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ARTICLES

LARGE SCALE EXPROPRIATION OF MINERAL RIGHTS IN SOUTH AFRICA:
THE AGRI SOUTH AFRICA SAGA

P J Badenhorst

Within the context of land reform in South Africa a new mineral law regime was introduced on 1 May 2004 by the Mineral and Petroleum Resources Development Act 28 of 2002. Provision was also made for the transition from the old order to the new order. In the most recent decision of Agri South Africa v Minister of Minerals and Energy it was held that expropriation of common law mineral rights of holders of "unused old order rights" took place under the act, and that compensation is payable to the holders of such rights. It is concluded that the decision is in line with South African Constitutional Property law jurisprudence. It is argued that in the case of other "old order rights", expropriations have also taken place, and compensation would be payable.

INTRODUCTION

Within the context of South Africa's history of racially discriminatory property laws a new mineral law regime was introduced on 1 May 2004 by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The preceding mineral law system (old order) broadly made provision for common law mineral rights, prospecting rights, mining rights and (transitional) statutory prospecting rights and mining rights. A holder of a mineral right was entitled to go upon the land to which these rights relate, to search for minerals, and, if he or she finds any, to sever these minerals and dispose of them. Mineral rights were freely transferable and served as objects of real security. Holders of mineral rights could grant prospecting or mining rights by virtue of a prospecting

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2 Van Vuren v Registrar of Deeds 1907 TS 289 294 295; Roche v Registrar of Deeds 1911 TPD 311 316; Ex parte Pierce 1950 (3) SA 628 (O) 634C-D; Erasmus v Afrikander Property Mines Ltd 1976 (1) SA 950 (W) 956E; Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A); 509G-H; Anglo Operations Ltd v Sandhurst Estates Pty Ltd 2007 (2) SA 363 (SCA); Agri South Africa v Minister of Minerals and Energy [2011] 3 All SA 296 (GNP) para 23.

3 Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town and Mines Ltd 1903 TS 499 510; Van Vuren v Registrar of Deeds 1907 TS 289 294; Ex parte Pierce 1950 (3) SA 628 (O) 634C; Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A) 509H.

4 In terms of s 3(1)(c) and 30(1) of the Deeds Registries Act 47 of 1937.
contract or a mineral lease, respectively. Statutory prospecting and mining rights were granted by the state under statutes which were repealed by the Minerals Act 50 of 1991 (but recognised as transitional rights in terms of the Minerals Act). Before prospecting rights or mining rights could be exercised, the necessary authorisation in the form of a prospecting permit or a mining authorisation had to be obtained from the state in accordance with the Minerals Act. Holders of mineral rights, prospecting rights or mining rights held a contingent right of ownership to the minerals. Upon severance of minerals from the land, ownership of minerals was acquired by the holder of the mineral right or mining right. Holders of mineral rights were under no obligation to exploit the minerals.

Under the MPRDA (new order) the previous system of common law mineral rights, prospecting rights, mining rights and statutory rights was completely superseded by a new administrative law 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 were fused into the prospecting right 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. As custodian, the Minister (or her delegate) may grant

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5 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd [2010] ZACC 26 para 65.
6 See in general, BLS Franklin and M Kaplan, The Mining and Mineral Laws of South Africa, (Butterworths, 1984). These statutory prospecting and mining rights were preserved in Ch VII of the Minerals Act. For a detailed discussion of the preservation of these rights, see M Kaplan and M O Dale, A Guide to the Minerals Act 1991 (Butterworths, 1992), 56-74 and 80-120 respectively.
7 A mining authorisation took the form of either a mining permit or a mining licence. A mining permit applied to small scale mining (see further s 9(3)(d)). A mining licence applied to large scale mining operations (see further s 9(3)(e)). Reference in this contribution would be to the generic term mining authorisations.
8 Agri South Africa v Minister of Minerals and Energy [2011] 3 All SA 296 (GNP) paras 34-36. A prospecting permit was issued in terms of s 6(1) of the Minerals Act. A mining authorisation was issued in terms of s 9(1) of the Minerals Act. Pending the application for prospecting permit or a mining authorisation, a temporary prospecting permit or mining authorisation could have been issued in terms of s 10 of the Minerals Act.
9 Agri South Africa v Minister of Minerals and Energy [2011] 3 All SA 296 (GNP) para 29.
10 Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A) 509G-510A; 534F-I.
11 Agri South Africa v Minister of Minerals and Energy [2011] 3 All SA 296 (GNP) para 29.
14 This contribution will only focus on mineral resources.
16 See s 103(1) and “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 P J Badenhorst and Henri Mostert, op cit n 1 at Related documents-33 to Related documents-36).
reconnaissance permissions, prospecting rights, permissions to remove minerals, mining permits or mining rights to minerals. Prospecting rights and mining rights are recognised as real (proprietary) rights. Holders of rights to minerals are entitled to prospect and mine for such minerals. Prospecting or mining is, however, prohibited unless 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. Extensive consultation, as required by the MPRDA, now constitutes the equivalent of negotiations and consensus which was required for the common law based agreements. The new system, together with the repeal of the Minerals Act, resulted in the destruction of the common law notion of mineral rights and the administrative controls which previously regulated the acquisition and utilisation of such rights. It is intended by the legislature for the MPRDA to override inconsistent common law principles.

**TRANSITIONAL ARRANGEMENTS**

Introduction of the MPRDA also required a transition from the old order to the new mineral law regime. Transitional arrangements were accordingly included in Sched II to MPRDA (hereafter referred to as “transitional arrangements”). The transitional arrangements are applicable to transitional rights called “old order rights” in respect of “minerals” and “OP26 rights” in respect of “petroleum”. These transitional arrangements were necessary to prevent the stultification and total disruption of an important sector of the economy until such time as existing prospecting and mining operations could be regulated in terms of the MPRDA. This was achieved by continuing the existing rights with respect to such operations in the form of “old order rights” and affording the holder of such rights the opportunity to comply with the MPRDA by applying for, or converting to, new prospecting or mining rights.

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17 Section 3(2).
19 As to the content of prospecting rights, mining rights and mining permits see further ss 5(2) and (3) and 27(7).
20 Section 5(4) of the MPRDA; Kowie Quarry CC v Ndlambe Municipality 2008 JDR 1380 (E) para 18.
24 See the definition of a “mineral” in s 1 of the MPRDA.
25 “Petroleum” is defined in s 1.
The following categories of "old order rights" are recognised in item 1 of the transitional arrangements by reference to specific rights that are listed in three corresponding tables:29 "old order prospecting rights";30 "old order mining rights"31 and "unused old order rights".32

In the first two categories, it is required that prospecting or mining, respectively, must have taken place immediately before the commencement of the MPRDA, whilst no such activity is required in the case of "unused old order rights". In the first two categories, an application had to be made during an interim period33 for conversion of "old order prospecting rights" or "old order mining rights" to prospecting rights34 or mining rights,35 whilst in the instance of "unused old order rights" a new application for prospecting or mining rights36 had to take place during an interim period of one year.37 The interim periods for the conversion of all "old order rights" to, or application for, new prospecting rights or mining rights (a process that has been compared to the crossing of a narrow bridge)38 have been completed.

In the first two categories, upon the conversion of the transitional right to minerals and the registration39 of the prospecting right40 or mining right41 into which it was converted, the transitional right to minerals ceased to exist. If the holder failed to lodge the transitional right for conversion before the expiry of the respective interim period, the transitional right ceased to exist.42 It is submitted that a transitional right was also terminated upon refusal of the application by the Minister. In the instance of an "unused old order right", it ceased to exist upon granting or refusal

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29 Upon a joint reading of the three tables, the following categories of rights can be listed: (a) mineral right; (b) mineral right with a prospecting permit or mining authorisation; (c) consent to prospect (prospect contract), mineral right with or without a prospecting permit; (d) consent to mine (mineral lease), mineral right with or without a mining authorisation; (e) prospecting lease, prospecting permit, prospecting licence or permission referred to in s 44 of the Minerals Act, mineral right with or without a prospecting permit; (f) a right to dig or mine, a claim licence, tributing agreement, mynpachtchen or any right to dig or mine acquired under a tributing agreement or sub-grant referred to in s 47(1) or (5) of the Minerals Act, mineral right with a mining authorisation; (g) permission to prospect or mine in terms of former apartheid laws, mineral right and a prospecting permit or mining permit; and (b) a temporary permit to continue with prospecting or mining operations in terms of s 10 of the Minerals Act. Mynpachtchen were added to the list by s 78 of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008.

30 An "old order prospecting right" means any "prospecting lease, permission, consent, permit or licence, and the rights attached thereto, listed in Table 1 to this Schedule in force immediately before the date on which this Act took effect and in respect of which prospecting is being conducted".

31 An "old order mining right" means any "mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted".

32 An "unused old order right" means any "right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect".

33 Two years for old order prospecting rights (item 6(1)) of the transitional arrangements in Sched I to MPRDA and five years for old order mining rights (item 7(1)).

34 Item 6(2).
35 Item 7(2).
36 Item 8(2).
37 Item 8(1); See Holcim v Prudent Investors (641/09) [2010] ZASCA 109 (17 September 2010) para 38.
39 Registration takes place in the Mineral and Petroleum Titles Registration Office.
40 Item 6(7).
41 Item 7(7).
42 Item 6(8) and 7(8) respectively.
of the application for a prospecting right or mining right,\textsuperscript{43} or upon the expiry of the interim period of one year (in the absence of such an application).\textsuperscript{44}

EXPROPRIATION

Item 12(1) 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 claim is subject to the provisions of item 12 and s 25 (or the so-called “property clause”) of the Constitution of the Republic of South Africa, 1996. The structure of s 25(1), (2) and (3) of the property clause has been broken down by the Constitutional Court in the following sequential questions:\textsuperscript{45} (a) Does that which is taken from the holder of property amount to “property” for purposes of s 25? (b) Has there been a deprivation of that property by the State? (c) If there has, is the deprivation of property in terms of a law of general application which does not permit arbitrary deprivation of property?\textsuperscript{46} (d) If not, is the deprivation justified under the general limitation clause (s 36)? (e) If it is, does it amount to an expropriation? (f) If so, does the deprivation takes place in terms of a law of general application for a public purpose or in the public interest and subject to payment of just and equitable compensation?\textsuperscript{47} (g) If not, is the expropriation justified under the general limitation clause. The state is empowered by the Constitution to adopt legislation and other measures to achieve “land, water and related reform”.\textsuperscript{48} The MPRDA is an example of legislation of related reform.

Generally compensation for expropriation must be determined in two stages: First, the court must consider what compensation is payable under the provisions of the expropriation or expropriating statute and then it has to consider if that amount is just and equitable under s 25(3) of the Constitution and make any necessary adjustment.\textsuperscript{49}

\textsuperscript{43} See item 8(3).
\textsuperscript{44} Item 8(4).
\textsuperscript{46} Section 25(1).
\textsuperscript{47} Section 25(2) and (3). Such compensation must be agreed upon or determined by a court (s 25(2)(b)) and reflect an equitable balance between the public interest and the interests of the expropriator, having regard to all relevant circumstances. The following circumstances are listed in s 25(3): (a) the current use of the property; (b) the history of the acquisition the property (c) the use of the property; (d) the market value of the property; (e) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (f) the purpose of the expropriation. Item 12(3) add more factors to the list.
\textsuperscript{48} Section 25(8).
\textsuperscript{49} See Du Toit v Minister of Transport 2006 (1) SA 297 (CC) para 35; City of Cape Town v Helderberg Park Development (Pty) Ltd [2007] 1 All SA 517 (SCA) para 20. The modus operandi are stated as follows by Gildenhuys J in Ex parte former Highlands Resident: In re: Ash v Department of Land Affairs (2000) 2 All SA 26 (LCC) para 35: “The equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require.” See also Khumalo v Potgieter [2000] 2 All SA 456 (LCC) para 23; Abrahams v Allie 2004 4 SA 535 (SCA) para 15. Apart from state investment, the market value of the property is the only factor listed in s 25(3) that is capable of quantification (City of Cape Town v Helderberg Park Development (Pty) Ltd [2007] 1 All SA 517 (SCA) para 19). Consideration of the purpose of expropriation may lead to a downward adjustment of the compensation amount (Du Toit v Minister of Transport 2003 1 SA 586 (C) para 51). The court a quo in its decision, however, relied on the incorrect provisions of the Expropriation Act (Du Toit v Minister of Transport 2005 1 SA 16 (SCA) para 6-7).
A claim of compensation had to be lodged in the prescribed manner on or before 30 April 2011, where the claimant has become aware or should reasonably have become aware on or before 30 April 2010 of the said expropriation. In all other cases, the claim of compensation had to be lodged within one year of the date when the claimant has or should reasonably have become aware of such expropriation. A court may, on good cause shown, condone the late lodgement. Upon the commencement of the running of prescription as mentioned, certain provisions of the Expropriation Act 63 of 1975 will apply with the necessary changes to a compensation claim. The Expropriation Act is the general and most important statute in South Africa dealing with expropriation.

The following questions pertaining to the changes brought about by the MPRDA have arisen: (a) whether the enactment of the MPRDA has resulted in the expropriation of rights acquired during the old order; and if so; (b) whether compensation is payable by the State. These questions recently received the attention of the courts in Agri SA v Minister of Minerals and Energy.

FACTS

Agri South Africa is a voluntary association representing the interests of commercial farms in South Africa. It regularly engages with the government regarding matters that concern farmers and agriculture in general. Agri SA instructed their attorneys to find a suitable instance to serve as a "test case" as to the issue whether the MPRDA effected expropriation. Sebenza Mining (Pty) Ltd (Sebenza) was identified. It appeared that during November 2001 Sebenza acquired coal rights for R1 048 000. Sebenza never obtained a prospecting permit or mining authorisation under the Minerals Act and never conducted prospecting or mining operations on the farm. Sebenza was, therefore, a holder of an "unused old order right" in terms of the MPRDA. Sebenza was placed under liquidation. The liquidators accepted an offer from Metsu Trading (Pty) Ltd (Metsu) to purchase the coal rights for R750 000. The sale of the mineral rights to Metsu was upon legal advice treated as void because since the commencement of the MPRDA the registration of cessions of mineral rights could no longer be effected in the Deeds Office. During March 2006 the liquidators of Sebenza, contending that it had been expropriated, lodged a claim for compensation with the Department of Mineral Resources. The claim was rejected by the department. The claim of compensation was ceded to Agri SA for R250 000. The plaintiff (as cessionary) claimed that the mineral rights were expropriated in terms of s 5 as read with ss 2, 3 and 4 of the MPRDA, and that they were entitled to compensation as contemplated in item 12 of the transitional arrangements in Sched II of the MPRDA. The plaintiff applied to court in terms of s 14 of the Expropriation Act 63 of 1975 for the determination of compensation to which it is entitled as a result of the expropriation.

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50 See reg 82A of the MPRDA Regulations as amended by GN R1203 in GG 29431 of 30 November 2006 and Gerrit Grobler, op cit n 24.
51 Regulation 82A(1)(a) of the MPRDA regulations as amended by GN R1203 in GG 29431 of 30 November 2006.
52 Regulation 82A(1)(b) as amended by GN R1203 in GG 29431 of 30 November 2006.
53 Regulation 82A(1)(b) as amended by GN R1203 in GG 29431 of 30 November 2006.
54 Item 12(6)(a) and reg 82A(7) as amended by GN R1203 in GG 29431 of 30 November 2006.
AGRA SA I DECISION

In the Agri SA I decision, an exception was raised by the Department that the provisions in the MPRDA relied upon by the plaintiff do not provide for compensation of the plaintiff’s rights, and that insufficient facts had been alleged to apprise the defendant of exactly what the plaintiffs’ claims were, thus rendering the particulars of the claim vague and embarrassing. The court undertook a before-and-after comparison of the rights of holders of “unused old order rights.” The court found that expropriation of mineral rights of the holders of “unused old order rights” took place upon commencement of the MPRDA. The court concluded that it is possible for holders of “old order rights” to prove that their rights have been expropriated and the MPRDA affords them a right to claim compensation. The court found that the plaintiff’s claim was not vague or embarrassing and the exception did not succeed.

AGRA SA II DECISION

At issue in Agri SA II was whether the MPRDA deprived Sebenza of its coal rights, and if so, was Sebenza expropriated of its coal rights and is Agri SA, as cessionary of the expropriation claim, entitled to compensation?

The court accepted that the coal rights constituted property as envisaged in s 25 of the Constitution. According to the court when it is contended that a person has been expropriated the first question is whether the person has been deprived of property as envisaged in s 25(1) of the Constitution. The second question is whether the deprivation constituted an expropriation as envisaged in s 25(2) of the Constitution.

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58 Paragraph 4.

59 See ibid paras 5, 7-9 and 11.

60 See ibid paras 16 and 17.

61 Ibid para 19.

62 Ibid para 19.


64 Ibid para 62. Badenhorst and Mostert, op cit n 1 at 25-22B indicate that in Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa (2002) 1 BCLR 233 T 283-G-H, 31D-E) the idea of constitutional protection of mineral rights was erroneously, and rather simplistically, rejected. The finding was based on a misunderstanding of the Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) 799, para 74. Mineral rights need not be explicitly mentioned in Bills of Rights, because they receive ample protection as property under most constitutions. It seems to be the accepted view that mineral rights are worthy of constitutional protection. See P J Badenhorst and P H G Vrancken “Do mineral rights constitute ‘constitutional property?’” (2001) Obiter 496; Elmarie Van der Schyff, “Ghost buster: Slaying a ghost by providing guidelines for determining whether ‘old order’ mineral rights constitute constitutional property” (2008) 71(2) THRHR 387-388.

65 Ibid para 61.

66 Ibid para 78.
Deprivation

In order to determine whether deprivation has taken place by the enactment of the MPRDA the court undertook and before-and-after analysis\(^67\) of the content of the common law mineral rights by comparing such rights before\(^68\) and after commencement of the MPRDA.\(^69\) The outcome of the analysis, according to the court, and with reference to the general provisions of the MPRDA is as follows:\(^70\)

(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 lost and subsumed into the power of the minister to grant prospecting and mining rights;\(^71\)
(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 disappeared; and
(f) only the right to apply for a prospecting right or mining right on a first-come-first-serve basis is conferred.
(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.\(^72\)

The outcome of the analysis, according to the court, with reference to the transitional arrangements is as follows:

(a) the unused old order right continues for one year;\(^73\)
(b) the underlying common law right to coal with its prior content has been legislated out of existence;\(^74\)
(c) the old order right has as its content only an exclusive right to apply for a prospecting or mining right;\(^75\)
(d) acquisition of a prospecting right or mining right requires compliance with the provisions of the MPRDA;\(^76\) and
(e) application for a prospecting right would cost approximately R50 000 and application for a mining right cost approximately R1,5 million.\(^77\)

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\(^67\) Ibid para 22.
\(^68\) See ibid paras 23-36
\(^69\) See ibid paras 37-48.
\(^70\) Ibid para 50.
\(^71\) See ibid para 51.
\(^72\) Ibid para 52.
\(^73\) Ibid para 57.
\(^74\) Ibid.
\(^75\) Ibid paras 56 and 57.
\(^76\) Ibid para 56.
\(^77\) Ibid para 58.
The court found that Sebenza had been deprived of its coal rights. It was accepted as sufficient if one or more of the entitlements of a right are interfered with. In order to determine whether it is the case, "a court must consider the extent of interference with the use and the enjoyment of property". If there is sufficient or substantial interference it constitutes a deprivation. The court referred to the Constitutional Court's decisions on deprivation of property in terms of s 25(1) of the Constitution.

The court rejected the contention that the MPRDA only regulated the use of the common law mineral rights. The court reasoned that the regulation of property requires that a person must still have the property, "albeit with a truncated content". Since the MPRDA taking effect, Sebenza no longer had coal rights that could be regulated.

The argument was also rejected that Sebenza lost its coal rights because of its failure to apply for prospecting or mining rights in terms of item 8 of the transitional arrangements. The court reasoned that deprivation cannot be undone by offering the deprived party something in the place of the deprived property. Item 8 of the transitional arrangements were only perceived as affording an opportunity for the holder to mitigate its damage.

The court held that deprivation took place upon commencement of the MPRDA when the holder only had a right to apply to be granted entitlements which the common law real right had conferred upon it. It also rejected the argument that deprivation took place upon lapsing of the "unused old order right" a year after commencement of the MPRDA.

**Expropriation**

For an expropriation to have occurred the court required in addition to a deprivation of the property, the "appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right". The essential enquiry was, therefore, whether the substance of the right has been acquired by the expropriator.\(^9\) The court referred to the Constitutional Court's decisions on expropriation of property in terms of s 25(2).

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78 Ibid para 77.
79 Ibid para 65.
80 Paragraph 65. See also para 72.
81 Paragraphs 72, 76.
82 *First National Bank of SA Ltd v Weshank v Commissioner, South African Revenue Service 2002 4 SA 768 (CC) para 57 1 and Mkontwana v Nelson Mandela Metropolitan Municipality; Bisett v Buffalo City Municipality, Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng 2005 1 SA 530 (CC), 2005 2 BCLR 150 (CC) para 32.
83 Ibid paras 66-68.
84 Ibid para 67.
85 Ibid para 67.
86 Ibid para 72. See further ibid para 74.
87 Ibid para 72.
88 Ibid.
89 Ibid para 75.
90 Ibid para 78. The court referred to.
91 Ibid para 80.
92 Harken v Lane NO 1998 (1) SA 300 (CC) para 32; Reflect-All 1025 CC and others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another 2009 (6) SA 391 (CC) para 64.
The court at the outset indicated that expropriation is an original mode of acquisition of rights.93 It was held that the "rights destroyed by the expropriation and those acquired by the expropriator need not to be identical".94 It was held that by enactment of the MPRDA, the State acquired the substance of the property rights of the erstwhile holder of common law mineral rights.95 The court reasoned that from a reading of ss 3 and 5 of the MPRDA, the Minister, was upon commencement of the act vested with the power to confer rights the contents of which were substantially, and in some respects, identical to the contents of common law mineral rights.96 The fact that the competencies of the State are collectively called custodianship was regarded as immaterial by the court.97

The court further reasoned that in terms of the Constitution expropriation of interest to be acquired by third parties is in any event sufficient.98 Other requirements for expropriation99 were not at issue.100 The court concluded that Sebenza’s coal rights had been expropriated by the enactment of the MPRDA, specifically in terms of s 5 with ss 2 and 3 thereof.101 Although the court in Agri SA II did not specifically deal with each of abovementioned sequential questions,102 it is clear that all these elements have been complied with.

Compensation

Compensation has to be just and equitable, as set out in the Constitution.103 The court accepted that the starting point in determining such compensation is market value of the right,104 and concluded that, having regard to all the relevant circumstances, R750000 is just and equitable compensation reflecting an equitable balance between the public interest and the interest of Sebenza.105 The court accepted that R750000 does not represent the market value of the coal rights,106 and reasoned that it would not be just and equitable to award market value in excess of the R750000 which the liquidators were prepared to accept in their intended sale to Metsu.107 It was not regarded as just and equitable that Sebenza should profit from expropriation.108 The fact that the liquidators actually accepted R250000 for the cession of the right to claim compensation was disregarded by the court. The court reasoned that if Sebenza had not accepted the figure and ceded the claim to Agri SA, it would have had to incur the cost of enforcing the claim.109

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93 Ibid para 80.
94 Ibid para 85.
95 Ibid para 82.
96 Ibid.
97 Ibid.
98 Ibid para 83.
99 Namely, the requirements that it must be an expropriation in terms of a law of general application and the expropriation must be for a public or in the public interest.
100 Paragraphs 9 and 87.
101 Ibid para 88.
102 Ibid para 91.
103 See paras 89, 91 and 92.
104 Ibid para 93.
105 Ibid para 99.
106 Ibid para 98.
108 Ibid para 99. It should be noted that Agri South Africa had a return of R500 000 on its investment.
109 Ibid para 100.
Market value is usually determined upon date of expropriation. The undisputed evidence before the court was that upon commencement of the MPRDA the market value of the (unused) mineral rights had risen to R2,000,000.119 This value should have been used as a point of departure, from which amounts, as the other relevant circumstances may require, should be deducted or added.

Comment

The *Agri SA II* decision has shown that the introduction of the MPRDA has lead to expropriation of “unused old order rights” and that compensation is payable for expropriation. The decision is in accordance with the decisions of the Constitutional Court on deprivations and expropriations. In determining compensation for such expropriations the market value of “unused old order rights” upon commencement of the MPRDA should be used as a point of departure.

It was not necessary in the *Agri SA II* to decide whether the MPRDA expropriated all minerals rights or apply the principles in a wider context.111 Apart from the instance of expropriation identified by the court in *Agri SA*, it is arguable that expropriations in terms of the MPRDA could also take place in the case of other “old order rights”.112 Expropriation can arguable be indicated in these other instances by applying a similar before-and-after analysis. Compensation would also be payable in those other instances.113 According to an estimate of the South African government, compensation for all mineral rights would amount to approximately R90 billion. The estimate was perceived as speculative by the court in *Agri SA II*.114 Nevertheless, payment of large amounts of compensation was foreseeable long before the reform of the mineral law system115 and probably expected by reformers. It was held in *Agri SA II* that it is not a defence for the State or any expropriator to plead that it cannot afford to pay compensation.116 It should be remembered that the State has acquired the substance or part of the property rights of the holders of old order rights. Upon granting of prospecting or mining rights to new applicants, prospecting fees and royalties will in addition be payable to the State.117

Objectives in s 2 of the MPRDA, that such a provision of equitable access to mineral resources for all South Africans and expansion opportunities for historically disadvantaged persons cannot be faulted.118 Absence of the object of compensating holders of old order rights in s 2 of the transitional arrangements was always glaringly apparent. It is submitted that first mentioned objectives and last mentioned objective are different sides to the same transformation coin. The impact of the MPRDA on old order rights must be recognised and addressed by the South African government. By not doing so, or pleading as in *Agri SA II* that it is unable to do so, would impact on future investment in the mining industry.

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119 Ibid para 96.
111 Ibid para 95.
113 See in general P J Badenhorst and Hanri Mostert, op cit n 1, ch ch 25.3.5.2.2.
114 Paragraph 95.
116 Paragraph 95.
117 Section 3(2)(b). See further P J Badenhorst and Hanri Mostert op cit n 1 at 13-8.
118 See s 2 of the MPRDA.
CONCLUSION

The possible expropriations of the underlying common law mineral rights of holders of “old order rights” are governed by the s 25 of the South African Constitution, expropriation provisions in the MPRDA, provisions of the Expropriation Act 63 of 1975 and general principles of Expropriation Law.

The Agri SA saga so far has shown that expropriation of underlying common law mineral rights of holders of “unused old order rights” (who could not avail themselves of applying for new prospecting or mining rights) did take place with enactment of the MPRDA. A before-and-after analysis by the courts supports such finding. Just and equitable compensation is payable for such expropriations. The Agri SA II decision is in line with South African Constitutional Property Law jurisprudence and will have an impact on future development of mineral law. It is arguable that expropriations by the MPRDA also took place in the case of other “old order rights”. It would be possible to indicate this in these instances by applying a similar before-and-after analysis. Compensation would, therefore, also be payable in these instances. The defence of inability to pay compensation will not be available as a defence for the South African government. The State has acquired the substance or part of the property rights of the holders of old order rights and just and equitable compensation is accordingly payable. The court’s protection of the fundamental right of holders of “unused old order rights” to compensation for proven expropriation is welcomed.