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REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 458/2011

In the matter between:

MINISTER OF MINERALS AND ENERGY — Appellant

and

AGRI SOUTH AFRICA — Respondent

CENTRE FOR APPLIED LEGAL STUDIES — Amicus Curiae

Neutral citation: *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)*[2012] ZASCA 93 (31 May 2012)

Coram: NUGENT, HEHER, MHLANTLA, LEACH and WALLIS JJA.

Heard: 4 May 2012

Delivered: 31 May 2012

Summary: Expropriation of mineral rights – Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) – expropriation of

common law mining rights -- are such rights expropriated under the provisions of the MPRDA – entitlement to compensation in terms of item 12(1) of Schedule II to the MPRDA.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Du Plessis J sitting as court of first instance).

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the court below is set aside and replaced by the following order:

'(a) The plaintiff's claim is dismissed with costs, such costs to include those consequent upon the employment of two counsel, but excluding all costs incurred in respect of or relating to the amendment referred to in paragraph (b) below.

(b) The defendant is ordered to pay the plaintiff's wasted costs, including the costs consequent upon the calling of witnesses and the hearing of evidence, occasioned by its application to amend its plea on 8 March 2011, such costs to include those consequent upon the employment of two counsel.'

JUDGMENT

WALLIS JA (HEHER and LEACH JJA concurring, NUGENT JA at paragraph 102 and MHLANTLA JA concurring for different reasons.)

Introduction

[1] The transformation of the legal landscape in regard to minerals and mining occasioned by the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA) has been the subject of previous consideration and comment by this court.[1] This is a test case aimed at determining whether the MPRDA expropriated rights that existed prior to its coming into force. The protagonists are Agri South Africa (Agri SA), which contends that it did, and the Minister of Minerals and Energy (the Minister), who contends that it did not. In adopting that stance the Minister reflects the viewpoint of the government at the time the MPRDA was introduced in Parliament. However, that view was not unchallenged.[2] Accordingly, had a court held that the MPRDA expropriated all or some existing rights and no provision was made for compensation, there was a risk of the legislation being held to be unconstitutional for non-compliance with the requirements of s 25(2)(*b*) of the Constitution, which requires that any expropriation be subject to the payment of compensation. In order to ensure constitutional

[1] *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd & others* [2011] 1 All SA 364 (SCA) paras 20 to 24 and *Xstrata & others v SFF Association* (326/2011) [2012] ZASCA 20 para 1.
[2] See for example Pieter Badenhorst and Rassie Malherbe 'The Constitutionality of the Mineral Development Draft Bill 2000 (Part 2)' 2001 *TSAR* 765 especially at 779 and 785.

compliance, whilst maintaining the stance that no expropriation was involved, item 12(1) of Schedule II provides that:

'Any person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State.' [3]

The government's stance that the MPRDA did not expropriate existing rights is reflected in the requirement that a person contending for an expropriation must prove it. In that light, criticism that item 12(1) was drafted evasively[4] appears misplaced. There is nothing amiss in government contending that the MPRDA did not expropriate existing rights, but providing that, if they are wrong, compensation will be payable as required by the Constitution.

[2] The factual background to this case is as follows. The MPRDA came into force on 1 May 2004. Prior to that date Sebenza Mining (Pty) Ltd (then called Bulgara Investment Holdings (Pty) Ltd) had taken a notarial cession of the rights to coal in, on, under and in respect of two properties situated in Mpumalanga (the coal rights). In 2006 the company, by then in liquidation, lodged a claim for compensation in terms of item 12(1) contending that the MPRDA expropriated its coal rights. This claim was rejected. On 10 October 2006 it ceded its claim to Agri SA, which acquired it for the purpose of bringing the present litigation. In doing so it was acting in the broad interests of its members, who took the view that, as a result of the changes effected by the MPRDA, they had lost valuable mining rights. Agri SA claimed compensation for the alleged expropriation of the coal rights in an amount of not less than R750 000. The trial came before Du Plessis J,

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[3] AJ van der Walt *Constitutional Property Law* (3ed, 2011) 446-451 speculates about the reason for including item 12(1) in the MPRDA but overlooks its obvious purpose. It does not impliedly recognise that the MPRDA brings about an expropriation, and the contrary view in *Agri SA v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) para 16, is incorrect.

[4] M O Dale and others *South African Mineral and Petroleum Law* Sch II-206 (Issue 9).

who upheld the claim and awarded compensation of R750 000. The appeal and cross-appeal are with his leave. In the appeal the Minister seeks to set aside the compensation award in its entirety. In the cross-appeal Agri SA seeks an increase in the compensation awarded to R2 million. At the commencement of the appeal the Centre for Applied Legal Studies (CALS) sought and was granted leave to intervene as *amicus curiae*. Broadly speaking it aligned itself with the stance of the Minister.

[3] Sebenza Mining's rights were restricted to the coal rights under a notarial cession of rights from the owners of the properties in question and the claim of which Agri SA has taken cession is a claim for compensation in relation to those rights alone. However, counsel made it clear in argument that Agri SA does not seek to distinguish these rights, or the position of Sebenza Mining, from any other mineral rights that previously existed or any other holder of such rights. It does not distinguish between precious metals and base metals, or between these and other forms of minerals, such as sand, stone or clay, precious stones, other gemstones and mineral oils. Nor does it distinguish between used and unused rights or between rights that were not separated from the land to which they related and rights that were so separated. To illustrate the breadth of the argument it was argued that the MPRDA effected an expropriation of the rights enjoyed by giant mining houses just as much as it had expropriated the unexploited mineral rights of farmers in rural areas. It was submitted that the only reason there had not been more claims in respect of existing mining operations was that the holders had suffered no financial loss, because they had converted their rights in terms of the transitional provisions in the Second Schedule to the MPRDA to rights in terms of the MPRDA.

[4] In view of this, the outcome of the appeal turns on the answer to a single question. Did the MPRDA expropriate all mineral rights in South Africa? Under earlier legislation such rights were held either by the owners of land or, where they had been separated from the land in respect of which the rights were to be exercised, the holders of the separated rights. Although there were differences in the form and nature of these rights, depending on the manner in which they had been constituted, they can for present purposes be referred to generically as mineral rights and the beneficiaries of the rights as holders of mineral rights.

[5] The argument proceeded, and was upheld by the trial court, on the basis of a comparison between the rights enjoyed by a holder of mineral rights in terms of the predecessor to the MPRDA, the Minerals Act 50 of 1991 (the 1991 Act) and the position under the MPRDA. The starting point was s 5(1) of the 1991 Act, which reads as follows:

'Subject to the provisions of this Act, the holder of the right to any mineral in respect of land or tailings, as the case may be, or any person who has acquired the consent of such holder ...shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings, as the case may be, and to dispose thereof.'

The leading commentary on the 1991 Act said that this restored to holders of mineral rights their common law rights in relation to prospecting for, mining, extracting and disposing of minerals.[5] The argument adopts this terminology and contends that the rights of holders of mineral rights under the 1991 Act were common law rights that were destroyed by the MPRDA.

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[5] M Kaplan and M O Dale *A Guide to the Minerals Act 1991* at 5-6. Hanri Mostert *Mineral Law: Principles and Policies* 69 endorses this proposition.

[6] Agri SA contended that these rights had in substance, if not in the same form, become vested in the government through its representative the Minister. Whilst it was argued that an expropriation might occur where the expropriated property is ultimately to be placed in the hands of a third party and not the expropriator, Agri SA did not contend that mineral rights had been expropriated by being transferred to third parties. Its case was that an expropriation was effected by the MPRDA on 1 May 2004, when the MPRDA came into operation and that the Minister had in substance acquired the expropriated rights. It disavowed any reliance on the suggestion by the Minister and CALS, in their alternative arguments, that the date of any expropriation would have been later and would have diverged from case to case, because any expropriation would only occur when existing miners or new entrants to the industry were awarded a prospecting right or a mining right or mining permit under the MPRDA in place of the previous holder of the mineral rights to that property. We can confine ourselves therefore to a consideration of the narrow proposition that the MPRDA effected an expropriation of all existing mining rights in South Africa on 1 May 2004.

[7] In its particulars of claim Agri SA said that the expropriation was effected by s 5, read with ss 2, 3 and 4, of the MPRDA. In further particulars for trial it inverted this by relying primarily on s 3 and only then and by way of supplement on the other provisions. As the question is one of law this change is of no great moment. The outcome of this litigation depends upon broad principles relating to the source and nature of mineral rights and the construction of the relevant provisions of the MPRDA in the context of the statute as a whole and in the light of the

Constitution. The precise form in which the argument has been couched from time to time does not affect this.

[8] The relevant provisions of the MPRDA start with the preamble where it is acknowledged that 'South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof'. The relevant objects in s 2 are said to be to:

'(*a*) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;

(*b*) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

(*c*) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(*d*) to (*f*) ...

(*g*) provide for security of tenure in respect of prospecting, exploration, mining and production operations.'

The role of the State in this new dispensation is set out in s 3, which provides that:

'(1) 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.

(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may—

(*a*) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(*b*) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.'

[9] Section 5 deals with the nature and consequences of the rights created under the MPRDA. It provides that:

'(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

(2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may—

(*a*) enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be;

(*b*) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;

(*c*) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

(*d*) subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and

(*e*) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.

(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without—

(*a*) an approved environmental management programme or approved environmental management plan, as the case may be;

(*b*) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) notifying and consulting with the landowner or lawful occupier of the land in question.'

[10] It is plain from these provisions that anyone who wishes to prospect for or mine minerals in South Africa may only do so in terms of rights acquired and held under the MPRDA. The rights of holders of mineral rights reflected in s 5(1) of the 1991 Act have, as such, disappeared. Whilst those who held such rights under the 1991 Act, and persons authorised by them, were formerly the only persons who could, subject to the 1991 Act, prospect and mine, and accordingly enjoyed exclusivity, that is no longer the case. They are free to compete with others for rights under the MPRDA, but their status as holders of mineral rights, recognised in the past, is of no relevance to whether they will be afforded such rights in the current dispensation. In addition, the owners of land, from which the mineral rights have not been separated, can no longer prevent others from coming onto their land for the purpose of mining. All they have is a right under s 5(4)(c) of the MPRDA[6] to be notified and consulted before others, acting in terms of rights afforded to them by the Minister under the MPRDA, come onto their land to prospect or mine. There are no longer any rights that can be put up for sale, used as security or bequeathed to one's heirs. That broadly constitutes the deprivation of which Agri SA complains.

[11] Against that background the appeal raises three issues. They are:

(a) What constitutes an expropriation in terms of s 25(2) of the Constitution?

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[6] Subject to the dispute resolution provisions in s 54 of the MPRDA and the possibility that some compensation may be paid to them, either as agreed or as determined by arbitration or a competent court.

(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?

If the last of these questions is answered in favour of Agri SA then it follows that Sebenza Mining's coal rights were expropriated and we must then consider the proper assessment of the compensation due to it.

The meaning of 'expropriation'

[12] The Constitution draws a distinction between a deprivation of property and an expropriation.[7] A deprivation of property is only constitutionally compliant if it occurs in terms of a law of general application and is not arbitrary. An expropriation is a special type of deprivation. It must, like any other deprivation, take place in terms of a law of general application and not be arbitrary. In addition it must be for a public purpose or in the public interest and the expropriation must be subject to the payment of compensation. Agri SA contends that the MPRDA expropriated all pre-existing mineral rights. It did not contend that the MPRDA involved an arbitrary deprivation of all or some of those rights. There would be difficulties in advancing such an argument in the light of the constitutional imperatives of transformation and accessibility to natural resources to which CALS drew our attention. It follows that if we conclude that the MPRDA did not expropriate pre-existing mineral rights the appeal must succeed.

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[7] Sections 25(1) and (2) embodying this distinction read as follows:
'(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application—
(*a*) for a public purpose or in the public interest; and
(*b*) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

[13] As item 12(1) was directed at ensuring the constitutional compliance of the MPRDA if it expropriated property, the 'expropriation' to which it refers must be an expropriation as contemplated by s 25(2) of the Constitution. In *Harksen v Lane NO & others*[8] Goldstone J said:

'[31] The word "expropriate" is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation. Whilst expropriation constitutes a form of deprivation of property, s 28 makes a distinction between deprivation of rights in property, on the one hand (ss (2)), and expropriation of rights in property, on the other (ss (3)). Section 28(2) states that no deprivation of rights in property is permitted otherwise than in accordance with a law. Section 28(3) sets out further requirements which need to be met for expropriation, namely that the expropriation must be for a public purpose and against payment of compensation.

[32] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. In *Beckenstrater v Sand River Irrigation Board,*[9] Trollip J said:

"(T)he ordinary meaning of 'expropriate" is 'to dispossess of ownership, to deprive of property' ... but in statutory provisions, like secs 60 and 94 of the Water Act, it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right. That is the effect of cases like *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) at 422-3, 424; *SAR & H v Registrar of Deeds* 1919 NPD 66; *Kent NO v SAR & H* 1946 AD 398 at 405-6; and *Minister van Waterwese v Mostert and Others* 1964 (2) SA 656 (A) at 666-7.'"

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[8] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) paras 31 and 32.

[9] 1964 (4) SA 510 (T) at 515A-C.

[14] It has been suggested[10] that the Constitutional Court departed from this approach in the *FNB* case.[11] The basis for that suggestion is that in *FNB* the court commenced by dealing with deprivation of property and whether it was arbitrary, whilst in *Harksen* it dealt directly with expropriation. It would be surprising to conclude that *FNB* departed from *Harksen* without saying so expressly, given their proximity in time and that *Harksen* is not even referred to in the judgment in *FNB*. What is more Ackerman J, who wrote *FNB*, had concurred in *Harksen*. The differences in approach between the two are readily ascribable to the fact that they were concerned with different questions. *Harksen* dealt with a contention that s 21 of the Insolvency Act 24 of 1936, which provides for the vesting of the property of one party to a marriage in the trustee of their insolvent spouse, pending proof by the solvent spouse of ownership of the assets in question, constituted an expropriation contrary to s 25(2) of the Constitution. *FNB* concerned whether the provisions of s 114 of the Customs and Excise Act 91 of 1964, providing for a lien for payment of a customs debt over all goods, including those of third parties, on any premises in possession or under control of the customs debtor, constituted an arbitrary deprivation of property.[12] Both judgments accept that expropriation is a form[13] or subset[14] of deprivation. Accordingly, whether a challenge is mounted under s 25(1) or s 25(2) the first issue will be whether there has been a deprivation of property. But that does not necessarily mean that the court must consider whether the particular deprivation of property was arbitrary, when the only point in issue in the

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[10] A J van der Walt 'Striving for the better interpretation – a critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the Property Clause' (2004) 121 *SALJ* 854 at 869-870; Van der Walt , supra, fn 3 at 341 to 347.

[11] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another: First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC)

[12] It appears that FNB argued that this was a prohibited expropriation (see para 26 of the judgment), but the case was disposed of on the grounds that the section involved an arbitrary deprivation of property.

[13] *Harksen* para 31.

[14] *FNB* para 57.

case is whether an expropriation has occurred. If the person contending for an expropriation is content not to allege that the deprivation is arbitrary, there is no reason for the court to enquire into that question. Its view on that would be *obiter* and it is a salutary approach, if possible, in writing judgments to avoid *obiter dicta.* Where the issue is whether an expropriation has occurred, the important question will be whether the deprivation reflects those characteristics that serve to mark out an expropriation from other types of deprivation of property.[15] In identifying those characteristics *FNB* said merely that we must be circumspect in relying on pre-constitutional jurisprudence[16] concerning expropriation, because it may not necessarily be reliable in construing the property clause under our present constitutional dispensation.[17]

[15] The MPRDA exhibits strong regulatory features. Other jurisdictions have grappled with cases dealing with the effect that regulatory measures, such as planning regulations, may have on existing property rights. This has resulted in the development in some jurisdictions of doctrines of constructive expropriation or inverse condemnation. In *Steinberg v South Peninsula Municipality*[18] this court left open the question whether there is room within our constitutional framework for the development of a concept of constructive expropriation. In *Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, & another*[19] Nkabinde J likewise left the question open, saying only that she

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[15] It is accepted in the present case that the MPRDA is an Act of general application; that it was passed for a public purpose and that it provides for compensation if it brings about an expropriation.
[16] I use the term to encompass both case law and academic writing on the topic.
[17] *FNB* para 59.
[18] *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8.
[19] *Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government,& another* 2009 (6) SA 391 (CC) paras 65 and 66. Elmarie van der Schyff in her doctoral dissertation *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002*

was uncertain whether it was an appropriate doctrine in the South African context and that it gives rise to debatable questions. We have not been asked to develop such a doctrine in the present case. Agri SA contends that the MPRDA effects a direct expropriation of previously existing mineral rights by taking those rights from existing rights holders and vesting their substance in the Minister. It is accordingly unnecessary to address this complex question. It is also unnecessary to address an issue raised by Professor van der Walt[20] whether an expropriation can be effected by statute in South Africa. No-one suggested that it could not be effected in this way.

[16] The primary contention of the Minister and CALS is that the MPRDA did not effect a general expropriation of existing mineral rights because the State did not acquire any rights in consequence of the MPRDA coming into operation. They accepted, although the correctness of this acceptance will be revisited later in the judgment, that there was a deprivation of property because all mineral rights under the 1991 Act were extinguished by the MPRDA. However, they say that those rights have not been acquired by the State and, as this is a necessary characteristic of an expropriation that is fatal to Agri SA's claim. Reliance is placed upon the quoted passage from *Harksen* and the *Reflect-All* judgment, in which the contention that there had been an expropriation of property, effected by the long-standing designation of portions of the appellants' properties for road purposes, was rejected because there had been no acquisition of the land affected by the designation. The relevant passage from that judgment reads as follows:

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at 164-177 proposes the adoption of a form of constructive expropriation. Professor van der Walt, fn 3, supra, 347-384 rejects the doctrine.

[20] Footnote 3, supra, 433-4 and 456-8, where he concludes erroneously that item 12(1) 'amounts to some form of statutory expropriation', a proposition not advanced by Agri SA.

'[64] The applicants argued that s 10(3) is inconsistent with the constitutional guarantee against uncompensated expropriation of property. I do not agree. Although it is trite that the Constitution and its attendant reform legislation must be interpreted purposively, *courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the State.*[21] *It must be emphasised that s 10(3) does not transfer rights to the State*. What it does is this: it deprives the landowner of rights to exploit the affected part of the land within the road reserve and thus protects part of the planning process which has economic value and is in the long run in the public interest. Remarkably, while the applicants accepted the distinction drawn by the court in *Harksen*, they nevertheless contended that s 10(3), read with ss 8 and 9 of the Infrastructure Act, enables the State to "acquire" land for the construction of public roads. As I have said, the State has not acquired the applicants' land as envisaged in ss 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid.' (Emphasis added.)

[17] Agri SA counters this argument in the following way. It contends that expropriation is an original, not a derivative form of acquisition of ownership. It does not involve a transfer from the expropriatee to the expropriator, but the extinguishing of the expropriatee's title or right and the acquisition by the expropriator, or possibly a third party through the expropriator, of a new right, equivalent or similar, but not necessarily identical, to that previously enjoyed by the expropriatee. Accordingly, so it is argued, the issue of expropriation in this case cannot be determined by asking whether, in consequence of the MPRDA, the State has acquired the mineral rights that existed under the old dispensation. As those rights

[21] This should not be read as if it were a statute prescribing that acquisition must be by the State in order for there to be an expropriation. In that case the only possible beneficiary of any 'acquisition' would have been the State and this dictated the language used by Nkabinde J. In *Offit Farming Enterprises (Pty) Ltd & another v Coega Development Corporation & others* 2010 (4) SA 242 (SCA) paras 14 to 18 this court held that the Constitution permitted an expropriation in the public interest even though the party ultimately acquiring the expropriated property was someone other than the expropriating authority. That finding was not challenged or questioned in the subsequent appeal to the Constitutional Court. *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation & others* 2011 (1) SA 293 (CC).

have been extinguished the answer to that question must necessarily be in the negative. Instead, it is contended that the proper question is whether the scheme for the regulation of mining in South Africa, contained in sections 2 to 5 of the MPRDA, vested in the State the substantive content of those rights, transferring the right to prospect, mine for and dispose of extracted minerals from the holders of mineral rights to the Minister. Agri SA says that the MPRDA divested owners of existing mining rights and granted 'a corresponding power, right or advantage to the expropriator in order to grant a similar right to a third party' and that this amounted to an expropriation. It contends that the court must look behind the appearance of the exercise of a regulatory power to the underlying reality that as a result of the MPRDA the rights enjoyed by holders of mining rights prior to the MPRDA have been extinguished and are now exercisable by the Minister and those to whom rights are granted under the MPRDA.

[18] Both arguments proceed on the footing that one of the identifying characteristics of an expropriation is that the expropriator acquires property (in its constitutional sense) either for itself or for others, whether directly or indirectly, that bears some resemblance to the property that was the subject of the expropriation. That is consistent with the decision in *Harksen* and is in my view correct. I find unconvincing the suggestion by Professor van der Walt[22] that, in terms of the Constitution, the characteristic that distinguishes an expropriation from other forms of deprivation is compensation. That puts the cart of compensation before the horse of expropriation. The need to identify whether a particular act constitutes an expropriation will arise in two circumstances. The first is where the validity of a law or some executive or administrative action is

[22] Footnote 3, supra, pp 343-4.

challenged on the ground that it involves an expropriation but does not provide for the payment of compensation, thereby infringing s 25(2) of the Constitution. The second is where, as in this case, there is provision for the payment of compensation if a law or action constitutes an expropriation, but there is a dispute whether the particular law or action involves an expropriation. In either event the presence or absence of a provision for compensation cannot be determinative of whether there is an expropriation. If one looks as the structure of s 25(2) of the Constitution it is more appropriate to view compensation as a pre-requisite for a lawful expropriation and a necessary consequence of an expropriation, rather than as a defining characteristic serving to distinguish expropriations from other forms of deprivation. The absence of an obligation to pay compensation is necessarily neutral, whilst its presence can never be more than a factor that may point to an expropriation.

[19] Accepting that one of the hallmarks of expropriation is that the expropriator or others through it acquire property, Agri SA says that what is acquired need not be the same or substantially the same as what has been taken. For obvious reasons this is a contention that can only be advanced when the subject of the alleged expropriation is incorporeal property. Even in that context there is room for considerable debate whether the argument is correct. In *Minister van Waterwese v Mostert & andere*[23] it was said that the person who expropriates only acquires, by means of the expropriation, the rights that have been expropriated.[24] Reference is made by counsel for Agri SA to a passage from the

[23] *Minister van Waterwese v Mostert & andere* 1964 (2) SA 656 (A) at 667A-B.
[24] Van Wyk JA said: '... in die afwesigheid van 'n regsfiksie, kan van niemand meer onteien word as wat hy eien nie' and '... die persoon wat onteien slegs die regte wat onteien is deur die onteiening kan verkry'.

judgment of van Winsen J in *Stellenbosch Divisional Council v Shapiro*,[25] where it was said that if property burdened by a *fideicommissum* is expropriated the burden falls away with the expropriation. However, it is by no means clear that this supports the principle for which counsel contends. The case[26] van Winsen J relied on for this observation, involved a dispute over the entitlement of the local authority to expropriate immovable property burdened by a *fideicommissum* where the ultimate beneficiaries of the *fideicommissum* were not yet in existence. The court decided that expropriation was permissible on the basis that the *fideicommissum* remained in existence after expropriation but burdened the compensation rather than the property.[27] It is not authority for the proposition that what is acquired by expropriation can be greater than what was taken, nor is it authority for the proposition that what is acquired can be different from what was taken.

[20] There is support for the contentions of the Minister in four cases, two from Zimbabwe[28] and the other two judgments of the Privy Council on appeal from Malaysia[29] and Mauritius[30] respectively. In each the claim for compensation failed on the basis that, whilst the rights of the claimants had either been extinguished or significantly diminished and the government in each case had significantly extended its rights and powers, the claimants had failed to show that any rights previously possessed by them had been acquired by the government. That strict

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[25] *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) at 423H-424A.
[26] *The Town Council of Cape Town v Hiddingh's Executors* (1894) 11 SC 146.
[27] A principle embodied in s 12 of the Expropriation Act 55 of 1965. See *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 243A-D.
[28] *Hewlett v Minister of Finance* 1982 (1) SA 490 (ZS) at 501H-507G; *Davies & others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC) at 232F-235I.
[29] *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC).
[30] *Société United Docks & others v Government of Mauritius: Marine Workers Union & others v Mauritius Marine Authority & others* [1985] 1 All ER 864 (PC) at 870c-d.

approach to the concept of an acquisition flowing from an expropriation supports the contention by the Minister and CALS.

[21] However there is a different line of cases reflecting a different approach to this problem. In Australia in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[31] Deane and Gaudron JJ said:

'The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property ... For there to be an "acquisition of property", there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result.'

In *Georgiadis v Australian and Overseas Telecommunications Corporation*[32] it was held that there is no reason why what is acquired should correspond precisely to what has been taken. A case that illustrates this possibility is the Canadian case of *Manitoba Fisheries Ltd v The Queen*,[33] where a commercial monopoly in relation to the export of freshwater fish from Canada was granted to a statutorily created Crown corporation, which could in turn grant licences to private businesses. The claimant had not been granted such a licence and as a result its existing profitable business could no longer be pursued. Whilst provision was made for provinces to compensate businesses for their redundant plant and equipment Manitoba had not done so. The Supreme Court of Canada held that the effect of creating the statutory monopoly was that the Crown corporation acquired the goodwill of the claimant's existing business and

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[31] *Mutual Pools & Staff Pty Ltd v The Commonwealth* [1994] HCA 9; (1994) 179 CLR 155 at 185.
[32] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 (HCA) at 304-5.
[33] *Manitoba Fisheries Ltd v The Queen* 88 DLR (3d) 462.

had thereby 'taken' its business. A similar conclusion was reached in the case of *Ulster Transport Authority v James Brown & Sons Ltd*,[34] namely that the repeal of a statutory exemption which had allowed the company to trade in competition with a government established board providing the same services, was 'a device for diverting a definite part of the business of furniture removers and storage from the respondents and others to the appellant' and was intended 'to enable the appellants to capture the ... business'.

[22] Lastly, in this survey of the problems that arise in determining whether an expropriation has resulted in an acquisition of property by the expropriating authority, there is the Australian case of *Newcrest Mining (WA) Ltd & another v The Commonwealth of Australia & another*. [35] It is a case that may have a particular resonance in the present one in that it involved rights conferred by the Commonwealth, all rights to minerals having been reserved to the Crown, under mining leases with commercial entities. The areas covered by the leases were then incorporated into a world heritage site, the Kakadu National Park, where there was a statutory prohibition on the recovery of minerals. There was also an express statutory provision that provided that no compensation would be payable if rights were lost in consequence of the incorporation of property into a conservation area, such as Kakadu. This rendered the rights under the mineral leases valueless because they could not be exploited. The majority of the court held that there was an acquisition by the Commonwealth because the effect of the sterilisation of the lessee's rights was to enhance the value of the government's holdings. However, in dissent McHugh J pointed out that the Commonwealth gained nothing

[34] *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 113 and 116.
[35] *Newcrest Mining (WA) Ltd & another v The Commonwealth of Australia & another* (1997) 190 CLR 513 (HCA).

thereby. It was not enabled to exploit the minerals and had the prohibition been lifted the claimant could have exploited them under the mineral leases. He accordingly held that there was no acquisition.

[23] These are complex and difficult questions. The approach that requires almost complete correspondence between what is taken from the expropriatee and the benefit or advantage accruing to the expropriator appears simple, but it ignores the reality that deprivations of property can take a variety of forms[36] and be effected in various different ways. The resultant advantage to the authority that effects the deprivation may also take a variety of forms. An unduly literal concept of acquisition flowing from a deprivation may mean that the concept of expropriation is too narrow and fails to afford the protection to property rights that s 25(2) is designed to afford. A broader and more generous concept of acquisition may also go some way towards addressing the problems that caused this court in *Steinberg* to pose the question whether there is scope under the Constitution for a concept of constructive expropriation. On the other hand an overly generous approach to the notion of acquisition runs the risk of reducing it to something akin to the peppercorn that in the English common law system suffices to provide the requisite consideration for a binding contract. That would blur the distinction our Constitution draws between expropriations and other forms of deprivation of property. It may also create barriers to the constitutionally mandated process of transformation in regard particularly to access to land and natural resources, where s 25 has sought to strike a careful balance between existing property rights and the achievement of transformation.

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[36] *Mkontwana v Nelson Mandela Metropolitan Municipality & another; Bisset & others v Buffalo City Municipality & others; Transfer Rights Action Campaign & others v MEC, Local Government and Housing, Gauteng, &others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) paras 87-91.

[24] In view of these difficulties it is undesirable to adopt a categorical approach to understanding what constitutes acquisition for the purposes of expropriation. I accept that acquisition by or through the expropriating authority is a characteristic of an expropriation in terms of s 25(2). However, it is preferable to determine what constitutes an acquisition for the purpose of identifying an expropriation on a case by case basis having regard to the particular form that any alleged expropriation takes, the nature of the property alleged to have been expropriated and the content of the rights allegedly acquired by the expropriator. This is of particular importance when one is dealing with an alleged expropriation of incorporeal property, effected by way of changes made in a regulatory environment. In that situation it will be as important to examine the substance of the right as its source, especially where there is a need for continuity of operations in the industry under consideration and the changes include transitional measures. That in turn may affect whether there has been a deprivation or the nature of any deprivation. In order to decide both the question of deprivation and the question of acquisition in the present case it is accordingly first necessary to consider the nature of the mineral rights that Agri SA says have been expropriated.

The nature of mineral rights

[25] In accordance with long-standing usage mineral rights are referred to as common law rights. Indeed they are so described in a leading judgment of this court in *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd & others*,[37] where the court was faced with a conflict

[37] *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd & others* 1996 (4) SA 499 (A) at 510A.

between two rights holders, the one holding the right to mine precious metals over the property and the other the right to mine all other minerals. They were so described, without further analysis, in the trial court's judgment and in the arguments of counsel both in that court and in this court. However, it is instructive to examine more closely and in its entirety the relevant passage from the judgment of Schutz JA, which, notwithstanding the division of views as to the outcome of the case, was accepted by all his colleagues. It reads:

'A brief account of the genesis of the various rights, their nature and subsequent fate, is needed because of certain arguments which will be considered later. Prior to 1925 the Transvaal Land Co Ltd owned Umkoanesstad, its surface and what was beneath it, in all the fullness that the common law allows, although even by then for about half a century there had been legislation which could affect its rights if payable minerals were present. In that year Willem Remmers acquired the farm, but simultaneously the mineral rights were separated and retained by Transvaal Land Co Ltd by means of a reservation in the transfer deed and the registration of a certificate of mineral rights in its favour. Those rights were defined as "all the mineral rights and all minerals, oil, precious stones, precious or base minerals". Such a separate registration of mineral rights had come to be recognised in the Transvaal long before 1925: see *Houtpoort Mining and Estate Syndicate Ltd v Jacobs* 1904 TS 105 at 110; also *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 at 315.

Indeed an entire structure of mineral and mining law had been evolved in South Africa both by the Courts and various legislatures. The need for such development arose out of the lack of such laws in the Roman-Dutch system. ...

The nature of rights to minerals which had been separated from the ownership of the land, as they had developed in South Africa, was described by Innes CJ in *Van Vuren and Others v Registrar of Deeds* 1907 TS 289 at 294 as being the entitlement "to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away". As these rights could not be fitted into the traditional classification of servitudes with exactness - they were not praedial as they were in favour of a person, not a dominant property - they were not personal as they were freely transferable - they had to be given another name, and the Chief

Justice dubbed them *quasi*-servitudes, a label that has stuck. They are real rights. Their exercise may conflict with the interests of the landowner. In a case of irreconcilable conflict the interests of the latter are subordinated, for if it were otherwise the grant of mineral rights might be deprived of content: see eg *Nolte*'s case supra at 315: *Hudson v Mann and Another* 1950 (4) SA 485 (T) at 488E-F. For so long as minerals remain in the ground they continue to be the property of the landowner: only when the holder of the right to minerals severs them do they become movables owned by him: *Van Vuren*'s case supra at 295. Those are the main established common-law principles that are relevant.'[38]

[26] From this we see that what have come to be referred to as common law rights emerged from the combined work of the courts and various legislatures over the many years in which mining has been a significant activity in South Africa. As Schutz JA expressed it 'an entire structure of mineral and mining law had been evolved in South Africa both by the Courts and various legislatures'. That accords with the view of Lord Sumner in the Privy Council in *Union of South Africa (Minister of Railways and Harbours) v Simmer and Jack Proprietary Mines Ltd*,[39] where in dealing with the nature of mynpacht rights he said:

'Mynpacht rights are sui generis and are the creature of statutes, which have conferred on the State the right to dispose of precious metals and invest the State's grantees with the right to win and get them, the ownership right of the dominium notwithstanding.'

It has been convenient down the years to describe the system of mining law as giving rise to common law mineral rights, but that nomenclature was probably adopted because of the role the courts played in characterising such rights. Hitherto it has been unnecessary to explore the underpinnings of the system and untangle its roots with a view to discerning the source and nature of these rights and whether they are in

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[38] At 509A-510A.

[39] *Union of South Africa (Minister of Railways and Harbours) v Simmer and Jack Proprietary Mines Ltd* [1918] AC 591 at 600.

fact derived from the common law. That exercise must be undertaken in the present case because it is those rights that Agri SA contends were expropriated by the MPRDA.

[27] Section 5(1) of the 1991 Act, which provides the foundation for the argument on behalf of Agri SA, conferred the right to enter upon the land, to prospect and mine for minerals and to dispose of those that were extracted upon holders of mineral rights. These are collectively referred to as the right to mine. A number of subsidiary rights or entitlements flow from the right to mine, particularly as between prospectors and miners on the one hand and property owners on the other. Together with the right to mine they constitute what were referred to as common law mineral rights. The holders of mineral rights could deal with them by, for example, selling them or bequeathing them to an heir, or could sterilise them by debarring others from coming upon the land to engage in prospecting or mining activities. The latter could be important to a farmer who wished to prevent any disruption of the surface of the land in order to pursue farming activities without interference. There is land that is valuable farming land under which rich mineral deposits are to be found. Where the owner held the mineral rights they were able to determine whether farming or mining would take place.

[28] The concept of mineral rights is founded on the right to mine. Does the right to mine have its source in the common law as Agri SA claims? In order to answer this question it is necessary to delve into the history of our mining law and the evolution of mineral rights. In undertaking that task it is right that I confess my debt in particular to Professor M O Dale and his doctoral thesis *An Historical and Comparative Study of the Concept and Acquisition of Mineral Rights*

(hereafter Dale) and Dr L V Kaplan's thesis *The development of various aspects of the gold mining laws in South Africa from 1871 until 1967* (hereafter Kaplan).[40] Much of what follows is derived from these sources and from a consideration of the statutes to which they refer.[41] For reasons that will emerge the consideration of these issues will be divided into different periods.

The common law

[29] Whilst there is little writing in Roman Law on the topic of mineral rights Professor Dale says[42] that there was a clear tendency to move away from unrestricted ownership of minerals to a restricted ownership of land on which minerals were found. This was linked to an appropriation by the State of the authority to determine who would enjoy the right to mine, initially in respect of public land and then in relation to private land. He notes that:

'This restriction of the landowner's full dominium in favour of freedom to mine, is a tendency which, while founded in Rome, is discernible in almost all legal systems, and is possibly attributable to the fact that the mining industry is generally of such national importance that it is allowed to take precedence over the interests of the individual landowner.'

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[40] I have also derived much assistance from the extensive writings in various journals of Professors P J Badenhorst and H Mostert; from the historical overview in B L S Franklin and M Kaplan *Mining and Mineral Laws of South Africa* 1-21 and from Professor Badenhorst's doctoral thesis *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg.* In the latter at p 3, fn 5 he makes the point that it is unclear whether mining rights as separate real rights were known to the common law and therefore adopts the expression 'tradisionele mineraalreg' in preference to 'gemeenregtelike mineraalreg'.

[41] After the hearing of the appeal and the preparation and circulation of the draft of this judgment, we were furnished with proof copies of Professor Hanri Mostert's book referred to in fn 4 supra. In large measure it is based on an analysis of the origins of mineral rights that is similar to the one in this judgment. It has provided a useful check on the conclusions reached in the judgment in regard to the historical analysis, although my conclusions in regard to the right to mine go further than hers and are not dependent upon characterising the critical provisions of mining legislation as regulatory.

[42] Dale at 3.

In Roman times various devices were used by the State to exercise authority over the right to mine. These included permits and authorisations and the requirement to pay royalties in return for the grant of a right to mine. In devising this system whilst 'the right to mine … was strictly under State Control' the interests of the State, the miner and the landowner were balanced and protected. This approach was not unique to the Romans. His conclusion is that:

'The development in Roman Law from private ownership of the right to mine on one's own land, to the control of the mining industry and the right to mine by the State, is one which is not singular to the Romans, but is traceable in the systems of most countries.'[43]

[30] That view is shared by Professor Barton, who testified on behalf of the Minister. He pointed out that absolute private ownership of minerals, carrying with it a right to exploit those minerals is rare. According to him, and this does not appear to have been disputed, there are two major variations. Under the one (the Dominial system) the State is said to own the minerals irrespective of ownership of the land on or under which they are found. Under the other (the Regalian or royalty system) the State controls the minerals and allocates the right to mine in return for the payment of royalties. Sometimes this is justified on the hypothesis that the minerals are not in private ownership at all but are owned by 'the people' collectively. There are echoes of this notion in the preamble to the MPRDA where it states that South Africa's mineral and petroleum resources 'belong to the nation' and that the State is the custodian thereof.

[31] As Schutz JA pointed out there is little of use in the Roman Dutch writers concerning mining and mineral rights because the Dutch countries

[43] Dale at 12.

were not places where much mining occurred. Interestingly, however, Voet 41.1.13[44] says in regard to Holland's overseas possessions that the right to all minerals and precious stones was vested in the Dutch East India Company by a law of the Estates-General. This appears to reflect in some measure the principle of the State exercising control over the right to mine.[45]

[32] The common law principle is that the rights of the owner of immovable property extend up to the heavens and down to the centre of the earth. This is expressed in the maxim *cuius est solum eius usque ad caelum et ad inferos*, usually abbreviated in academic writing to the *cuius est solum* principle. Its origins are obscure as it is not to be found in the *Digest* or elsewhere in the *Corpus Iuris Civilis*, but emerges in the writing of the Glossator, Accursius, in the thirteenth century. It is not a principle unique to the civil law tradition but is also applicable, with some qualification in the light of modern conditions, under the English common law.[46] The principle continues to be recognised in our law today,[47] although we have not had occasion to consider some of the difficulties in giving it unrestricted application in modern conditions. Its application leads to the conclusion that the minerals in the soil under the surface of immovable property are owned by, or, to use the Latin expression, part of the *dominium* vested in, the owner of the property.[48] Unlike the English law, where separate ownership of strata of the soil

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[44] Gane's translation, Vol 6, 192.

[45] I doubt, however, whether it fully justifies Professor C G van der Merwe's comment, based on it, that: 'Sedert die Middeleeue word die reg op die ontginning van minerale as 'n privilegie van die staat beskou. Hierdie standpunt het in die Romeins-Hollands sowel as die Suid-Afrikaanse reg neerslag gevind.' C G van der Merwe *Sakereg* (2ed, 1989) 566.

[46] *Star Energy Weald Basin Ltd & Anor v Bocardo SA* [2010] UKSC 35; [2010] 3 All ER 975; [2011] 1 AC 380, paras 13 to 28 where Lord Hope discusses the brocard in some detail.

[47] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 16.

[48] *Le Roux & others v Loewenthal* 1905 TS 742 at 745; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 at 315.

under the surface is possible, such separation was never recognised in Roman Dutch law,[49] so that there could not be a separate ownership of minerals before their extraction from the soil.

[33] In general the owners of property are free to do with it what they wish. That is the foundation for the view that as a matter of common law the right to mine vests in the owner of the land. Professor Badenhorst identifies the entitlement to exploit the minerals in, on and under the land as being one of the entitlements arising from ownership of land.[50] Flowing from that entitlement, owners could permit others to prospect or mine on their land, but that was in terms of personal contracts, not giving rise to real rights. From the early days of mining in South Africa contracts were concluded in terms of which the right to 'prospect, dig, quarry and exploit for, work, win, take out and carry away, and for his own account to sell and dispose of minerals, metals or precious stones' was conferred by landowners upon those who wished to prospect or mine.[51] This required 'a progressive development of the law keeping place with modern requirements'.[52]

[34] The endeavour to accommodate the demands of mining within the framework of contract and the common law gave rise to considerable

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[49] 'Horizontal layers of the earth cannot with us, as they can in England, be separately owned.' per Bristowe J in *Coronation Collieries v Malan* 1911 TPD 577 at 591; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* supra para 16. The contrast between the English law and our own is discussed by Dale, supra, Chapter 3.

[50] P J Badenhorst 'The re-vesting of state entitlements to exploit minerals in South Africa: privatisation or deregulation?' 1991 *TSAR* 113 at 114. In accordance with the school of thought in property law that there cannot be a right in a right, he eschews the use of the expression 'rights' in relation to the things that the owner may do preferring the expression 'entitlements'. The difficulty with this approach is that when this entitlement is severed from the land it becomes an independent real right, which suggests that its legal character is different prior to severance than after, a notion that poses considerable conceptual difficulties.

[51] This is the wording of the contract in *Henderson & another v Hanekom* (1903) 20 SC 513 at 522 of which Kotzé J said that the conclusion of such contracts had become one of daily practice.

[52] Per De Villiers CJ in *Henderson & another v Hanekom* op cit 519.

difficulties. Thus, for example, although these contracts were commonly, including in legislation, referred to as leases of mineral rights, the appropriateness of this nomenclature was questionable as they lacked the hallmarks of a contract of *locatio conductio*.[53] Another problem was the nature of the rights afforded by such contracts. Personal rights, unlike real rights, cannot be asserted against the world and this affected the security afforded by such contracts. That was important because, from an early stage it became apparent that substantial investment was needed to develop mines. Such investment would not be forthcoming if, for example, the insolvency of the landowner could destroy the rights on which that investment had been made. The lack of separate ownership of the minerals themselves gave rise to difficulties in transferring them.[54] None of these problems could be resolved until the right to mine could be separated from the dominium of the land itself. That occurred in the following stage of development.

The pre-Union legislation

[35] As is well known diamonds were discovered in South Africa in 1867. In 1871 the Kimberley pipes were discovered and in 1880, after some uncertainty, Griqualand West was annexed to the Cape Colony. In the South African Republic (to which I will for convenience refer as the Transvaal) there were initial gold rushes in Pilgrim's Rest and Barberton. The main Witwatersrand gold bearing reef was discovered on Langlaagte farm in 1886, leading to the Witwatersrand gold rush and the development of the gold mining industry, in which many of the leading industrialists from the Kimberley diamond mines played a leading role.

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[53] *Lazarus and Jackson v Wessels & others* 1903 TS 499 at 506.
[54] Dale at 82.

The first major attempt to explore for coal occurred in 1881 in the Dundee area of the Colony of Natal. This lead to the establishment of mines in that area and by 1903 more than half a million tons of coal was being produced by collieries in Dundee and surrounding areas. Mining accordingly became a significant part of the economic life of the Cape, Transvaal and Natal and this resulted in legislation.

[36] In the Cape Colony, save to an insignificant extent, all rights to precious stones, gold and silver were reserved to the Crown in terms of s 4 of Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure dated 6 August 1813.

'Government reserves no other rights but those on mines of precious stones, gold, or silver; as also the right of making and repairing public roads, and raising materials for that purpose on the premises: Other mines of iron, lead, copper, tin, coal, slate or limestone belong to the proprietor.'

When Namaqualand was incorporated into the colony provision was made by statute[55] for the leasing and working of mineral lands in return for payment of rent and a royalty. In 1883, shortly after the annexation of Griqualand West, a comprehensive statute, the Precious Stones and Minerals Mining Act,[56] was passed. It provided for the taking out of prospecting licences for precious stones, gold, silver and platinum on Crown land or land where the right to those precious stones and minerals was reserved. In the latter case the consent of the owner of the land was not required. Discoveries had to be declared and this could then lead to the area being proclaimed as a mine or alluvial digging always under government control. Royalties were payable on the gross return from mining. On private land not subject to a reservation of rights the owner could allow prospecting or the extraction of minerals or precious stones,

[55] The Mining Leases Act 10 of 1865 (Cape). This was amended from time to time thereafter.
[56] Act 19 of 1883 (Cape).

but, if the number of claims exceeded a stipulated maximum, the area could be proclaimed. Whilst in that event the owner would fix the amount of the royalty, 10 per cent would be payable to the government. In later years amendments were made to provide for compulsory prospecting[57] and the rights of owners of land were varied. Lastly two new and consolidated pieces of legislation were passed in 1898[58] and 1899[59] in relation to precious metals and precious stones. The provisions of both were similar. Prospecting licences could be obtained for both Crown and private land, in the latter case with the consent of the owner, and on discovery provision was made for proclamation with some protection for owners. In 1907 similar regulation of prospecting for and mining of most base minerals was enacted,[60] whereby prospecting licences were issued for prospecting on Crown land and if minerals were discovered a mineral lease would be awarded subject to the payment of both rental and royalties.

[37] In the Transvaal a Volksraad resolution of 1858 resolved that the owners of land where minerals were found would be bound to sell or lease the land to the government. Ordinance 5 of 1866 provided for the exploitation and smelting of ores and the payment of a royalty to government in respect of the proceeds. In 1871 the first of a series of laws known generally as the Gold Laws and bearing the long title:

'Regelende de ontdekking, het beheer en bestuur van de velden waarop edelgesteenten en edele metalen in dezen Staat gevonden word'[61]

was passed.[62] It provided that:

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[57] The Precious Stones and Minerals Mining Law Amendment Act 44 of 1887 (Cape).
[58] Precious Minerals Act 31 of 1898 (Cape).
[59] Precious Stones Act 11 of 1899 (Cape).
[60] The Mineral Law Amendment Act 16 of 1907 (C).
[61] An Act regulating the discovery, control and management of the fields where precious stones and precious metals are found in this State. (My translation.)
[62] Law 1 of 1871.

'het mijnregt op alle edelgesteenten en edele metalen behoort aan de Staat.'[63]

Discoveries of precious stones or precious metals had to be reported after which the government would exercise control over the proclamation of diggings and the activities of mining. Licences were required by anyone wishing to dig for precious stones or precious metals. As Professor Dale describes it:

'The essence of the law was therefore the reservation of the right to mine to the State, State control of diggings including private land, and the payment of licence moneys.'

The first Gold Law was followed by a succession of laws all of which conformed in essence to the same pattern, whilst building upon their predecessors and adapting to new conditions.[64] They all sought to strike a balance between the interests of the State and those of the diggers and landowners.[65] The State needed the revenues that mining would generate and accordingly needed to encourage the introduction of capital and mining, whilst the majority of citizens (as opposed to *uitlanders*, as the foreign miners were termed) were farmers, whose farming activities and lives were disrupted by mining and who resented other people becoming rich on the product of their land. As part of this balance provision was made in the 1875 law for payments to be made to surface owners and for the owners to have some control over prospecting on their own land.

[38] The 1883 law went further than its predecessors in providing that:

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[63] The mining right to all precious stones and precious metals belongs to the State. (My translation.)

[64] Law 2 of 1872; Law 7 of 1874; Law 6 of 1875; Law 1 of 1883; Law 8 of 1885; Law 10 of 1887; Law 9 of 1888; Law 8 of 1889; Law 10 of 1891; Law 18 of 1982; Law 14 of 1894; Law 19 of 1895; Law 21 of 1986 and Law 15 of 1898. The full title of each law is set out in a table in Dr Kaplan's thesis at xi. From Law 1 of 1883 they were entitled laws 'op het delven van en handel drijven in edel metalen en edelgesteenten in de Z A Republiek'. The 1898 Law was the first to be described as 'De Goudwet Der Zuid-Afrikaansche Republiek op Het Delven van en Handel Drijven in Edele Metalen.'.

[65] Dale, at 194, draws attention (referring to the position in 1897) to 'the delicate counter-balancing of the potentially conflicting rights of the surface owner, mineral right holder, and mining title holder, as also between the various mining title holders themselves' He also adopts the view of M Nathan in the preface to *Gold and Base Metals Laws* (6ed, 1944) that these laws reflected the growing importance of State supervision and intervention and the recognition of the interest of the public at large.

'Het eigendom in en mijnregt op alle edelgesteenten en edelmetalen behoort aan den Staat.'

In other words the State would now claim ownership of precious stones and precious metals as well as the right to mine them. This was a departure from the *cuius est solum* principle as it contemplated ownership of the minerals separately from the soil in which they were to be found. More importantly it highlighted the view of the Transvaal that power over these minerals vested in the State rather than the owners of private property. Owners were afforded some preference by giving them a concession to dig for gold on approved terms but that was all.

[39] In the same year a fundamentally important development occurred in a law not primarily directed at mining and minerals, but at transfer duties. It was Law 7 of 1883[66] which provided in article 14 that:

'Geen afstand van regt op mineralen aanwezig te zijn of werkelijk aanwezig op eenige plaats, zal wettig wezen zonder dat daaroover eene notarieele acte is opgemaakt en behoorlijk geregistreerd ten kantore van der Registrateur van Akte.'[67]

By s 23 of Law 8 of 1885 the requirement of notarial execution and registration was extended to mynpachten. Innes CJ dealt with the earlier provision in *Jolly v Herman's Executors*[68] in the following terms:

'At the date when the agreement now sued upon was entered into, the law as to the registration of mineral contracts was contained in Law No. 7 of 1883 and in Volksraad Besluit No. 1422 of the 12th August, 1886. By sec. 14 of the statute it was enacted that no grant of rights to minerals on any farm should be lawful unless embodied in a notarial deed and duly registered in the office of the Registrar of Deeds. Those provisions are strong and clear; ... In view of the magnitude of the interests affected by mineral grants in this country, and of the desirability of publicly

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[66] Tot regeling van de Betaling van Heerenregten.

[67] No disposal of rights to minerals believed to be present or actually present on any property shall be lawful unless a notarial deed thereover is prepared and properly registered at the office of the Registrar of Deeds. (My translation.) The provision was replaced by s 16 of Law 20 of 1895 and thereafter by s 29 of Proclamation 8 of 1902 which was to the same effect.

[68] *Jolly v Herman's Executors* 1903 TS 515 at 520.

recording such grants, so that all persons concerned might know them, it seems to me that the policy of the legislature was quite as much to register these transactions as to tax them. However that may be, the Volksraad did not long rest content with the wording of the section above referred to. By Besluit No. 1422 of the 12th August, 1886, that body resolved that all contracts concerning the cession of rights to minerals or about rights to mine (*omtrent afstand van regten op mineralen of omtrent regten om te delven*) which did not conform to the provisions of the first paragraph of sec. 14 of Law No. 7 of 1883 should be *ab initio* void, and no one should have any action whatever on such agreements. It is impossible after this lapse of time to say what case occurred, or what facts came to the notice of the Raad between 1883 and 1886 which led to this Besluit. But whatever the reason may have been which induced the legislature to take action, the effect of the action which they did take was unmistakable.

The policy embodied in the Law of 1883 was further extended, and in two directions. It was made to apply to contracts which had not been covered by the statute, and the result of non-compliance with the statutory direction was expressed in language still stronger and more unmistakable than had been used before. The Law dealt only with grants to mineral rights; the Besluit extended the provisions of the Law to all agreements connected with such grants or with rights to mine. The Law declared that non-notarial or unregistered contracts were unlawful; the Besluit directed that they should be considered void *ab initio*, and should confer no rights of action of any kind whatever.'

[40] In 1884 the focus shifted briefly from gold to coal when, by Volksraad resolution of 10 November 1884, the government was authorised to grant licences for the working of coal mines on government owned land. This was the first time that some control was taken of the mineral rights in respect of base metals, perhaps as a result of similar explorations in the Transvaal, which then included Vryheid, Utrecht and Paulpietersburg, to those being undertaken in Natal. Another Volksraad resolution in 1889 resolved that the government submit a law on base metals to the Volksraad during the next session. That was done by way of

Law 10 of 1891, which provided, in a chapter intended to make provisional regulation in respect of base metals, for licences to mine base metals on proclaimed land. The chief feature of this appears to have been that if the licence holder discovered precious metals or precious stones they would receive a preference in being enabled to work their discovery.

[41] The 1885 law reverted to the original position in 1871, namely that:

'Het mijn-en beschikkiingsregt op alle edelgesteenten en edelmetalen behoort aan den Staat.'

Private owners were permitted to prospect on their own land and to permit others to do so, but the government became entitled to appoint a state mineralogist to conduct a survey, no doubt with a view to identifying viable mineral deposits. The system of proclamation of diggings was maintained and some preference was afforded to the discoverer of minerals and the owner. The law clarified that by precious metals gold was meant. Silver was added in 1887. A consolidating law was passed in 1892, which required stone makers, rock quarries and chalk burners to obtain licences for these activities on proclaimed land.

[42] In 1895 the Transvaal enacted its first comprehensive law dealing with base metals and minerals in the form of the Base Metals and Minerals Law 17 of 1895, which provided in s 1 that:

'Het eigendomsrecht van en het beschikkingsrecht oor onedele metalen en mineralen, zoowel op geproclameerde als ongeproclameerde gronden, behoort aan den eigenaar van den grond.'[69]

Whilst the entitlement to engage in prospecting and mining for base metals was held by or was within the gift of the owner, a royalty would

[69] The ownership of and right to exploit base metals and minerals on both proclaimed and unproclaimed ground belongs to the owner of the ground. (My translation.)

be payable to the State. On government land licences were required and a royalty was also payable. The law was replaced in 1897[70] but without major change. Then in 1898 precious stones were separated from gold, silver and quicksilver in two new statutes.[71] Both statutes continued to state, as had their predecessors, that the right to mine precious stones and precious metals was reserved to the State. After the war ended in 1902, the Crown Land Disposal Ordinance[72] provided for the reservation of all rights to minerals, mineral products and precious stones to the Crown on land granted by the Crown. This was moderated in 1906[73] by making such a reservation permissible but not obligatory.

[43] Prior to union in 1910 there were new ordinances dealing with both precious stones[74] and precious and base metals.[75] As to the former Professor Dale says it 'preserved the philosophy that the right of mining for and disposing of precious stones is vested in the Crown'.[76] As to the latter it provided in s 1 that:

'The right of mining for and disposing of all precious metals is vested in the Crown; The ownership of and the right of mining for and disposing of base metals on Crown or private land, is vested in the owner of such land.'

This last of the Gold Laws, for the first time, referred to and defined the expression 'holder of the mineral rights', thereby giving statutory recognition to the possibility of a separation of the right to minerals from the ownership of the land. It also defined, for the first time in the Gold Laws, the expression 'mining title'. The definition set out six different sources of mining titles. All six flowed from statutory grants under the

[70] Base Minerals and Metals Law 14 of 1897 (T).
[71] Gold Law 15 of 1898 (T) and Precious Stones Law 22 of 1898 (T).
[72] Ordinance 57 of 1903 (T).
[73] By Ordinance 13 of 1906 (T).
[74] Precious Stones Ordinance 66 of 1903 (T).
[75] Gold and Base Metals Ordinance 35 of 1908 (T).
[76] Dale at 197.

Gold Laws. In the 1908 law prospecting for precious metals required a permit save in the case of the owner of land. On discovery of precious metals the area could be proclaimed as a public digging, a mineral lease could be granted or a State mine established. In order to obtain a mineral lease the applicant would have to show that it had the capacity to mine. These provisions were replicated in relation to base metals on Crown land but otherwise the owner was permitted to prospect or mine for base metals, or to permit others to do so. However, in terms of s 121, a royalty was payable to the government on the extraction of base minerals.

[44] In Natal there were some early laws relating to mining, the first of which involving a concession to a coal company, but the first major piece of legislation was the Natal Mines Act 17 of 1887, which provided in s 4 that:

'The right of mining for and disposing of all gold, precious stones and precious metals, and all other minerals in the Colony of Natal, is hereby vested in the Crown for the purposes of and subject to the provisions of this Law."

This went further than the legislation in the Cape and Transvaal in that it reserved to the Crown the right to mine for and dispose of all minerals. Prospecting required a prospecting licence and on the discovery of minerals there could be public proclamation of diggings or a mining lease. A linguistic, though not a practical, distinction was drawn between a gold mining lease and a mineral lease. The Natal Mines Act emphasised the search for gold and coal. Owners could obtain mining leases on payment of rent and royalties. Thus from the outset the position in Natal was that the government controlled the right to mine and dispose of all

minerals. This continued when the 1887 Act was replaced in 1888[77] and again in 1899.[78]

[45] There was also legislation dealing with mining in the Republic of the Orange Free State and, after 1902, the Orange River Colony, although the major mining activities in that area lay in the future. This largely followed the early Transvaal legislation. Separate provision was made in relation to diamonds, where the State had the option to acquire, with the consent of the owner, any farm on which diamonds were discovered as an alternative to proclaiming diggings. In 1904 three pieces of legislation were passed dealing with precious metals,[79] precious stones[80] and base metals.[81] These did not differ in principle from the legislation in the Transvaal, save that in regard to base metals they provided that the owner could prospect for them or consent to a prospector doing so, but in that event the prospector had to obtain a licence, even though the prospecting was to take place on private land. As in the Transvaal a royalty was payable in respect of the extraction of base metals. Measures in the form of licence fees for non-working of a claim or even in some circumstances forfeiture of the claim were put in place to encourage mining. Like the Transvaal an ordinance[82] was passed reserving all rights, including the right to mine, to precious stones and precious and base minerals on alienated Crown lands to the Crown.

[46] At the end of this general and necessarily limited survey of the pre-Union legislation governing mining in South Africa some conclusions

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[77] Natal Mines Act 34 of 1888.
[78] Coal and Mines Act 43 of 1899 (N).
[79] Precious Metals Ordinance 3 of 1904 (O).
[80] Precious Stones Ordinance 4 of 1904 (O).
[81] Base Metals and Minerals Ordinance 8 of 1904 (O).
[82] Crown Land Disposal Ordinance 13 of 1908 (O).

can be expressed. In relation to precious stones, of which diamonds were the most important, gold and silver (and in the Transvaal quicksilver[83]), the right to mine was everywhere reserved to the State under legislation. As Innes CJ expressed it in *Greathead v Transvaal Government and Randfontein Estate and Gold Mining Co Ltd*:[84]

'The policy and scope of the Gold Law of 1889, and its successors, was to vest the sole right of mining for, and disposing of, precious metals in the State.'

This statement was equally applicable to the other parts of the country prior to Union. Natal went further in that the sole right of mining for and disposing of base metals and minerals also vested in the State. In the Transvaal and Orange Free State and parts of the Cape royalties were payable to the government on the products of mining for base metals and minerals. This is significant because a royalty is conventionally a payment in return for the right to mine for and extract metals, minerals, precious stones or oils and gas.[85] Counsel for Agri SA accepted that this was the nature of these royalties and that they were not a form of taxation. In this way therefore the government in these areas conferred and controlled the right to mine in relation to base metals and minerals as well as precious stones and precious metals.

[47] The control that the governments of the four colonies and their predecessors exercised over the right to mine in the areas under their jurisdiction did not divest the owners of land on which minerals were found or their rights of ownership in those minerals, prior to their being extracted by the process of mining. Until then ownership remained with

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[83] Mercury in solid form that was used in the process of extracting gold from gold ore.

[84] *Greathead v Transvaal Government and Randfontein Estate and Gold Mining Co Ltd* 1910 TS 276 at 288. This was a view consistently held by him. See *Neebe v Registrar of Mining Rights* 1902 TS 65 at 81 where he said: 'The right of mining for and disposing of all precious metals has by statute been given to the State.' See also Smith J at 90.

[85] *Xstrata & others v SFF Association*, supra, para 18.

the owner of the land, but that ownership was restricted because the right to mine was controlled by the State. As Innes CJ said:[86]

'But that does not decide the question as to the ownership of the mining rights. Under the scheme of all the gold laws, past and present, such rights are treated as distinct from the *dominium* of the soil; they are vested in and disposed of by the State, and are exercisable and enjoyed quite apart from the *dominium*.'

[48] I conclude that from an early stage of South African mining development the right to mine was a right that the State asserted for itself and controlled. It then allocated to owners, prospectors, claims holders or persons holding mynpachte or mineral leases in terms of legislation, the right, in accordance with the terms of those grants, to exercise the right to mine as it deemed appropriate. Professor Dale writes:[87]

'The Mining Industry is of such great national importance in a country that is blessed with mineral wealth, that from the earliest times, the State has sought to control it in some form or another.

...

In South Africa, after 1850, each of the four colonies which in 1910 united to form the Union of South Africa, developed its own system whereby the State controlled the prospecting and mining of certain minerals, in particular precious metals and precious stones ...'

In relation to any minerals to which these statutes did not apply he says that 'the ordinary common law provisions in regard to the acquisition of mineral rights, a right to prospect and a right to mine ... apply'. That may be so but the extent of this entitlement is unclear. It was not the case at all for Natal. In areas other than Natal and some parts of the Cape the owner was expressly permitted to prospect and cause base minerals to be mined. In the Transvaal that was as a result of a specific provision in the Gold

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[86] *Simmer and Jack Proprietary Mines Ltd v Union Government (Minister of Railways and Harbours)* 1915 AD 368 at 396.

[87] Dale at 171-2.

Law that gave the right to mine base minerals to the owner of the land on which they were found and demanded payment of a royalty for the privilege. In the Orange Free State the position was the same, except that a prospecting licence was required as it was in parts of the Cape. In three of the provinces royalties were payable on all or some base mineral production. None of this is compatible with the notion that there were substantial areas where the common law held sway. At the very least I think Professor Mostert is correct in saying[88] that: 'The right to seek for and extract minerals was, however, in many respects, the prerogative of the state.'

[49] A key event in the development of mining rights in South Africa was the imposition of the requirement that disposals of such rights and mynpachte had to be notarially executed and registered in the Deeds Registry in order to be binding. The construction the courts placed upon such registered rights facilitated the creation of separate mineral rights. Originally there was nothing to say in what form registration should take place. It appears from *Houtpoort Mining & Estate Syndicate Ltd v Jacobs*[89] that the Registrar's practice was to place such deeds in a register of *Diverse Akten*, although in some instances he registered them at the instance of the parties against the title deed in the Land Register.

[50] That case dealt with the earlier legislation referred to in paragraph 39, which was replaced in 1902 with a provision that 'No lease of any mijnpacht, claim or right to minerals ...' would be valid unless notarially executed and registered 'against the title deeds of the property'.[90] Innes CJ held that this applied to 'those mineral prospecting contracts in return

[88] Mostert supra 20.
[89] *Houtpoort Mining & Estate Syndicate Ltd v Jacobs* 1904 TS 105
[90] Section 29 of Proclamation 8 of 1902 (T).

for the payment of a yearly rent, and with or without option rights which are so common in this country'.[91] He went on to say in regard to a right to search for and win minerals that:

'I must confess to having at first experienced considerable difficulty --- a difficulty which pressed me during the argument in finding an appropriate juristic niche in which to place this right. Rights of that nature are peculiar to the circumstances of the country, and do not readily fall under any of the classes of real rights discussed by the commentators. They seem at first sight to be very much of the nature of personal servitudes; but then they are freely assignable. On further consideration, however, I am of opinion that the difficulty I have referred to is more academic than real. After all, the right in question involves the taking away and appropriation of portions of realty; it implies the exercise of certain privileges generally attached only to ownership, and it is treated by the Proclamation as a real right and is ordered to be registered against the title. In my opinion; therefore, this right when registered occupies the position of a real right ...'

[51] Thereafter, in *Van Vuren v Registrar of Deeds*,[92] Innes CJ, having pointed out that the rights so registered were neither personal nor praedial servitudes, described them as quasi-servitudes. Separate registration of any mining right was now required and they were effectively characterised as real rights. In addition the 1908 Gold Law provided a definition of mining title. In the same year provision was made for all mining titles to be registered under the Mining Titles Registration Act.[93] Thus was the foundation laid for a class of separate mineral rights held separately from the ownership of land. This was a marked departure from the common law and the operation of the *cuius et solum* principle. The latter was 'diluted by the fact that the landowner who had alienated the

[91] *Lazarus and Jackson v Wessels & others* supra 506.
[92] *Van Vuren v Registrar of Deeds* 1907 TS 289 at 295.
[93] Act 29 of 1908.

mineral rights to another was denuded of any entitlement regarding extraction of and disposal over such minerals'.[94]

[52] Thus the ability to sever mineral rights from the dominium of the land to which they related was afforded by statute, not the common law. That meant they could be dealt with as separate real rights. Their registration in the Deeds Registry against the title deeds of the property provided protection that, as the *Houtpoort Mining* case demonstrated, had not hitherto been available. The further concepts underlying our notion of mineral rights were then developed by 'the creative judgments'[95] of our courts. Against that background I turn to consider the next important period in relation to mineral laws from 1910 to 1967.

From 1910 to 1967

[53] Section 123 of the South Africa Act, 1909 provided that:

'All rights in and to mines and minerals, and all rights in connection with the searching for, working for, or disposing of minerals or precious stones, which at the establishment of the Union are vested in the Government of any of the Colonies, shall on such establishment vest in the Governor-General-in-Council.'

The pre-Union statutes summarised above remained in force and did so, subject to some amendment and supplementation, until their repeal by the Mineral Rights Act 20 of 1967. During this lengthy period mining became ever more important to the South African economy. Not surprisingly therefore the legislative changes that did occur reflect an expansion of the State's powers of control over mineral resources. In three instances legislation was adopted that, like the Gold Laws and the

[94] Mostert supra 7

[95] The phrase is Professor Badenhorst's in his article 'Towards a theory of mineral rights' 1990 *TSAR* 239 at 239.