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## LARGE SCALE EXPROPRIATION OF MINERAL RIGHTS IN SOUTH AFRICA: THE *AGRI SOUTH AFRICA* FIASCO

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*The Supreme Court of Appeal of South Africa decided in Minister of Minerals and Energy v Agri SA (CALS amicus curiae) that the Mineral and Petroleum Resources Development Act 28 of 2002 did not expropriate all former mineral rights in South Africa, because the so-called right to mine was actually vested in the State. The decision of the court a quo (previously discussed) was overruled. It is argued that the decision of the Supreme Court of Appeal was incorrect because it negated the content of mineral rights and departed from the accepted views about the content and features of mineral rights. It is indicated that the decision may also have a negative effect on the security of tenure of new prospecting and mining rights granted by the State, and investor confidence in South Africa.*

### INTRODUCTION

The Supreme Court of Appeal of South Africa has recently rendered one of the most controversial decisions in over 150 years of mining law in *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)*<sup>1</sup> (hereafter "*Agri SA IIP*"). Wallis JA (with whom Heher and Leach JJA concurred) (majority of the court) decided that all mineral rights that existed in South Africa under the (repealed) *Minerals Act 50 of 1991* were not expropriated by enactment of the *Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)*.<sup>2</sup> Nugent JA (with whom Mhltantla JA concurred) concurred with the majority of the court for different reasons.<sup>3</sup>

In a previous contribution to this Journal,<sup>4</sup> the decision of the court was discussed a quo in *Agri South Africa v Minister of Minerals and Energy (CALS amicus curiae)*<sup>5</sup> ("*Agri SA II*"). Briefly, it was decided that in the case of a common law mineral right (underlying an "unused old order right") such mineral right had "been expropriated by the enactment of the MPRDA, specifically in terms of section 5 read with sections 2 and 3 thereof".<sup>6</sup> The court held that the State acquired the substance of the property rights of the erstwhile holder of common law mineral rights.<sup>7</sup> The court

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<sup>1</sup> 2012 (5) SA 1 (SCA).

<sup>2</sup> Paragraphs 90-99.

<sup>3</sup> Paragraph 117.

<sup>4</sup> P J Badenhorst, "Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* saga" (2011) *Australian Resources and Energy Law Journal* 261; see also P J Badenhorst and N J J Olivier, "Expropriation of 'unused old order rights' by the MPRDA: You have lost it!" (2012) 75.2 *THRHR* 329.

<sup>5</sup> 2012 (1) SA 171 (GNP). As to the judgment at the exception stage of this case, see *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) (*Agri SA I*) and the discussion thereof by P J Badenhorst, "Expropriations by virtue of the Mineral and Petroleum Resources Development Act: Are there some more trees in the forest? *Agri South Africa and Van Rooyen v Minister of Minerals and Energy* (2009) TSAR 600; Heleen Van Niekerk and Hanri Mostert, "Expropriation of Unused Old Order Mineral Rights: The Courts have its first say" (2010) 21.1 *Stell LR* 158; Peter Leon "Compensation for expropriation of 'old order mineral rights'" July 2011 *De Rebus* 47.

<sup>6</sup> *Agri South Africa v Minister of Minerals and Energy (CALS as amicus curiae)* 2012 (1) SA 171 (GNP) para 88; P J Badenhorst and N J J Olivier, op cit n 4, at 335.

<sup>7</sup> Ibid para 82; P J Badenhorst and N J J Olivier, ibid at 335.

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 the same as, and in some respects, identical to, the contents of common law mineral rights".<sup>8</sup> The court found that: (a) a former holder of a mineral right in respect of coal, which did not apply for new prospecting or mining rights in terms of item 8(2) of Sched II of the MPRDA, was expropriated by provisions of the MPRDA; and (b) a cessionary of its compensation claim was accordingly entitled to compensation.<sup>9</sup> In the said contribution, the author has provided the reader with a brief overview of the South African mineral law system which preceded the MPRDA, relevant provisions of the MPRDA, the transitional measures, and basic principles of Expropriation law which serve as background for the present discussion as well.

## BACKGROUND

Some further background for the present discussion of the *Agri SA III* decision by the Supreme Court of Appeal may be provided.<sup>10</sup> Since the discovery of diamonds and gold in South Africa during 1867 and 1870, respectively, broadly speaking, three distinct periods of legislation can be distinguished.

The first is an initial or halfway-house period during which prospecting and/or mining rights to different classes of minerals were divided or shared between the State and private holders of mineral rights.<sup>11</sup> For instance, in terms of s 2(1) of the *Mining Rights Act 20 of 1967* and s 2 of the *Precious Stones Act 73 of 1964*, the right to prospect for natural oil and the right to mine natural oil, precious stones and precious metals (on "state land"<sup>12</sup> and "private land"<sup>13</sup>) were vested in the State. The right to prospect for base minerals, precious stones and precious metals and the right to mine base minerals were held by the holders of mineral rights. The right to prospect for base minerals, precious metals and precious stones was vested in the owner of "alienated state land",<sup>14</sup> whilst the rights to mine such minerals were held by the State.<sup>15</sup> Preceding Union, Colonial and Afrikaner Republican legislation contained similar statutory reservations.<sup>16</sup>

<sup>8</sup> Ibid para 82; P J Badenhorst and N J J Olivier, *ibid* at 335.

<sup>9</sup> Ibid para 88.

<sup>10</sup> For a more detailed discussion of the decision in *Agri SA III*, see Badenhorst "Expropriation of 'unused old order rights' by the MPRDA: you had nothing!" to be published in the 2013 THRHR.

<sup>11</sup> See B L S Franklin and M Kaplan, *The Mining and Mineral Laws of South Africa* (Butterworths, 1982), 1.

<sup>12</sup> "State land" was land of which the State was the owner of the land and the holder of mineral rights to precious stones, precious metals, base minerals and natural oil.

<sup>13</sup> "Private land" was land in respect of which the State was not the holder of the rights to precious stones, precious metals, base minerals and natural oil.

<sup>14</sup> "Alienated state land" was land not owned by the State but in respect of which there was a reservation of the rights to precious stones, precious metals, base minerals and natural oil to the State.

<sup>15</sup> Section 12(1) of the *Mining Rights Act 20 of 1967* and s 5(1) of the *Precious Stones Act 73 of 1964*.

<sup>16</sup> See further, M O Dale, *An Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* (LLD thesis, University of South Africa (1979)), 175-247; L V Kaplan, *The Development of Various Aspects of the Gold Mining Laws in South Africa from 1871 until 1967* (PhD thesis, University of the Witwatersrand, 1986); P J Badenhorst and Hanri Mostert, *Mineral and Petroleum Law of South Africa* (2004) (Revision Service 7), Juta at 1-18 to 1-20; Elmarie Van der Schyff, *Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis, Northwest University (2006)), at 22-53. It should be noted that during this period the right to prospect and mine all minerals could also have vested in the State. See, for instance, s 4 of the *Natal Mines Law 17 of 1887* of the Natal colony.

Ever since the halfway-house period mineral rights, which could be separated from ownership of the land and registered in the deeds register,<sup>17</sup> were always recognised by the legislature<sup>18</sup> and courts<sup>19</sup> as limited real rights (proprietary rights) that entitle holders to go upon the land to which the mineral rights relate and prospect for minerals, and, if minerals are found, to mine the minerals and to dispose thereof. Mineral rights were classified as *quasi-servitudes* by the courts.<sup>20</sup> The closest equivalent to a mineral right in the Australian law would be a *profit à prendre* in gross to enter land and take minerals.<sup>21</sup> A mineral right had a definable content<sup>22</sup> and distinct features developed over time.<sup>23</sup> Mineral rights are recognised as “property” for purposes of constitutional

<sup>17</sup> See P J Badenhorst and Hanri Mostert, *op cit* n 16, at 3-1 to 3-4.

<sup>18</sup> Article 363 of a *Volksraadsbesluit* of the *Zuid-Afrikaansche Republiek* (South African Republic) dated 1881-11-08; s 14 of *Act 7 of 1883*; s 30-32 of the *Registration of Deeds and Titles Act 25 of 1909* (Transvaal); s 41 of the *Deeds Registries Act 13 of 1918*; ss 70-73 of the *Deeds Registries Act 47 of 1937*.

<sup>19</sup> *Van Vuren v Registrar of Deeds* 1907 TS 289 294 295; *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Ex parte Pierce* 1950 (3) SA 628 (O) 634 C-D; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) 956E; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509G; BLS Franklin and M Kaplan *op cit* n 11, at 7.

<sup>20</sup> *Lazarus and Jackson v Wessels, Oliver and Coronation Freehold Estates, Town and Mines Ltd* 1903 TS 499 510; *Van Vuren and Ors v Registrar of Deeds* 1907 TS 289 294; *Nolte v Johannesburg Consolidated Investments Co Ltd* 1934 AD 295 305-306; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509I. In some cases, the view was expressed that mineral rights can be classified as *sui generis*: *Ex parte Pierce* 1950 (3) SA 628 (O) 634D; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) 956E; *Apex Mines Ltd v Administrator, Transvaal* 1986 (4) SA 581 (T) 590F. The quasi-servitude construction has, however, been accepted by the Supreme Court of Appeal in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 371E-F.

<sup>21</sup> See Michael Hunt, *Mining Law in Western Australia* (4th ed, Federation Press 2009), 38.

<sup>22</sup> A mineral right had as its content the following entitlements: (a) use, which entails the entitlement to use the land for the purposes of exploitation of minerals to which the mineral rights relate. This entitlement, in turn, 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) a 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 exercise an entitlement which has been restricted, after removal of the restriction (see P J Badenhorst and Hanri Mostert, *op cit* n 16, at 3-12 and *Agri South Africa v Minister of Minerals and Energy (CALS as amicus curiae)* 2012 (1) SA 171 (GNP) para 29.

<sup>23</sup> Additional features were: (a) a mineral right title subsisted in perpetuity; (b) a mineral right holder was obliged to exercise his entitlements in a manner less injurious to the interest of the owner of the surface of the land; (c) upon severance of the minerals from the land, ownership thereof was acquired by the mineral right holder; (d) mineral rights were freely transferable and capable of being transmitted to the heirs of the holder; (e) mineral rights could further be fragmented into shares (subject to legislative provisions), prospecting rights or mining rights to particular minerals or classes of minerals; (f) mineral rights could themselves have been the object of other limited real rights such as usufruct and mortgage; (g) due to its elasticity, a mineral right expanded to its original form upon termination of the limited rights granted; (h) mineral rights were valuable assets having a commercial value; and (i) the holder of a mineral right was not under a duty to exploit minerals even if it would be for the public benefit (see *Agri South Africa v Minister of Minerals and Energy*; *Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP)

protection under the Property clause of the *Constitution of the Republic of South Africa, 1996* (Constitution).<sup>24</sup> Holders of mineral rights could grant prospecting or mining rights for consideration by virtue of a prospecting contract or a notarial mineral lease, respectively.<sup>25</sup> Mining statutes during the halfway-house period provided for the granting of statutory prospecting and mining rights by the state.<sup>26</sup>

The second is a period of privatisation during which Apartheid government re-vested state-held prospecting or mining rights to certain classes of minerals in private holders of mineral rights.<sup>27</sup> This formed part of the Apartheid government's broader policy on privatisation during the eighties<sup>28</sup> or perhaps an attempt to entrench privately-held mineral rights against the demands of a future government.<sup>29</sup> Other forms of governmental intervention in the mineral industry, such as advancement of Afrikaner interest in the mining sector and development of new self-sufficient industries, also took place since the National party came in power in 1948.<sup>30</sup> In terms of s 5(1) of the *Minerals Act 50 of 1991* the holder of a mineral right had the right to enter land, prospect and mine for all minerals<sup>31</sup> and dispose thereof.<sup>32</sup> Before prospecting rights or mining rights could be exercised, authorisation in the form of a prospecting permit<sup>33</sup> or mining authorisation<sup>34</sup> from the State had to be obtained. During the privatisation period, statutory prospecting and mining rights survived as transitional rights.<sup>35</sup>

para 29 and 30; *Agri South Africa v Minister of Minerals and Energy (CAL S as amicus curiae)* 2012 (1) SA 171 (GNP) paras 7-9).

<sup>24</sup> Section 25 of the Constitution of the RSA, 1996. *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. P J Badenhorst and P H G Vrancken "Do mineral rights constitute 'constitutional property'?" *Lebowa Mineral Trust Beneficiaries Forum v The President of the RSA* 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 *THRHR* 387-388.

<sup>25</sup> *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 65.

<sup>26</sup> The *Mining Rights Act 20 of 1967* and the *Precious Stones Act 73 of 1964* and preceding legislation.

<sup>27</sup> See P J Badenhorst, "The revesting of state-held entitlements to exploit minerals in South Africa: Privatisation or deregulation?" 1991 *TSAR* 113; M Kaplan and M O Dale, *A Guide to the Minerals Act 1991* (Butterworths, 1992), 5-6 14.

<sup>28</sup> *Benade v Minister van Mineraal en Energiesake* 2002 *JDR* 0769 (NC) 15; ANC "Maximising the developmental impact of the people's mineral assets: State intervention in the minerals sector" Report prepared for the ANC's Policy Institute (17 February 2012) 39 (Hereafter cited as "ANC Policy Report"). As to privatisation by the apartheid government, see in general the *White Paper on Privatisation and Deregulation in the RSA*, 1987; G N Barrie "Privatisation: the legal issues are as important as the economic ones" 1988 *De Rebus* 407; R G Evans "Some economic and legal aspects of the privatisation of the public sector with specific reference to the South African Transport Services" 1989 *SA Merc LJ* 373.

<sup>29</sup> The compensation payable for expropriation of a mineral right in terms of the *Expropriation Act 63 of 1975* was also enhanced on 1 May 1992 to make specific provision for payment of market value of a registered mineral right and actual financial loss caused by the expropriation (s 11(a) of the *Expropriation Amendment Act 45 of 1992*).

<sup>30</sup> For a discussion of these other forms of state intervention, see ANC Policy Report op cit n 28, at 37-44.

<sup>31</sup> Different mineral rights could have existed in respect of classes of minerals or specific minerals.

<sup>32</sup> Section 43 of the *Minerals Act 50 of 1991* granted transitional rights to owners of the former category of "alienated state". See further M Kaplan and M O Dale, op cit n 27 at 121-131; P J Badenhorst and Hanri Mostert, op cit n 16, at 12-3 to 12-5. Statutory prospecting and mining rights survived as transitional rights (see further P J Badenhorst and Hanri Mostert, *ibid* at 12-1 to 12-3 and 12-5 to 12-18).

<sup>33</sup> Section 6(1) of the *Minerals Act 50 of 1991*.

<sup>34</sup> Section 9(1) of the *Minerals Act 50 of 1991*.

<sup>35</sup> See Ch VII of the *Minerals Act 50 of 1991*; M Kaplan and M O Dale, op cit n 24, at 56-74 and 80-132.

And the third is a transformation period during which the ANC government vested all rights to all minerals in the State.<sup>36</sup> The State is custodian of mineral resources which, in turn, belong to the South African nation.<sup>37</sup> The State, acting through the Minister of Mineral Resources, can grant different kinds of rights to all minerals to an applicant<sup>38</sup> against payment of royalties and fees.<sup>39</sup> These rights take the form of reconnaissance permissions, prospecting rights, permissions to remove minerals, retention permits, mining permits or mining rights. It was recently acknowledged by the ANC in its policy report on state intervention in the mining sector that nationalisation of mineral assets was realised through the MPRDA through the conversion of "old order private rights" to "new order state rights".<sup>40</sup>

During the transformation period all previous mineral rights, prospecting rights and mining rights were recognised as "old order rights" under the umbrella of the transitional arrangements of the MPRDA. Holders of old order prospecting rights<sup>41</sup> or old order mining rights<sup>42</sup> could apply for conversion into prospecting rights or mining rights within two or five years of enactment of the MPRDA, respectively. Holders of unused old order rights (land upon which no prospecting or mining took place at commencement of the MPRDA) had the exclusive right to apply for a prospecting right or a mining right within a one-year period of transition.<sup>43</sup> Upon: (a) a grant of a prospecting right or mining right or conversion into a prospecting right or mining rights and registration thereof;<sup>44</sup> (b) failure to apply for such rights or conversion of such rights; or (c) refusal of an application, the old order rights were terminated.<sup>45</sup> Upon such termination of old order rights, the question arose as to whether the holders of old order rights had been expropriated by enactment of the MPRDA, and whether a claim of compensation is available in terms of item 12 of Sched II to the MPRDA. The general view was that some form of expropriations did take place.<sup>46</sup>

## FACTS AND ISSUES

The facts were, briefly: Prior to enactment of the MPRDA, Sebenza Mining (Pty) Ltd (hereafter "Sebenza") was the registered holder of mineral rights to coal in respect of two properties situated in Mpumalanga (in the former Transvaal) which it acquired for R1048000. After enactment of the MPRDA the company did not exercise its exclusive right to apply for a prospecting or mining right and the unused old order right, accordingly, ceased to exist. The company, by then in liquidation, lodged a claim for compensation in terms of item 12(1) of Sched II of the MPRDA

<sup>36</sup> See P J Badenhorst and Hanri Mostert, "Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property clause" 2003 Stell LR 377.

<sup>37</sup> Section 3(1) of the MPRDA.

<sup>38</sup> Section 3(2) of the MPRDA.

<sup>39</sup> Royalties are levied in terms of the *Mineral and Petroleum Resources Royalty Act 28 of 2008*.

<sup>40</sup> ANC Policy Report op cit n 28, at 353.

<sup>41</sup> Item 6 of Sched II of the MPRDA.

<sup>42</sup> Item 7 of Sched II of the MPRDA.

<sup>43</sup> Item 8 of Sched II of the MPRDA.

<sup>44</sup> Registration takes place in the Mineral and Petroleum Titles Registration Office.

<sup>45</sup> See items 7(7) and (8), 8(7) and (8)(3)(4) of the MPRDA.

<sup>46</sup> M O Dale, L Bekker, F J Bashall, M Chaskalson, C Dixon and G L Grobler *South African Mineral and Petroleum Law* (Butterworths, 2005, (Service issue 10), at SchII-206 to SchII-212(18)); P J Badenhorst and Hanri Mostert, op cit n 36, at 396-399; "Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property clause" 2004 Stell LR 22 42-51; P J Badenhorst and Hanri Mostert, op cit n 16, ch 25.3.5. See, however, A J Van der Walt, *Constitutional Property Law* (2006) Juta 387.

contending that the MPRDA expropriated its coal rights. The claim of compensation was ceded to Agri South Africa for R250 000. Agri South Africa is a voluntary association not-for-gain representing the interests of commercial farms in South Africa. Agri South Africa claimed compensation in a "test case" for the alleged expropriation of the coal rights in amount of R750 000. The claim was rejected by the Department of Mineral Resources<sup>47</sup> but upheld by the court *a quo* and compensation of R750 000 was awarded.<sup>48</sup>

On appeal, a much broader question was considered by Wallis JA to be at issue, namely, did the MPRDA on 1 May 2004 expropriate all mineral rights in South Africa?<sup>49</sup> Nugent JA, however, confined his judgment to the position of holders of unused old order rights because he correctly indicated that holders of other categories of old order rights were not parties before the court.<sup>50</sup> It should also be remembered that the court *a quo* in *Agri SA IP*<sup>51</sup> did not deem it necessary to decide whether the MPRDA expropriated all minerals rights, or apply the principles in a wider context.

It is generally accepted that the structure of any constitutional property expropriation enquiry consists of a number of phases in order to determine whether:<sup>52</sup>

- (a) the right of or interest in question satisfies the s 25 definition of property;
- (b) a deprivation has taken place;
- (c) the deprivation is in terms of a law of general application (the so-called non-arbitrariness criterion);
- (d) the deprivation is in line with the s 36 general limitations provisions;<sup>53</sup>
- (e) the nature of the deprivation is such that it constitutes expropriation;
- (f) the expropriation is in terms of a law of general application, for public purpose or in the public interest and subject to payment of compensation;<sup>54</sup> and
- (g) in cases of non-compliance, whether it is justifiable as being in accordance with s 36.<sup>55</sup>

<sup>47</sup> See *Agri South Africa v Minister of Minerals and Energy (CALS as amicus curiae)* 2012 (1) SA 171 (GNP) paras 16, 17 and 20, and *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 2.

<sup>48</sup> *Agri South Africa v Minister of Minerals and Energy (CALS as amicus curiae)* 2012 (1) SA 171 (GNP) para 99.

<sup>49</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 4. As to the reasons for such a broad sweep, see *ibid* paras 3 81 90.

<sup>50</sup> *Ibid* para 103.

<sup>51</sup> *Agri South Africa v Minister of Minerals and Energy (CALS as amicus curiae)* 2012 (1) SA 171 (GNP) para 95.

<sup>52</sup> See P J Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman's Law of Property* (5th ed) 2006 Juta 529; P J Badenhorst and N J J Olivier, *op cit* n 4, at 338.

<sup>53</sup> In terms of s 36 of the *Constitution of the Republic of South Africa, 1996* fundamental rights may be limited only in terms of "law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". During such determination, the following factors are taken into account: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

<sup>54</sup> Section 25(2) of the *Constitution of the Republic of South Africa, 1996*.

<sup>55</sup> *First National Bank of SA Ltd t/a Wesbank v The Commissioner, South African Revenue Service* para 46; *Haffejee v Ethekwini Municipality* [2011] ZACC 28 para 26.

Such a detailed enquiry was not undertaken by the Supreme Court of Appeal, probably because of its finding that no deprivation took place. According to the majority of the court the appeal raised the following issues: "(a) What constitutes an expropriation in terms of section 25(2) of the Constitution? (b) What were the rights enjoyed by holders of mineral rights prior to the MPRDA coming into operation? (c) Were those rights expropriated in terms of the provisions of the MPRDA?"<sup>56</sup>

### DECISION

The court's decision in respect to the above issues identified by the court will be discussed, followed by a general discussion and conclusion as to the correctness of the decision. By considering the possibility of whether expropriation of old order rights took place, the court, by implication, recognised old order rights as constitutional property.

### EXPROPRIATION

Wallis JA provided a general discussion of the distinction in the Constitution between and requirements of a deprivation and expropriation of property.<sup>57</sup> It was accepted that expropriation is a form or subset of deprivation of property.<sup>58</sup>

"Deprivation"<sup>59</sup> of property and "acquisition"<sup>60</sup> of property by the State was identified as defining features of an act of expropriation in terms of s 25(2) of the Constitution. Wallis JA accepted that acquisition of property (in its constitutional sense) by the expropriator (or on behalf of others), "whether directly or indirectly, that bears some resemblance to the property that was the subject of expropriation" is one of the identifying characteristics of an expropriation.<sup>61</sup> The court highlighted the problems presented by the variety of forms of acquisition<sup>62</sup> after its survey of foreign case law,<sup>63</sup> including *Newcrest Mining (WA) Ltd v The Commonwealth*,<sup>64</sup> and indicated that "acquisition" should be determined on a case by case basis.<sup>65</sup> Payment of compensation was regarded as a prerequisite for a lawful expropriation and a necessary consequence thereof, but not a "characteristic serving to distinguish expropriations from other forms of deprivation."<sup>66</sup>

In order to determine whether a deprivation of mineral rights or an acquisition of those rights by the state has taken place, the following tests are proposed by Wallis JA:

"[I]t is first necessary to consider the nature of mineral rights. The next step in the analysis must be to compare the position of holders of mineral rights in terms of those rights and their position after the changes brought about by the MPRDA. That deals with the issue of deprivation. Then the position of the state insofar as the rights it held before and after

<sup>56</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 11.

<sup>57</sup> See *ibid* paras 12-13.

<sup>58</sup> *Ibid* para 14.

<sup>59</sup> *Ibid* para 85.

<sup>60</sup> *Ibid* para 24.

<sup>61</sup> *Ibid* para 18. Because *Agri SA* was relying on an alleged direct expropriation by the provisions of the MPRDA the court did not deal with constructive expropriations (see *ibid* para 14). As to the provisions of MPRDA as a form of constructive expropriation, see Peter Leon, "Creeping expropriation of mining investments: an African perspective" (2009) *Journal of Energy and Natural Resources Law* 597.

<sup>62</sup> See *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 23.

<sup>63</sup> *Ibid* paras 20-22.

<sup>64</sup> (1997) 190 CLR 513 (HCA).

<sup>65</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 24.

<sup>66</sup> *Ibid* para 18.



the enactment of the MPRDA must be considered in order to determine the issue of acquisition.<sup>67</sup>

The court's treatment and application of these tests will not be discussed.

#### NATURE AND ORIGIN OF MINERAL RIGHTS

The source and nature of mineral rights were identified as having a bearing on the outcome of this case.<sup>68</sup> Wallis JA held that what came to be referred to as "common law mineral rights", do not have their origin in the South African common law.<sup>69</sup> Rather, the recognition of a mineral right as an independent right originated from legislation that recognised it as such.<sup>70</sup> The ability to sever mineral rights from ownership of land was afforded by a statute allowing registration thereof in the Deed office<sup>71</sup> and not the common law.<sup>72</sup> According to Wallis JA, the concept of a mineral right was founded on the "right to mine"<sup>73</sup> which does not have its source in the common law either.<sup>74</sup> A mineral right was said to have as its content the right to mine, subsidiary rights and the right not to exercise it.<sup>75</sup> Mineral rights were regarded as alienable and inheritable.<sup>76</sup>

Wallis JA, instead, opted to work with the novel notion of a right to mine. The meaning of the right to mine varies in his judgment from, an allocated private law right in the sense of the right to prospect and mine for minerals and extract and depose of them,<sup>77</sup> to a substantive power of the State to exercise or allocate the right to mine.<sup>78</sup> Linked to the private law right to mine was the power to allocate the right to others.<sup>79</sup>

After an overview of the pre-Union mining laws of South Africa,<sup>80</sup> Wallis JA concluded that "the right to mine was a right that the State asserted for itself and controlled".<sup>81</sup> According to Wallis JA, in the former Transvaal it also included the right to mine base minerals because legislation demanded payment of a royalty.<sup>82</sup> Despite the express reservation of the right to prospect and mine base minerals to holders of mineral rights by s 2(1)(b) of the *Mining Rights Act 20 of 1967*, Wallis JA held that under s 2(1) the "State controlled the prospecting and mining of all minerals, precious and base, and either reserved them to itself or allocated them to the holders of minerals rights".<sup>83</sup> The long-established view that s 2(1)(b) of the *Mining Rights Act* amounted to a re-statement of the common law insofar as base mineral rights were concerned was rejected.<sup>84</sup>

<sup>67</sup> Ibid para 76.

<sup>68</sup> Ibid para 7.

<sup>69</sup> Ibid paras 68-81.

<sup>70</sup> See ibid para 63.

<sup>71</sup> See ibid paras 49-52.

<sup>72</sup> Ibid paras 52-82.

<sup>73</sup> Ibid para 28.

<sup>74</sup> Ibid paras 56-83.

<sup>75</sup> See ibid para 27.

<sup>76</sup> See ibid para 27.

<sup>77</sup> Ibid para 99.

<sup>78</sup> Ibid paras 99-84.

<sup>79</sup> Ibid para 85.

<sup>80</sup> Ibid paras 35-48.

<sup>81</sup> Ibid para 48.

<sup>82</sup> Ibid para 48; see, however, ibid para 55.

<sup>83</sup> Ibid para 61.

<sup>84</sup> Ibid para 61.

Wallis JA rejected the view<sup>85</sup> that s 5(1) of the *Minerals Act 50 of 1991* amounted to a restoration of common law rights.<sup>86</sup> On the legal position prior to the enactment of MPRDA in 2002, Wallis JA concluded that the development of varying forms of mineral rights over the years has been underpinned by the “basic philosophy that the right to mine is under the suzerainty of the State and its exercise is allocated from time to time, as the State deems appropriate.”<sup>87</sup> Wallis JA further concluded that the State controlled the right to mine and its exercise.<sup>88</sup>

The MPRDA was held to affirm the “principle that the right to mine is controlled by the State, and allocated by those who wish to exercise it”.<sup>89</sup> Wallis JA confirmed that the right to mine along with the power to allocate the right to others were vested in the State and not private individuals.<sup>90</sup> Section 3(1) of the MPRDA which determines that mineral resources are the common heritage of the people of South Africa of which the State is the custodian was said to “encapsulate in non-technical language the notion that the right to mine vests in the State.”<sup>91</sup>

Nugent JA went one step further and held that from the beginning of significant mining, “legislation has stripped the right to prospect for and to mine minerals from such common law rights as owners of land might have had”.<sup>92</sup> Only the right to minerals *in situ* was said to remain as part of ownership of the land after it had been stripped.<sup>93</sup> The right of exploitation was not regarded by Nugent JA as

<sup>85</sup> P J Badenhorst, op cit n 27 at 124-125; M Kaplan and M O Dale, op cit n 27, at 5.

<sup>86</sup> See *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) paras 63-67. The court reasoned that: (a) an independent mining right or mineral right did not exist in the common law and mineral rights had their origin in legislation; (b) the right to prospect and mine that was conferred on holders of mineral rights by s 5(1) of the *Minerals Act* was subject to obtaining statutory authorisation; (c) the duration of authorisation was determined by the Director-General of Mineral Affairs; (d) The *Minerals Act* increased State control and the exercise of mineral rights was closely regulated; (e) the absence of an express reservation of mineral rights in the State or owner; (f) provisions such as ss 5(2)(a), 5(3) and 7 of the *Minerals Act*. See, however; paras 66 and 110. The reasoning is subject to challenge: The fact that separate mineral rights were possible due to legislation permitting separation does not mean such mineral rights did not have a content which could be determined with reference to ownership of the land from which they were separated. Only the exercise and duration of exercise and not the acquisition of mineral rights were regulated by s 5(1) of the *Minerals Act 50 of 1991*. The fact that exercise of rights has to be authorised in terms of legislation does not mean that the holder of a right does not have a right with a defined content. The *Minerals Act* only increased control in the regulation of the exercise of a right due to safety and environmental concerns, and did not decrease the content of the mineral rights per se. The fact that statutory reservation in favour of the State was absent, rather confirms the increased content of holders' mineral rights. The provisions of the *Minerals Act* that were referred to by the court merely regulated the exercise of mineral rights (by virtue of the police power of the State) and not its acquisition: The SA Road Board and provincial governments were exempted in terms of s 5(2)(a) of the *Minerals Act* from applying for statutory authorisation, but still had to acquire or expropriate the right to the substances used for road building purposes from mineral right holders (see, for instance, *Minister of Transport v Du Toit* 2005 1 SA 16 (SCA)). Section 6(3) of the *Minerals Act* merely dealt with the practical problem of mining of mixed minerals held by different holders of mineral rights. Section 7 of the *Minerals Act* prohibited prospecting or mining in certain areas (urban areas, public roads, railways and cemeteries) in the interest of safety and planning.

<sup>87</sup> Ibid para 69.

<sup>88</sup> Ibid para 84.

<sup>89</sup> Ibid para 85.

<sup>90</sup> Ibid para 85.

<sup>91</sup> Ibid para 86.

<sup>92</sup> Ibid para 104.

<sup>93</sup> Ibid para 104.

an element or characteristic of mineral rights.<sup>94</sup> Nugent JA attached almost no relevance to the holding of law mineral rights and denied its proprietary nature:

“The holding of mineral rights did no more than to identify upon whom the legislature had chosen to bestow its gift. So far as it created a monopoly, in doing so, I cannot see that the statutory monopoly constituted a property right.”<sup>95</sup>

In conclusion, the court decided that the right to mine, in the sense of the right to prospect and mine for minerals and dispose of minerals is vested in the State.<sup>96</sup> The right to mine is allocated by the State in terms of legislation.<sup>97</sup>

### EXPROPRIATION OF MINERAL RIGHTS

Wallis JA held that all mineral rights that existed in South Africa under the *Minerals Act* were not expropriated under the MPRDA.<sup>98</sup> The court reasoned that there was an absence of deprivation of property because the right to mine was never vested in the holders of mineral rights.<sup>99</sup> Wallis JA decided that the before-and-after analysis should take place between statutory rights enjoyed under the previous statutory dispensation and the rights enjoyed under the present dispensation.<sup>100</sup> The court *a quo*'s before-and-after analysis of a lost common law right with a statutory grant was rejected as being incorrect.<sup>101</sup> The court also found that acquisition of rights by the State did not take place.<sup>102</sup>

Wallis JA found that holders of unused old order rights<sup>103</sup> were not deprived of their rights because they not only retained a preference to apply for a prospecting right or a mining right for a year, but “would acquire more extensive rights if they sought and obtained a prospecting right or mining right”.<sup>104</sup> Deprivation would take place according to the court upon “failure to apply for a right to exercise them”.<sup>105</sup> The imposition of a time limit of one year to apply for new rights was not perceived as a deprivation of rights.<sup>106</sup>

The court further found, albeit *obiter*,<sup>107</sup> that holders of older order prospecting rights<sup>108</sup> or old order mining rights<sup>109</sup> who applied for conversion of their rights were not deprived of the right to (prospect or) mine because of the continuation of their (prospecting or) mining activities and the similar content of present rights and previous rights.<sup>110</sup> Expropriation of so-called common law mineral rights did not take place due to the absence of both the elements of deprivation and the acquisition of property.<sup>111</sup> Upon failure to convert these rights, the absence of rights is regarded by the court

<sup>94</sup> Ibid para 117.

<sup>95</sup> Ibid para 117.

<sup>96</sup> Ibid para 99.

<sup>97</sup> See *ibid* para 99.

<sup>98</sup> Ibid para 99.

<sup>99</sup> Ibid para 85.

<sup>100</sup> Ibid para 87.

<sup>101</sup> Ibid para 87.

<sup>102</sup> Ibid paras 90-94.

<sup>103</sup> See item 8 of Sched II of the MPRDA.

<sup>104</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 97.

<sup>105</sup> Ibid para 97.

<sup>106</sup> Ibid para 97.

<sup>107</sup> See *ibid* para 90.

<sup>108</sup> See item 6 of Sched II of the MPRDA.

<sup>109</sup> See item 7 of Sched II of the MPRDA.

<sup>110</sup> See *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) paras 89-90.

<sup>111</sup> Ibid paras 90-95.

as the source of loss.<sup>112</sup> The court did not exclude the possibility, based on the facts of a particular case, that the MPRDA may have expropriated prior existing rights.<sup>113</sup> Insofar as the majority of the court's finding involves all three categories of old order rights, the chances are slim that other instances of expropriation may be recognised.<sup>114</sup>

Nugent JA held that there "can be no doubt that the MPRDA divested unused [old order] mineral rights of the value that they had while the 1991 Act held sway".<sup>115</sup> Despite his acceptance that the MPRDA extinguished common law mineral rights,<sup>116</sup> the judge denied that common law mineral rights had as their content the right of exploitation.<sup>117</sup> Therefore, Nugent JA had no difficulty in finding that the abolition of common law rights by the MPRDA seemed to be immaterial.<sup>118</sup> The loss of the value of common law mineral rights was not attributed by Nugent JA to the abolishment of common law mineral rights.<sup>119</sup> The question of expropriation of common law mineral rights was relegated to "an abstract question that had no practical bearing on their claim".<sup>120</sup> Nugent JA was also of the view that the extension of exploitation rights to others by the MPRDA that were earlier under the exclusive control of mineral right holders, did not constitute a deprivation of property.<sup>121</sup>

The judgment of the court *a quo* in favour of Agri SA was, accordingly, set aside.<sup>122</sup>

#### COMMENT

Still unknown to the South African courts seems to be the analysis by De Boer<sup>123</sup> of the writings of the medieval scholar, Paulus De Castro<sup>124</sup> on special mining problems which occurred during the Middle Ages. If the Supreme Court of Appeal had had the benefit of this analysis it might have led to the recognition of De Castro as (probably) the father of the notion of a separate mineral right (*ius fodiendi*) in the common law, his pioneering working method of comparing mineral rights with servitudes, and his early recognition of the *sui generis* nature of mineral rights. It is conceded that De Castro's *consilia* became obsolete.<sup>125</sup> It is nevertheless submitted that absence of a common law source for mineral rights does not mean that the mineral right which has developed in South Africa was without a defined content.

In determining whether a deprivation took place, the position of the holder of a mineral right before enactment of the MPRDA must be compared with the position after enactment of the MPRDA.

<sup>112</sup> Ibid para 91.

<sup>113</sup> Ibid para 99.

<sup>114</sup> This might be the case with former holders of mineral rights who have lost their claims to prospecting moneys or royalties because, since the enactment of the MPRDA, contractual royalties are no longer due (*Xstrata v SFF Association* 2012 (5) SA 60 (SCA) para 26) (but, see *ibid* para 25).

<sup>115</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 111.

<sup>116</sup> Ibid para 112.

<sup>117</sup> Ibid para 113.

<sup>118</sup> Ibid para 114.

<sup>119</sup> See *ibid* paras 114-115.

<sup>120</sup> Ibid para 116.

<sup>121</sup> Ibid para 117.

<sup>122</sup> Ibid para 100.

<sup>123</sup> Jan De Boer, *De Winning van Delfstoffen in het Romeinse Recht, De Middeleeuwse Juridische Literatuur en het Franse Recht en het Franse Recht tot 1810* (Doctoral thesis, Leiden University, 1978), 153-161 167-175 269-270; see further, P J Badenhorst, "Trojan Trilog: III Mineral rights and mineral rights law" 1999 *Stell LR* 96 97-99; P J Badenhorst and Hanri Mostert, *op cit* n 13 ch 1.2.2.

<sup>124</sup> *Consiliorum, sive responsorum* (Vol I and II Venetiis 1671) (as cited by Jan De Boer).

<sup>125</sup> Jan De Boer *op cit* n 123, at 169 n 11.

This is in line with the court's suggested approach. However, in undertaking such comparative analysis, one's view about the nature and content of a mineral right is, of course, crucial. Whether a separate mineral right had its origin in legislation allowing separate registration, the common law or Property law theory does not change the fact that mineral rights were recognised as limited real rights with a recognised content and features. We have seen that according to the majority of the court, a mineral right had as its content the right to mine, subsidiary entitlements and the entitlements of disposal and alienation. Wallis JA, however, held that the right to mine (as content of the mineral right) is vested in the State or subject to some public law power to mine vested in the State. In other words, a mineral right was stripped of its content by the court despite the express statutory reservation of the right to mine base minerals in favour of holders of mineral rights by pre-Union, Union legislation and the *Mining Rights Act*, and despite the statutory vesting and re-vesting of the right to mine all minerals in the holders of mineral rights by the *Minerals Act*. We have also seen that Nugent JA was of the view that a mineral right did not have as its content the "right of exploitation of minerals". The court's construction of a mineral right runs contrary to the trite statement in law (for more than a century) that a holder of a mineral right is entitled to go upon the land to which these rights relate, to search for minerals, and, if he or she finds any, to mine these minerals and dispose of them.<sup>126</sup>

If the content of an allocated mineral right is incorrectly watered down to almost nothing, one would also after a before-and-after analysis of the position of a holder of a mineral right conclude that no deprivation took place. The reasoning is on the following lines: Because the holder of a mineral right did not have the right to mine it, he has lost nothing upon enactment of the MPRDA. Prior to the MPRDA an allocated mineral right had a defined content and exhibited certain features which were largely ignored by the court by simply recognising a right to mine in favour of the State.

In determining whether an acquisition has taken place the court seemed to have considered the position of the State before and after the enactment of the MPRDA and accepted that the State had the right to mine in the past and at present under the MPRDA. This would mean that nothing (new) was acquired by the State, and, therefore, no acquisition of property took place. Had the true content of an allocated mineral right been compared with the content of a prospecting right, or a mining right which the State could grant in terms of the MPRDA, it would be apparent that the State acquired most of the entitlements that were formerly vested in the holder of mineral rights. It is submitted that the application of the before-and-after analysis of the court in both *Agri SA I*<sup>127</sup> and *Agri SA II*<sup>128</sup> and subsequent recognition of a compensation claim were correct.

To reiterate, before the enactment of the MPRDA a holder of a mineral right (in respect of unexploited land) was entitled to (a) prospect or mine on the land with State approval,<sup>129</sup> (b) alienate the mineral rights for consideration, (c) grant a prospecting contract against payment of prospecting moneys or (d) grant a mineral lease against payment of royalties. Upon enactment of the MPRDA the holder of an unused old order mineral right was only entitled to apply to (a) the State for a

<sup>126</sup> *Van Vuren v Registrar of Deeds* 1907 TS 289 294 295; *Rocher 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 supra* 509G-H; see also *Anglo Operations Ltd v Sandhurst Estates Pty Ltd* 2007 (2) SA 363 (SCA) 373H.

<sup>127</sup> *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) paras 5 7-9 and 11.

<sup>128</sup> See P J Badenhorst, op cit n 4, at 268-269.

<sup>129</sup> This approval was required only for the exercise of mineral rights.

prospecting or mining right within one year and (b) alienate such rights, if ministerial approval in terms of s 11(1) of the MPRDA could be obtained.<sup>130</sup> A proper before-and-after analysis clearly shows that the holder of the unused old order right is worse off than the former holder of a mineral right in respect of land which had not been exploited. Such holder has been deprived of (a) the right to alienate the mineral right without the need for ministerial approval for (i) the acquisition of a prospecting or mining right and (ii) alienation thereof, (b) the right to receive prospecting moneys or royalties upon the grant of a prospecting contract or mineral lease,<sup>131</sup> which grants are no longer possible. The State has by virtue of s 3 of the MPRDA acquired the right to grant new prospecting rights and mining rights to applicants. Such loss (and acquisition by the State), for which compensation should be payable to former holders of mineral rights, is not acknowledged by the court. It should also be remembered that the mineral right to coal *in casu* was a valuable asset. Sebenza paid R1048 000 for the coal rights, whilst the liquidators sold the rights for R750 000 but could not proceed with the sale because, since enactment of the MPRDA, registration of cessions of mineral rights was no longer possible in the Deeds Office.<sup>132</sup> Because Sebenza was in liquidation it was financially unable to apply for and comply with the requirements for a new prospecting rights or mining rights in terms of the MPRDA.<sup>133</sup> Sebenza was, therefore, in an even worse position. Before the MPRDA it held a mineral right to coal, whilst upon enactment of the MPRDA it could only salvage a compensation claim in terms of item 12 of Sched II of the MPRDA. Again this is not recognised or acknowledged by the court.

The novel right to mine seemed to have been used by Wallis JA in the sense of either an allocated private law right or a substantive public law power of the State. If used in the sense of an allocated private law right, it is submitted that it is in conflict with the accepted view of the content of mineral rights. If so, the decision does not explain how thousands of transactions for over a century took place upon the basis that holders of mineral rights had *inter alia* entitlements to alienate mineral rights, prospect for or mine certain classes of minerals (and later all minerals), and could, accordingly, have granted mineral rights, prospecting rights or mining rights to third parties and receive consideration, prospecting fees and royalties for such transactions. Similarly, the State as holder of statutory mineral rights, granted prospecting rights and mining rights to persons in terms of the *Precious Stones Act* and the *Mining Rights Act*. These statutory prospecting and mining rights survived the *Minerals Act* in terms of its transitional arrangements and are, like common law mineral rights, expressly recognised by Sched II of the MPRDA. If the same reasoning is applied to new prospecting and mining rights that are granted by the Minister to applicants in terms of the MPRDA, does it also mean that these rights do not include the right to mine in a private law sense because the right to mine is vested in the State by s 3(1) of the MPRDA? Can holders of these rights be deprived of the content of their right and also not be expropriated because the right to mine is vested in the State? This interpretation would not afford investors security of tenure and confidence in the present mineral law regime. Decline in investor confidence is compounded by the current labour unrest in the mining industry since the shooting by the police of protesting mine workers during August 2012 at Marikana.<sup>134</sup>

<sup>130</sup> See further *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* 2011 (6) SA 96 (GJS) [27]-[38].

<sup>131</sup> See *Xstrata v SFF Association* 2012 (5) SA 60 (SCA) para 26.

<sup>132</sup> See *Agri South Africa v Minister of Minerals and Energy (CALS as amicus curiae)* 2012 (1) SA 171 (GNP) paras 16 18; see further *Southern Era Resources Ltd v Farnell NO* 2010 (4) SA 200 (SCA) [8].

<sup>133</sup> *Ibid* para 73.

<sup>134</sup> See Annon "Marikana miners' strike" Wikipedia at [http://en.wikipedia.org/wiki/Marikana\\_miners'\\_strike](http://en.wikipedia.org/wiki/Marikana_miners'_strike) accessed on 16 October 2012.

The right to mine, as used in the second sense, is part of sovereignty and has, of course, been vested in the State as part of sovereignty.<sup>135</sup> As a public law power, the right to mine seemed to have been used in the sense of a prerogative<sup>136</sup> which seems reminiscent of the royal prerogative of English law, which reserved the right to mines of gold and silver in the Crown.<sup>137</sup> It is doubtful whether such a type of a prerogative existed in South Africa and, if so, whether it survived in the new South African constitutional dispensation. Traces of such usage in South Africa was Sir John Cradock's Proclamation on Conversion of Loan Place Quitrent Tenure, dated 6 August 1813, which seemed to have preserved the English law concept of the Crown prerogative by reserving the rights to "mines of precious stones, gold or silver" to the Crown, but its application was restricted to the former Cape Province.<sup>138</sup> Even if such a prerogative existed, Devenish<sup>139</sup> has indicated that neither the interim Constitution<sup>140</sup> nor the present South African Constitution referred to "the nebulous concept and existence of prerogative powers". Devenish concluded that "in view of the fact that the Constitution is declared to be the supreme law, these 'common law powers have finally been put out to pasture'".<sup>141</sup>

The notion that the right to mine is under the suzerainty of the State is also novel to South African Mineral law.<sup>142</sup> Suzerainty can be said to occur where a sovereign or state is having some control over another state that is internally autonomous.<sup>143</sup> For instance, after the First Anglo-Boer war, complete self-government was conferred on the South African Republic under the suzerainty of Great Britain by the Convention of Pretoria of 1881.<sup>144</sup> Another example is the port and settlement of Walvis Bay in the former South West Africa which was placed under the suzerainty of the Cape Colony.<sup>145</sup> The term suzerain refers to the powerful entity within the suzerainty relationship, but it can also refer to a feudal lord, to whom vassals must pay tribute.<sup>146</sup> If the word is used in this sense by the court, it should be noted that the idea of the State being an overlord is reminiscent of the Doctrine of Tenure which never formed part of South African land law which is based upon full *dominium* or allodial title. The acquisition of mineral rights and mining rights in South Africa simply did not take place along the lines of something akin to a tenure system. Allodial ownership of land (or full *dominium*) was granted by the State which had as its content the entitlement to

<sup>135</sup> Section 2(a) of the MPRDA, thus, recognises the internationally accepted right of the State to exercise sovereignty over mineral and petroleum resources within South Africa as part of the objectives of the MPRDA.

<sup>136</sup> Wallis JA ascribed to the view of Hanri Mostert that the right to seek and extract minerals was "the prerogative of the State" (see *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (5) SA 1 (SCA) para 48).

<sup>137</sup> *Case of Mines* (1567) 1 Plowd 310 336-337; 75 ER 472 510-511; *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27 at 1 4-8 32-33; Hunt op cit n 21, at 36; Adrian J Bradbrook, Susan V MacCallum, Anthony P Moore and Scott Grattan, *Australian Real Property Law* (5th ed, Thomson Reuters; 2011), 795; Peter Butt, *Land Law* (6th ed, Thomson Reuters, 2010), 15.

<sup>138</sup> P J Badenhorst and Hanri Mostert, op cit n 16, at 1-14B. Sir John Cradock's Proclamation was repealed by Act 44 of 1968.

<sup>139</sup> G E Devenish "Constitutional law" in W A Joubert (founding editor) *Law of South Africa* (Vol 5(3) LAWSA Lexis Nexis Butterworths, 2004), para 226.

<sup>140</sup> *Constitution of the Republic of South Africa, 200 of 1993*.

<sup>141</sup> Op cit n 139, para 226.

<sup>142</sup> In the present context, only in *Shingler v Union Government (Minister of Mines)* 1925 AD 556 was the notion of suzerainty mentioned in passing.

<sup>143</sup> *Concise Oxford English Dictionary* (Oxford University Press, 2008).

<sup>144</sup> *Rex v De Jager* (1901) 22 NLR 62 63 65; *Rex v Christian* 1924 AD 101 125.

<sup>145</sup> *Kaputuaza v Executive Committee of the Administration for the Hereros* 1984 (4) SA 295 (SWA) 297D/E.

<sup>146</sup> Anon "suzerainty" Wikipedia at <http://en.wikipedia.org/wiki/Suzerainty> accessed on 20 June 2012.

exploit the minerals in the land, unless the State reserved mineral rights upon grant of ownership, or reserved prospecting or mining rights to minerals in terms of the legislation discussed by the court. Mineral rights in South Africa were never held by private holders "of the State" as an overlord. Perhaps the notion of suzerainty in the present context means that holders of mineral rights had the autonomous right to mine but such right was always subject to the right of the State to mine.

The origin and nature of the State's (newly found) right to mine, which was applied retrospectively to previously existing privately held mineral rights, remain unclear.

In the broader context it should be added that had the Supreme Court of Appeal decided in *Agri SA III* that all old order rights to minerals were indeed expropriated by enactment of the MPRDA this outcome would have been contrary to the ANC government's recent policy document on State intervention in the minerals sector.<sup>147</sup> An amendment of the Property clause of the Constitution may even have been on the cards:<sup>148</sup>

"However, there have been challenges to this conversion [of 'old order' private rights to 'new order' state rights] on the basis that it is in effect a property expropriation under Section 25 of the Constitution. Accordingly, we should find a way to make it absolutely clear that mineral rights are not included in property rights and belong to the people as a whole."

In the meanwhile, *Agri South Africa* has appealed to the Constitutional Court which appeal will be heard on 8 November 2012.<sup>149</sup>

## CONCLUSION

The majority of the Supreme Court of Appeal decided the MPRDA did not expropriate all mineral rights that existed in South Africa under the *Minerals Act* due to the absence of the requirements of expropriation, namely "deprivation" and "acquisition" of rights by the State. The minority of the court decided that expropriation did not take place in case of unused old order rights. The court reasoned this is so because the so-called right to mine in the past was and still is vested in the State. Holders of old order rights lost their claim of compensation for which the MPRDA provides.

The court's determination of whether expropriation of mineral rights took place by enactment of the MPRDA was flawed. In its determination whether a deprivation took place, it purported to compare the position of a holder of a mineral right before and after the enactment of the MPRDA. It actually compared a watered-down mineral right (of which the right to mine was incorrectly said to have been vested in the State) with the position of such holder under the MPRDA. It was reasoned that because of the content of such (watered-down) mineral right and the fact that the State is holding the right to mine, the holder of a mineral right, in effect, had nothing of which they could be deprived of. Ergo, no deprivation took place! In determining whether an acquisition took place it seemed to have compared the position of the State before and after the enactment of the MPRDA and concluded that no acquisition by the State took place because the State always held and still holds the right to mine. The before-and-after analysis of the court in both *Agri SA I* and *Agri SA II* and subsequent recognition of a compensation claim is preferred as being correct.

<sup>147</sup> See ANC Policy Report op cit n 26, at 353.

<sup>148</sup> ANC Policy Report ibid at 353.

<sup>149</sup> The site for the Constitutional Court can be accessed at: <http://www.constitutionalcourt.org.za/site/home.htm>.



It is submitted that by deciding that the right to mine, in a private law sense, formed part of a mineral right, but was vested in the State, the Supreme Court of Appeal negated the content of a mineral right and departed from the accepted views about the content and features of mineral rights. The right to prospect and mine base minerals in the former Transvaal has always vested in the holders of mineral rights by statute, and the right to prospect and mine for minerals previously held by the State were re-vested in the holders of minerals rights by the *Minerals Act*. We now learn that the right to mine, either in the sense of a public law power and/or the private law right to mine, has always vested in the State. Whilst the first part of the statement is correct, it is submitted that the nature and origin of this right to mine remains unclear. It is further submitted that the last part of the statement is not correct and is not reflected in the thousands of transactions which have been taking place for more than a century. The reasoning of the court not only denied holders of once valuable mineral rights of a claim for compensation for their loss, but also raises questions about the security of tenure of newly-acquired prospecting and mining rights under the MPRDA in South Africa. If rewriting the law of the past is a fiasco, which seems to be the case for former holders of old order rights who did not apply for new prospecting rights or mining rights or a conversion of their rights, so will be the present Mineral law regime. It now remains up to the Constitutional Court to resurrect the Mineral law (and not the political system) of the past and to grant constitutional protection to holders of unused old order rights for their loss of "property".