minerals, set out the possible contraventions of the act and inform the owner of the steps which may be taken upon failure to grant access.\textsuperscript{89} If, after consideration of the issues raised by the holder of rights to minerals and the owner's written representations, the regional manager concludes that the owner has suffered or is likely to suffer loss or damage as a result of the mining operations, the regional manager may request the parties to endeavour to reach an agreement for the payment of compensation for loss or damage.\textsuperscript{90} If the parties fail to reach an agreement, compensation must then be determined by arbitration or a competent court.\textsuperscript{91} If the regional manager, having considered the issues, representations and written recommendation by the regional mining development and environmental committee, concludes that further negotiations may detrimentally affect specified objectives of the act,\textsuperscript{92} the regional manager may recommend to the minister that the land be expropriated in terms of section 55 of the act.\textsuperscript{93} If the regional manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the rights to minerals, the regional manager may in writing prohibit the holder from commencing or continuing with prospecting or mining operations on the land, until such time as

\textsuperscript{82} As to other legislation that may supplement the common law principles, see Badenhorst, Mostert and Dendy in XVIII LAWSA par 88-90.

\textsuperscript{83} s 4(1) of the act.

\textsuperscript{84} the \textit{Meepe} case (n 22) par 8.3.

\textsuperscript{85} the \textit{Meepe} case (n 22) 111A.

\textsuperscript{86} or lawful occupier.

\textsuperscript{87} s 54(1).

\textsuperscript{88} s 54(2).

\textsuperscript{89} s 54(2).

\textsuperscript{90} s 54(3).

\textsuperscript{91} s 54(4).

\textsuperscript{92} These objectives are to: (a) promote equitable access to the nation’s mineral resources to all the people of South Africa (s 2(c)); (b) expand opportunities for historically disadvantaged persons, including women, to enter the mineral industry and to benefit from the exploitation of the nation’s mineral resources (s 2(d)); (c) promote employment and advance the social and economic welfare of all South Africans (s 2(f)); and (d) provide for security of tenure in respect of prospecting and mining operations (s 2(g)).

\textsuperscript{93} s 54(5).
the dispute has been resolved by arbitration or by a competent court. The owner of land must notify the relevant regional manager if the owner has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operations. To be distinguished from conflict resolution measures in the act, formal expropriation by the minister to achieve stated objectives of the act is also possible.

The common-law principles regarding the exercise of rights to minerals as espoused in \textit{Hudson v Mann} and \textit{Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd} are applicable to rights to minerals granted in terms of the act. The common-law principles entail priority of right, but the exercise of rights to minerals must take place in a reasonable and least injurious manner vis-à-vis the owner of land without the duty to pay compensation for damage caused. Whilst prospecting rights and mining rights are expressly recognised as limited real rights in the act, nothing is stated about the nature of a mining permit. In the present context of dispute resolution it was expected that the courts may fall back on the notion of the quasi-servitutial nature of mineral rights. In \textit{Holcim v Prudent Investors} a (new) mining right was perceived as being similar to the common-law mineral right. It was reasoned that the mining right is also a limited right that confers upon the holder the right to enter on to the land, to search for minerals, and, if found, to mine and dispose of them for the account of the holder. The similarity of (new) mining rights to a common-law mineral right was, therefore, based upon a comparison of the content of the common-law mineral rights and authorisations. As indicated before, the common-law principles do not oblige the holder of rights to minerals to pay compensation to the owner of land for damage caused in the course of prospecting or mining operations. The common-law principles regarding the exercise of rights to minerals are supplemented by section 54 of the act.

The act lacks an independent statutory claim for compensation for damage or loss suffered by the owner of land against holders of rights to minerals. Even if such a claim did exist in the common law, a defence of statutory authority could be raised against a common-law claim for damages caused by mining operations.

4 Example of an independent statutory claim

The Mining Act 1978 of Western Australia makes provision for conclusion of a compensation agreement prior to commencement of mining, and an independent

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\footnotesize{\textsuperscript{94} \textsuperscript{54}(6).}

\footnotesize{\textsuperscript{95} See \textsuperscript{54}(7).}

\footnotesize{\textsuperscript{96} See \textsuperscript{55}.}

\footnotesize{\textsuperscript{97} \textsuperscript{5}(1). In addition, \textsuperscript{2}(4) of the Mining Titles Registration Act 16 of 1967 determines that registration of such rights constitutes a limited real right binding on third parties.}

\footnotesize{\textsuperscript{98} \textsuperscript{5}(i)(y) of the Mining Titles Registration Act merely makes provision for the recording of a mining permit. As to the nature of rights in terms of the act, see Badenhorst "Nature of new order rights to minerals: a Rubikian exercise since passing the mayday Rubicon with a cubic circunioius?" 2005 \textit{Obiter} 505.}

\footnotesize{\textsuperscript{99} See Badenhorst (n 60) 164.}

\footnotesize{\textsuperscript{100} (n 21) par 21.}

\footnotesize{\textsuperscript{101} The view was based upon \textsuperscript{5}(1), (2) and (3)(a) to (e) of the act.}

\footnotesize{\textsuperscript{102} Badenhorst (n 15).}

\footnotesize{Badenhorst "Right of access to land for mining purposes: On terra firma at last?" 2010 \textit{THRHR} 318 325.}

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statutory claim for compensation for damage or loss suffered by the owner of private land.\textsuperscript{104}

Prior to the commencement of mining on private land the holder of a mining right must have paid to the owner or occupier of land the amount of compensation he is required to pay under the act, or made an arrangement with the owner about the amount, times and mode of compensation.\textsuperscript{105} A written compensation agreement is usually concluded between the parties and, upon default to reach such an agreement, it may be determined by the warden's court.\textsuperscript{106}

If mining takes place an owner or occupier of land is entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining whether or not lawfully carried out.\textsuperscript{107} A person mining on such land must pay compensation for such loss or damage or likely loss or damage resulting from any act or omission on his part or that of his agents, sub-contractors or employees.\textsuperscript{108} The amount of compensation payable may include compensation for: (a) being deprived of the possession or use of the natural surface or any part of the land; (b) damage to the natural surface or any part of the land; (c) severance of such land from other land or, or used by, that person; (d) loss or restriction of a right of way, easement (ie, a servitude) or right; (e) the loss of or damage to improvements; (f) social disruption; and (g) any reasonable expense properly arising from the need to reduce or control the damage resulting from the mining.\textsuperscript{109} In addition, in the case of private land under cultivation, compensation is for: (a) any substantial loss of earnings; (b) delay; (c) loss of time; (d) reasonable legal or other costs of negotiation; (e) disruption to agricultural activities; (f) disturbance of the balance of the agricultural holding; and (g) the failure of the miner to observe the laws or requirements which are observed by the owner or occupier in relation to the spread of weeds, pests, disease, fire or erosion, or as to soil conservation.\textsuperscript{110}

Compensation is also claimable for injury or depreciation caused by mining to adjoining land or land in the vicinity of the mining.\textsuperscript{111} Compensation for loss or damage is, however, not payable in consideration of permitting entry on to land for mining purposes, for minerals or by reference to any rent or royalty assessed in respect of the mining of the mineral.\textsuperscript{112} Compensation is not payable for minerals,
because in Australia most minerals are owned by the crown (in right of the state), either by the royal prerogative to gold and silver or statutory reservation.\textsuperscript{113}

5 Comparative evaluation

Priority of right by the holder of the right to minerals, the manner in which the right had to be exercised and resolution of conflicts with the owner of land in terms of the common law, applied during the Minerals Act dispensation. The common-law principles did not oblige the holder of rights to minerals to pay compensation to the owner of land for damage caused in the course of prospecting or mining operations. The remedies available to the owner of land which had become uneconomical for farming purposes and the holder of rights to minerals had been supplemented by section 42 of the Minerals Act. In exchange for the loss of the right to apply to court to prohibit the holder of rights to minerals from mining, compensation could be obtained from the holder of rights to minerals for damages caused by mining operations, if the owner wished to retain such land and the compensation avenue had been followed. If the owner of land (who did not wish to retain such land) or holder of the right to minerals requested the state to acquire the land, the state may do so by expropriation and pay compensation to the owner of land. If the state did not intend to acquire the land, the minister could have instructed the holder of the right to minerals to purchase the land and pay a purchase price for the land. By not allowing the holder of a right to minerals to continue with mining operations under certain circumstances, incentives were placed on such holder to speedily reach agreement about a purchase price for the land or compensation for mining damages caused to the land. In terms of section 42 of the Minerals Act, land which became uneconomical for farming purposes could be substituted for compensation or a purchase price payable in terms of section 12 of the Expropriation Act, if the owner did not wish to retain the land. Alternatively, the owner of the land could be compensated for damages caused by mining operations and retain the land.

Priority of right by the holder of the right to minerals, the manner in which the right had been exercised and resolution of conflicts with the owner of land in terms of the common law apply to the act. A holder of a right to transitional rights to minerals is implicitly entitled to conduct open-cast mining when it is reasonably necessary in order to remove the minerals and it is done in a manner least injurious to the interest of the owner of the land. If, however, an owner expressly or implicitly retained the "right to vertical support" in a grant of rights to minerals prior to commencement of the act, a holder of a transitional right to minerals may not conduct open-cast min-

\textsuperscript{113} Hunt (n 104) 2 and 297. As to ownership of minerals in Australia, see Badenhorst "Ownership of minerals in situ in South Africa: Australian daring to the rescue" 2010 \textsc{sali} 646 651-652 662-668.

\textsuperscript{114} The Case of Mines (R v Earl of Northumberland) (1568) 1 Plowden 310 336; 75 ER 472 510; Millican v Wildish (1862) 2 W & W VIC (E) 37 43; Woolsey v Attorney-General of Victoria (1877) LR 2 App Cas 163 166; Commonwealth v New South Wales 1923 33 CLR 1 19 57; New South Wales v Cadia Holdings Pty Ltd (2009) 257 ALR 528 par 143; Bradbrook, MacCallum and Moore \textit{Australian Real Property Law} (2007) 654; Butt \textit{Land Law} (2006) 15.

\textsuperscript{115} Mineral Resources (Sustainable Development) Act 1990 (Vic) s 9(1)(b); Crown Lands Act 1989 (NSW) s 171(1); Crown Lands Act (NT) s 21(1); Mineral Resources Act 1989 (Qld) s 8(3) and 8(2); Mining Act 1971 (SA) s 16(1); Crown Lands Act 1976 (Tas) s 16(3), Minerals (Acquisition) Act (NT) s 3; Mineral Resources Development Act 1995 (Tas) s 6(2)-(5) and Mining Act 1978 (WA) s 9(1)(b); Bradbrook, MacCallum and Moore (n 113) 654; Butt (n 113) 16. S 8(1) of the Mineral Resources Act 1989 (Qld) and s 9(1)(a) of the Mining Act 1978 (WA) confirm the crown's prerogative to gold and silver.
ing. It seems as if a holder of rights to minerals granted *de novo* in terms of the act is similarly entitled by implication to conduct open-cast mining. It is, however, unclear whether it would be the case if an owner expressly or implicitly retained the "right to vertical support" in a grant of rights to minerals prior to the commencement of the act. The state probably may not grant rights to minerals which would entitle a miner to conduct open-cast mining (or withdraw vertical support) because this entitlement is still retained by the owner of land. This would probably also apply if common-law rights to minerals were never severed from the ownership of land. The common-law principles do not provide for a claim of compensation to the owner of land for damage caused in the course of prospecting or mining operations. The common-law principles regarding the exercise of rights to minerals are supplemented by section 54 of the act. An owner of land who has been properly notified and consulted *prima facie* could make reasonable demands in return for granting access to the holder of rights to minerals. The initial operation of the section hinges on unreasonable demands. In broad terms, what may be reasonable for the owner may be unreasonable for the holder of rights to minerals. Any demand by the owner could be construed as being unreasonable in the light of the statutory right of access\(^\text{116}\) accorded to the holder of rights to minerals.\(^\text{117}\) If these demands are not met, the owner of land can either allow access to land or refuse access to land. Refusal of access by the owner can be construed as unlawful in the light of the statutory right of access of the holder.\(^\text{118}\) So construed, a holder of rights to minerals would be entitled to apply to court to obtain an interdict against such refusal or to claim damages.\(^\text{119}\) If access to commence mining operations is refused, and the holder of rights to minerals sets the ball rolling by informing the regional manager, the owner would only be able to recover compensation if the regional manager concludes that the owner has suffered or is likely to suffer loss or damage as a result of the mining operations and a settlement is reached or compensation is determined by arbitration or a court of law. The act does not contain a general provision that if the parties are unable to reach agreement on compensation, the mining operations should be suspended. That will only occur when the regional manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the right to minerals.\(^\text{120}\) Mere refusal in an unreasonable manner by an owner of land to allow a holder of a right to minerals access to land does not require the regional manager to initiate an expropriation process.\(^\text{121}\) Expropriation by the state and payment of compensation to the owner would only be possible if further negotiations between the parties may detrimentally affect some of the objectives of the act.\(^\text{122}\) These objectives are aimed at aspects such as equitable access to minerals, social and economic welfare, employment and security of tenure for miners. These objectives are not aimed at protecting the interest of an owner of land, as was the case with section 42 of the Minerals Act when land became unsuitable for farming purposes. Section 54 does not contain a similar provision in regard to the prevention of interdicts in sec-

\(^{116}\) s 5(3), 15(1) and 27(7).


\(^{118}\) Dale *et al* (n 117) MPRDA-445. See the Joubert case (n 71) par 13.

\(^{119}\) Dale *et al* (n 117) MPRDA-445. See the Joubert case (n 71) par 1 and 21.

\(^{120}\) Joubert *v* Maranda Mining Company (Pty) Ltd 2010 2 All SA 67 (GNP) par 47.

\(^{121}\) the Joubert case (n 71) par 16 and 17.

\(^{122}\) See n 92.
tion 42 of the Minerals Act, as it would be unconstitutional as a prohibition against application to court.\textsuperscript{123}

As in the past, conflict resolution between owners of the land and holders of rights to minerals will be inevitable. The proliferation of the granting of prospecting rights and eventually mining rights\textsuperscript{124} by the department of minerals may lead to a proliferation of disputes between owners of land and holders of rights to minerals and a great need for conflict resolution. Holders of rights to minerals will be able to rely on the common-law principles regarding the exercise of rights to minerals and section 54 of the act, leaving owners of land, especially owners of farm land, in a very vulnerable position.

Because of the obvious advantages of the Western Australian system to owners of land who are concerned about damage or destruction of their land by mining operations, and to prevent impasses, section 54 of the act should be amended to make provision for conclusion of a compensation agreement between the owner of land and the holder of rights to minerals prior to commencement of mining operations. If such an agreement cannot be reached, the compensation must be determined by arbitration or by a competent court, as provided for in section 54(4). The act lacks an independent statutory claim for compensation for damage or loss suffered by the owner of land against holders of rights to minerals. Therefore, in addition, an independent claim for compensation in favour of the owner of land should be recognised in section 54 along the lines of the independent claim for compensation in Western Australia. If further negotiations between the parties would mean that the objectives of the act, as stated in section 54(4), are not met, the present avenue of expropriation of the land by the state should be retained. Expropriation by the state upon the request of an owner of land which has become uneconomical for farming purposes, or a holder of rights to minerals, as in section 42(1) of the Minerals Act, should be added by the legislature.

Due to the lopsidedness of section 54, it should be revisited by the legislature against the background of some of the following possible remedies:

- Expropriation of land that was rendered uneconomical for farming purposes by the state upon request of the owner or holder of rights to minerals subject to a veto right in favour of the owner of land who wishes to retain the land.
- Instruction by the minister, or regional manager of the holders of rights to minerals, to purchase land if the state, after due consideration did not decide to expropriate the land, including measures to ensure that a purchase price can be determined.
- Expropriation of the land by the state if further negotiations between the parties may detrimentally affect certain objectives of the act.
- Instruction by the minister or regional manager of the parties to conclude a compensation agreement underpinned by measures to ensure that such an agreement will be reached in given situations, such as, for instance, refusal of access by the owner of the land.
- Conclusion of a compensation agreement prior to the commencement of mining operations.

\textsuperscript{123} Dale \textit{et al} (n 117) MPRDA-444.

\textsuperscript{124} As the next step, upon compliance with the act, a prospector has an exclusive right by virtue of section 19(1)(b) to apply for and be granted a mining right in respect of the mineral and prospecting area.
An independent statutory claim of compensation for damage or loss caused by mining operations in favour of the owner of the land.

Determination of compensation by arbitration or a court in the absence of agreement about compensation.

Suspension of mining operations if resolution of the dispute is, in the opinion of the minister or regional manager, due to the fault of the holder of rights to minerals.

Another possible remedy available to an owner of land comes to mind but will not be further discussed, namely, the expropriation of the use of land upon granting of rights to minerals by the state in terms of item 12 of the transitional arrangements contained in schedule II to the act and section 25(2) of the constitution. Compensation would then be payable by the state, not by the holder of the rights to minerals.

6 Conclusion

The common-law principles regarding the exercise of rights to minerals or transitional rights to minerals, as espoused in Hudson v Mann and Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd, are applicable to rights to minerals granted in terms of section 3(2)(a) of the act. These principles entail that in a case of irreconcilable conflict between the owner of the land and holder of rights to minerals, the surface rights must be subordinated to mineral exploration. The fact that the use to which the owner of land puts the property is earlier in point of time, cannot derogate from the entitlements of the holder of the rights to minerals. A holder of rights to minerals must exercise his entitlements reasonably, in good faith, and in a manner least onerous or injurious to the owner of the land. A holder of rights to minerals is entitled to do anything which is reasonably necessary to remove the minerals from the land. The owner of the land is, thus, bound to allow the holder of the rights to minerals to do whatever is reasonably necessary for the purpose of the exercise of his entitlements. The holder of rights to minerals is, in turn, bound to exercise his entitlements civiliter modo, that is, reasonably viewed, in a manner least injurious to the interest of the owner of the land. The common-law principles do not oblige the holder of rights to minerals to pay compensation to the owner of land for damage caused in the course of prospecting or mining operations. The common-law principles are supplemented by section 54 of the act.

Section 54 is, however, hugely problematic insofar as it is based upon the supposition that only if the owner of the land has refused access to the land, made unreasonable demands for such access, or cannot be found for purposes of application of access to the land, the administrative mechanism finds application. Section 54 mainly protects the interests of the holder of rights to minerals and the state. Access to land by the holder of the rights to minerals is secured and the objectives of the state are protected. This results in a lopsided legal triangle skewed in favour of the holder of rights to minerals at the expense of the owner of land. Even though this

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125 It is submitted that expropriation of the use of land does constitute expropriation of "property" for purposes of item 12 of the transitional arrangements.


127 See the Anglo case (n 37) 398E-398G and Badenhorst and Mostert (n 37) 417 419-421; Dale et al (n 117) MPRDA-447. See, however, the Anglo case (n 2) 374I-375A and 375D-E.
triangle, like its Bermuda counterpart, has resulted in the disappearance of unexploited common law minerals rights “into thin air”, the same cannot be said about expected legal problems. Owners of land were better protected under the previous mineral law system, as they were involved in the granting of rights to minerals, which is now the exclusive domain of the state. Section 42 of the Minerals Act also provided better protection to owners of land than section 54 of the act. Section 54 requires urgent review by the legislature against the background of possible supplementary remedies for owners of land, holders of rights to minerals and the state, as identified in this contribution. In particular, the recognition of an independent statutory claim for damage or loss caused by mining operations could go a long way towards achieving a fair and more balanced outcome in resolving the age-old conflict between owners of land and holders of rights to minerals. A stable legal triangle would work for the benefit of all parties concerned and reduce conflict and litigation. The problems caused, and those anticipated by the proliferation of the granting of prospecting rights by the department of minerals, may lead to a similar proliferation of conflicts between owners of land and holders of rights to minerals, which is a cause for concern. As stated before, along with the state’s grant of the fish in another man’s pond (in return for payment of royalties by the fishermen to the grantor) is granted power to come upon the bank of the man and fish for them (whilst the man of the pond may merely watch on)!

SAMEVATTING

OPOLOSSING VAN GESKILLE TUSSEN EIENAARS VAN GROND EN HOUERS VAN MINERALEGREGTE: ‘N ONEWEWIGTIGE DRIEHOEK?

Die artikel fokus op die botsing van belange tussen eiendaars van grond en houers van regte op minerale, die bepaling van regsvoorkeur by belangebotsings en die oplossing van geskille tussen die partye. Eerstens word gekyk na die driehoekige verhouding tussen die eiendaars van grond, houers van regte op minerale en die staat. In die vorige bedeling is regte op minerale deur grondelijkeiers (of houers van mineralegregte) verleen terwyl sulke regte trans deur die staat verleen word. Die onlangsige vermenigvuldiging van die regte op minerale deur die beweerde vrylike toekennings deur die staat word aangerak in verskeie hierdie toekennings in die toekoms aanleiding kan gee tot die vermenigvuldiging van botsings tussen grondeiers en houers van regte op minerale. Tweedens word die tersake gemeenregtelike beginsels ter oplossing van die geskil uiteengesit. Die beginsels soos neergelê in Hudson v Mann word as vertrekpunt gebruik. Die wysiging van die gemeenregtelike beginsels deur wetgewing, soos die Mineralewet 50 van 1991, word aangetoon. Die voortgesette toepassing van die gemeenregtelike beginsels in die huidige bedeling en die aanvulling daarvan deur die Mineral and Petroleum Resources Development Act 28 van 2004 (MPRDA) word uiteengesit. Die toepassing van die gemeenregtelike beginsels op oorgangsgregte in Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd word bespreek en dié bespreking dien ter stawing van die standpunt dat hierdie beginsels ook van toepassing is op nuwe regte wat ingevolge die MPRDA deur die staat toegeken word. Vanweë die afwesigheid in die Suid-Afrikaanse reg van ‘n eis vir vergoeding vir skade wat deur mynbou veroorsaak is, word ter toelieting ‘n Australiese voorbeeld van sodanige onafhanklike skadevergoedingseis verskaf. Ten slotte word die huidige reëls wat gemis is op die oplossing van geskille tussen eiendaars van grond en houers van regte op minerale aangestip. Die behoeftre vir regshervorming word ook aangeraak.

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128 Agrt South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy 2010 1 SA 104 (GNP) par 11. See further Badenhorst “Expropriations by virtue of the Mineral and Petroleum Resources Development Act: are there some more trees in the forest?” 2009 TSAR 600.