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STATUS OF TAILINGS DUMPS: LET'S GO WORKING IN THE PAST?*

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1 Introduction

The *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd*¹ (“*De Beers*”) decision is important regarding the legal status of mine dumps or tailings dumps created by mining companies before the Mineral and Petroleum Resources Development Act 28 of 2002 (“the MPRDA”) came into operation. The concept “tailings” as a definition first appeared in section 1 of the Minerals Act 50 of 1991 (“the Minerals Act”), where it was defined as “any waste rock, slimes or residue derived from any mining operation or processing of any mineral”. Before the Minerals Act dumps were simply referred to as “mine dumps”. The MPRDA did not repeat the definition of “tailings”, but introduced two new concepts namely “residue stockpile” and “residue deposit” without linking them to “tailings” as it occurred in the Minerals Act. The concept “residue stockpile” is defined as “any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or production right”.² The concept “residue deposit” means “any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right or production right”.³ It speaks for itself that the MPRDA applies to these two new concepts. Whether the MPRDA applies to mine dumps or tailings dumps created before inception of the MPRDA has become a pertinent legal issue.

The court in *De Beers* decided that “tailings dumps” are not governed by the provisions of the MPRDA. Ownership of tailings dumps is determined by the common law principles of property law. It will be argued that the same would apply to tailings dumps created by holders of “old order mining rights” for a period of time after commencement of the MPRDA until eventual termination

* A discussion of *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* OPD 13-12-2007 case no 3215/06.

¹ OPD 13-12-2007 case no 3215/06.

² S 1.

³ S 1.

in 1932. Treatment of accumulated pulsated tailings in the recovery plant continued up until the end of May 1932. As from January 1940, De Beers leased the New Company's assets and operated the Jagersfontein mine for its own account. No mining was done owing to the Second World War, but the re-treatment of old pulsated gravels continued up to October 1940. Shortly thereafter the mine was closed down and refitted and re-equipped with a new reduction plant. The reconditioned mine, which had been shut down for 17 years, recommenced production in July 1949, and continued until 1971, when De Beers ceased the mining operations of the New Company. At the time, De Beers had full knowledge of the fact that the tailings dumps contained diamondiferous material which could, when economic circumstances were conducive to further exploitation, again be the subject of further mining operations.¹⁰ By notarial deed of cession on 20 September 1973 the New Company ceded the rights to all precious stones and all precious metals, base minerals, and oils in the farm to De Beers. Thereafter the mine was stripped of all treatment plant and equipment and the infrastructure for resuming underground operations was removed and sold off. In terms of another notarial agreement of cession executed on 8 October 1973, the New Company ceded to De Beers all its assets, whether immovable, movable, incorporeal or otherwise. A prospecting right (7/2006) in terms of the MPRDA was issued on 31 December 2006 to Ataquia Mining (Pty) Ltd ("Ataquia Mining") by the Deputy Director-General and the Minister of Minerals and Energy to prospect on the farm.

The different rights existing or claiming to exist in respect of the farm and tailings dumps can be summarised as follows:

- (a) Rights in terms of a notarial lease whereby De Beers, since January 1940, leased the New Company's assets, including certain land, mines and mining claims and operated the mine on the farm;¹¹
- (b) Ownership of all the assets of the New Company, whether movable, immovable or incorporeal by virtue of a notarial agreement of cession on 8 October 1973 by the New Company;¹²
- (c) Mineral rights in respect of precious stones, precious metals, base minerals and oil in respect of the farm held by De Beers by virtue of a registered notarial cession of mineral rights of 20 September 1993 by the New Company;¹³
- (d) Prospecting permit¹⁴ and mining authorisation¹⁵ in terms of the Minerals Act 50 of 1991, held by De Beers;
- (e) New order prospecting rights in respect of the farm held by Ataquia Mining; and
- (f) Ownership of the farm.

¹⁰ Para 4.

¹¹ Paras 4 and 5.

¹² Para 6.

¹³ Para 6.

¹⁴ See para 68(iv).

¹⁵ See para 68(iv).

De Beers applied for an order declaring that it is the owner of the tailings dumps on the farm and that Ataquia Mining was not entitled to conduct prospecting operations on the tailings dumps situated on the farm. De Beers applied for a further order that the decision of the Deputy Director-General and the Minister be reviewed and set aside.¹⁶ The application was granted by the Orange Free State Provincial division of the High Court of South Africa.¹⁷ Due to non compliance with the requirements of the MPRDA,¹⁸ the decision of the Deputy Director-General and the Minister to grant a prospecting right to Ataquia Mining and the prospecting right was reviewed and set aside by the court.¹⁹ This explains the exit of Ataquia Mining from the proceedings.²⁰ The non-compliance by Ataquia Mining and especially the officials of the State with requirements of the MPRDA and the Promotion of Administrative Justice Act 3 of 2000, though a cause for concern, will not be further discussed.

The legal questions to be decided in the *De Beers* case were: (a) whether the diamonds found in tailings dumps, containing diamondiferous material on the farm, “are diamonds or minerals for purposes of the interpretation of the Mineral and Petroleum Resources Development Act”,²¹ and (b) ownership of the tailings dumps, which originated from ore mined on the farm by the New Company and De Beers.²²

3 Ownership of a tailings dump

Determination of ownership of a tailings dump depends on whether the tailings dump is movable or immovable. If movable, it belongs to the mining company that lawfully severed the ore and minerals, unless abandonment of ownership has taken place. If immovable, the owner of the land would be the owner of the tailings dump. Determining whether tailings dumps are to be considered as movables or part of the land is determined by the principles of building (*inaedificatio*) as a form of accession. Whether accession has taken place is determined by considering the following factors: (a) the nature and purpose of the movable; (b) the degree and manner of its annexation to the soil; and (c) the intention of the owner of the movable with regard to the attachment of his movable to the soil.²³

In *De Beers*²⁴ it was held, with reference to the criteria for determining whether accession has taken place that the tailings dumps are to be considered as movables. This was despite the nature of the tailings dumps and the manner of annexation. The tailings dumps were capable of acceding to the land and it is trite law that accession can even take place by mere weight.²⁵ The tailings dumps were enormous, similar in size to some of the surrounding natural

¹⁶ Paras 1 and 2.

¹⁷ Para 68.

¹⁸ See paras 9-13.

¹⁹ See paras 2 and 19.

²⁰ Para 4.

²¹ Para 8.

²² Paras 4 and 5.

²³ Van der Merwe “Things” in *LAWSA* 27 (2001) para 337.

²⁴ Para 25.

²⁵ See *Macdonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 466.

koppies.²⁶ They were left there for more than a century.²⁷ The tailings dumps were, however, found to be distinguishable from the surface of the farm and were capable of being removed without injuring the land.²⁸ In other words, according to the two tests used to determine whether the second criteria is decisive, it did not form an integral part of the land and could be removed without substantial injury to the land or old tailings.²⁹ The court found that neither the New Company nor De Beers, when it conducted the business of the New Company for its own account, had an intention to discard the tailings and to attach them permanently to the land.³⁰ According to the court, the intention was clearly to own and retain the ownership of the minerals mined which had been treated or which could in the future be treated with better technology and more favourable economic considerations.³¹ The court reasoned that the “modern approach” to the application of the criteria for accession, as suggested by Nienaber JA in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*³² (“*Konstanz Properties*”), must be followed.³³ Accordingly, in terms of the modern approach, the subjective intention or *ipse dixit* is paramount. The nature of the tailings dumps and the way in which the dumps were affixed, are, as a question of degree, only indicative of the intention.³⁴ The court found that the intention was that the tailings dumps should be regarded as movables, and that the *ipse dixit* was, therefore, determinant of the question. The next question to be considered was whether the other factors³⁵ were indicative of the intention of De Beers at the time of the annexation that they should be considered as movables.³⁶ The court was of the opinion that the first and second requirements³⁷ are both compatible with and indicative of that intention.³⁸ The court was satisfied that the tailings dumps were movables which were owned by De Beers.³⁹

Some general points of criticism can be noted:

- (a) Apparently the court did not consider the well known criticism against the decisive emphasis that is being placed on the intention of the owner of the movable in terms of the modern approach.⁴⁰ The Appellate Division in *Konstanz Properties* already expressed its willingness in future to consider aspects of accession, such as the question whether the intention of the owner of the movable or the annexor, is the relevant one.⁴¹

²⁶ Para 23.

²⁷ Para 24.

²⁸ Para 23.

²⁹ See Van der Merwe *LAWSA* 27 para 337.

³⁰ Para 19.

³¹ Para 19.

³² 1996 3 SA 273 (A).

³³ Para 25.

³⁴ Para 25.

³⁵ Namely, the nature of the tailings dumps and the manner in which the dumps are affixed.

³⁶ Para 25.

³⁷ The court actually referred to the second and third requirements, which seems incorrect.

³⁸ Para 25.

³⁹ Para 25.

⁴⁰ See in general, Van der Merwe *LAWSA* 27 para 339.

⁴¹ *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 3 SA 273 (A) 282B and 284G.

- (b) Decisive emphasis was placed on the *ipse dixit* of De Beers regarding the tailings dumps. As will be indicated in 4.3.2 below, De Beers only could have acquired ownership of the movable tailings dumps by delivery with the short hand during 1973. Only from this moment (and not earlier when it conducted the business of the New Company for its own account) could the intention of De Beers as owner of the movable dumps be taken into account for purposes of the third criteria to determine whether accession of a movable to land has taken place. Prior to that date De Beers was merely a lessee of the New Company's assets, including certain land, mines and mining claims and operated the mine on the farm.
- (c) Apparently the court did not take note of the views of Franklin and Kaplan⁴² that due to the uniqueness of mine dumps, the application of the three factors of accession to mine dumps is more complex and do not provide a true or useful analogy to the case of mine dumps. Briefly, as to the physical features, the nature of a mine dump is such that it is capable of effective attachment to land by its mere weight. Planting of grass and vegetation on mine dumps is required by environmental legislation.⁴³ Removal of a mine dump does not cause damage to the land or the dump because the sand and waste rock in the dump may be used and sold for commercial purposes, and the physical condition of the land may be restored to its previous condition. Due to the existence and accumulation of a mine dump over long periods of time, as in the present case, it may be difficult to determine the intention of successive mining companies that produced the mine dump(s).
- (d) The court could have relied on *Simmer and Jack Mines Ltd v GF Industrial Proprietary Co (Pty) Ltd*⁴⁴ for its approach that the subjective intention of the owner of the tailings dump is paramount in the determination of whether accession of a tailings dump has taken place. In its day the *Simmer and Jack Mines* decision, however, did not escape a fair amount of academic criticism.⁴⁵

4.1 State custodianship

The court held that the “the MPRDA leaves no doubt that mining rights in respect of minerals which have not been mined, have been taken out of private hands, and that such rights vest in the custodianship of the state ...”.⁴⁶ The

⁴² *The Mining and Mineral Laws of South Africa* (1982). See also Badenhorst, Mostert & Dendy “Minerals and Petroleum” in *LAWSA 18* 2 ed (2007) para 92.

⁴³ Sonnekus “Mynhoop as Roerende Saak – Aanhegting – Eiendomsreg *Simmer and Jack Mines Ltd v GF Industrial Proprietary Co (Pty) Ltd* 1978 2 SA 654 (W)” 1978 *De Jure* 390 392 points out that one should not be blinded by the statutory reason for planting grass but one should rather attach weight to the factual reality of growing grass.

⁴⁴ 1978 2 SA 654 (W) 658D-F.

⁴⁵ Van der Merwe “Law of Property (including Mortgage and Pledge)” 1978 *Annual Survey* 290 304; Lewis “*Superficius Solo Cedit – Sed Quid Est Superficies?*” 1979 *SALJ* 94 104-105; Schoeman “*Simmer and Jack Mines Ltd v GF Industrial Proprietary Co (Pty) Ltd* 1978 2 SA 654 (W) – Mynhoop – Roerend of Onroerend – Riglyne” 1978 *THRHR* 449; Sonnekus 1978 *De Jure* 390. See further Franklin & Kaplan *Mining and Mineral Laws* 52-54.

⁴⁶ Para 67.

court merely cited sections 2 and 3 of the MPRDA as authority for its view.⁴⁷ Section 2(b) has as an objective of the MPRDA, to give effect to “the principle of the State’s custodianship of the nation’s mineral and petroleum resources”. Section 3(1) states that the “mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans”. In terms of section 3(2), the State as the custodian of the nation’s mineral and petroleum resources, acting through the Minister, may grant rights to minerals and petroleum to exploit mineral and petroleum resources. The holder of a mining right may enter the land, prospect and mine for his or her own account on or under that land for the mineral for which the right has been granted and remove and dispose such mineral.⁴⁸ The entitlements by virtue of a mining right is exactly the same as the entitlements that the holder of a common law mineral right had.⁴⁹ Whilst section 3(1) refers to custodianship of minerals (or mineral resources),⁵⁰ section 3(2) refers to rights to (mine, own and sell) minerals. The court did not express itself about ownership of unsevered minerals in terms of section 3(1). The court seems to acknowledge an “expropriation” of mineral rights and vesting thereof in the custodianship of the state. The meaning of section 3 of the MPRDA has been the subject of much academic discussion⁵¹ and needs to be examined by the courts in future. At present this issue falls beyond the scope of our discussion.

The result and the purpose of the MPRDA are to terminate all privately owned common law rights to minerals in respect of land. Once this is accepted, the following questions can be raised: why would the rights to minerals in tailings dumps be excluded from such termination? Why would minerals like diamonds occurring in a tailings dump not fall under the custodianship of mineral resources? Is it because this resource is at times movable and/or privately owned? Such a distinction does not appear from the MPRDA itself. Theoretically, in terms of the common law maxim *cuius est solum eius est usque ad coelum et ad inferos* private ownership of unsevered minerals vested in owners of land.⁵² Whether this maxim has been abolished by the MPRDA and whether ownership is still vested in the owner of land is part of the academic debate referred to above which remains unanswered.

4 2 Applicability of the MPRDA

According to the court the “central question in this case is whether the MPRDA deprives the applicant of the ownership of the minerals in its tailings

⁴⁷ Para 67.

⁴⁸ S 5(3) of the MPRDA.

⁴⁹ See Badenhorst & Mostert *Mineral and Petroleum Law of South Africa* (2004) 3-11-3-12.

⁵⁰ It is submitted that whether the word “resources” appears in the MPRDA or not would not make a difference.

⁵¹ For a discussion of the differing views, see Badenhorst & Mostert “Artikel 3(1) en (2) van die *Mineral and Petroleum Resources Development Act* 28 of 2002: ‘n Herbeskouing” 2007 *TSAR* 476 and Van der Schyff “Who “owns” the Country’s Mineral Resources? The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act” 2008 *TSAR* 757.

⁵² See Badenhorst & Mostert *Mineral Law* 1-9-1-10.

dumps”.⁵³ The court held that there are several reasons why tailing dumps, and in particular the applicant’s tailing dumps which form the subject matter of this case, are not subject to control by the MPRDA.⁵⁴

4 3 Reasoning of the court

The reasoning of the court can be restated under the following headings:

4 3 1 Tailings dumps

The nature of a tailings dump was found to be as follows by the court: tailings dumps do not occur naturally in or on the earth. They are formed by the placement of processed and partly processed materials in order to be re-worked in future years when technology improves.⁵⁵ The tailings dumps are perceived as being movable. Diamonds occurring in movable tailings dumps do not occur “naturally in or on the earth”.⁵⁶ Tailings are to be regarded as a unique place in which minerals can be found after someone has removed them from the earth and processed them to some extent. Minerals that have not yet been mined differ from tailings by occurring in the earth in the sense of being a bonus to the owner of land. If they were undiscovered when the landowner bought the land, they were acquired without being part of the purchase price. Tailings are different because the owner of the tailings is entitled to extract the minerals by improved means.⁵⁷ A tailings dump is made, kept, sold and bought because of the knowledge that it contains valuable material. The court found that minerals in the tailings dumps had such a value to De Beers.⁵⁸

We agree that tailings are by nature unnatural or man-made structures. There is, however, an argument to be made that the diamonds contained in the mother kimberlite rock still occurred naturally in the mother rock in the tailings dump on the earth, and as such was subject to new or “old order mining rights”.⁵⁹ If the diamonds were not still in the mother rock or kimberlite in their natural possession but on another location on the earth they would have been visible to the eye. It seems as if the concept of ‘occurring naturally’ was not properly considered or correctly interpreted. The source of diamonds are kimberlite pipes and diamonds are only found in kimberlite pipes or in alluvial deposits because as the diamond pipes weathered the diamonds were moved from the kimberlite source or mother rock by water to be deposited on another location in what is called alluvial gravel. In the case of alluvials the diamonds are not situated or covered by smaller dimensions of the mother rock as is the case in diamondiferous tailings dumps derived from the mining of kimberlite pipes. The argument is thus that the diamonds in the tailings dumps *in casu* are still covered by the mother rock where it occurred naturally

⁵³ Para 67.

⁵⁴ Para 68.

⁵⁵ Para 68(ii).

⁵⁶ Para 68(i).

⁵⁷ Para 68(xii).

⁵⁸ Para 68(x).

⁵⁹ See, however the finding of the court in 4 3 3 below.

for hundreds of years but only at another location on the earth. If they were not in the natural kimberlite mother rock then it would be possible to retrieve these diamonds through a washing process like alluvial diamonds and not a crushing process when diamonds are retrieved from kimberlite rock. If the Roads Department does massive earth moving when constructing a road and puts the soil that they are so moving at another location then any minerals occurring in that soil will not be the subject of the MPRDA because the soil is not in its natural position anymore.⁶⁰ The Department of Minerals and Energy in practice grants mining permits in terms of the MPRDA for dump recovery purposes despite the *De Beers* decision.

4 3 2 Ownership of tailings dumps

The court found that diamonds in the ore were severed by De Beers or its predecessor in title from the mother rock. Upon such severance the ore became a new object. According to the court such severance vested ownership in the mineral title holder, De Beers, before the MPRDA came into operation.⁶¹ The court could have relied on *Trojan Exploration Co v Rustenburg Platinum Mines Ltd*⁶² for this statement of law. The court found that the tailings dumps have been owned by De Beers since 1973 and such ownership was undisputed.⁶³ The court also found that De Beers has spent money and labour and time on these tailings dumps.⁶⁴ According to the court the Minerals Act recognised De Beer's ownership of the tailings dumps. Reference is made to section 9(1) of the Minerals Act which provided for the issuing of a mining authorisation for "land or tailings".⁶⁵

It is submitted that only ownership of ore actually mined by De Beers could have vested in it. The other tailings dumps were purchased by De Beers. Ore mined by the New Company was acquired in ownership by it in its capacity as the miner. The court found earlier that for purposes of *inaedificatio* the mine and tailings dumps on the farm were movable. Ownership of all the assets of the New Company was purported to be transferred to De Beers by virtue of a notarial agreement of cession on 8 October 1973. Real rights to land may be transferred from one person to another by means of a notarial deed of cession.⁶⁶ Transfer of ownership of movables can, however, only be effected by one of the recognised forms of delivery.⁶⁷ As a lessee since 1940, De Beers, being already in possession of the mine dumps, probably acquired ownership of the tailings dumps and other movables during 1973 by delivery with the short hand (*traditio brevi manu*). This was never proven by De Beers in court. Only then can it be stated and accepted that De Beer's ownership

⁶⁰ It is assumed in our example that the Roads Department has not been exempted from some of the provisions of the MPRDA in terms of section 106(1) of the MPRDA.

⁶¹ Para 68(xi).

⁶² 1996 4 SA 499 (A) 509J-510A.

⁶³ Para 68(iii) and (x).

⁶⁴ Para 68(iii).

⁶⁵ Para 68(iv).

⁶⁶ S 16 of the Deeds Registries Act 47 of 1937.

⁶⁷ Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 73.

would be fully undisputed. The conclusion of the court in this regard seems to be unfounded. If New Company abandoned the tailings dumps then it did not form part of the movable assets that New Company sold to De Beers. The New Company did not work these dumps for many years and probably never had the intention to do so otherwise their allegedly valuable assets should have been specifically listed, which apparently was not the case. Whilst identification of tailings dumps take place in practice by notarial agreements, it remains important that transfer of ownership of (movable) tailings dumps takes place by virtue of one of the recognised forms of delivery of movables. Compliance with the requirements of such modes of delivery has to be proven in a court of law. If the transferee is not yet in possession, delivery with the long hand (*traditio longa manu*) could be resorted to if the requirements for this form of delivery have been met. The fruits of labour as age old theoretical justification for the institution of ownership were certainly present on the philosophical plane due to the labour and money expended by (the New Company and) De Beers as a mining company over the years.

It should be noted that what the Minerals Act recognised under the definition of a “holder” in section 1 was a “right to a mineral which occurs in or on tailings”. A sequence to establish who the “holder of the right to a mineral which occurs in or on tailings” was established: firstly, the holder of the mining right from which the tailings were produced. Secondly, if such holder does not exist, or if the tailings or mining right has been separately alienated, then the common law owner. Thirdly, failing such common law owner, or if he is unknown or cannot readily be traced, then the owner of the land on which the tailings is situated.⁶⁸ The mining authorisation merely allowed a holder of a mineral right or a mining right to exercise the entitlement of mining. The same would have applied to the holder of a right to a mineral which occurs in a tailings dump upon the issue of a mining authorisation.

4 3 3 Tailings and the MPRDA

Following a purposive interpretation by looking at the history and origin of the MPRDA, the White Paper and the objects of the Act, the court held that those sources are silent on tailings. There is no reference to tailings indicating that mineral rights in tailings fall under the custodianship of the state in terms of the MPRDA. The purpose of the MPRDA Act is not defeated or notably reduced by excluding tailings dumps from its operation.⁶⁹ Tailings dumps cannot be considered a *casus omissus* because no absurdity follows if tailings are excluded. According to the court it is quite easy to give full and proper effect to the MPRDA if tailings are left out. It was explained that the MPRDA targets mining rights in unsevered minerals in the ground, not in tailings which have been mined.⁷⁰ The court reasoned that in enacting the MPRDA the legislature must have contemplated that environmental legislation, such as

⁶⁸ Definition of holder with reference to a right to a mineral which occur in a tailings in s 1 of the Minerals Act 50 of 1991; Kaplan & Dale *A Guide to the Minerals Act 1991* (1992) 26.

⁶⁹ Para 68(v).

⁷⁰ Para 68(viii).

the National Environmental Management Act 107 of 1998, would adequately regulate the processing of minerals from dumps created before 2002. The processing of minerals from dumps is, therefore, not an unregulated activity.⁷¹ The court held that the MPRDA did not want to regulate tailings dumps. There is no continuation of the regime created by the Minerals Act in respect of tailings dumps.⁷² The transitional provisions of the MPRDA in schedule II do not continue De Beer's prospecting permit under section 6 of the Minerals Act.⁷³

We are of the view that the mining and processing of a mine dump or tailings dump created before the commencement of the MPRDA are not governed by the provisions of the MPRDA because such mine dump or tailings dump does not constitute a "residue stockpile" or a "residue deposit" being "mined" for purposes of the MPRDA. This would mean that the processing and mining of such mine dumps or tailings dumps are not subject to acquisition of mining rights in terms of the MPRDA, stringent environmental requirements and black economic empowerment provisions of the MPRDA, and delays in obtaining the necessary authorisations. We agree that such activities are, however, still subject to compliance with South African environmental laws in general.

The court pointed out that the MPRDA, has a clear definition of a "residue stockpile".⁷⁴ According to the court "mining" of a tailings dump is in fact "processing" for purposes of the MPRDA.⁷⁵ Processing is seen by the court as the winning of a mineral. The court held that tailings are not part of the heritage of the people of South Africa to which section 3(1) of the MPRDA refers.⁷⁶ The court found that the MPRDA did nothing to detract from De Beer's rights to the tailings dumps.⁷⁷

A finding that the state is now the custodian of the minerals remaining in tailings dumps, would according to the court amount to expropriation, which is not expressly provided for and cannot be inferred to have been contemplated by the legislature. It is indicated by the court that our law requires that a strict construction be placed upon statutory provisions which interfere with elementary rights. If the legislature intended to take away private rights in tailings dumps, which have existed for more than a hundred years, it would according to the court have stated so clearly and unambiguously.⁷⁸

The argument that, if there has been an expropriation, De Beers has a right to compensation under schedule II item 12 is perceived as fallacious by the court. It was argued that no expropriation took place but merely the termination of De Beer's "old order prospecting right" due to the failure of De Beers to apply for conversion of its rights. The reason for the failure to apply was the view of De Beers that the MPRDA does not apply to the tailings

⁷¹ Para 68(ix).

⁷² Para 68(iv).

⁷³ Para 68(iv).

⁷⁴ Para 68(iv).

⁷⁵ Para 68(iv).

⁷⁶ Para 68(xii).

⁷⁷ Para 68(xi).

⁷⁸ Para 68(vi).

dumps in question because they are movable assets which were not produced under the MPRDA.⁷⁹

Occurrence of diamonds in ore was not at issue according to the court. In order for diamonds in the tailings dumps to be considered “minerals” for purpose of the MPDRA (and therefore vesting under custodianship of the state) they must be found to be occurring naturally in the earth. According to the court the fact that they still occur naturally in the ore is irrelevant for purposes of the definition of “mineral” in the MPRDA.⁸⁰ A finding that it is relevant would have changed the outcome of the case and may be the correct decision.

It is true that the MPRDA does not deal with “tailings” but only with “mineral resources”, “residue stockpiles” and “residue deposits”. The court’s explanation of this failure on the part of the legislature is debatable. Another explanation is that the definition of “tailings” in the Minerals Act was simply not aligned with the definitions of “residue deposits” and “residue stockpiles”. Another example of the carelessness of the legislature with definitions in the MPRDA is the retention of the definition of “topsoil” from the Minerals Act without it being linked to the definition of mineral. On such explanation, custodianship of a broader mineral resource (including minerals contained in “tailings”) may just as well have been the purpose of the wide sweeping MPRDA. The court’s reference to a permit under section 6 seems to suggest that the transitional provisions of the MPRDA in schedule II did not continue De Beer’s prospecting permit. If such a prospecting permit existed it was subject to the transitional provisions of the MPRDA. The transitional provisions of the MPRDA do, however, not expressly make provision for the conversion of “right to a mineral which occurs in or on tailings”. The court’s reference to “mineral rights in tailings” may be confusing in the light of the rights to tailings recognised under the Minerals Act. Such rights should have suffered the same institutional expropriation fate as common law mineral rights, the reason being that expropriations in terms of the MPRDA could also take place if holders of mineral rights or other rights were excluded on 1 May 2004 from the transitional provisions in the sense that they did not become holders of “old order rights”.⁸¹

Whilst it is correct that a finding that the state is also custodian of tailings dumps would constitute expropriation of ownership of such movables, it must be remembered that the legislature did not hesitate to expropriate “old order rights”, especially “unused old order rights”. The custodianship of the state over mineral resources⁸² and rights to minerals⁸³ amounts to an expropriation of (old order) mineral rights, prospecting rights and mining rights which is only constitutional because of the transitional arrangements of the MPRDA and, especially, the compensation which is provided for in item 12 of the

⁷⁹ Para 68(vii).

⁸⁰ Para 68(xi).

⁸¹ See Dale et al *Mineral and Petroleum Law* sch II-210.

⁸² S 3(1) of the MPRDA.

⁸³ S 3(2).

transitional arrangements.⁸⁴ Expropriation of minerals in movable tailings dumps may not have been contemplated by the legislature as transitional measures for such movable tailings dumps are absent. If it was contemplated it would have been unconstitutional.⁸⁵

In looking at remedies available to De Beers a distinction should be drawn between their ownership of the movable tailings dump and their “old order rights” in respect of the farm. The court is correct to say that as owner of the movable tailings dump De Beers was not expropriated and need not have resorted to compensation under item 12 of the transitional arrangements to the MPRDA. As holder of “old order rights” De Beers was, however, subject to the transitional arrangements and could, but have not chosen to do so, follow the transitional route.

From the definition of a “mineral”⁸⁶ one may deduce that in order for any substance to qualify as a mineral for purposes of the MPRDA the following requirements have to be satisfied, namely:⁸⁷ the substance (a) must either be in solid, liquid or gaseous form; (b) has (i) to occur naturally in or on the earth, in or under water; and (ii) to have been formed by, or subjected to, a geological process; or (c) has to occur in residue stockpiles or residue deposits. Sand, stone, rock, gravel and clay are minerals. Water *per se*, petroleum and peat are, however, not minerals. For purposes of the definition of a “mineral” in the MPRDA, a mineral either occurs naturally in the earth or under water or in a “residue stockpile” or “residue deposit”. The tailings dump or the diamonds contained by the tailings dump do not occur naturally in the earth. A tailings dump is also not a “residue deposit” or a “residue stockpile” for purposes of the MPRDA. The crux of the decision is that minerals in tailings dumps do not occur naturally in the earth or in such “residue stockpile” or residue deposits”. The definitions of “residue stockpile” and “residue deposit” in the MPRDA refer only to “residues” produced by virtue of an exploration right,⁸⁸ mining permit, mining right (or production right) granted in terms of the Act. Tailings dumps not so produced, therefore, are not regulated in terms of the MPRDA.⁸⁹ Thus, the diamonds found in tailings dumps, containing diamondiferous material on the farm, are not diamonds or minerals for purposes of the MPRDA.

5 Summary

In the determination whether accession of a mine dump or tailings dump has taken place, it seems as if the new approach towards *inaedificatio* will be followed by the courts. As to the determining factors, it should be kept

⁸⁴ *Agri SA and Van Rooyen v Minister of Minerals and Energy* NGP 06-03-2009 cases no 55896/2007 and 10235/2008 (unreported decision of the North and South Gauteng High Court, Pretoria) para 11. For a discussion of this decision, see Badenhorst “Expropriations by Virtue of the Mineral and Petroleum Resources Development Act: Are There Some More Trees in the Forest?” 2009 *TSAR* 600.

⁸⁵ See *Agri SA and Van Rooyen v Minister of Mineral and Energy* NGP 06-03-2009 cases no 55896/2007 and 10235/2008 para 11.

⁸⁶ S 1.

⁸⁷ Badenhorst & Mostert *Mineral Law* 13-8–13-8A; Badenhorst & Shone 2008 *Obiter* 44.

⁸⁸ Only with reference to the definition of a “residue deposit”.

⁸⁹ Dale et al *Mineral and Petroleum Law MPRDA*–190.

in mind that the purpose of such tailings dumps is not to serve the land permanently because due to new technology such dumps can be reprocessed and mined. Whether this was always intended by different mining companies at different times and decades ago is debatable. Reprocessing of tailings dumps take place on a large scale in South Africa. A dump is considered viable for reprocessing when 0.4 grams of gold can be obtained from every ton. For instance, the familiar mine dumps south of Johannesburg are disappearing due to reprocessing. The 200 dumps scattered in and around the city are the remains of mine workings from the birth of Johannesburg in 1886. Some 170 million tons of sand have so far been removed from the dumps, and the plan is to eventually remove them all, and in the process, change the face of south Johannesburg.⁹⁰ The legal status of mine dumps and tailings dumps, as determined in the *De Beers* decision, will expedite this process which is to be welcomed from an economical, environmental, job creation and aesthetic perspective.

A “residue stockpile” created by a holder of a mining permit, mining right or production right in terms of the MPRDA and a “residue deposit” remaining at the termination of a prospecting right, exploration right, mining permit, mining right or production right are governed by the MPRDA. “Mining” of such a “residue deposit” is also governed by the MPRDA. A mine dump or tailings dump created before the commencement of the MPRDA and the processing and mining thereof is, however, not governed by the provisions of the MPRDA because such mine dump or tailings dump does not constitute a “residue stockpile” or a “residue deposit” being “mined” for purposes of the MPRDA. The processing and mining of such mine dumps or tailings dumps are not subject to acquisition of prospecting or mining rights in terms of the MPRDA, stringent environmental requirements and black economic empowerment provisions of the MPRDA, and delays in obtaining the necessary authorisations. Such activities are still subject to compliance with South African environmental, health and safety laws in general. It is submitted that the MPRDA would only be applicable to “residues” created by holders of (new order) rights in terms of the MPRDA. Tailings dumps created by holders of “old order rights” during the five year period of transition before termination of “old order mining rights” would by analogy also not be subject to the provisions of the MPRDA. Such termination of “old order mining rights” will take place either during the five year period of transition upon: (i) conversion into and registration of new order mining rights, (ii) refusal of an application for conversion by the Minister or (iii) termination of unconverted “old order mining rights” on 30 April 2009. The reason for such additional period is that item 7(7) of the transitional arrangements to the MPRDA determines that the “old order mining right” only ceases to exist upon conversion of the “old order mining right” and the registration of the mining right into which it was converted. The holder must lodge the converted mining right within 90 days from the date on which he or she received notice of conversion at the Mineral

⁹⁰ Davie “Johannesburg’s Mine Dumps Bite the Dust” <http://www.ens-newswire.com/ens/jan2004/2004-01-27-01.asp> (accessed 22-03-2009).

and Petroleum Titles Registration Office for registration.⁹¹ Simultaneously, the “old order mining right” must be lodged at the Deeds Office or Mineral and Petroleum Titles Registration Office for deregistration.⁹² Termination of the “old order mining right” may even be after 30 April 2009, namely, until approval of the conversion to a new order mining right by the Minister of Minerals and Energy and registration thereof in the Mineral and Petroleum Titles Registration Office which period in practice could take more than a year. Application for conversion of the “old order mining right” must, however, have taken place prior to 31 April 2009. Such “old order mining right” remains valid until refusal or granting of the application for conversion and registration in the Mineral and Petroleum Titles Registration Office.

The legislature intends to undo the *De Beers* decision by substitution of the definitions of “residue deposit” and “residue stockpile” in the MPRDA by reference not only to new order rights but also to “old order rights” in the respective new definitions.⁹³ Working and reprocessing of mine dumps prior to the commencement of the proposed amendments will still amount to be “working in the past”. Whether such amendments will apply retrospectively to mine dumps or tailings dumps created within the abovementioned periods will, however, not be further discussed at present.

6 Conclusion

The court in *De Beers* did not express itself about ownership of unsevered minerals in terms of section 3(1) of the MPRDA. This fundamental question, the subject of differing academic views, remains unanswered.

The *De Beers* decision has far reaching consequences. Mine dumps or tailings dumps created upon the exercise of “old order mining rights” before the commencement of the MPRDA and, it is submitted, even after commencement of the MPRDA until eventual termination of the “old order mining rights”, are not subject to the extensive, mining, environmental, empowerment provisions of the MPRDA. Termination of “old order mining rights” takes place upon: (i) refusal of an application for conversion of a mining right during (or even after) the period of transition, (ii) conversion into and registration of new order mining rights during (or even after) the period of transition or (iii) termination of unconverted “old order mining rights” on 30 April 2009. The legal status of these tailings dumps is simply determined by application of the common law principles regarding accession. If upon such application it is found that a tailings dump is movable, it remains important that transfer of ownership of (movable) tailings dumps takes place by virtue of one of the recognised forms of delivery of movables. Mere identification of tailings dumps in practice by notarial agreements would not qualify as such form of delivery of movables. Processing of these dumps will, however, still be subject to compliance with South African environmental, health and safety laws in general. To the

⁹¹ Item 7(5) of the MPRDA.

⁹² Item 7(5) of the MPRDA.

⁹³ S 1 of the Mineral and Petroleum Resources Development Amendment Act 2008 published in GG 32151 of 2009-04-21.