Natal Mines Act, vested the right to mine and the right to exploit minerals in the State. The first of these was the Precious Stones Act,[96] which provided in s 1 that 'the right of mining for and disposing of all precious stones is vested in the Crown'. Precious stones were defined to include diamonds, rubies, sapphires and any other substances proclaimed as such by the Governor-General. Accordingly the legislation reserved to the State the power by proclamation to extend its right to mine to other materials. This was similar to the position under the 1908 Gold Law and its predecessors, which authorised the extension of the class of precious metals by way of proclamation. That power had been exercised to include silver and quicksilver during republican days and was invoked in 1922 to include platinum, iridium and the platinum group metals.[97]

[54] In 1942 the State assumed the right to mine for natural oil in terms of s 2 of the Natural Oil Act,[98] which provided that 'the right to prospect and mine for natural oil is vested in the State', although there was at that time little anticipation of natural oil being discovered in South Africa. This was at a time when the off-shore drilling had only taken place in a very few locations close to shore in very shallow waters. The advent of deep water off-shore drilling came after the end of World War 2.[99] Uranium was a different matter and the State took control of that in 1948 under the Atomic Energy Act, [100] which provided that

'... there shall be vested in the State the sole right –

(a) to search, prospect or mine for prescribed materials or in any manner to acquire any such material or to dispose thereof;

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[96] Act 44 of 1927.
[97] Kaplan 11.
[98] Act 46 of 1942.
[99] See *A Brief History of Offshore Drilling* a staff working paper prepared for the National Commission investigating the BP Deepwater Horizon Oil Spill and Offshore Drilling available at http://www.oilspillcommission.gov/sites/default/files/documents/A%20Brief%20History%20of%20Offshore%20Drilling%20Working%20Paper%208%2023%2010.pdf.
[100] Act 35 of 1948.

(b) to extract or isolate any such material from any substance, or to concentrate, refine or process, or to produce atomic energy.'

Prescribed materials were defined as uranium, thorium or any other material proclaimed by the Governor-General and included any substance containing uranium, thorium or any other such material.

[55] Apart from these instances there were also developments in the law relating to base minerals. No doubt this was influenced by the expansion of mining in metals such as iron ore, manganese, chromium and asbestos[101] that had occurred from around the time of Union through the 1920s and early 1930s. Whilst the exercise of the right to mine these base minerals remained largely in private hands, steps were taken in the Base Minerals Amendment Act[102] to encourage and compel the holders of such rights to exploit them. To this end the Minister was empowered to give notice to a holder of such rights, who was not prospecting for minerals pursuant to those rights or in the view of the Minister was not doing so adequately, calling upon the holder to prospect adequately or to cause such prospecting to be undertaken within six months, failing which the Minister could call for tenders for and grant a prospecting lease over the affected property. However, if this occurred, the royalties that would be paid would enure for the benefit of the mineral rights holder. Base minerals were comprehensively defined as including 'any mineral substance' with the exclusion of natural oil, precious stones, water and precious metals as defined in the statutes governing the exploitation of those. In order to avoid any overlap, once the Atomic Energy Act had

[101] H P Hart 'Asbestos in South Africa' *J. S. Afr. Inst. Min. Metal* vol 88, no 6, 185-196, which notes that asbestos mining began in earnest in South Africa in the 1930s.
[102] Act 39 of 1942.

come into operation the exclusions were extended to exclude material covered by the Atomic Energy Act in 1951.[103]

[56] In the 1960s a process of consolidating and revising the statutes governing mining in South Africa occurred. First there was the Precious Stones Act.[104] As with its predecessors it provided that the right of mining for and disposing of precious stones was vested in the State. In other respects it largely followed the pattern of earlier legislation. More important, because of its broader scope, was the Mining Rights Act 20 of 1967 (the 1967 Act), which replaced all the pre-Union legislation and for the first time created a single system of mining rights in South Africa as a whole. Section 2(1) provided that:

'Save as otherwise provided in this Act –

(a) the right of prospecting for natural oil and of mining for and disposing of precious metals and natural oil is vested in the State;

(b) the right of prospecting and mining for and disposing of base minerals on any land is vested in the holder of the right to base minerals in respect of the land.'

The exclusion of material covered by the Atomic Energy Act was continued by s 2(2). Mining title was defined[105] as meaning:

'any right to mine granted or acquired under this Act, and any other right to mine granted or acquired under any prior law and existing at the commencement of this Act, but does not include a right to mine for precious stones.'

This language is significant because it contemplated that all mineral rights would flow from a statutory grant or be acquired by virtue of statutory provisions. That is inconsistent with the notion that such rights flow from the common law. [106]

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[103] By s 1 of the Base Mineral Investigation Act 31 of 1951.
[104] Act 73 of 1964.
[105] In s 1(xxiii).
[106] Franklin and Kaplan, supra, 340 say that the sources of mining title under this definition are twofold namely a right to mine granted under the 1967 Act or a statutory right acquired directly by the holder. In either event the right flows from the statute not the common law. In the Mining Titles Registration

[57] Under s 7(1) of the 1967 Act no person was permitted to prospect for precious metals on either State land or private land not held under mining title, or for base minerals on unproclaimed State land not held under mining title, without a permit. Under s 11 the Minister could conduct an investigation into the precious metal, base metal or natural oil content of any land. Under s 15(1), if the holder of mineral rights or others having an entitlement to prospect did not do so or did not do so to the Minister's satisfaction, the Minister could proceed along lines similar to those under the Base Minerals Amendment Act, 1942. In other words there was an inducement, and if necessary a compulsion, to explore for and exploit minerals. Under s 25(2) the Minister was obliged to issue mining leases in respect of precious metals to holders of mineral rights over unproclaimed private land, to owners or lessees of unproclaimed alienated State land and otherwise to the prospector. However the entitlement of these persons to a mining lease was not absolute. The Minister had to be satisfied that the precious metal, base mineral or natural oil was present in workable quantities; that the scheme under which it was proposed to carry on mining was satisfactory; and that the applicant had, or had made arrangements to obtain, adequate financial resources and capital to conduct the proposed mining activities.

[58] The 1967 Act preserved the power of the State President to proclaim public diggings and the right of persons to peg claims in such diggings. It dealt with prior rights under mynpachten and provided, in s 75, for existing mining leases and mineral leases to remain in force as if it had not been passed. Sections 76(1) and 77(1) provided for mining

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Act 16 of 1967 the concept of a holder of a mining right is defined (s1(vi)) in relation to rights 'granted or acquired' under the 1967 Act or any other statute.

leases in relation to base minerals granted under the old Transvaal and Cape legislation to be converted into mining leases under the 1967 Act.

[59] From 1910 onwards the rights established in the Transvaal for the registration of mining titles were maintained and from time to time extended.[107] In addition the two Deeds Registries Acts[108] made provision for separate registration of some mineral rights, and, in 1967, the Mining Titles Registration Act[109] required that title to all mineral rights be registered. Registration in turn required the development of principles relating to the resolution of conflicts between the holders of mineral rights and owners of the land or other rights holders or public authorities. These disputes were resolved by the courts applying and adapting common law principles to these novel rights. They did so by using familiar legal terms such as lease and servitude while acknowledging that they were not being used in their conventional sense. In the process the legislative origin of these rights and the degree of departure from common law principles became obscured.

[60] This tendency to obscure or overlook the key role of legislation in the development of our law of mineral rights is well illustrated by the analysis in the leading textbook on mining law in regard to the effect of s 2(1) of the 1967 Act.[110] That section dealt clearly and explicitly with the right to mine in relation to precious minerals (ss 1(*a*)) and base minerals (ss 1(*b*)). In doing so it followed the example of the 1908 Gold Law. There seems little reason not to view this as a statutory allocation of the right to mine in accordance with government policy of the day. One

[107] Franklin and Kaplan, supra, 586.
[108] Act 13 of 1918 and Act 47 of 1937.
[109] Act 16 of 1967.
[110] See para 56.

cannot view ss 1(*a*) as taking away the common law rights of landowners. That would be inconsistent with over a century of history reflecting the approach of successive governments in the different parts of the country that it was for government, not landowners, to determine who should exercise the right to mine, at least in regard to precious stones, precious metals, natural oil and uranium and in some instances more. Insofar as there can be any question of taking away rights vested in landowners by the *cuius et solum* principle, that had occurred many years before when mineral rights became capable of severance from ownership of the land, and it was never reversed. Section 2(1)(*a*) clearly retained the position in regard to precious metals and natural oil that the right to mine was vested in the State and was allocated by statute.

[61] Looking at the structure of s 2(1) there seems no good reason to think that it reflects an entirely different view in regard to the right to mine base minerals. That is recognised by Franklin and Kaplan[111] when they pose the question whether this is a statutory grant of those rights or a restatement of the common law.[112] However, without further analysis they then express the view that it is a restatement of common law rights. In my opinion that is incorrect. Under the common law only the owner of the land would have had the right to prospect for, mine for and dispose of base minerals in accordance with the *cuius et solum* principle. Section 2(1)(*b*) does not mention the owner of the land at all, although it is the landowner who is the beneficiary of the *cuius et solum* principle. The section conferred the right to mine in relation to base minerals on the holder of the rights to base minerals, who might or might not have been the owner of the land. If they were, the fact of ownership of the land

[111] Supra 345-6.

[112] The same question was posed, without being answered, by Caney J in *S A Permanent Building Society v Liquidator, Isipingo Beach Homes (Pty) Ltd* 1961 (1) SA 305 (D) at 313C.

added nothing to their entitlement to prospect and mine. At most it afforded greater control over the use to which their property could be put. Where the rights were separated they were held under a title that had its origins in legislation and was impossible to acquire at common law. I conclude that s 2(1)(*b*) reflects an allocation by the State of the entitlement to exercise the right to mine to holders of mineral rights to base metals. The underlying principle is that the State has always viewed it as its entitlement to control and allocate the right to mine. Even if one accepts that Professor Dale is correct in saying that at Union in each of the four provinces 'the State controlled the prospecting and mining of certain minerals' leaving some to be dealt with by landowners pursuant to the rights enjoyed by owners under the common law, under s 2(1) the State controlled the prospecting and mining of all minerals, precious and base, and either reserved them to itself or allocated them to the holders of mineral rights. Professor Mostert summarises matters correctly when she says[113] that:

The philosophy of state control over minerals during the period 1964 to 1990 resulted in a system whereby the state, in which the right to mine was vested, conferred rights to mine and prospect to mineral rights holders.'

The 1991 Act

[62] There can be no doubt that the 1991 Act was intended to alter the position in respect of mineral rights that had developed over the 150 years that preceded it.[114] Its genesis was a policy of privatisation and

[113] Mostert supra 55.

[114] In what follows I deal with the 1991 Act as if it had been applicable from the outset in the whole of South Africa. That was not however the case, as in the so-called TVBC states and homelands the 1967 Act remained in force and in some instances there was local legislation. There was only a unified system after the passage of the Mineral and Energy Laws Rationalisation Act 47 of 1994. A more complete picture emerges from Mostert, supra, 51-53.

deregulation announced by the government of the day in 1987.[115] Its embodiment was s 5(1) the terms of which bear repetition:

'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 shift from s 2(1) of the 1967 Act lay in the fact that there was no longer an express reservation to the State of any mineral rights, save where those rights had not been severed from State land or where they had been severed, but for some reason the State was still the holder of the rights. Nor was there any reservation of rights to the owner of land. In this iteration of South African mining legislation the holder of the mining rights was the only person able to exercise the right to mine. Neither the State nor the landowner was so entitled, save where they were also the holder of the mining rights in respect of land.

[63] Kaplan and Dale[116] expressed the view that this was a restoration of common law rights in the following comment on s 5(1):

'This has the effect, subject to the system of authorisations and subject to the special provisions relating to alluvial diggings mentioned below, that the common law rights of the holder of the rights to minerals revive to their full extent, Section 5(1) probably having been intended to be a mere restatement of such common law ... Accordingly, the Minerals Act is more easily comprehensible if the principles formerly applicable to base metals on private unproclaimed land are extended to all other minerals on all other classes of land.'

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[115] Badenhorst fn 46 supra, p 113, fn 7.
[116] Supra, para 1.5.2, pp 5-6 and paras 4.2 and 4.3 pp 46-48.

Professor Badenhorst drew attention to two major difficulties with this view.[117] First, nowhere in the common law was an independent right to mine identified or refined. The entitlement to mine arising from ownership of land was recognised (presumably by reference to the *cuius et solum* principle), but its recognition was indirect and flowed from the principle that ownership of land gave the owner an entitlement to the fruits of the soil. Second, a mineral right was not recognised as a separate independent right by the common law. That was a development that had its origin in legislation and statutory instruments that imported and adapted British mining practice of reserving the right to mine to the State, or recognised mineral rights as separate rights. Both the legislature and the courts then categorised these rights by adapting familiar common law terms, such as ownership, lease and servitude.[118]

[64] The 1991 Act vested substantial powers in the responsible Minister. Although s 5(1) conferred the right to mine on the holders of mineral rights, that was made subject to their obtaining authorisation in terms of s 5(2). The extent of this power of authorisation is best illustrated by the fact that it was thought necessary in s 5(2)(*b*) to provide a special exemption from the obligation to obtain a mining authorisation for occupiers of land who removed sand, stone, rock, gravel, clay or soil

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[117] P J Badenhorst 'Artikel 5(1) van die Mineraalwet 50 van 1991: 'n herformulering van die gemenereg?' (1995) 58 *THRHR* 1 at 5-8.

[118] Professor Badenhorst expresses it thus:

'Tweedens word kategorisering van bevoegdhede voortspruitend uit 'n mineraalreg as sodanig nie in die gemenereg aangetref nie aangesien 'n mineraalreg nog nie as afsonderlike en selfstandige saaklike reg bestaan het nie. Hierdie ontwikkeling het sedert 1813 hier te lande plaasgevind, hoofsaaklik vanweë wetgewing wat óf uitdrukking verleen het aan die Britse praktyk om tydens die uitgifte van grond die mineraalregte ten gunste van die owerheid voor te behou, óf die selfstandigheid van mineraalregte erken het.

Kategorisering van ontginningsbevoegdhede wat ingevolge die gemenereg bestaanbaar sou wees, het eerder deur (i) die wetgewer en (ii) die howe na analogie van die inhoud van eiendomsreg, die serwituut-figuur en wetgewing plaasgevind.

Die wetgewer het 'n belangrike rol gespeel in die nadere identifisering van die ontginningsbevoegdhede wat vanuit ontginningsregte voorspruit deurdat hierdie bevoegdhede as selfstandige regte beskou is.'

for farming purposes or for effecting improvements in connection with farming purposes on the land they were occupying. That such an exemption was necessary illustrates that the Minister had extensive powers to control mining activities and could exercise those powers through the grant or withholding of mining authorisations. The issuing of mining authorisations was governed by s 9 and was dependent on the Director: Mineral Development being satisfied that the proposed mining would result in the optimal development of the minerals; that the applicant had the capacity to rehabilitate the mine once mining activities ceased; that the applicant had the ability, which obviously included the financial resources, to mine optimally and rehabilitate the surface. In terms of s 9(5) an application for a mining authorisation had to include substantial information concerning the proposal. The Director would, in terms of s 11(i), determine the duration of the authorisation and in terms of s 63 the Minister was empowered to make regulations governing the exploitation, processing, utilisation or use of or the disposal of any mineral and the conditions attaching to any mining authorisation.

[65] The reaction of the Chamber of Mines to the original draft of the Bill that became the 1991 Act was hostile. They said in a memorandum that:

'The State will maintain complete control of all mining for and disposal of all minerals, precious as well as base; firstly, by laying down conditions for the grant of permits and licences with power to vary such conditions; and secondly by being in a position to dictate ... that the manner in which the mining operations and marketing of minerals are being conducted must be in the Minister's liking.'

Whilst the Bill was amended thereafter, the position remained that it was characterised by 'a cradle to grave form of regulation'.[119] Professor Badenhorst concluded that in its final form it embodied an increase and not a decrease in State control because it extended control to all mining of base minerals; it gave wide discretionary powers to officials and the Minister and it maintained strict control of all previous state-held entitlements to exploit minerals including base minerals.[120]

[66] These comments were in my view justified. To characterise the 1991 Act as restoring common law rights and relaxing state control of the right to mine was erroneous. What the 1991 Act did was to confer on the holder of mineral rights the exclusive right to exploit them, because only the holder, or someone acting with the consent of the holder, could obtain an authorisation to prospect or mine that would enable the rights to be exploited. In itself that was not a major change, as the holders of mineral rights, or persons acting with their consent, had in large measure under the 1967 Act been the only persons entitled to exercise those rights, subject to the exception mentioned below in relation to unexploited rights. The change lay more in two matters. First there was no longer any express reservation of rights to the State in respect of any category of minerals, although the State was, for various reasons, a substantial holder of mineral rights and would remain such. Second, the provisions directed at securing the optimum exploitation of minerals were altered. The State could no longer, as it had been entitled to do under the 1967 Act, grant a prospecting lease in respect of unexploited mineral deposits against the will of the owner of the land or the holder of the mineral rights, subject

[119] Badenhorst, fn 46, supra, 129. Mostert, supra, para 5.2.1, pp 60-69 and para 5.4 at p 72 appears to share this view, although she also seems to think that in some form this involved a restoration of common law rights, a view I do not share.
[120] Badenhorst op cit 129-130.

only to the payment of rental and compensation for damage.[121] In terms of chapter IV of the 1991 Act, the Minister could in very limited circumstances, where the right to prospect could not be secured from the rights holder, authorise prospecting and could also cause unexploited deposits to be investigated. However, if it was thought desirable to exploit them, either the land or the rights would have to be expropriated and compensation paid. There is nothing in the record to indicate the extent to which the Minister had exercised his powers under s 15 of the 1967 Act. It is accordingly impossible to say more than that the 1991 Act diminished the powers of the Minister in this respect and expanded the rights of the mineral rights holder. However, the exercise of mineral rights was still closely regulated and there were provisions to bring about the optimum exploitation and discourage sterilisation of viable mining rights,[122] as there had been in other legislation down the years.

[67] Three small and perhaps slightly obscure provisions make it clear that the State was not, in the 1991 Act, abandoning the principle that the right to mine vested in it and that it was for the State to allocate that right as it deemed appropriate. The first is s 5(2)(a), which empowered the South African Roads Board and provincial governments (in relation to provincial roads) to search for and take 'sand, stone, rock, gravel, clay and soil' for road-building purposes irrespective of whether they held mineral rights to those minerals. That would clearly diminish the rights of holders of mineral rights in respect of those minerals. The second is s 6(3) which, no doubt in response to the *Trojan Mining* case, authorised a person who was exercising a right to mine in respect of one mineral to

[121] Section 15 of the 1967 Act and particularly s 15(3). A prospecting lease was the gateway to a mining lease. Franklin and Kaplan, supra, 79. In the case of a prospecting lease under s 15 the prospector would be entitled to obtain a mining lease under s 25(1)(e) read with s 25(2)(c) of the 1967 Act.

[122] Chapter IV of the 1991 Act.

mine and dispose of other minerals in respect of which they did not have such rights, subject only to an obligation to compensate the holder of the mineral rights in respect of the other mineral. Again that is a subtraction from the rights of the second mineral rights holder. Third the exercise of mineral rights was prohibited in certain areas in terms of s 7 of the 1991 Act. All of these illustrate to my mind the fact that in the 1991 Act, as in previous legislation the State was asserting that the right to mine vested in it and that it was for the State to allocate that right in the manner and to the extent it saw fit.

Legal position prior to 2002

[68] It is apparent from this survey that what have come to be referred to as common law mineral rights, in both judgments of the courts and academic writing, do not in fact have their origin in the common law. They originate largely from legislation governing the right to mine and legislation that permitted personal rights obtained under contracts to be registered as rights separate from the ownership of the land to which those rights related. Their 'common law flavour' has arisen from the creative judgments of the courts in characterising and giving effect to such rights within a framework provided by well-known categories of rights in our law. This juristic pigeonholing cannot however be used to disguise the true origins of such rights. Nor can the adoption by the courts or, on occasions, the legislature, of the expression 'common law mineral rights' be taken as being any more than a convenient mode of referring generally to such rights. It cannot alter their true source and nature.

[69] Underpinning the development of varying forms of mineral rights over the years has been the basic philosophy that the right to mine is

under the suzerainty of the State and its exercise is allocated from time to time, as the State deems appropriate. Apart from a few instances the State has not claimed ownership of minerals separate from the ownership of the land on or under which they are found. It has been content to allow such ownership to remain with the landowner. However, ownership of minerals without the right to exploit that ownership is of little value. At most it confers on the owner the power to exclude others from exploiting them. Even that has been of limited value over the years as early legislation recognised the claims of diggers and proclaimed private land as public diggings in order to ensure that the minerals were exploited for the benefit of the State and its inhabitants. Later legislation has contained provisions directed at ensuring the optimal exploitation of mineral rights. This accords with a point made by Professor Dale[123] that State interference in relation to mining has aimed to:

'... ensure the full exploitation of the mineral wealth of the country either by itself mining or by throwing open the land to public prospecting and mining, thus ensuring that sterilization of valuable minerals did not occur merely because private landowners did not wish, or were not in a position, to prospect and mine their land.'

[70] Two other important points flow from this analysis. The first is that the value of mineral rights – and I recognise that for many years such rights have had substantial value – has flowed from the entitlement the holders have enjoyed under the legislation in force from time to time to exercise, with or without some form of permit, licence or authorisation, the right to mine. Mere ownership of minerals in the ground was only valuable when owners could control access to their land for the purpose of prospecting and mining for minerals. Where they could not, as in the initial gold rush, where claims were pegged out on private land and the

[123] Dale at 172.

state recognised such claims, the value of that ownership was diminished. By 1991 the presence of minerals on or under land conferred no value on the owner, unless the right to mine in respect of those minerals was also vested in the owner of the property. Even then the value lay not in the person's ownership of the land but in their being the holder of the mineral rights. As Heher JA put it in *Holcim*:[124]

'Under the Minerals Act 1991, (and previous to that Act) it was the mining authorisation which conferred practical value on the mineral rights by authorising the exercise of those rights.'

[71] The value of mineral rights at any time lay first in the anticipation that minerals in payable quantities were to be found on the property, and second in the anticipation that under the then current system in terms of which the State controlled the right to mine an appropriate permit, licence or authorisation would be obtained. This situation pertains whenever parties are negotiating a price pursuant to a possible sale or where, for a purpose, such as rating, estate duty, compensation on expropriation or the like, the market value of property must be assessed. The owner contends that the land has potential for use for particular purposes that enhance its value. The prospective purchaser or valuer will assess the likelihood of the land being usable for that purpose. Often the potential use will require some form of authority from a public authority.[125] If so the likelihood of the public authority granting that authority will affect the value of the property.

[72] Accordingly the value of mineral rights will have ebbed and flowed over time with every adaptation of the statutory scheme for the

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[124] Para 37.

[125] See for example the discussion of this issue in *Port Edward Town Board v Kay* 1996 (3) SA 664 (SCA) at 674I-682H.

allocation of the right to mine. Prior to 1922 in the Transvaal the right to mine for minerals other than gold, silver and quicksilver included the right to mine for platinum. When platinum was proclaimed to be a precious metal under the 1908 Gold Law any value ascribable to the presence of platinum attaching to a right to mine base minerals in the Transvaal would have declined. When the 1967 Act made mining leases the key feature of the allocation of the right to mine, rights held under different forms of mineral rights would have diminished in value, save to the extent that they were preserved or could be converted into mining leases. Agri SA's argument necessarily implies that each of these changes involved an expropriation of mineral rights and would, if the present constitutional protection had then existed, have resulted in compensation being payable for the loss of the rights in question. But that comes close to saying that any action that detrimentally affects the value of a right is an expropriation, which is certainly not correct.

[73] The second point is that changes in the statutory system for the allocation of the right to mine will affect those who have already received permits, licences or authorisations under the current system differently from those who merely have the right to apply for such permits, licences or authorisations, but have not yet done so. Where rights have been exercised, changes in the statutory system may detrimentally affect the activities being conducted pursuant to the exercise of those rights. In the latter case what is affected is the ability in the future to exercise those rights by applying for a permit, licence or authorisation on an exclusive or preferential basis. The difference is well illustrated by cases dealing with the effect of statutory amendments on accrued rights in the context of applications for permits or licences. Where an application has already been lodged, a right to have it considered and decided in accordance with

the current licensing regime may arise. However, people who could have made an application under the earlier regime, but did not do so and are excluded under the new regime, have no cause for complaint.[126] Applying those principles in the present case the holders of unused mineral rights could not complain that they had an accrued right to apply for an authorisation to mine under the 1991 Act. Their entitlement to make such an application was removed by the repeal of that Act. Of course that does not provide an immediate answer to the question whether their mineral rights have been expropriated, but it illustrates the fact that those who had exercised their entitlement under the 1991 Act to obtain an authorisation stand in a different position to those who had not. In turn that undercuts the contention that in considering whether their mineral rights have been expropriated they can be treated as being similarly situated.

What happened in 2002?

[74] The relevant provisions of the MPRDA were set out earlier in paragraphs 8 and 9. The right to mine is now to be allocated to persons who apply for that right in accordance with the provisions of the MPRDA. No preference is given to the owner of land or the previous holders of mineral rights, although they can compete with everyone else for the allocation of a prospecting or mining right or a mining permit under the MPRDA. Existing mineral rights are relevant only in relation to the transitional provisions of the MPRDA contained in Schedule II. The way in which they are dealt with depends on whether they had been exercised under the 1991 Act or whether they had not. These provisions need to be examined.

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[126] *Director of Public Works & another v Ho Po Sang & others* (1961) 2 All ER 721 (PC); *Natal Bottle Store-keepers and Off-sales Licences Association v Liquor Licensing Board for Area 31 & others* 1965 (2) SA 11 (D); *Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of Manpower and Another* 1984 (2) SA 238 (D).

[75] In item 1 of Schedule II the following definitions appear:

'"**holder**" in relation to an old order right, means the person to whom such right was or is deemed to have been granted or by whom it is held or is deemed to be held, or such person's successor in title before this Act came into effect;

"**Minerals Act**" means the Minerals Act, 1991 (Act No. 50 of 1991);

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

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

"**old order right**" means an old order mining right, old order prospecting right or unused old order right, as the case may be;

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

[76] The statutory old order rights referred to in these definitions are derived from the mineral rights that existed under the 1991 Act. That is apparent from Tables 1, 2 and 3 to Schedule II. Depending on the nature of the previous right it translated into either an old order mining right, or an old order prospecting right or an unused old order right. I accept, as this court held in *Holcim*, that these are new statutory rights not merely the previous rights under a different guise. However, the argument presented by Agri SA is that not only were common law mineral rights destroyed by the MPRDA, but that, in substance, those rights have been acquired by the State. In paragraph 24 I made the point that in order to determine whether there has been either a deprivation of rights held by

the holders of mineral rights or an acquisition of those rights by the state it is first necessary to consider the nature of mineral rights. The next step in the analysis must be to compare the position of holders of mineral rights in terms of those rights and their position after the changes brought about by the MPRDA. That deals with the issue of deprivation. Then the position of the state insofar as the rights it held before and after the enactment of the MPRDA must be considered in order to determine the issue of acquisition.

[77] The holder of an old order prospecting right was dealt with under item 6 of the Schedule, which is headed 'Continuation of old order prospecting right'. Under item 6(1) the old order right continued for two years. In other words for two years a person who held one of the rights falling within the concept of an old order prospecting right continued to enjoy precisely the same rights they had enjoyed under the 1991 Act, save that they were unable to transfer their old order prospecting right to a third party as they had been able to do previously. During the period of two years they were entitled, but not obliged – they were free to allow the right to lapse if they wished – to lodge the right for conversion in terms of item 6(2) and the Minister was obliged to convert the right into a prospecting right under the MPRDA. The process of conversion was straightforward. Once the holder of the old order prospecting right complied with the requirements of item 6(2) the Minister was obliged under item 6(3) to convert the old order right into a prospecting right under the MPRDA. In terms of s 5(1) of the MPRDA, such a prospecting right is a limited real right entitling the holder to prospect on the land to which it relates subject to the conditions attaching to that right. The right endures for the period provided in s 17 of the MPRDA and is subject to renewal in terms of s 18 of the MPRDA.

[78] The position in respect of those mineral rights existing under the 1991 Act that were translated into old order mining rights in terms of Schedule II was similar. They were dealt with under item 7, which this court analysed in *Holcim*. It is unnecessary to repeat that analysis. Unless the right was abandoned the holder of the old order right would convert it into a mining right under the MPRDA with all the advantages flowing from such right as set out in s 5, read with ss 23 and 24, of the MPRDA. The intention was, as Heher JA said in *Holcim*[127] to achieve 'the seamless continuation of existing mining operations which are tested ... by the scope of the licence pursuant to which the operations were being conducted'. The same was true of prospecting activities under the 1991 Act.

[79] Unused old order rights were dealt with under item 8 of the Schedule. These rights were continued for a period of one year only. During that year item 8(2) gave the holder of such rights 'the exclusive right to apply for a prospecting right or a mining right, as the case may be' in terms of the provisions of the MPRDA. Accordingly the holder of such rights instead of having the exclusive right to apply for an authorisation to exercise such rights, as was the case under the 1991 Act, was given an exclusive right to apply for either a prospecting right or a mining right under either s 16 or s 22 of the MPRDA. The consideration of any such application then followed the procedures prescribed under the MPRDA and the application was dealt with and disposed of under the MPRDA. If a right was granted the holder of the new right would be in the same position as a person who had converted an old order prospecting or mining right as the case might be.

[127] Para 26.

[80] The operation of Schedule II served to provide former mineral rights holders, who had already started to exploit those rights, with rights that enabled them to a greater or lesser extent to continue to engage in the activities that they were engaging in under the 1991 Act. It is correct that the allocation of the right to mine was now entirely at the disposal of the State acting through the agency of the Minister, with the holder of mineral rights no longer enjoying any preferent or exclusive right to such an allocation, but the transitional provisions resulted in those who had been allocated a right to mine under the 1991 Act and exercised it continuing to enjoy it under the new dispensation. It is so that the terms upon which they did so would have altered to some extent, but they remained in possession of the right either to prospect or mine for, and in the later case to dispose of, minerals as before. Those with unused rights were afforded the opportunity to exercise those rights but would lose them if they did not exercise that opportunity. It is against that background that I turn to deal with the third question raised by this case namely whether the MPRDA expropriated mineral rights.

Was there an expropriation of mineral rights?

[81] It is helpful at the commencement of this part of the judgment to remind oneself of the full ambit of the contention that is being advanced by Agri SA. It is that all mineral rights in existence under the 1991 Act at the time the MPRDA came into operation were expropriated under that Act. Central to this is the contention that the rights were taken away from the holders of those rights and in substance vested in the Minister as representative of the State. At the heart of those mineral rights and central to all of them is the right to mine in the sense I have used it throughout

this judgment as the right to prospect and mine and dispose of the minerals extracted from mining. I start therefore by considering what has happened in regard to the right to mine under the MPRDA.

[82] Agri SA's argument is based upon the hypothesis that mineral rights were common law rights and that extensive common law rights were taken away and replaced by lesser statutory rights in the gift of the Minister. This was the approach adopted by the trial court, no doubt because it was the approach adopted by counsel. However, as I have endeavoured to show, that is an incorrect characterisation of the right to mine that lies at the heart of the debate. A convenient shorthand terminology, useful in the sphere of the type of disputes that our courts had over the years to deal with in cases involving mining and minerals, has been erroneously construed as identifying the source of mineral rights. It is on that basis that it is said that the right to mine flows from the common law and has been expropriated.

[83] This contention is not borne out on analysis, whether one's starting point is the common law or the history of mineral rights in South Africa. Taking the common law as the starting point it is said to be founded in the *cuius et solum* principle. However, that principle has no application once mineral rights are severed from the ownership of the land to which they relate. That severance was not effected by the common law. It came about in the first instance through the legislation that required the contracts embodying personal rights to prospect or mine for minerals to be registered. Then the courts construed the resulting registered rights as real rights separate from the dominium of the land. Their separate character was preserved in subsequent legislation dealing with mining

and with the registration of mineral rights. One cannot then ascribe the origin of separated mineral rights to the workings of the common law.

[84] Looked at from the perspective of the history of mining legislation in South Africa, that history demonstrates that it has been the policy of successive governments, be they colonial, those of the old republics, the union government or the former regime in South Africa before the advent of democracy, that the State controlled the right to mine and its exercise. In other words the State has always asserted that in its broad sense, as opposed to the narrower use of the word in relation to rights enjoyed by individuals, the right to mine is vested in the State and that the State either exercises or allocates that right.[128] The manner in which this has been done has varied down the years, but the central philosophy in regard to control by the State has been consistent.

[85] It seems to me that the key issue is not whether, as a result of the exercise of the power to allocate the right to mine, that right was placed in the hands of persons in the private sector, which is inevitable unless the mines are nationalised. It is rather whether the right vested in the State, along with the power to allocate the right to others, or whether it vested in individuals arising from their ownership of land or some other private source. In my view it was the former. That being so the MPRDA is merely the latest in a long line of legislation and statutory instruments in South Africa that affirms the principle that the right to mine is controlled by the State, and allocated to those who wish to exercise it. The right to mine remains, as it has always been, ever since mining became an important part of the economy of South Africa, under the control of and

[128] It is in this sense that I understand Professor Dale to refer to the right to mine being vested in the State. It is also the sense in which I understand Professor Barton to use it in describing comparative legislative systems.

vested in the State, which allocates it in accordance with current policy. That being so the first requirement of an expropriation, namely that there be a deprivation of property, is not established insofar as the right to mine is concerned. That right was never vested in the holders of mineral rights, but was vested in the State and allocated to those holders in accordance with the legislation applicable to it from time to time. It could not therefore be expropriated although rights flowing from the State's allocation of the right to mine could.

[86] Whether this involves the incorporation into South African law of elements of the public trust doctrine that has some application in the United States of America seems to me neither here nor there. Nor do I think it necessary to try and extract additional meaning from the provisions of the MPRDA that describe the State as the custodian of South Africa's mineral and petroleum resources and say that these belong to the nation. Once it is accepted that the State is vested with the right to mine and is able to allocate that right in relation to the country's mineral resources, it is I think clear that the State is exercising sovereignty over those resources. That the State must exercise its powers on behalf of the nation goes without saying in a constitutional democracy. The statements that the mineral and petroleum resources of the country 'belong to the nation' and that the State is the custodian of these resources, encapsulate in non-technical language the notion that the right to mine vests in the State. There is nothing to be gained by attempts to dissect these concepts and categorise them in terms of private law concepts such as ownership. It suffices to say that recognising that the right to mine is vested in the State is wholly in accordance with these statements.

[87] Accepting that the right to mine has remained vested in the State, and that the mineral rights that existed prior to 2004 are no more, is there any other basis upon which the contention of a wholesale expropriation of mineral rights can be sustained? The trial court approached the matter by way of a before and after comparison of the position of holders of mineral rights. That was premised on the proposition that the right to mine vested in the mineral rights holder by virtue of the inherent nature of those rights rather than as a result of a statutory allocation of the right to mine. The first difficulty is that the premise is faulty. The second, arising from the before and after approach, is that one is not then comparing a lost common law right with a statutory grant. The comparison is between two statutory grants, namely the rights enjoyed under the previous statutory dispensation and those enjoyed under the present dispensation.

[88] Reference to the transitional provisions demonstrates that this alternative approach cannot assist Agri SA. The preamble to the MPRDA reaffirms 'the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations'. Section 2(*g*) of the MPRDA identifies one of its objects as being to 'provide for security of tenure in respect of prospecting, exploration, mining and production operations'. Item 2 of Schedule II repeats this as being one of the objects of the transitional provisions and records that one of its aims is to give to holders of old order rights 'an opportunity to comply with this Act', which it seeks to achieve by way of the provisions summarised in paragraphs 76 to 78. These provisions make it clear that the rights that former mineral rights holders received as a result of the conversion of their old order rights overlapped to a large extent with those they previously enjoyed.

[89] This reality was highlighted by counsel when he submitted that the large mining houses had not brought claims under item 12(1) because they had suffered no loss. However, the reason they suffered no loss is because, subject no doubt to some variation, they continued to enjoy the same or similar rights to those they held prior to the MPRDA coming into operation. That accords with what Du Plessis J said in paragraph 81 of his judgment in the trial court, namely that the prospecting and mining rights granted under the MPRDA are 'a real right with substantially the same content as the rights the holders of quasi-servitudes had before the MPRDA'. If one uses the mining houses as an example and asks whether, once the MPRDA came into operation, they continued to enjoy, by way of an allocation from the State, the right to mine, to extract minerals and dispose of them, the answer would be in the affirmative. Reference to the reports of the companies listed in the resource sector of the JSE would reveal that this was the case. That being so, the MPRDA can at most have deprived them of some part of the mineral rights they previously possessed. Prior to 1 April 2004 they were mining in terms of their mineral rights and authorisations granted under the 1991 Act. From 1 April 2004 they were mining in terms of old order mining rights in terms of Schedule II. After conversion they continued mining, but in terms of mining permits issued under the MPRDA. I find it impossible to say in the light of the continuity of their mining activities that they were at any stage deprived of their right to mine. It is true that the source of the right is now different but the substance is the same.

[90] The entitlement of holders of old order prospecting and mining rights to convert their rights into prospecting and mining rights in terms of the MPRDA is destructive of the contention that the content of the mineral rights translated into old order rights was removed by the

MPRDA. The aim was to afford security of tenure and that was largely achieved by the mechanism of translating existing mineral rights into old order rights and providing for their conversion. I accept that the rights now enjoyed may not be precisely the same as those previously enjoyed. That means no more than that some part of the rights previously enjoyed, or some components of those rights when viewed as a whole, have been removed. It is not, however, compatible with the wholesale removal of the content of mineral rights. Nor is it compatible with the substantial content of mineral rights having vested in the Minister. Accordingly both elements of an expropriation – deprivation and acquisition – are absent. I do not exclude the possibility that some holders of rights may be able to advance a case that, because of their own particular circumstances, there has been an expropriation of some or all of the rights they previously enjoyed. However, we are not concerned with such a case but with a contention that there was a blanket expropriation of mineral rights. That case cannot be sustained in the light of the transitional provisions.

[91] I have borne in mind that there are no longer any mineral rights, in the previously understood sense, that are capable of transmission to others without involvement from the side of the state. That does not assist Agri SA's argument. If existing rights have been converted into prospecting or mining rights under the MPRDA they are capable of being transferred, although this requires ministerial permission.[129] If they have not been converted then it is the absence of the rights themselves, rather than the absence of transmissibility, that is the source of loss. The fact that the transmissibility of rights under the new dispensation is restricted does not support the notion that there has been a deprivation of rights, in the absence of evidence indicating how this impacts on the value of the

[129] Section 11.

newly acquired rights. A substantial, if not the major, portion of mining in South Africa is undertaken by large companies. If the mine is valuable the company exploiting it will not want to give up their mining right. When a transfer is sought it must be granted provided the transferee is capable of carrying out its obligations under the right and satisfies the requirements set out in the MPRDA for the allocation of such a right initially. It may transpire that in practice there is little difficulty in transferring rights in the new dispensation. If it presents a problem there may be commercial means of circumventing the difficulty. I am unable to see that the issue of transmissibility of rights has a bearing on the question whether all mineral rights have been expropriated. Nor do I think that new provisions in regard to the duration of rights affects matters. Rights may now be of a fixed duration rather than indefinite, but they are renewable and whether their duration matters will depend upon how long it will take to mine them to exhaustion. Furthermore, as Professor Mostert points out,[130] rights obtained on conversion may endure for longer than the rights that were held before.

[92] The foregoing analysis demonstrates that the situation of different holders of mineral rights will differ, depending upon whether they converted their old order rights and the result of conversion. In some instances advantages may flow to one party from a conversion of rights as the facts of *Xstrata & others v SFF Association* illustrate. On the other hand, as Xstrata, the recipient of the advantage, urged upon the court, that may have been a situation where there was an expropriation. I do not suggest that this was necessarily the case, but mention it to illustrate the point that different factual circumstances may warrant different conclusions on the issue of expropriation. Similarly, the fact that the

[130] Mostert, supra, 99.

owner of land may no longer be able to prevent the exploitation of minerals on their property may be a considerable burden for a farmer who wishes to preserve the land for farming purposes, but may be of little concern, save for the lack of financial benefit flowing from these activities, to another landowner. The point is that each mineral rights holder will have been affected differently by the advent of the MPRDA. That is inconsistent with the notion of a blanket expropriation of all mineral rights.

[93] In the trial court the judge concluded on this aspect of the case that: 'From a reading of sections 3 and 5 it is apparent that, when the MPRDA commenced the State, acting through the Minister, was vested with the power to grant rights the content of whereof were substantially the same as, and in some respects identical to, the contents of the quasi-servitude of the holder of mineral rights. It follows that, by enactment of the MPRDA, the State acquired the substance of the property rights of the erstwhile holders of quasi-servitudes. The fact that the State's competencies are collectively called custodianship does not matter.'

[94] I respectfully disagree. The entire structure of the transitional provisions of the MPRDA was directed at securing that the holders of mineral rights would continue to enjoy broadly the same rights under the new mining dispensation once those rights were translated into old order prospecting and mining rights and converted under the MPRDA. The process of converting those rights was largely formal and the Minister was obliged to convert, provided the rights holder complied with the limited and objective requirements for conversion. The rights acquired on conversion were not acquired in consequence of an exercise of the Minister's power to grant rights under ss 17 and 23 of the Act. They were acquired because the MPRDA made specific provision in Schedule II for their continued enjoyment by the holders of mineral rights through the

process of conversion. In substance the rights remained largely the same, albeit with a different provenance. The fact that the MPRDA conferred upon the Minister the power to grant such rights to new applicants in respect of properties where no such rights exist, does not mean that in relation to existing prospecting and mining rights they were taken away from holders of mineral rights, acquired by the Minister and then granted again to the original holders. The conversion process provided the means whereby in substance existing mineral rights holders retained the entitlements they previously had subject to some variation, the importance of which would vary from case to case. They were neither deprived of their rights nor were the rights they previously enjoyed acquired by the State in the person of the Minister.

[95] That conclusion is fatal to the contention that the MPRDA expropriated all so-called common law mineral rights. It plainly did not do so in respect of existing prospecting and mining rights that were being used. It is appropriate, however, to consider whether it effected a narrower expropriation of all unused mineral rights, into which category Sebenza Mining's rights fell. In the trial court, whilst confining himself to the coal rights of Sebenza Mining, the reasoning of Du Plessis J involves upholding the broad submission that the MPRDA expropriated all mineral rights. However, in his judgment at the exception stage of this case[131] Hartzenberg J appears to have approached the matter on a narrower basis that all the rights translated into unused old order rights, as specified in Table 3 to Schedule II, were expropriated.

[96] Hartzenberg J referred to common law rights in the same fashion as they were referred to at the trial. He then analysed item 8 that provides

[131] Footnote 3, supra.

for the conversion of unused old order rights. He correctly said that the application for conversion was one in terms of either s 16 or s 22 of the MPRDA and drew attention to the fact that under the 1991 Act there would have been no compulsion on holders of such rights to seek authorisations to exploit them. They were free to let them lie fallow. Under the MPRDA they either had to apply for their conversion or lose them entirely. Such an application was not a formality and not all applications would succeed. Leaving on one side his erroneous view that item 12(1) by necessary implication recognised that an expropriation had occurred, Hartzenberg J said that, apart from the transitional provisions, mineral rights were not recognised in the MPRDA and concluded that item 8 was no more than a means of mitigating loss and did not prevent there from being a deprivation of existing mineral rights and their acquisition by the State.

[97] I agree that item 8 proceeds on a different footing from items 6 and 7, which deal with rights that were already being exploited when the MPRDA came into operation. I agree also that it forced the holders of such rights to decide whether to try and make use of them on penalty of deprivation. However, that was only a more stringent approach by the State to compel holders of mining rights to exploit them than that adopted in previous legislation. My difficulty is with the proposition that item 8 was merely a means whereby holders of unused old order rights could mitigate the loss they had already suffered in consequence of an expropriation of their rights. That overlooks the consequence of a holder of such rights successfully applying for either a prospecting or a mining right as contemplated in item 8. In that event they would hold greater rights than they had enjoyed under the 1991 Act. Under the earlier Act their unused rights would only have been of value to the extent that they

were capable of being exploited by way of an authorisation to prospect or mine and the holders of such rights had an exclusive right to obtain that authorisation. Under item 8 they not only retained that preference for a year, but would acquire more extensive rights if they sought and obtained a prospecting or mining right. The imposition of a time limit did not deprive them of their rights. A failure to apply for a right to exercise them would.

[98] Hartzenberg J also attached some weight to the fact that applicants seeking to proceed under item 8 would have to pay a fee; undertake an environmental impact assessment and satisfy the Minister that they had access to adequate funds to prospect or mine. However that overlooks the fact that in terms of s 9(3)(*a*) and (*c*) of the 1991 Act an applicant for an authorisation to mine would have had to satisfy the Minister in regard to the manner and scale of the proposed operations and their ability to mine optimally as well as their ability to rehabilitate the surface after exhausting the minerals being mined. In terms of s 39 of the 1991 Act they would have had to submit an environmental management programme. It is by no means clear that there would have been a great deal of difference between the two situations. Similarly it is not clear that there would be any great difference between an application for a prospecting authorisation under s 6 of the 1991 Act and an application for a prospecting permit under s 16 of the MPRDA. I do not think that these issues have any impact on the question whether the MPRDA effected an expropriation of those mineral rights that were translated into unused old order rights.

Conclusion

[99] It is as well at the conclusion of a lengthy judgment to summarise what it decides and make it clear what it does not decide. What it decides is that the right to mine in South Africa, in the sense of the right to prospect and mine for minerals and extract and dispose of them, is vested in the State. It is allocated by the State in accordance with policies that are determined from time to time and embodied in the applicable legislation. The MPRDA is the current iteration of that right. The contention that all mineral rights that existed in South Africa under the 1991 Act were expropriated under the MPRDA is incorrect. The judgment does not exclude the possibility that the MPRDA may have effected an expropriation of certain rights that existed under the previous dispensation, but holds that whether it did so depends not on any general expropriation of mineral rights, but on the facts of a particular case. Nor does it decide that the effect of a broadly regulatory statute cannot be to effect an expropriation, but leaves that open for the future. In fact the judgment is not concerned with the regulatory impact of the MPRDA as opposed to its substantive treatment of the right to mine. I do not find it helpful to pose the issues in this case as being 'regulatory vs expropriatory'.[132] In my view the right to mine, as opposed to its allocation, is not a regulatory matter, but a matter of the substantive powers of the State in contrast to private law rights to property.

[100] That means that the judgment in favour of Agri SA must be set aside. It is unnecessary in those circumstances to express any view on the assessment of the amount of compensation awarded by the trial court. There was an issue over the wasted costs occasioned by an amendment brought by the Minister at the close of her case. This compelled Agri SA

[132] It is here that I part company from Professor Mostert in her analysis in Chapters 6 to 8, which locates the right to mine within a regulatory framework for mining.

to call additional witnesses and incur additional costs. The Minister did not dispute that a separate order should be made in terms of which she should be responsible for these wasted costs but suggested that they be fixed as the costs of one day of the trial. In my view it is more appropriate to leave that issue to the taxing master.

[101] In the result the following order is made.

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.'

M J D WALLIS
JUDGE OF APPEAL

NUGENT JA (MHLANTLA JA concurring)

[102] I have read the judgment of my colleague and I agree with the orders that he proposes. However, I reach my conclusion along a slightly different path and I find it necessary to set out my approach to the matter briefly.

[103] The mineral rights that are in issue in this appeal are mineral rights on private land that were not being exploited, and in respect of which no authorisation to prospect for and to mine the minerals had been issued, at the time the MPRDA took effect – what are referred to in the Act as 'unused old order rights'. Although the argument advanced on behalf of Agri SA was said by its counsel to apply as much to 'old order rights' that were being used when the Act took effect, nonetheless I confine myself to unused rights, bearing in mind that holders of other rights are not parties to these proceedings and we have not had the benefit of hearing what they might otherwise have said.

[104] I am grateful to my colleague for his succinct yet comprehensive analysis of the mining legislation that has existed from time to time in our history, with which I agree. His analysis amply demonstrates that, from the beginning of significant mining in this country, legislation has stripped the right to prospect for and to mine minerals from such common law rights as owners of land might have had. What remained of that common law right after they had been stripped – if anything remained at all[133] – was only the right to the minerals while they were in situ under the ground.

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[133] At least some of the legislation might be construed as extinguishing common law mineral rights altogether, and conferring upon the owner an equivalent statutory right to the minerals in situ, at least

[105] My colleague has pointed out that the right to minerals in situ is of no value unless they are capable of being turned to account. Throughout its history the legislation has consistently recognised that the holders of mineral rights should enjoy at least some of the bounty. At times the holder was given the right to exploit part of the mineral deposit while the remainder was made available for exploitation by others. At times the holder was given at least a preference when the rights were allocated. And even where the right to prospect and mine was allocated to others the holder of the mineral rights was usually given some of the fruits by way of royalties or rentals or a portion of the license fees. It was the potential that they offered to secure those benefits -- whatever form the benefits took at various times – that gave mineral rights their value. Without some potential of that kind there is no market for mineral rights and they exist as no more than a curiosity.

[106] But in whatever way the holders of mineral rights reaped benefit from the minerals over the years, that has been the product of contemporary legislative policy, dictated by political imperatives from time to time, and not of the mineral rights themselves. If they have always been of value that is only because it has always been government policy to give them the potential for being turned to financial account.

[107] The policy of affording the holder at least some benefits from exploitation of the minerals – which were features of all legislation until

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by implication. Whether the right of owners to the minerals in situ is a remnant of their common law right, or whether it is itself a right conferred at various times by statute, is nonetheless not material to this appeal.

then – was carried through to the Mining Rights Act 20 of 1967. In general, it was the holder of the mineral rights who would be allocated the benefit of exploiting them, at least as a matter of preference, but the state nonetheless retained the right to allocate them elsewhere, particularly to prevent them being hoarded or sterilised to the detriment of the country. Thus s 15(1) allowed the Minister of Mines, if he had reason to believe that adequate prospecting operations may prove the existence of minerals, to call upon the holder of the mineral rights to commence prospecting or to cause prospecting to commence, failing which the Minister was entitled to authorise prospecting by third parties, subject only to payment to the holder of the mineral rights of rental fixed by the Minister.[134] Similarly, s 33(1) entitled the Minister, where he was satisfied that reasonable grounds existed for believing that minerals existed on any land in workable quantities, to call upon the person who qualified for a mining lease (generally, but not exclusively, the holder of the mineral rights), to apply for such a lease, failing which he was deemed to have abandoned his right to the lease, which entitled the Minister to grant a mining lease to others.[135]

[108] I attach greater significance than my colleague to the effect of the Minerals Act 50 of 1991. It seems to me to have departed in some respects significantly from what had gone before, particularly so far as the hoarding and sterilisation of unused mineral rights was concerned, which are the rights now in issue. The extent to which anti-sterilisation provisions of earlier legislation had been called upon in the past is not material. Poised as the country was on the brink of a new dispensation, in

[134] Section 15(1) read with s 15(3).
[135] Section 35 read with s 42.

which access to land and natural resources was destined to come to the fore, provisions of that kind could be expected to assume significance, no matter the extent to which it had been necessary to call upon them before.

[109] So far as the allocation of exploitation rights is concerned the material provisions of the 1991 Act were simple and stark. Section s 5(1) allowed the holder of mineral rights, or any person who had his consent, but no others, to prospect for and to mine the minerals, subject to state authorisation being given. And while state authorisation could be withheld, where it was given ss 6(1) and 9(1) allowed it to be given only to the holder of the mineral rights, or to a person who had his consent, with some exceptions for rare occurrences that are not significant[136]. Almost without exception the ability to exploit the mineral wealth of the country was placed in the exclusive control of the holders of mineral rights. As for the hoarding and sterilisation of mineral rights, far from the state's considerable remedies under the 1967 Act and earlier legislation, its only remedy under the 1991 Act was to expropriate the relevant land, or to 'expropriate' the mineral rights (a misnomer) – which the Minister was permitted to do if he deemed it necessary in the public interest[137] – against payment of compensation to the holder of the rights.[138]

[110] In those few brief provisions the 1991 parliament placed the exploitation of minerals within the full monopoly of mineral right holders. It retained to the state considerable power to prevent uneconomic

[136] Where the holder of the mineral rights could not be readily traced, and where the person entitled to the rights by succession had not obtained them by cession after a period of two years: s 17(1).
[137] Section 24(1).
[138] Compensation was payable by the person at whose request the land or rights had been expropriated. In the absence of agreement, it was to be determined by valuation in accordance with s 12 of the Expropriation Act 63 of 1975 (s 24(1).

or environmentally damaging exploitation, by requiring stringent conditions to be met before authorisation would be granted,[139] but so far as exploitation might take place that could be done only with the consent of the mineral-right holder.

[111] There can be no doubt that the MPRDA divested unused mineral rights of the value that they held while the 1991 Act held sway. The thrust of the argument before us on behalf of Agri SA was that this came about because the MPRDA extinguished the common law rights of a mineral-right holder, and those rights, so it was submitted, included the right to exploit the minerals. As it was put in the heads of argument, the holder of a mineral right previously 'did not have to apply to the state for the right to go onto the land, search for coal, and dispose of any coal it found' – those rights 'existed as the content, at common law, of the mineral right and were not conferred by the state granting a prospecting permit or mining licence in terms of sections 6 and 9 of the Minerals Act'.

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[139] Section 9(1) prohibited the issue of a mining authorization unless the regional director was satisfied –

(a) with the manner in which and the scale on which the applicant intends to mine the mineral concerned optimally and safely under such mining authorization;
(b) with the manner in which such applicant intends to rehabilitate disturbances of the surface which may be caused by his mining operation;
(c) that such applicant has the ability and can make the necessary provision to mine such minerals optimally and safely and to rehabilitate such disturbances of the surface ; and
(d) that the mineral concerned in respect of which a mining permit is to be issued -
    (i) occurs in limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or
    (ii) will be mined on as limited scale; and
    (iii) will be mined on a temporary basis; or
(e) that there are reasonable grounds to believe that the mineral concerned in respect of which a mining licence is to be issued –
    (i) occurs in more than limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or
    (ii) will be mined on a larger than limited scale; and
    (iii) will be mined for a longer period than two years.'

[112] That the MPRDA extinguished common law rights – such as they were – seems to me to be plain. Item 8(4) of Schedule II says as much in providing that

'subject to subitems (2) and (3)[140] an unused old order right ceases to exist upon the expiry of the period contemplated by subitem (1)' [that is, one year after the Act came into operation].

An 'unused old order right' is defined in Table 3 of Schedule to include 'common law' rights.

[113] But I do not agree, for reasons I have given, and that are expressed more comprehensively in the judgment of my colleague, that the 'content' of such common law rights included rights of exploitation, as submitted on behalf of Agri SA. Since the commencement of significant mining those have always been statutory rights granted in the gift of the state, their grant being restricted by the 1991 Act to holders of the mineral rights.

[114] In those circumstances the abolition by the MPRDA of 'common law rights' seems to me to be immaterial. Even without their abolition the holder of mineral rights would have been in the same position. The provisions of the MPRDA that have brought about the loss of their value are not those that abolish common law rights but instead ss 16, 17, 22 and 23. Sections 16 and 17 deal with applications for and the grant of prospecting permits respectively. Sections 22 and 23 deal with applications for and the grant of mining authorizations. I do not find it

[140] Those subitems are not now material

necessary to set out the terms of those sections. It is sufficient to extract from them a feature that they have in common.

[115] Under those sections the grant of prospecting and mining authorisations is not confined to the holders of the mineral rights or those that have their consent – as it was under the 1991 Act. They might be granted to anybody, provided only that they satisfy various stipulated conditions.[141] The holding of mineral rights is no longer the gateway to the exploitation of minerals and it is for that reason that the mineral rights have ceased to have value. Indeed, the draftsman of the MPRDA might just as well not have extinguished common law rights at all, for the difference that it makes. Once they became irrelevant to the exploitation of minerals – as ss 16, 17, 22 and 23 have made them – they existed in any event as no more than a curiosity. In short, it was the extinction of the monopoly that had been conferred upon holders of mineral rights by ss 6 and 9 of the 1991 Act – brought about by ss 16, 17, 22 and 23 – that caused mineral rights to lose their value, not the extinction of the rights themselves.

[116] Whether the extinction of 'common law rights' by the MPRDA constitutes an 'expropriation' of those rights, as contended for by Agri SA, thus seems to me to be an abstract question that has no practical bearing on their claim. Such value as it has lost, for which it claims compensation, did not lie in its common law rights, but it lay instead in the exclusive ability to exploit those rights that was conferred by the earlier legislation. If any question of expropriation arises at all it seems to

[141] For example, that they have the financial resources and technical capacity to prospect or mine, as the case may be.

me the question is whether the extension to others of a statutory right that holders of mineral rights had previously enjoyed exclusively constitutes an expropriation.

[117] My colleague has dealt extensively with what is meant by 'expropriation' in the MPRDA and I need not repeat what he has said. I can see no basis upon which to find that the extension to others of exploitation rights that were earlier within the exclusive control of mineral-right holders constitutes a deprivation of property. Those rights of exploitation did not exist as elements or characteristics of the mineral rights – what counsel for Agri SA called the 'content' of the mineral rights. The holding of mineral rights did no more than to identify upon whom the legislature had chosen to bestow its gift. So far as it created a monopoly in doing so I cannot see that the statutory monopoly constituted a property right. By choosing to bestow its gift anew in 2002 parliament did not deprive the holders of mineral rights of property – it deprived them of value that had accrued to their property by the creation of the monopoly. While property might have value, I do not think that value is in itself property.

[118] For those reasons I agree with the orders that my colleague proposes.

R W NUGENT

JUDGE OF APPEAL

Appearances

For appellant:	C H J BADENHORST SC (with him M WESLEY) Instructed by: The State Attorney, Pretoria and Bloemfontein
For respondent:	G L GROBLER SC (with him J L GILDENHUYS) Instructed by: Macrobert Attorneys, Pretoria Claude Reid Inc, Bloemfontein.
For amicus curiae:	GEOFF BUDLENDER SC (with him MAX DU PLESSIS and J BRICKHILL) Instructed by: Legal Resources Centre, Cape Town Webbers attorneys, Bloemfontein