THE MAKE-UP OF TRANSITIONAL RIGHTS
TO MINERALS: SOMETHING OLD,
SOMETHING NEW, SOMETHING
BORROWED, SOMETHING BLUE . . .?*

PJBADENHORST
Associate Professor of Law, Deakin University
Visiting Professor of Law, Nelson Mandela Metropolitan University

I INTRODUCTION

Upon the introduction of a new mineral law regime into South Africa by the
Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)
the previous system of common law mineral rights, prospecting rights,
mining rights and statutory rights was completely superseded by a new
administrative system whereby (a) the common law mineral rights were
replaced by similar prospecting and mining rights granted by the Minister of
Mineral Resources, and (b) the statutory authorisations to exercise such
rights were fused into the prospecting or mining right thus granted. The
state, acting through the Minister, is the custodian and controller of mineral
and petroleum resources which, in turn, belong to the South African
nation. Prospecting or mining is prohibited unless a prospecting right or
mining right (or mining permit) is obtained, an environmental management
programme or plan is approved, and notification and consultation with the
owner of, or lawful occupier of, the land has taken place. The new system,
together with the repeal of the Minerals Act 50 of 1991, resulted in the

* I acknowledge the useful comments and suggestions of Ernie van der Vyver and
the anonymous referees. I, however, remain responsible for the correctness of the
end product. The law is stated as at 30 April 2011.
2 This contribution will only focus on mineral resources and the transitional
arrangements pertaining to such minerals.
3 The question of in whom ownership of minerals in situ is vested was left open in
Agri South Africa v Minister of Minerals & Energy [2011] 3 All SA 296 (GNP) para 49. See
further P J Badenhorst ‘Ownership of minerals in situ in South Africa: Australian
daming to the rescue?’ (2010) 127 SALJ 646.
4 A mining permit is acquired in the case of small scale mining operations (see
further s 27). Not being a right acquired by holders of transitional rights, it will not be
discussed further.
5 Section 5(4) of the MPRDA; Kowie Quarry CC v Ndlambe Municipality [2008]
JDR 1380 (E) para 18.
destruction of the common law notion of mineral rights and the administrative controls which previously regulated the acquisition and utilization of such rights. The legislature's intention was that the MPRDA would override inconsistent common law principles. The overriding common law features of mineral rights, prospecting rights, mining rights by the MPRDA will be discussed in part III(c) below.

The transition from the old order to the new mineral law regime was made possible by the transitional arrangements included in Schedule II to the MPRDA (hereafter referred to as 'transitional arrangements'). Transition was necessary to prevent the stultification and total disruption of an important sector of the economy until existing prospecting and mining operations could be regulated in terms of the MPRDA. This was achieved by continuing the existing rights to such operations in the form of 'old order rights' to minerals and affording the holders of such rights the opportunity to comply with the MPRDA by applying for, or converting to, new prospecting or mining rights.

In this contribution, features of the three categories of transitional rights ('old order rights') in relation to their acquisition, nature, content, transfer and termination will be examined in the light of recent case law. By a process of analogical reasoning 'old order rights' will be compared with common law mineral rights, prospecting and mining rights and new order rights granted in terms of MPRDA. The contentious issue of the manner and moment of expropriation of transitional rights will be touched upon briefly at the end of the article.

II STATUTORY DEFINITION OF TRANSITIONAL RIGHTS

The following categories of 'old order rights' are recognised and defined in item 1 of the transitional arrangements: (a) 'old order prospecting rights'; (b) 'old order mining rights'; and (c) 'unused old order rights'. The different types of rights qualifying as 'old order rights' are listed in three tables contained in the transitional arrangements. It will be assumed that the reader is familiar with the definitions, tables and rights.

The first two categories of transitional rights may be distinguished from the last category on the basis of whether active prospecting or mining

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6 Holm v Prudent Investors supra note 1 para 24.
7 Section 4(2).
9 Holm v Prudent Investors supra note 1 para 26.
10 Ibid.
operations\textsuperscript{12} were in progress at the date immediately before the commencement of the MPRDA. The first two categories involve an application for conversion of old order rights to new order rights, whilst the transitional arrangements regarding ‘unused old order rights’ involve a new application for a prospecting or mining right. The difference in procedure and consequences were highlighted by the Supreme Court of Appeal in \textit{Holcin v Prudent Investors}.\textsuperscript{13} Compared to new applications, the court perceived the conversion of rights to be reasonably straightforward,\textsuperscript{14} and stated that the Minister must convert the right if there is compliance with the statutory requirements.\textsuperscript{15} However, the holder of an ‘unused old order right’, who had an exclusive right for one year to apply for conversion, had to satisfy the extensive demands of the MPRDA,\textsuperscript{16} which are in many respects novel.\textsuperscript{17} Success with such an application is by no means a mere formality\textsuperscript{18} or a matter of course and may yet involve a long, drawn-out process.\textsuperscript{19}

III TRANSITIONAL RIGHTS

The acquisition, nature, content, transfer and termination of transitional rights will now be examined.

(a) Acquisition

An ‘old order prospecting right’\textsuperscript{20} or ‘old order mining right’\textsuperscript{21} was acquired upon commencement of the MPRDA if any of the rights listed in the categories of tables 1 and 2, respectively, are present; the prospecting permit or mining authorisation and the underlying prospecting right, mining right or mineral right were valid; and prospecting or mining had been conducted immediately before the commencement of the MPRDA.\textsuperscript{22} An ‘unused old order right’ was acquired if any of the rights listed in the categories of table 3

\textsuperscript{12} In \textit{Isleta Trading (Edens) Bpk v Top Coat Property Investments 23 (Edens) Bpk [2009] JDR 0192 (NC) paras 13–14, the definition of ‘mine’ as a verb in s 1 of the MPRDA was given a wide interpretation to include loosening, stock-piling and crushing of sand and stone.}
\textsuperscript{13} Supra note 1 para 38.
\textsuperscript{14} Ibid.
\textsuperscript{15} Compliance with the requirements for conversion, even perceived to be less demanding by the Supreme Court of Appeal, still does not take place as of right. The preference of M O Dale, L Bekker, F J Bashall, M Chaskalson, C Dixon, G L Grobler & C DA Loxton \textit{South African Mineral and Petroleum Law} (2005) (note 23 at 14.1.10) of a transitional system providing for ‘the automatic deemed conversion of existing rights into the form of new rights’ underlines the fact that compliance is still cumbersome.
\textsuperscript{16} Sections 16 and 17 (prospecting right), and sections 22 and 23 (mining right).
\textsuperscript{17} \textit{Holcin v Prudent Investors} supra note 1 para 38.
\textsuperscript{18} \textit{Agni South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy} 2010 (1) SA 104 (GNP) para 15.
\textsuperscript{19} \textit{Holcin v Prudent Investors} supra note 1 para 38.
\textsuperscript{20} Item 6(1) of the transitional arrangements.
\textsuperscript{21} Item 7(1).
\textsuperscript{22} \textit{Holcin v Prudent Investors} supra note 1 para 57.
were present and the mineral right, prospecting right or mining right was
valid before commencement of the MPRDA. In this instance, it is not
required that prospecting or mining has occurred immediately before
the commencement of the MPRDA, and a prospecting permit or mining
authorisation may or may not have been issued depending on the category of
the right.

In the case of mining, the mining operations must be conducted in respect
of the mining authorisation and the rights attached to it. The terms of the
mining authorisation have to be investigated in order to determine whether
mining operations were being conducted in respect of that authorisation at
the relevant time. The creation of an ‘old order mining right’ does not
depend upon the use of any particular portion of land to which a mining
authorisation relates, but rather upon whether mining operations were being
conducted according to the terms of the authorisation on the relevant date. Security
of tenure is afforded to a holder of a mining authorisation who,
immediately before the MPRDA took effect, was conducting authorised
mining operations on land covered by the authorisation, even though the
operation had not been extended to all cadastral units so covered and might
not be so extended in the future. In short, it is not necessary for the holder
of an ‘old order mining right’ to have conducted mining operations on all
properties (i.e., registered cadastral units) covered by the mining authorisation
on the date immediately preceding the operation of the MPRDA. It is
submitted that the same would have applied to a case of prospecting by virtue
of a prospecting permit.

If an ‘old order right’ was held by two or more holders, each holder must
meet the requirements for the old order right with reference to their
undivided share. If, for instance, one of the holders of an old order right did
not conduct mining upon commencement of the MPRDA, such holder
would not acquire an ‘old order mining right’ but may qualify for an ‘unused
old order right’.

(b) Nature

The main body of the MPRDA is silent about the nature of transitional
rights. The transitional arrangements only deal with the notion of the
respective categories of ‘old order rights’ and not the constituent elements.
The continuation, conversion and termination of the respective transitional
rights are treated in items 6 to 8 of the transitional arrangements. Transitional
rights, therefore, amount to creatures of statute that exist within the
parameters of the MPRDA. Transitional rights will be compared with new

23 Item 8(1).
24 See Hokim v Prudent Investors supra note 1 para 18.
26 Ibid para 34.
27 Ibid paras 1, 29 and 43.
28 Ibid para 15.
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prospecting and mining rights and the rights granted under the old order. As will be shown, these rights and transitional rights are real in nature. However, the differences in the features of these respective real rights will be indicated from the discussion of the content of transitional rights in part III(c) below.

As to their nature, our courts have accepted that common-law mineral rights are limited real rights. Mineral rights have finally been classified by the Supreme Court of Appeal as quasi servitudes. In *Vuna Vanadium SA Ltd v Registrar of Deeds* it was held that a prospecting contract registered in the Deeds Office does not create a prospecting right which is in the nature of a real right. A mining right, by virtue of a mineral lease, is regarded as a real right. These rights were registrable in the Deeds Office.

29 *Taylor and Claridge v Van Jaarsveld and Nellmapius* (1886) 2 SAR 137; *McDonald v Vosfeld* (1888) 2 SAR 234; *Pearce v Olivier and Noyce* (1889–1890) 3 SAR 79; *Van Vuren v Registrar of Deeds* 1907 TS 289; *Lazarus and Jackson v Weser*; *Oliver and the Conservancy Holders Estates; Town and Mines Ltd* 1903 TS 499 at 510; *Bulimus v Registrar of Deeds* 1903 ORC 65 at 64; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315; *Ex parte Pierce 1950* (3) SA 628 (O) at 634C; *Manganese Corporation Ltd v South African Manganese Ltd* 1964 (2) SA 185 (W) at 189A; *Evans v Afrikaner Proprietors Mines Limited* 1976 (1) SA 950 (W) at 956D–E; *Apex Mines Ltd v Administrator, Transvaal* 1986 (4) SA 581 (T) 591C–D; *Government of the Republic of South Africa v Ocean Development Investment Trust plc 1989* (1) SA 35 (T) at 36H; *Trojan Exploration Co (Pty) Ltd v Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509H–I; *Agri South Africa v Minister of Minerals & Energy* supra note 3 paras 26 and 29.

30 Art 363 of a Volksraadbesluit of the ZAR, dated 8 November 1881; s 14 of Act 7 of 1883; ss 30–32 of the Registration of Deeds and Titles Act 25 of 1909 (T); s 41 of the Deeds Registries Act 13 of 1918 and ss 3(1)(m) and 70(1) of the Deeds Registries Act 47 of 1957.

31 *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* supra note 29 at 5091; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at 371E–F. As to the earlier alternative classification of mineral rights by the courts and academics as sui generis rights, see Badenhorst & Mostert op cit note 11 at 3–6 to 3–7.

32 1997 (2) SA 784 (T) at 794G and 795H–I.

33 For criticism to this view, see Badenhorst & Mostert op cit note 11 at 4–4.

34 *Ibid* at 3–5.

35 By virtue of (the now repealed) ss 3(1)(d), 3(1)(m), 16, 70, 71, 72 (mineral rights), 3(1)(e) (prospecting contract) and 3(1)(m) and 77 (mineral lease).

36 The following features of common law mineral rights can be identified:

(a) mineral rights either formed part of ownership of land or could be separated from ownership of land;

(b) mineral rights could be vested in someone other than the owner of the land;

(c) mineral rights were freely transferable and capable of passing to the heirs of the mineral right holder;

(d) a holder of a mineral right was entitled to go upon the property to which they relate, prospect for minerals, and mine and remove the minerals;

(e) minerals in situ remained the property of the owner of land until severance of the minerals from the land by the mineral right holder;

(f) in the case of irreconcilable conflict between the exercise of a mineral right and the ownership of the land, the interest of the latter is subordinated to the interest of the mineral right holder;
mining right\textsuperscript{37} exhibited the typical features of a real right.\textsuperscript{38} As a quasi servitude there are similarities and differences between mineral rights and personal and praeclial servitudes.\textsuperscript{39} Prospecting and mining rights granted in terms of earlier legislation repealed by the Minerals Act are statutory rights and were argued to constitute real rights.\textsuperscript{40} Most of these rights were registrable in the (former) Mining Titles Office in terms of the Mining Titles Registration Act 16 of 1967.\textsuperscript{41} These transitional statutory prospecting and mining rights were still registrable during the periods of transition in the (newly established) Mineral and Petroleum Titles Registration Office.\textsuperscript{42}

(g) the holder of a mineral right was under no duty to exploit the mineral rights, even if it would be for the public benefit (\textit{Agri South Africa v Minister of Minerals & Energy} supra note 3 para 29);

(h) if the holder was unable to exploit mineral rights, the holder could sell it for handsome amounts;

(i) mineral rights were valuable assets having a commercial value;

(j) mineral rights could further be fragmented into shares, prospecting rights or mining rights to particular minerals (see \textit{Agri South Africa v Minister of Minerals and Energy}; \textit{Van Rooyen v Minister of Minerals and Energy} supra note 18 paras 7–9 and 29–30);

(k) the mineral right holder is bound to exercise his entitlements civiliser modo; i.e., in a manner less injurious to the interest of the owner of the surface of the land (\textit{Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd} supra note 31 at 373G);

(l) mineral rights were also capable of being the object of a mortgage (\textit{ex 3(A)}(6) and 50(1) of the Deeds Registries Act; \textit{Agri South Africa v Minister of Minerals & Energy} supra note 3 para 29; P J Badenhorst \textit{Die Juistiese Bevoegdheid om Mineale te ontgin in die Suid-Afisiese Reg} (LLD thesis, University of Pretoria, 1993) 477–82) or a usufruct (\textit{Ex parte Eloff 1953 (1) SA 617 (T)}; P J Badenhorst \textit{Vruggebruik ten aansien van ontginningstregte} (1993) 4 Stell LR 394); and


\textsuperscript{37} Mining rights also exhibit some of the above features such as transferability, separate existence, being valuable, being capable of fragmentation and gaining priority in their operation.


\textsuperscript{39} See further Badenhorst & Mostert op cit note 11 at 3–8 to 3–10.

\textsuperscript{40} See in general Badenhorst op cit note 36 at 723–33.

\textsuperscript{41} \textit{Van der Merwe} op cit note 36 at 570–80.

\textsuperscript{42} In terms of s 12 of the (amended) Mining Titles Registration Act the Director-General is empowered during the transitional period to keep the corresponding register in use in the Mineral and Petroleum Titles Registration Office at commencement of the MPRDA, and to continue to make the necessary entries. See further Badenhorst & Mostert op cit note 11 at 29–2 to 29–30.
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These rights also exhibited features of real rights. A prospecting permit or mining authorisation was merely a licence and does not exhibit typical features of a real right.

A new prospecting and mining right is recognised in the MPRDA as a 'limited real right in respect of the mineral and the land to which such right relates' in the main body of the MPRDA. In *Holcin v Prudent Investors* the 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 real 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'. It is submitted that similar reasoning could apply to the new prospecting right. It was held that the statutory authorisations to prospect or mine were fused into the new prospecting right or mining right granted.

The new composite mining right is thus made up of what was previously held separately by means of the mining authorisation and the common law mineral right.

Upon placing of 'old order rights' or statutory creatures under the juridical microscope, however, it becomes apparent that in most instances it is a combination of common law rights, statutory rights and prospecting permits or mining authorisations (or a lesser combination). A picture of the (alien) Anglo-American notion of a bundle of rights or facets of rights comes to mind. In *Holcin v Prudent Investors* it was held that an 'old

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43 Such as transferability, separate existence, having value, being capable of fragmentation and gaining priority in their operation.


45 For instance, a prospecting permit was only granted for a limited period (twelve months or a longer period as determined by the regional director) and was renewable (§ 6(4) of Minerals Act). The period of a mining authorisation was determined by the regional manager (§ 9(1)). A prospecting permit or mining authorisation could not have been alienated, transferred, ceded or encumbered by mortgage (§ 13). The Minister could suspend or cancel a prospecting permit or mining authorisation upon contravention of or failure to comply with the Minerals Act (§ 14(1)). Lapsing of a prospecting permit or mining authorisation could also take place in certain circumstances (see § 16).

46 Section 5(1). See *Koujie Quarry CC v Ndhlakwe Municipality* supra note 5 para 17.

47 Supra note 1 para 21. See also *Agri South Africa v Minister of Minerals & Energy* supra note 3 paras 52 and 81.

48 The view was based upon in 5(1), (2) and (3)(a) to (i) of the MPRDA.

49 *Holcin v Prudent Investors* supra note 1 para 20.

50 See ibid paras 21.

51 Ibid para 15.

52 See *Badenhorst & Mostert* op cit note 11 at 25–7.

53 *Holcin v Prudent Investors* supra note 1 para 14.
order mining right’ in the particular instance has the three components, which derive from the definition and third table. These are:

(a) the mining authorisation in terms of s 9(1) of the Minerals Act;
(b) the underlying common law rights;54 and
(c) the fact that mining operations were conducted in respect of the authorisation and the underlying common law mineral rights.55

In order to ascertain the nature of transitional rights, an examination of the constituent elements remains inevitable.56 As to the rights present upon the introduction of the MPRDA, the question is whether the constituent elements of a transitional right to minerals have survived, and if so, in what form? In other words, if these rights continue to exist, to what extent are they regulated by the new regime and the transitional arrangements?

In De Beers Consolidated Mines Limited v The Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy,57 the court held:

‘All mineral right holders in whichever form, were divested of their rights in respect of their previously held mineral rights. These mineral right holders obtained new rights in terms of the transitional arrangements in Schedule II to the MPRDA.’

In Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy,58 Hartzenberg J held that existing holdings of mineral rights are not acknowledged in the main text of the MPRDA. Thus, ‘unused old order rights’, in so far as they have not been exploited, simply ‘disappeared into thin air’.59 But for the transitional arrangements, the effect of the MPRDA would have been to extinguish all rights.60 The transitional arrangements, however, give rights or afford some relief to holders of ‘old

54 That is, the common law mineral right or a consent to mine together with a mineral right.
55 It is submitted that the taking place of prospecting or mining operations is a requirement for the acquisition of a transitional right rather than part of the make-up or identity of the ‘old order right’.
56 See De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy supra note 36 para 5 (at page 4): ‘The only relevance of previous mineral rights was that they constitute an element of the transitional arrangements in the MPRDA.’
57 Supra note 36 para 6 (on pages 30-1).
59 Supra note 18 para 11.
60 Ibid paras 11 and 16. Such expropriation would have been without compensation, would have offended the provisions of s 25 of the Constitution and rendered the MPRDA unconstitutional (paras 11 and 12).
order rights”.61 In the present context, the transitional arrangements have as one of its objects to give holders of ‘unused old order rights’ the opportunity to comply with the MPRDA.62 That would involve the exclusive right to apply for a prospecting right or a mining right. Item 8 of the transitional arrangements only affords the opportunity to holders of ‘unused old order rights to mitigate their damage by applying for prospecting rights or mining rights’.63 In the subsequent case of Agri South Africa v Minister of Minerals and Energy64 Du Plessis J confirmed that since the introduction of the MPRDA the common law mineral rights have disappeared. As a result, he held that these rights were legislated out of existence. Nevertheless, the continuation in existence of a right, without any content other than the right to apply for rights under the MPRDA, is recognised during the interim period.65

I agree that in so far as the new order per se is concerned (which is set out in the main text of the MPRDA) common law mineral rights, prospecting rights or mining rights no longer exist.66 The same would be true for statutory prospecting or mining rights. The same applies to prospecting permits or mining authorisations granted in terms of the repealed Minerals Act.

It seems as if the first Agri SA decision would mean that in the case of ‘unused old order rights’, the common law right or statutory right survives, and these are regulated by the transitional arrangements. The existence of the new order rights means that the holder thereof has the exclusive right to apply for conversion to a prospecting right or mining right. The second Agri SA decision perhaps goes further by maintaining that the common law mineral rights have been extinguished. On the other hand, it is accepted that the transitional arrangements ensure the continuation of such rights and permissions (even though limited in content) as regulated by these transitional measures.

In Holiam v Prudent Investors,67 it was held that the new system and the old system of common law mineral rights are mutually exclusive68 and that the new system has resulted in the destruction of common law mineral rights.69 The court emphasised that the common law mineral right is not preserved under the new statutory dispensation.70 However, the court acknowledged that the existing rights with respect to mining operations are continued as ‘old order rights’.71 According to the court, the focus of the transitional

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61 Ibid para16.
62 See ibid para 13.
63 Ibid para 17.
64 Supra note 3 paras 57, 67 and 68.
65 Ibid para 57.
67 Supra note 1.
68 Ibid para 23.
69 Ibid para 24.
70 Ibid para 37.
arrangements is 'the seamless continuation of existing mining operations'. The common law mineral right itself is not regarded as an 'old order right' which can be converted under the transitional arrangements. In the case of an 'old order mining right', a common law mineral right survives only as a right underlying a mining authorisation. According to the Supreme Court of Appeal, it seems as if 'survival' or 'continuation' and not divestment of rights has taken place.

It is submitted that the Holec decision would mean that the rights and permissions which survived are regulated by the transitional arrangements and the existence of the new order. For instance, the creation and transfer of mineral rights, prospecting rights or mining rights by registration in the Deeds Office is no longer possible. Prospecting or mining operations may be continued for the respective periods of transition. The holders of such transitional rights would be able to apply for conversion of their rights to prospecting rights or mining rights. Even if, in terms of the dictum in De Beers Consolidated Mines Limited, it is accepted that new rights are granted by the transitional arrangements, these new rights take the form of a composite right made up by components as identified and demarcated by common law and statute. The continuation of rights, as adopted by the Supreme Court in the Holec decision, is binding in precedent and is to be preferred as affording a better dogmatic point of departure for the protection of the rights of holders of 'old order rights'.

It is submitted that transitional rights are real in nature to the extent that they contain underlying rights which were real in terms of the common law or repealed mining statutes. The absence of some of the features of real rights pertaining to rights granted under the old order in the case of transitional rights will become more apparent when the content, transferability and duration of the constituent rights and permissions are investigated under the respective headings below.

(4) Content
The ambit of a real right is determined by ascertaining the content thereof by identifying and listing its entitlements and identifying the limitations placed upon the exercise of such rights. Determining the content of transitional rights requires a before-and-after comparative analysis of the rights before 1 May 2004, and the rights, as regulated by the MPRDA, thereafter. What

72 Ibid.
73 Ibid para 37.
74 Ibid.
75 Southern Era Resources Ltd v Fosdell NO 2010 (4) SA 200 (SCA) para 4.
76 See notes 36, 37 and 43 above.
78 See Agri South Africa v Minister of Minerals and Energy; Vin Rooden v Minister of Minerals and Energy supra note 18 para 5; Agri South Africa v Minister of Minerals & Energy supra note 3 para 22.
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will follow is such an analysis only in respect of common law mineral rights, prospecting rights and mining rights. Statutory prospecting and mining rights would have to be determined on an ad hoc basis with reference to the provisions of the statute of creation.

A common law mineral right had as its content the following entitlements:  

(a) exploitation, which entails the entitlement to use the land for the purposes of exploitation of minerals to which the mineral rights relate. This entitlement includes the following: (i) the entitlement to enter upon 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;  

(b) disposition, which entails the entitlement to decide what may and what may not be done on the land for purposes of the exploitation of minerals;  

(c) alienation, which entails the entitlement to cede the mineral rights in respect of the land to another person or to grant a prospecting right or mining right in respect thereof;  

(d) encumbrance, which entails the entitlement to grant a limited real right (such as a usufruct or mortgage bond) with regard to the mineral right;  

(e) resistance, which entails the entitlement to resist any unlawful interference with the exercise of the mineral right; and  

(f) reversionary or minimum entitlement, that is, the 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

79 Badenhorst & Mostert op cit note 11 at 3-11 to 3-12. See Agri South Africa v Minister of Minerals & Energy supra note 3 para 29.  
80 Van Vuuren v Registrar of Deeds supra note 29 at 294–295; Roder v Registrar of Deeds supra note 29 at 316; Ex parte Pierse supra note 29 at 634C–D; Entumas v Afrikaner Property Mines Ltd supra note 29 at 956E; Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd supra note 29 at 509G–H; Anglo Operations Ltd v Sandhurst Estates Pty Ltd supra note 31 at 373B–C.  
81 For instance, in Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd supra note 31 at 373F it was held that due to the invasive nature of open-cast mining it should only be allowed if it is reasonably necessary. It was found that open-cast mining was reasonably necessary and had to be allowed (at 337F–G and 378E).  
82 Section 3(1)(m) of the Deeds Registries Act authorised the registration of notarial cessions of mineral rights in the Deeds Office.  
83 Section 3(1)(q) of the Deeds Registries Act authorised the registration of a notarial prospecting contract in the Deeds Office.  
84 Section 3(1)(y) of the Deeds Registries Act authorised the registration of notarial mineral leases in the Deeds Office.  
85 Ex parte Eleff supra note 36.  
86 Sections 3(1)(e) and 50(1) of the Deeds Registries Act.  
87 Upon registration of cession the reversionary entitlement is also transferred together with the other entitlements.
exercise an entitlement which has been restricted, after removal of the restriction.\textsuperscript{88}

A holder of a mineral right held a contingent ownership to the relevant mineral: upon severance of the minerals from the land, the ownership of minerals was obtained.\textsuperscript{89}

The above list does not purport to provide a complete list of all the entitlements of a mineral right.\textsuperscript{90} A holder of a mineral right is entitled to do whatever is reasonably necessary to attain his ultimate goal, as empowered by the grant of mineral rights.\textsuperscript{91} Ancillary entitlements can thus be added to the list.\textsuperscript{92} Unlike the doctrine of estates in the English common law, which fragments property interests in a temporal dimension,\textsuperscript{93} such fragmentation does not take place in South African law. Nevertheless, it is submitted that the exercise of entitlements takes place with reference to a time period. As indicated before,\textsuperscript{94} a mineral right theoretically endured in perpetuity. This important feature of a mineral right must be kept in mind for purposes of determining the content and degree of regulation of underlying common law rights before and after commencement of the MPRDA.

A prospecting right was acquired by conclusion of a prospecting contract. A prospecting contract is one which a prospecting right is granted with an option to: (a) purchase the ownership of land or a mineral right; or (b) enter into a mineral lease.\textsuperscript{95} The prospecting right has as its content the entitlement to prospect, dispose of the land for purposes of prospecting, alienate,\textsuperscript{96} mortgage the prospecting contract\textsuperscript{97} and to resist unlawful interference with the exercise of the prospecting right. A prospecting contract was usually granted for a fixed period with a right of renewal in favour of the prospector existing for further successive periods.\textsuperscript{98}

\textsuperscript{88} The existence of this entitlement explains why a mineral right, just like ownership, has the characteristic of elasticity.

\textsuperscript{89} Agri South Africa v Minister of Minerals & Energy supra note 3 para 29.


\textsuperscript{92} Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd supra note 31 at 373C-D.

\textsuperscript{93} See further Badenhorst & Mostert op cit note 11 at 3-12 to 3-12A.


\textsuperscript{95} See point (n) in note 36 above.

\textsuperscript{96} Definition of a ‘prospectng contract’ in 102 of the Deeds Registries Act.


\textsuperscript{98} See Badenhorst op cit note 36 at 694.

\textsuperscript{99} Lowe et al op cit note 96 at 218.
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A mining right was acquired by the conclusion of a notarial mineral lease.\textsuperscript{90} A mineral lease is a contract under the terms of which the holder of a mineral right confers on the miner the right to mine and dispose of minerals for consideration. The mining right has as its content the entitlement of exploitation, disposal, alienation,\textsuperscript{100} encumbrance\textsuperscript{101} and resistance. A mineral lease was granted for a determined or determinable period, or in perpetuity.\textsuperscript{102}

An 'old order prospecting right' that was in force immediately before the MPRDA took effect 'continues in force for a period of two years' from commencement of the MPRDA.\textsuperscript{103} It was intended that the duration of an 'old order prospecting right' would be two years.\textsuperscript{104} The two-year period was effectively in the nature of a moratorium such that, regardless of the period when the prospecting permit expires, it continued to be valid and legally enforceable for two years, provided that the 'old order prospecting right' was converted at some time within that two-year period.\textsuperscript{105} A prospecting permit which exceeded the two-year period would be terminated two years after commencement of the MPRDA (namely, 30 April 2006).\textsuperscript{106} The continuation of the 'old order prospecting right' took place subject to the terms and conditions under which it was granted or issued,\textsuperscript{107} provided that the terms and conditions were not contrary to the provisions of the Constitution or the MPRDA.\textsuperscript{108}

Any entitlements by virtue of the underlying common law mineral right or prospecting right, in the case of an 'old order prospecting right', are subject to the constraints of the particular grant. The entitlement to enter on to land and prospect for minerals continues during the interim period as well as the entitlements to dispose of the land for purposes of prospecting and to prohibit interference with prospecting. The entitlement to prospect was exercisable during the interim period because of the existence and continu-

\textsuperscript{90} Section 3(1) of the General Law Amendment Act 50 of 1956 required notarial execution for the validity of a mineral lease.

\textsuperscript{100} Section 3(1)(m) of the Deeds Registries Act authorised the registration of cessions of notarial mineral leases in the Deeds Office.

\textsuperscript{101} The bonding of a mineral lease was permitted by s 81 of the Deed Registries Act; see Lowe et al op cit note 96 at 234n157.

\textsuperscript{102} Commissioner of Island Revenue v De Been Consolidated Mines, Ltd 1943 GWLD 21 at 32; Franklin & Kaplan op cit note 90 at 612.

\textsuperscript{103} Item 6(1).

\textsuperscript{104} See Idrada Trading (Edms) Bpk v Top Coat Property Investments 23 (Edms) Bpk supra note 12 para 10.2. The court reasoned that in terms of s 6(4) of the Minerals Act, a prospecting permit was usually issued for a one-year period (or longer if the regional director so determined).

\textsuperscript{105} De Been Consolidated Mines Limited v The Regional Manager, Mineral Regulation Fire State Region: Department of Minerals and Energy supra note 36 para 6 (at page 43).

\textsuperscript{106} Idrada Trading (Edms) Bpk v Top Coat Property Investments 23 (Edms) Bpk supra note 12 para 10.2.

\textsuperscript{107} Item 6(1) of the transitional arrangements.

\textsuperscript{108} Ibid.
tion of a valid prospecting permit. The entitlements of alienation and encumbrance have been terminated upon commencement of the MPRDA in so far as provision is not made for the alienation, transfer or encumbrance of the 'old order prospecting right' (or its underlying common law rights) in the MPRDA. The right of a prospector to exercise the option to purchase the mineral right or acquire a mining right has also been terminated. A duty is imposed upon the holder of an 'old order prospecting right' to apply for conversion to a prospecting right. If granted, such a new prospecting right is awarded for a period which may not exceed five years, although the legislation allows for the exercise of a right of renewal of the prospecting right once for three years, and also for a mining right. A new prospecting right is subject to its stipulated terms and conditions, the provisions of the MPRDA and other legislation. The entitlements of a holder of a prospecting right with regard to all the activities associated with prospecting, including access to the property to be prospected, are set out in the MPRDA. A prospecting right is subject to certain conditions, transferable with the consent of the Director-General of the Department of Minerals. A prospecting right is capable of mortgage by a bank or financial institution if an undertaking is given by the mortgagee that the sale in execution or foreclosure would be subject to the consent of the Director-General. Under prescribed circumstances, the Minister of Minerals may cancel or suspend a prospecting right. Some of the features of a new prospecting right remind one of a prospecting permit in terms of the Minerals Act. This can be attributed to the fusion of the statutory authorisations into the prospecting right. A before-and-after analysis shows that in the present instance the common law rights were reduced in content, not only with respect to the 'old order prospecting right' but also with respect to the (new) prospecting right in terms of the MPRDA (if an application for conversion is successful).

An 'old order mining right' in force immediately before the MPRDA took effect 'continues in force for a period not exceeding five years' from

109 Item 6(2).
110 Section 17(6) of the MPRDA.
111 Sections 18(4) and 19(1)(a) and (b).
112 Section 17(6).
113 See s 5(3) of the MPRDA and Kowie Quarry CC v Ndlambe Municipality supra note 5 para 17.

In terms of s 5(2), additional rights may be granted to the holder of a prospecting right.

115 See further s 11(2).
116 Section 11(1); item 1 of the 'Delegation of powers by the Minister of Minerals and Energy to officers in the Department of Minerals and Energy' of 12 May 2004 (Reproduced in Badenhorst & Mostert cit note 11 at Related documents 33-6).
117 See further s 47.
118 Supra note 45.
119 See part 1 above.
commencement of the MPRDA.\textsuperscript{120} The legislature intended to reduce the duration of an 'old order mining right' to five years, namely until 30 April 2009\textsuperscript{121} and not to extend it beyond the five-year period.\textsuperscript{122} The continuation of the 'old order mining right' took place subject to the terms and conditions under which it was granted or issued,\textsuperscript{123} provided that the terms and conditions were not contrary to the provisions of the MPRDA and the Constitution.\textsuperscript{124} The duration of the mining authorisation is one of those terms or conditions.\textsuperscript{125} Thus, if a mining permit expired before the end of the five-year period, the 'old order mining right' was terminated upon such earlier date.\textsuperscript{126} If a mining permit was supposed to expire after the five-year period, it expired on 30 April 2009.\textsuperscript{127} In short, the interim period could be the full five-year period, or less than the five-year period, depending on the terms of the grant.\textsuperscript{128}

Any entitlements by virtue of the underlying common law mineral right or mining right in the case of an 'old order mining right' are subject to the constraints of the particular grant. The entitlement to enter land, prospect and mine for minerals continues during the interim period as well as the entitlements to dispose of the land for purposes of prospecting and mining and to prohibit interference with prospecting or mining\textsuperscript{129} because of the existence and continuation of a valid mining authorisation. In the absence of specific provision being made for such rights, the entitlements of alienation and encumbrance have been terminated upon commencement of the MPRDA. A duty is imposed upon the holder of an 'old order mining right' to apply for conversion to a mining right.\textsuperscript{130} Such new mining right is granted for a maximum of thirty years,\textsuperscript{131} with a right of renewal of thirty years at a time.\textsuperscript{132} A new mining right is subject to its stipulated terms and conditions, the provisions of the MPRDA and the other legislation.\textsuperscript{133} The entitlements of a holder of a mining right with regard to all the activities associated with

\textsuperscript{120} Item 7(1).
\textsuperscript{121} 
\textit{Idada Trading (Edms) Bpk v Top Coat Property Investments 23 (Edms) Bpk} supra note 12 para 9.1. It was reasoned by the court that if the legislature indeed intended to extend the duration of an old order mining right it would have used the same wording as item 6(1), namely 'continues in force for a period of...'. Instead it used the words 'for a period not exceeding...'(para 10.2).
\textsuperscript{122} Ibid para 9.1.
\textsuperscript{123} Item 7(1).
\textsuperscript{124} Item 7(6).
\textsuperscript{125} 
\textit{Idada Trading (Edms) Bpk} supra note 12 para 9.3.
\textsuperscript{126} Kourie Quarry CC v Nellieside Municipality supra note 5 para 27 31; see also \textit{Idada Trading (Edms) Bpk} supra note 12 para 12.
\textsuperscript{127} \textit{Idada Trading (Edms) Bpk} supra note 12 para 9.1.
\textsuperscript{128} See also ibid para 6.
\textsuperscript{129} Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd supra note 31 at 373H.
\textsuperscript{130} Item 7(2).
\textsuperscript{131} Section 23(6).
\textsuperscript{132} Section 24(4).
\textsuperscript{133} Section 23(6). In \textit{Swaarland Municipality v Law NO 2010 (5) SA 314 (WCC) para 20 it was held that 'relevant laws' includes provincial legislation, such as the Land
mining, including access to the property to be mined, are set out in the MPRDA. Upon meeting certain conditions, a mining right is transferable with the consent of the Director-General of the Department of Minerals. A mining right is capable of mortgage by a bank or financial institution if an undertaking is given by the mortgagee that the sale in execution or foreclosure would be subject to the consent of the Director-General. Under certain circumstances, the Minister of Minerals may cancel or suspend a mining right. Some of the features of a new mining right remain one of a mining authorisation in terms of the Minerals Act because of the fusion of the statutory authorisations into the mining right. A before-and-after analysis shows that in the present instance the common law rights which existed before commencement of the MPRDA were reduced in content not only with respect to the 'old order mining right' but also with respect to the (new) mining right in terms of the MPRDA (if an application for conversion is successful).

An 'unused old order right' in force immediately before the MPRDA took effect and continued in force for one year from the commencement of the MPRDA. If an application for a new prospecting right or mining right had been lodged during the one-year period, the 'unused old order right' remained valid until such time as the application is granted and dealt with in terms of the MPRDA or is refused. The interim period could be longer than a year in such an instance. The continuation of the 'unused old order right' took place subject to the terms and conditions under which it was granted, acquired or issued. The entitlement to enter land, prospect or mine for minerals continued during the interim period as well as the entitlements to dispose of the land for such purposes and to prohibit interference with prospecting or mining. The entitlement to prospect and mine was, however, only exercisable during the interim period if a valid prospecting permit or mining authorisation existed for a particular category. In the absence of provision for it in the MPRDA, the entitlements of alienation and encumbrance have also been terminated upon commence-

Use Planning Ordinance 15 of 1985 of the Western Cape, which regulates land use planning and zoning by municipalities.

131 Section 5(2) of the MPRDA and Kouie Quarry CC v Ndlambe Municipality supra note 5 para 17.
132 See further s 11(2).
133 Section 11(1); Item 1 of the Ministerial Delegation of 12 May 2004.
134 Section 11(3).
135 See further s 47.
136 Supra note 43.
137 See part I above.
138 Item 8(1) of the transitional arrangements. In CA Vissers Detaveye (Eduns) Bpk v Du Plooy; In Re Du Plooy v Minister of Minerals and Energy [2006] 2 All SA 614 (NC) at 629 item 8(1) was interpreted as being one year 'regardless of the period for which it had originally been issued'.
139 Item 8(3).
140 Item 8(1).
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ment of the MPRDA. However, an ‘exclusive right’ was granted to its holder to apply de novo during the interim period for a prospecting right or a mining right. What has been said about the duration, transferability and capability of encumbrance by mortgage of a prospecting right or mining right in the previous two paragraphs applies mutatis mutandis. A before-and-after analysis shows that, in the present instance, the common law rights which existed before commencement of the MPRDA were extensively reduced in content not only with respect to the ‘unused old order right’ but also with respect to the (new) prospecting right or mining right in terms of the MPRDA (if, at best, an application for a prospecting right or mining right is successful).

In Agri South Africa v Minister of Minerals and Energy the court undertook a comparative analysis of the content of the common law mineral rights underlying ‘unused old order rights’ before and after commencement of the MPRDA. The outcome of the analysis, according to the court, with reference to the transitional arrangements, was as follows:

(a) the unused old order right continued for one year;
(b) the underlying common law right to coal with its prior content has been legislated out of existence;
(c) the old order right has as its content only an exclusive right to apply for a prospecting or mining right;
(d) the acquisition of a prospecting right or mining right requires compliance with the provisions of the MPRDA; and
(e) an application for a prospecting right would cost approximately R50 000 and an application for a mining right cost approximately R1.5 million.

The outcome of the analysis, according to the court, with reference to the general provisions of the MPRDA was as follows:

(a) common law mineral rights are no longer recognised, but have disappeared;
(b) the entitlements of a holder of a common law mineral right have been

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144 See Agri South Africa v Minister of Minerals & Energy supra note 3 para 57.
145 Item 8(2). See Agri South Africa v Minister of Minerals & Energy supra note 3 para 56.
146 Supra note 3 para 22.
147 Ibid paras 23-36
149 Ibid para 57.
150 Ibid para 57.
151 Ibid para 56 and 57.
152 Ibid para 56.
153 Ibid para 58.
154 Ibid para 50.
lost and subsumed into the power of the minister to grant prospecting
and mining rights;\textsuperscript{155}
(c) the holder of such right no longer has an asset that can be sold, otherwise
alienated, used as real security or kept as an investment;
(d) the holder’s contingent ownership in the minerals, once severed, has
disappeared;
(e) the right to grant prospecting contracts or mineral leases has disap-
ppeared;
(f) only the right to apply for a prospecting right or mining right on a
first-come-first-served basis is conferred; and
(g) upon the grant of prospecting or mining right the combined content
thereof is similar to the content of the previous common law mineral
right.\textsuperscript{156}

It is submitted that the above applies mutatis mutandis to holders of old
order prospecting rights and old order mining rights who have acquired the
right to convert their respective rights during the respective interim periods.
By virtue of their prospecting permits or mining authorisations they would,
however, be entitled to prospect and mine during the interim period.

The above discussion of the content of the respective ‘old order rights’
illustrates the loss of some of the features of mineral rights, prospecting rights, and
mining rights since they are inconsistent with the provisions of the MPRDA.

In the case of a transitional right to minerals, the underlying rights may be
vested in different holders. For instance, X may be the holder of the common
law mineral right, whilst Y may be the holder of the mining right (and a
mining authorisation). The question in relation to the respective definitions
of ‘old order rights’ and the respective tables is, which holder should be
accorded priority to exercise the rights and to be able to apply to convert
these to prospecting rights or mining rights?

One approach is to grant priority to the first right, permission or consent
mentioned within a category and, therefore, to read this to include the other
rights, permissions or consents.\textsuperscript{157} The bundling of common law or statutory
rights and authorisations can be equated with the Röman fasces, which were
bundles of wood tied together around an axe which was carried as a symbol
of power by officials called lictores.\textsuperscript{158} In terms of such an analogy, the rights
and authorisations form a bundle of sticks, the first-mentioned right being
the axe, while everything else is bound together with a rope labelled ‘old
order right’.\textsuperscript{159} In terms of the transitional provisions, everything which is

\textsuperscript{155} See ibid para 51.
\textsuperscript{156} Ibid para 52.
\textsuperscript{157} P J Badenhorst & H Mostert ‘Revisiting the transitional arrangements of the
Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitu-
tional Property Clause: An analysis in two parts’ (2003) 14 Stellenbosch LR 377 at 381,
op cit note 11 at 25–4.
\textsuperscript{158} D H van Zyl Geskiedenis en Bogurels van die Romeinse Privaatrecht (1977) 14n30.
\textsuperscript{159} Badenhorst & Mostert op cit note 157 at 392, op cit note 11 at 25–7.
tied together shares the same fate; rights, consents and authorisations are
terminated or converted together as a bundle, even though holders of
different rights, consents and authorisation may be involved.160

A different approach was followed by the Supreme Court of Appeal in
Holom v Prudent Investors. Priority was granted to the holder of a mining
authorisation forming part of an ‘old order mining right’. It was reasoned that
under the previous dispensation it was the mining authorisation which
conferred practical value to the mineral rights by authorising the exercise of
mineral rights.161 By analogy, the same priority could be accorded to the
holder of a prospecting permit forming part of an ‘old order prospecting
right’. It is submitted that the same result could have been achieved if the
same priority as applied under the fasces approach had been followed,
because the first mentioned holder of rights by virtue of an ‘old order
prospecting right’ or ‘old order mining right’ would also be holding the
prospecting permit or mining authorisation. The granting of priority on the
basis of a prospecting permit or mining authorisation as in the Holom
decision would, however, not provide an answer to determining the identity of
the holder of an ‘unused old order right’ for which no prospecting permit or
mining authorisation had been issued. It is submitted that priority as applied
under the fasces approach would also have provided an answer in such
instance.

(d) Transferability

Transitional rights per se are not transferable during the respective interim
periods.162 These rights are only capable of conversion into prospecting
rights or mining rights. An ‘unused old order right’ contains an exclusive
right to apply de novo for a prospecting or mining right. Once converted or
acquired, a prospecting right or mining right is transferable with the consent
of the Director-General under certain circumstances. Thus, in an indirect
manner, transitional rights that are used as a springboard to acquire new rights
successfully under the MPRDA are transferable in a limited sense. The
transferability of the underlying mineral right, mining right or prospecting
right has, however, been lost by the coming into force of the MPRDA.163

(c) Termination

A distinction can be drawn between termination of ‘old order prospecting
rights’ and ‘old order mining rights’, on the one hand, and ‘unused old order
rights’, on the other hand.

In the first instance, upon the conversion of the transitional right to

161 Supra note 1 para 37.
162 Agri South Africa v Minister of Minerals & Energy supra note 3 para 50.
163 Upon such transfers, new prospecting permits or mining authorisation had to be
obtained because these statutory permissions to exercise rights were not transferable.
minerals and the registration\textsuperscript{164} of the prospecting right\textsuperscript{165} or mining right\textsuperscript{166} into which it was converted, the transitional right to minerals ceases to exist. If the holder fails to lodge the transitional right for conversion before the expiry of the respective interim periods, the transitional right ceases to exist.\textsuperscript{167} It is submitted that a transitional right would also be terminated upon refusal of the application by the Minister.

In the instance of an 'unused old order right', it ceases to exist upon granting or refusal of the application for a prospecting right or mining right,\textsuperscript{168} or upon the expiry of the interim period (in the absence of such an application).\textsuperscript{169}

The transitional right of co-holders are similarly terminated if they held the same type of 'old order right'. However if, for instance, one co-holder did not mine and only qualified for an 'unused old order right' in respect of his undivided share, such right terminated earlier than the 'old order mining right' held by the other co-holder(s) who mined before commencement of the MPRDA and who qualified for an 'old order mining right'.

On termination of the transitional rights, the constituent elements thereof are also terminated. Accordingly, the expropriation of underlying mineral rights, prospecting rights or mining rights took place upon termination of the respective transitional rights, and a claim for compensation would arise from that moment for the difference in value between the underlying rights and new prospecting rights or mining rights, if acquired. If new rights are not acquired, the claim for compensation would be for the difference in value between the underlying rights and the absence of new rights. On the 1st of May 2004 restrictive regulation of the underlying common law mineral rights, prospecting rights\textsuperscript{170} or mining rights\textsuperscript{171} took place. These rights survived only as rights underlying a mining authorisation or prospecting permit,\textsuperscript{172} and are regulated by the transitional arrangements and the existence of the new order.

Another approach is that the underlying mineral rights, prospecting rights or mining rights were terminated on the 1st of May 2004 and that the transitional rights form part of the compensation for loss of property that has been expropriated. The extent of compensation payable will also only become clear upon termination of the 'old order rights to minerals'.

In \textit{Agri South Africa v Minister of Minerals and Energy} it was held that

\textsuperscript{164} Registration takes place in the Mineral and Petroleum Titles Registration Office.
\textsuperscript{165} Item 6(7).
\textsuperscript{166} Item 7(7).
\textsuperscript{167} Item 6(8) and 7(8) respectively.
\textsuperscript{168} See item 8(3).
\textsuperscript{169} Item 8(4).
\textsuperscript{170} Common law or statutory based.
\textsuperscript{171} Common law or statutory based.
\textsuperscript{172} Unless absent in the case of some 'unused old order rights'.
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deprivation, and more particularly expropriation, of common law mineral rights of the holder of unused mineral rights took place by enactment of the MPRDA, specifically in terms of s 5 read with ss 2 and 3 thereof. By enactment of the MPRDA the state acquired the 'substance of the property rights of the erstwhile holders of quasi-servitudes'. Because expropriation is an original mode of acquisition of ownership, the rights destroyed by the expropriation and those acquired by the expropriator, as in the present case, need not be identical. A further detailed analysis of the Agri SA decision falls beyond the scope of this article.

Item 12 of the transitional arrangements provides that any person who can prove 'that his or her property has been expropriated' in terms of any provision of the MPRDA, may claim compensation from the state. Such a claim is subject to the provisions of s 25 of the South African Constitution. A discussion of the time, manner and requirements for institution of a claim of compensation, however, fall beyond the scope of the present discussion.

IV CONCLUSION

Prospecting and mining rights granted before and after the commencement of the MPRDA are real in nature, both in terms of the common law and in terms of the provisions of the MPRDA. Transitional rights are composite creatures made up of prospecting and mining rights and statutory permissions and authorisations which survived the commencement of the MPRDA. Transitional rights are also real in nature because of their constituent elements. However, upon a comparison of the features of the first mentioned prospecting and mining rights it appears that these rights have either lost most, if not all, of their entitlements or features of real rights, or alternatively these entitlements have been severely restricted. The loss of these common law features took place because they are inconsistent with the provisions of the MPRDA.

Transitional rights as a composite creature reminds one of the old saying about good-luck tokens for the bride on her wedding day:

'Something old, something new
Something borrowed, something blue
And a silver sixpence in her shoe.'

Hence, the rights and permissions from the past survived, due to (but subject to) the new transitional regime of the MPRDA. They are exercisable by virtue of consent given by the state during the old order, with the hope of

172 Supra note 3 paras 71, 75 and 77.
173 Ibid para 88.
174 Ibid para 82.
176 Ibid para 88.
177 See further Agri South Africa v Minister of Minerals & Energy supra note 3 paras 60–8 and 78–84.
178 See further Grobler op cit note 8 at 23.
passing over the bridge to the new order. To the extent that the crossing of
the bridge of transition has reduced the content of the composite right of its
holder, a claim of compensation for loss of property may be available.

In line with the approach of the Supreme Court of Appeal in the Hokin
decision about the continuation of underlying rights during the interim
period, the survival of the composite creature may mean that expropriation
of 'property' by virtue of the MPRDA took place upon the termination of
the transitional rights, and that only the regulation of underlying rights took
place earlier on the 1st of May 2004. If the expropriation of property did take
place on the 1st of May 2004, as was held in second Agri SA decision, the
transitional rights form part of the compensation measures, and the picture is
completed upon termination of the transitional rights.

In determining the make-up of transitional rights, an examination of the
content, acquisition and termination of the transitional rights/or the consti-
tuent elements thereof, is essential. The constituent elements of transitional
rights must still be kept in mind to be able to understand the features of the
composite creature. Further grappling with the beast by the courts would
pave the way for a better understanding of what really happened, under the
Constitutional dispensation, to the 'property' of holders of mineral rights,
prospecting rights or mining rights, upon commencement of the MPRDA.
The last word about the expropriation of transitional rights in Agri SA and
other instances has not yet been spoken.