CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 51/12
[2013] ZACC 9

In the matter between:

AGRI SOUTH AFRICA	Applicant
and	
MINISTER FOR MINERALS AND ENERGY	Respondent
and	
AFRIFORUM	First Amicus Curiae
AFRISAKE	Second Amicus Curiae
CENTRE FOR APPLIED LEGAL STUDIES	Third Amicus Curiae
FLORIS JOHANNES POOL	Fourth Amicus Curiae

Heard on : 8 November 2012

Decided on : 18 April 2013

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Cameron J (except [58], [59], [67] and [68]), Jafta J, Nkabinde J, Skweyiya J, Yacoob J and Zondo J concurring):

Introduction

[1] South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.

[2] That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act[1] (MPRDA). Its commencement had the effect of freezing the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy[2] (Minister). It also had the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This ought to come as no surprise in a country with a progressive Constitution, a high unemployment rate and a yawning gap

[1] 28 of 2002.

[2] Now the Minister for Mineral Resources.

between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth.

[3] The inability of mineral rights holders to sterilise those rights, sell, lease or cede them whenever they wanted to, as before, and the extinction, after the prescribed periods, of the hitherto permanent and exclusive rights to determine who would exploit the minerals,[3] caused grave dissatisfaction, particularly among major landowners like the applicant's members. They believed that the commencement of the MPRDA had the immediate effect of expropriating mineral rights. Hence this application.

Parties

[4] The applicant is Agri South Africa[4] (Agri SA), whose objects include the making of representations to Parliament on legislation that might affect commercial farming, the institution of legal proceedings to challenge legislation in the interest of farming and generally the protection of the rights and interests of the commercial farming community.

[5] The respondent is the Minister, the Cabinet member responsible for the administration of the MPRDA, including the granting of various rights.[5]

[3] This was possible, subject to prescribed exceptions, under the Minerals Act 50 of 1991 (Minerals Act). See section 5 read with sections 6(1) and 9(1).

[4] An association not for gain incorporated in terms of section 21 of the Companies Act 61 of 1973 (Companies Act).

[5] See sections 14, 17 and 23 of the MPRDA.

[6] Four amici curiae were admitted. The first and second amici are Afrikaanse Forum vir Burgerregte[6] and Afrisake.[7] The third amicus is the Centre for Applied Legal Studies (CALS), based at the University of the Witwatersrand. The fourth amicus is Mr Floris Johannes Pool, a farmer who has approached this Court in his individual capacity.

Background

[7] Under common law a landowner owns everything above and below the land, including minerals.[8] One of the incidents of landownership was the entitlement to search for, mine and dispose of minerals, for own account.[9] As with most rights in property, it was exclusive and could not be appropriated by third parties for their use, benefit or enjoyment without the owner's consent.

[8] Due in part to commercial expediency, the law developed to allow for severance or separation of landownership from any rights to minerals found in the land.[10] Severance could be effected in a number of ways including a notarial deed of

[6] An association not for gain incorporated in terms of section 21 of the Companies Act. Also known as Afriforum.

[7] A business organisation which has as its main goals the protection of the Constitution, keeping the free market system intact and the holistic protection of constitutional property rights.

[8] See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) (*Anglo*) at para 16; *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 at 246; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315 and Mostert *Mineral Law: Principles & Policies in Perspective* (Juta & Co Ltd, Cape Town 2012) at 7.

[9] Badenhorst "Ownership of minerals in situ in South Africa: Australian darning to the rescue" (2010) 127 *SALJ* 646 at 649.

[10] Mostert above n 8 at 10. A landowner may not have had the financial capabilities or interest in developing the mineral potential that existed on the land, but was more than willing to allow a third party to do so, subject to the payment of consideration in return for the right to do so.

cession in terms of which the owner transferred mineral rights to a third party.[11] The conclusion of a cession bestowed on the holder an exclusive right to enter the property to which the rights relate, to search for minerals, and if found, sever and carry them away.[12] Although the landowner would still be the owner of the minerals whilst they remained in the ground unceded,[13] once separated from the land, the minerals became distinct movables with ownership vesting in the holder of mineral rights.[14]

[9] The conclusion of a cession created a personal right in favour of the cessionary, enforceable only against the cedent but not against the "whole world".[15] A massive capital injection was required for the infrastructural development necessary to exploit minerals, but the inadequacy of the protection afforded by the personal right was a source of great concern. This necessitated further development of the law to enable holders of mineral rights to register their deeds of cession with the Deeds Registry.[16]

[11] *Edwards (Waaikraal) GM Co., Ltd. v Mamogale, N.O., and Bakwena Mines, Ltd* 1927 TPD 288 at 307. As to the ways in which this could be done, see Mostert id at 8-11.

[12] *Trojan Exploration Co (Pty) Ltd and Another v Rustenberg Platinum Mines Ltd and Others* 1996 (4) SA 499 (AD) at 509G-H and *Van Vuren and Others v Registrar of Deeds* 1907 TS 289 (*Van Vuren*) at 295. See Dale *An Historical and Comparative Study of the Concept and Acquisition of Mineral Rights* (doctoral thesis, University of South Africa 1979) at 88-9 for the distinction between minerals and mineral rights, and the confusion that sometimes surrounded these two distinct concepts. Whereas the former concerned the actual mineral deposits, such as coal, the latter concerned the rights to do certain things in relation to that coal. It is with the latter that this matter is concerned.

[13] *Nolte v Johannesburg Consolidated Investment Co. Ltd.* 1943 AD 295 at 315 and *Van Vuren* above n 12. This was because our law does not allow for the separate ownership of horizontal layers of land (see *Anglo* above n 8 at para 16).

[14] See Dale above n 12 at 79-83.

[15] Du Bois (ed) *Wille's Principles of South African Law* (Juta & Co Ltd, Cape Town 2007) at 428.

[16] The provision for such registration was encapsulated in sections 3(1)(m) and 70(1) of the Deeds Registries Act 47 of 1937, before their repeal by section 110 of the MPRDA.

The mineral right was then recognised as a limited real right in land, enforceable against the world at large.[17]

[10] A holder of mineral rights could alienate the rights by cession, a grant of a prospecting or mining lease or encumber them by granting a further limited real right, such as a mortgage bond or a *usufruct*. These rights were in practice and in law treated as assets that could be sold, leased or used as security. They formed part of the holder's estate and could be bequeathed to an heir.[18]

[11] A substantially similar position was adopted in the Mining Rights Act[19] of 1967 and the Minerals Act. This appears from section 1 of the Minerals Act which defines a "holder" of mineral rights, in relevant part, as—

> "the owner of such land: [p]rovided that—
>
> (i) if the right to such mineral or an undivided share therein has been severed from the ownership of the land concerned, the person in whose name such right or an undivided share therein is registered in the deeds office concerned, either by means of a separate deed or by means of a reservation in the title deed of the land concerned".[20]

[12] It follows from this definition that mineral rights could still be held by a landowner under the Minerals Act. Since this right was capable of being severed from

[17] Badenhorst and Mostert "Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property Clause: An Analysis in Two Parts" (2003) 3 *Stellenbosch Law Review* 377 at 384-5.

[18] Badenhorst above n 9 at 651 and Badenhorst and Mostert id at 384-5.

[19] 20 of 1967.

[20] Section 1(ix)(a)(i) of the Minerals Act. See also the Mining Rights Act which defined "holder" similarly.

landownership, mineral rights or an undivided share therein would, in circumstances where severance had taken place, be registered in the Deeds Office, in the name of the holder. The significance and benefits of being a holder of mineral rights under the Minerals Act were—

> "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."[21]

The exercise of the right to prospect for or mine minerals was conditional upon the grant of the authorisation or permit.[22]

[13] Sebenza (Pty) Ltd (Sebenza) bought coal rights from the liquidators of Kwa-Zulu Collieries (Pty) Ltd for R1 048 800 on 2 October 2001 and registered them in its name. Sebenza was not the owner of the land on which the coal was located.

[14] On 1 May 2004 the MPRDA came into effect. Sebenza became the holder of an unused old order right on that date. This happened in terms of item 8 of Schedule II to the MPRDA. Unused old order rights were in force for a period of one year after commencement.[23] As the holder of an unused old order right, Sebenza had

[21] Section 5(1) of the Minerals Act.

[22] Id section 5(2). This is not to say, however, that the grant of statutory authorisation by a regional director or the Minister was the source of the mineral rights (see *Anglo* above n 8 at para 25 and Badenhorst and Mostert above n 17 at 391-2).

[23] Item 8(1) of Schedule II to the MPRDA.

the exclusive right to apply for a prospecting or mining right under the MPRDA within a year.

[15] Because of an internal dispute which resulted in the dissolution of the shareholding, Sebenza was not in a position to pay the fees required to apply for and secure the authorisation to prospect for,[24] or a permit to mine[25] the coal in terms of the Minerals Act. The same situation persisted even under the MPRDA. Liquidation proved to be the only viable option Sebenza had. And that is the route it took. Its liquidators attempted to sell its coal rights to Metsu Trading (Pty) Ltd (Metsu) for R750 000, but the sale was cancelled after the parties were advised that the rights had ceased to exist under the MPRDA.[26]

[16] Sebenza eventually lodged a claim for compensation in terms of Schedule II to the MPRDA, on the grounds that the MPRDA had expropriated its mineral rights. This lodgment coincided with Agri SA's decision to seek clarity from a court of law on its view that the commencement of the MPRDA had the effect of expropriating mineral rights conferred on holders by the Minerals Act. In pursuit of this objective, it identified Sebenza's claim as the ideal test case for the vindication of the rights of its members which it believed the MPRDA had extinguished. Agri SA procured

[24] An application fee for a prospecting right was R50 000 at the time, according to the undisputed evidence of Agri SA's expert in proceedings before the North Gauteng High Court, Pretoria.

[25] R1,5 million was payable for a mining right application, according to the undisputed evidence of Agri SA's expert in proceedings before the North Gauteng High Court, Pretoria.

[26] See section 110 read with Schedule I to the MPRDA.

Sebenza's claim for compensation against the payment of R250 000. That claim was later rejected by the state.

[17] The rejection presented Agri SA with the opportunity to get certainty on the status of potential claims for compensation by its members. As a result, litigation commenced in the North Gauteng High Court, Pretoria (High Court).

[18] The High Court held that Sebenza's mineral rights had been "legislated out of existence"[27] and that this constituted a deprivation in terms of section 25(1) of the Constitution.[28] It also held that this deprivation amounted to expropriation because the substance of Sebenza's rights had been acquired by the state which, through the Minister, now grants mining rights to third parties with substantially the same content as the right that vested in the holder of mineral rights before the commencement of the MPRDA. Aggrieved by this decision, the Minister appealed to the Supreme Court of Appeal.

[19] After embarking on an extensive analysis of South African legal history in relation to mining, the Supreme Court of Appeal held that the development of the law on mineral rights over the years was premised on the basic philosophy that the right to mine is under the suzerainty of the state and its exercise is allocated from time to time

[27] *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP) at para 57.

[28] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

by the state as it deems appropriate.[29] The MPRDA was thus said to be the latest iteration of legislation that confirms this principle. As regards the value of mineral rights, the Court said:

> "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*:
>
> > '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.'"[30] (Footnote omitted.)

[20] The Court held that at the heart of the mineral right is the right to mine[31] which is a gift from the state.[32] Mineral rights are, it held, devoid of any practical value in the absence of the right to mine.[33] And a mineral right in relation to which the right to mine has not been secured does not constitute property of which its holder could be deprived or expropriated.[34] It held further that the transitional arrangements ensured that the rights conferred on holders of mineral rights after the conversion of their old order rights, overlapped to a large extent with those they previously enjoyed.[35] For these reasons the Court concluded that neither deprivation nor expropriation took

[29] *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) at para 69 (Supreme Court of Appeal judgment).

[30] Id at para 70.

[31] Id at para 81.

[32] Id at para 113. Nugent JA wrote the concurring judgment and Mhlantla JA agreed.

[33] Id at para 70.

[34] Id at para 117.

[35] Id at para 88.

place, and set aside the decision of the High Court.[36] Dissatisfied with the reversal of its gains, Agri SA seeks leave to appeal to this Court.

Leave to appeal

[21] This application raises a number of important constitutional matters. These include deprivation of property and expropriation, what the concept of acquisition within the context of expropriation entails and legislation that is aimed at broadening access to opportunities to exploit our mineral and petroleum resources.

[22] The decision of this Court will be of importance not only to parties to the dispute, the mining industry at large, landowners and previous holders of mineral rights but also to the vast majority of people who were previously excluded and who, but for this legislative intervention, would have no properly structured access to the lucrative mineral and petroleum resources of this country. Agri SA has reasonable prospects of success. It is in the interests of justice for leave to appeal to be granted.

Leave to cross appeal

[23] The Minister sought leave for a conditional cross appeal. The cross appeal relates to her contention that the Supreme Court of Appeal did not (i) set aside the order of Du Plessis J refusing her leave to amend her plea in order to introduce further facts relevant to the determination of just and equitable compensation; and (ii) award her the qualifying fees and costs of the expert witness. In the view I take of the

[36] Id at para 101.

matter, leave to cross appeal should be dismissed. This is so because the issue of compensation does not arise and *Biowatch Trust v Registrar, Genetic Resources, and Others*[37] stands in the way of the award of qualifying fees and costs of the expert witness being made in favour of the state against Agri SA.

Issue

[24] At the epicentre of this application is the question whether Sebenza's mineral rights, enjoyed during the subsistence of the Minerals Act, were expropriated when the MPRDA took effect.

Relevant provisions of the MPRDA

[25] On behalf of all the people of South Africa, the state is now the custodian of the mineral and petroleum resources of this country which is their common heritage.[38] One of the objects of the MPRDA is to give effect to this principle[39] by granting various kinds of rights to successful applicants.[40] Prospecting, mining, exploration or production rights granted in this manner are regarded as limited real rights.[41] Detailed provision is made for the grant, content and duration of the rights.[42] If these rights are

[37] [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[38] Section 3(1) of the MPRDA.

[39] Id section 2(b).

[40] Id section 3(2)(a).

[41] Id section 5(1).

[42] Id sections 13-36.

not appropriately exercised, they may be suspended or cancelled.[43] Whenever the common law is inconsistent with the MPRDA, the latter prevails.[44]

[26] According to its long title, the MPRDA was enacted to facilitate equitable access to and sustainable development of the nation's mineral and petroleum resources. This objective finds support from the Preamble[45] which sets out a list of commitments which lie at the heart of the MPRDA. They are, among others, the eradication of all forms of discriminatory practices in the mining sector. Also included is the undertaking to take measures to address the effects of the skewed distribution of economic benefits which took place during the apartheid era and the creation of a mining regime that is internationally competitive and efficient.[46]

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[43] Id section 51(4).

[44] Id section 4(2).

[45] The Preamble of the MPRDA reads:

> "Recognising that minerals and petroleum are non-renewable natural resources;
>
> Acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;
>
> Affirming the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development;
>
> Recognising the need to promote local and rural development and the social upliftment of communities affected by mining;
>
> Reaffirming the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources;
>
> Being committed to eradicating all forms of discriminatory practices in the mineral and petroleum industries;
>
> Considering the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination;
>
> Reaffirming the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations; and
>
> Emphasising the need to create an internationally competitive and efficient administrative and regulatory regime".

[46] Id.

[27] This synopsis of the objects of the MPRDA would be incomplete without an outline of portions of the transitional arrangements, relevant to mineral rights, which are provided for in Schedule II to the MPRDA. The Schedule sets out additional objects of the MPRDA, as being to protect the security of tenure in respect of ongoing prospecting, exploration, mining and production operations, and to give the holder of an old order right the opportunity to meet the requirements of the MPRDA to sustain the continued enjoyment of pre-existing rights.[47]

[28] Schedule II defines a "holder" of an old order right as a person to whom that right was or is deemed to have been granted or by whom it is held or deemed to be held or that person's successor in title before the commencement of the MPRDA. An "old order right" is, in turn, said to be an old order mining right,[48] old order prospecting right[49] or unused old order right.[50] The transitional provisions protect the entitlement of the person who held the mineral rights in terms of the Minerals Act, to benefit from the exploitation of mineral and petroleum resources.

[47] Id item 2 of Schedule II. Applications for a prospecting permit or mining authorisation which had already been submitted when the MPRDA came into effect were to be processed in the same way as under the Minerals Act. Where information was incomplete, applicants were afforded the opportunity to comply pending the determination of the application which could be favourable or unfavourable as was the case during the Minerals Act regime.

[48] Schedule II to the MPRDA defines an "old order mining right" as "any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 [of Schedule II] in force immediately before the date on which [the MPRDA] took effect and in respect of which mining operations are being conducted".

[49] Id. "Old order prospecting right" means "any prospecting lease, permission, consent, permit or licence, and the rights attached thereto, listed in Table 1 [of Schedule II] in force immediately before the date on which [the MPRDA] took effect and in respect of which prospecting is being conducted".

[50] Id. "Unused old order right" means "any right, entitlement, permit or licence listed in Table 3 [of Schedule II] in respect of which no prospecting or mining was being conducted immediately before [the MPRDA] took effect".

[29] The lifespan of an old order prospecting right was two years, calculated from the coming into operation of the MPRDA.[51] A holder was expected to lodge the right for conversion within the two-year period.[52] If the requirements were met, the Minister would have no choice but to convert the old order prospecting right into a prospecting right in terms of the MPRDA.[53]

[30] Any old order mining right that was in force when the MPRDA took effect continued to be enjoyed by the holder for a period of five years from the date of commencement of the MPRDA.[54] It was convertible into a new order mining right during the transitional period, subject to compliance with certain requirements.[55] Items 6 and 7 of Schedule II to the MPRDA therefore conditionally guaranteed holders of old order prospecting and mining rights the continued enjoyment of the equivalent of their mineral rights.

[31] Item 12 of the Schedule provides that any person who can prove that his or her property has been expropriated in terms of the MPRDA may be entitled to compensation from the state. I find it convenient to discuss the nature of the rights

[51] Id item 6(1).

[52] Id item 6(2).

[53] Item 6(5) of Schedule II to the MPRDA provides that "[t]he holder must lodge the right converted under subitem (3) within 90 days from the date on which he or she received notice of conversion at the Mining Titles Office for registration and simultaneously at the Deeds Office or at the Mining Titles Office for deregistration of the old order prospecting right, as the case may be."

[54] Item 7(1) of Schedule II to the MPRDA provides that "[s]ubject to subitems (2) and (8), any old order mining right in force immediately before [the MPRDA] took effect continues in force for a period not exceeding five years from the date on which [the MPRDA] took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued."

[55] Id item 7(3).

allegedly expropriated and the approach of the Supreme Court of Appeal to this matter, at this stage.

The nature of the affected rights

[32] Agri SA brought this application on the basis that Sebenza's mineral rights were extinguished by the commencement of the MPRDA. This begs the question, what rights did Sebenza have under the Minerals Act which were taken away by the MPRDA? The Minister agrees that holders were deprived of their mineral rights but denies that the state acquired those rights.

[33] In the main judgment, the Supreme Court of Appeal effectively held that Sebenza's mineral rights did not constitute property, while the concurring judgment found that what Sebenza had might have had value, but that value was not in itself property.[56] I disagree with these judgments. Our fundamental difference lies in the characterisation of property that Sebenza claims was expropriated by the MPRDA.

[34] Central to the main judgment is the notion that, the "right to mine . . . in the sense of the right to prospect and mine for minerals and extract and dispose of them, is vested in the state"[57] and that this has always been the case.[58] This "right to mine", as opposed to its allocation, is according to this reasoning not a regulatory matter, "but a matter of the substantive powers of the state in contrast to private law rights to

[56] Supreme Court of Appeal judgment above n 29 at para 117.

[57] Id at para 99.

[58] Id at para 84.

property".[59] Because the "concept of mineral rights is founded on the right to mine",[60] which vests in the state by virtue of its "substantive powers", it follows from the main judgment that the existence of separate and independent mineral rights in private hands was illusory:

> "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."[61]

[35] It is, however, not clear what is meant by the proposition that the "right to mine" is a matter of the "substantive powers" of the state, or something under its "suzerainty". During the era of parliamentary supremacy, the state could by legislation allocate to itself substantive rights of ownership and regulate the exploitation of minerals by those who owned them. This is not disputed. Beyond that it had no residual competence to exploit or own minerals.

[36] Prior to the commencement of the MPRDA the state could, in respect of private land, allocate these rights to exploit only to those who owned minerals. In some colonies, before the Union in 1910, mineral ownership was reserved for the state.[62] But this was not so in the major mining areas of Griqualand West,[63] the Orange Free

[59] Id at para 99.

[60] Id at para 28.

[61] Id at para 69.

[62] *Van Niekerk & Union Government (Minister of Lands) v Carter* 1917 AD 359 (*Van Niekerk*) at 392.

[63] Id.

State[64] and the old South African Republic.[65] This position endured in the provinces of the unified South Africa and did not change under the major mining consolidating legislation of 1967 and 1991. Neither of these Acts granted the state any rights to the mineral rights on private land beyond those it enjoyed previously.

[37] The state also owned minerals on state land.[66] There was thus an inextricable link between ownership of mineral rights and the right to exploit the minerals concerned.[67]

[38] The use of the concepts "right to mine" and "mineral rights", and the distinction made between them, is potentially misleading. The confusion arises from the fact that, before statutory regulation of the exploitation of minerals, the owner of minerals[68] could exploit the minerals without state authorisation, a situation that existed in relation to base metals until the MPRDA came into operation.[69] "Mineral rights" in that original sense included both ownership of minerals and the right to exploit them. The "right to mine" the minerals formed part of the "mineral rights".

[64] *Webb v Giddy* (1878) 3 App. Cas. 908 at 930-1.

[65] This was the position, except for a brief period from 1883 to 1885 when the ownership of precious stones and precious metals was, by legislation, awarded in favour of the state. See Dale above n 12 at 175, 181-2 and 185.

[66] Section 2(1) of the Mining Rights Act and see also the definition of "state land".

[67] All this accorded with the understanding of landownership in our law and of land allocation to persons under quitrent tenure. The understanding was that the allocation of quitrent tenure conferred full ownership of the land, whereas the reservation of rights in favour of the state only created real rights and not landownership. See *The Colonial Government v Fryer and Huysamen* (1886) 4 SC 313 and *Van Niekerk* above n 62. I am not aware of any residual substantive power of the state, apart from its legislative authority under the system of parliamentary supremacy, from which it acquired proprietary rights in land or minerals. Actual exploitation by the state has been rare. See eg Dale above n 12, which refers to one ill-fated attempt in 1907. As far as petroleum and gas are concerned the state has been more proactive.

[68] See [7]-[12] above.

[69] Section 5(1) of the Minerals Act.

Once the state assumed the regulatory authority for the exploitation of minerals it became necessary to differentiate the two aspects more clearly.

[39] That clarity could have been achieved by discarding the concepts of the "right to mine" and "mineral rights" in favour of "exploitation rights" and "ownership of the minerals" respectively. It would thus be understood that prior to the commencement of the MPRDA the state had the power to regulate the exploitation of minerals owned by either the landowner or, in the case of minerals notionally "separated" from landownership, by the owner[70] of minerals.[71]

[40] When the state assumed regulatory authority, it could permit only mineral owners to extract. Where ownership of minerals, separated or not, once gave unregulated entitlement to exploit, now the state has the authority to decide when and how minerals may be exploited.

[41] Whenever the state sought to compel the exploitation of minerals by third parties, it recognised the proprietary aspect or value of mineral ownership. Initial recognition took the form of paying royalties to the owner of the minerals where prospecting leases were granted to third parties.[72] Under the Minerals Act

[70] Some would prefer "holder" rather than "owner" because of doctrinal difficulty in the ownership of rights, but I prefer "owner" here because it conveys that after extraction of the minerals the holder of the "separated" right actually becomes the owner of the extracted minerals. For a full exposition of the development of the separation of ownership of minerals from ownership of the land, see [7]-[12] above.

[71] "Notionally", because the actual separation of the minerals would only take place once the minerals had been removed from below the earth.

[72] Section 31(1) of the Mining Rights Act.

expropriation was permissible only against payment of compensation.[73] Prior to these legislative interventions, the state held no power of compulsion to enforce the exploitation of privately owned minerals.

[42] It remains to deal with the relationship between the value of a right and its content. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,[74] Ackermann J rejected the argument that a right's lack of value also meant its lack of proper content. That proposition was, in his view, an illegitimate conflation of two distinctly different legal concepts.[75] I agree. The argument that a lack of value, or indeterminate value, destroyed the existence of the right to ownership of minerals before the advent of the MPRDA is also unfounded.

[43] What is missing from both judgments of the Supreme Court of Appeal is adequate acknowledgement of the entitlement not to mine, or the ability not to exploit minerals, as one of the essential components of mineral ownership. As we have seen,[76] the legal position under the Minerals Act was that the holder's ability to sterilise or not to exploit the minerals could only be extinguished by expropriation and payment of compensation. That, on its own, appears to be a complete answer to the notion that mineral ownership either had no independent existence or independent value.

[73] Section 24 of the Minerals Act.

[74] [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*).

[75] Id at para 56.

[76] See [41] above.

[44] Sterilisation of minerals was not dependent on the state's conferment of the right to mine, however understood. It stemmed from mineral ownership. And it was undoubtedly property with economic value.

[45] Many people have an attachment to land for its own sake and would prefer not to see the surface of their land disturbed through the exploitation of minerals. Under the Minerals Act, farmers who were not interested in mining could not, if they owned the minerals on the land, be compelled to extract or consent to the extraction of their minerals.[77] The economic value of minerals on agricultural land was enhanced by the right not to exploit those minerals or the state's inability to compel the exploitation of privately-owned minerals.

[46] It bears repeating that, although the exploitation of minerals was subject to the regulatory power of the state, the state could only compel exploitation by expropriation against payment of compensation. Agri SA alleges that deprivation of property, envisaged by section 25, took place and rose to the level of expropriation.

The approach to interpreting section 25

[47] I find it useful to quote section 25 of the Constitution at this stage which in relevant part provides:

[77] Except by expropriation and payment of compensation. See [41] above.

> "(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.
>
> . . .
>
> (4) For the purposes of this section—
>
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
>
> (b) property is not limited to land."

[48] Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof.[78] Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with,[79] the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation.[80] There is therefore more required to establish expropriation although there is an overlap and no bold line of demarcation between sections 25(1) and 25(2).

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[78] *FNB* above n 74 at para 57.

[79] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 32.

[80] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (*Reflect-All*) at para 64 and *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 32-3.

Section 25(1) deals with all property and all deprivations, including expropriation, although additional requirements must be met for deprivation to rise to the level of expropriation.[81]

[49] When a determination has to be made whether there was deprivation of property, an affirmative answer would necessitate a further enquiry into the extent, if any, to which that deprivation limits the section 25(1) right. And if it does limit the right, whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution. A constitutionally invalid deprivation, either because it was not brought about through a law of general application or by reason of its arbitrariness, would put an end to the enquiry.[82]

Deprivation

[50] Part of the inescapable reality in relation to the finding of the Supreme Court of Appeal that Sebenza was not deprived of anything, is that mineral rights holders used to enjoy rights which they could dispose of as alluded to above. Under the old mineral rights regime, holders had the latitude to sterilise mineral rights for as long as they wanted to and benefit from their value-enhancing effect on the land, if the right were not yet severed from landownership. But even as a self-standing real right severed from landownership, as in the case of Sebenza, it had value that appreciated with time.[83] It could therefore be kept as a valuable investment or asset, be

[81] See *FNB* above n 74 at paras 58-9.

[82] Id.

bequeathed or mortgaged and constituted property as envisaged by section 25 of the Constitution.

[51] The holders of mineral rights had the ability to prospect or mine.[84] After the commencement of the MPRDA, they had the exclusive entitlement to apply for the right to prospect or mine but only for one year. The free or unregulated right to sterilise mineral rights was terminated with effect from 1 May 2004. Similarly, the rights to sell or lease mineral rights prior to securing the authorisation to prospect or mine,[85] were extinguished at the same time, although they could be revived later.[86] Under the MPRDA, prospecting and mining rights only existed, and could only be sold or transferred, in terms of item 8 of the transitional provisions.[87] That transfer was nevertheless subject to conditions which not every landowner or holder of mineral rights was necessarily in a position to meet. Sebenza could for example not meet those requirements.

[52] Holders of unused old order rights who could not apply for the right to prospect or mine within the window period created by the MPRDA transitional provisions, or whose applications were unsuccessful, lost all their mineral rights permanently. In that event their loss was not merely confined to the extinction of the right to sterilise, the monopoly and the suspension of the right to sell or lease the mineral rights, but

[83] Although Sebenza's coal rights were bought for just over R1 million, they were estimated at about R2 million at the time of litigation. This points to appreciation of value.

[84] Which Mostert above n 8 at 136 describes as *ius utendi*.

[85] Id. The ability to dispose of the right is similarly described as *ius disponendi*.

[86] See section 11 of the MPRDA.

[87] These are contained in Schedule II to the MPRDA.

was also a total and permanent loss. Even if the mineral rights had been bought, as in the case of Sebenza, the possibility to recoup the purchase price or a portion of it was totally lost.

[53] It follows that the MPRDA, which is a law of general application, had the effect of depriving Sebenza, and a similarly-positioned holder of a pre-existing mineral right, of elements of that right, as correctly conceded by the Minister. It is common cause between the parties that the deprivation was not arbitrary, and this is correct considering both the objects of the MPRDA and the transitional arrangements. Did this deprivation rise to the level of expropriation?

Expropriation

[54] Agri SA contends that the MPRDA—

(a) destroyed Sebenza's coal rights which encompassed the entitlements to enter the land with employees, prospect for or mine minerals and dispose of them as well as the competencies to keep, transfer, bequeath, encumber or lease the rights;

(b) vested in the Minister a public law power or competency to confer upon third parties, by means of a prospecting or mining right created by the MPRDA, the entitlements tabulated in (a) above, subject to ministerial consent in terms of section 11 of the MPRDA; and

(c) imposed the obligation to compensate on the state, which is the expropriator.

[55] Agri SA also says that Sebenza could not apply for a prospecting or mining right because it was not in a financial position to do so. After liquidation, section 56(d) of the MPRDA[88] precluded it from being granted the right to prospect or mine. The possibility to cede or transfer any prospecting or mining right to Metsu in terms of section 11 of the MPRDA was thus not open to Sebenza owing to the operation of section 56(d). Sebenza was deprived of the right—

(a) not to prospect or mine and to prevent anybody else from doing so;

(b) to preserve the option to prospect or mine later; and

(c) to sell or lease the right to prospect or mine to any person of its choice.

[56] Agri SA argues further that when the MPRDA took effect, it deprived Sebenza of its mineral rights. While it accepts that the state did not itself acquire the right to prospect or mine, it however contends that the state destroyed Sebenza's mineral rights so as to release them for allocation to third parties. It basically takes the position that the coming into operation of the MPRDA expropriated Sebenza's mineral rights held under the Minerals Act. To Agri SA expropriation is essentially about ending the rights of an expropriatee and the consequential acquisition of new rights equivalent but not necessarily identical to those lost by the expropriatee. It argues that the issue is not whether the state acquired rights identical to those held by the likes of Sebenza under the Minerals Act. The issue is whether the regulatory

[88] Section 56(d) of the MPRDA provides:

> "Any right, permit, permission or licence granted or issued in terms of this Act shall lapse, whenever—
>
> (d) save for cases referred to in section 11(3), the holder is liquidated or sequestrated".

framework introduced by the MPRDA conferred rights on the state which are substantially similar to the lost mineral rights, to facilitate the grant of those rights to third parties. In sum, Agri SA contends that mineral rights were extinguished and vested in the Minister, on behalf of the state, to have them enjoyed by any third party to whom she may decide to grant them.

[57] Both the Minister and CALS reject Agri SA's contention that the commencement of the MPRDA brought about an expropriation of Sebenza's pre-existing mineral rights and the nuanced meaning sought to be given to the notion of acquisition within the context of expropriation. The Minister argues that the state did not acquire mineral rights as a result of the deprivation that admittedly took place.

[58] To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired. Exact correlation is not required. In *Harksen*, Goldstone J had this to say about expropriation:

> "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, section 28 makes a distinction between deprivation of rights in property, on the one hand . . . and expropriation of rights in property, on the other. 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.
>
> 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."[89] (Footnotes omitted.)

[59] In addition, in *Reflect-All*, Nkabinde J had this to say about when expropriation takes place:

> "The applicants argued that section 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. It must be emphasised that section 10(3) does not transfer rights to the state. . . . As I have said, the state has not acquired the applicants' land as envisaged in sections 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid."[90]

There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.

[60] The approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfillment of our country's nation-building and reconciliation

[89] *Harksen* above n 80 at paras 32-3. In *Harksen* this Court interpreted section 28 of the interim Constitution which is the equivalent of section 25 of the Constitution.

[90] *Reflect-All* above n 80 at para 64.

responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.[91]

[61] Section 25(4)(a) enjoins the courts to bear in mind, as they interpret section 25, that the public interest referred to in section 25(2) includes the nation's commitment to land reform and reforms to bring about equitable access to all of our natural resources. We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in this country. And by design,

[91] *FNB* above n 74 at paras 49-50. These remarks by Ackermann J are therefore instructive:

> "The subsections which have specifically to be interpreted in the present case must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole. Subsections (4) to (9) all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa. The details of these provisions are not directly relevant to the present case, but ought to be borne in mind whenever section 25 is being construed, because they emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.
>
> The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on 'democratic values' and 'fundamental human rights', but also on 'social justice'. Moreover the Bill of Rights places positive obligations on the State in regard to various social and economic rights. *Van der Walt* (1997) aptly explains the tensions that exist within section 25:
>
> > '[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterise the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.'
>
> The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions." (Footnotes omitted.)

the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans.

[62] This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state's social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources.[92]

[63] There is much to be said for the view that too narrow a meaning of acquisition, stemming from a deprivation, could militate against the constitutional protection sought to be given to property rights in terms of section 25(2) of the Constitution. Equally apposite is the proposition that an overly liberal interpretation of the concept of acquisition could blur the line drawn by our Constitution between deprivation in section 25(1) and expropriation in section 25(2). More tellingly, it could undermine the constitutional imperative to transform our economy with a view to opening up access to land and natural resources to previously disadvantaged people, as envisaged

[92] Id.

by section 25(4) of the Constitution. This would also affect the need to create jobs, grow our economy by developing these resources in a sustainable way and guarantee security of tenure to those prospecting for or exploiting mineral and petroleum resources.[93] Additionally, a proper meaning to give to the notion of acquisition should pose no threat to the possibility of maintaining a sensitive balance between existing private property rights and the pursuit of transformation that section 25 was designed to facilitate.[94]

[64] A one-size-fits-all determination of what acquisition entails is not only elusive but also inappropriate particularly when an alleged expropriation of incorporeal rights, like mineral rights, is considered. A case by case determination of whether acquisition has in fact taken place presents itself as the more appropriate way of dealing with these matters. This is so because acquisition is likely to assume many variations in its manifestation,[95] especially as a result of the nature of the right involved. In this case for example, the source, nature and content of the affected incorporeal rights as well as measures taken to interfere with them or to preserve their essence would be of special significance in giving a contextual meaning to acquisition. Equally important is a recognition of the need to protect individual

[93] Holders, who had prospecting permits and mining authorisations under the Minerals Act, did not really have security of tenure. A prospecting permit was valid for a renewable period of 12 months or such longer period as the regional director may have determined (see section 6(4)) whereas a mining authorisation was granted for a period which was at the discretion of the Director: Mining Development, (see section 9(1)). The MPRDA created security of tenure by increasing the prospecting period to a renewable tenure of not more than five years (see section 17(6)). It has also brought about certainty by setting the duration of a mining right at a renewable period not exceeding thirty years (see section 23(6) – previously, the period was not stipulated). The right to prospect or mine is more secure under the MPRDA, than it was under the Minerals Act.

[94] See Wallis JA's position in the Supreme Court of Appeal judgment above n 29 at paras 23-4.

[95] Id at para 24.

property rights as well as the facilitation of sustainable development, eradication of all forms of discriminatory practices in the mining industry and equitable access to the mineral and petroleum resources of this country, to all its people.

[65] Incidental to the problems sought to be addressed through the MPRDA is the inequitable distribution of land stemming from our unpleasant past. The historical inextricable link between landownership and mineral rights ownership equally explains why the vast majority of black people do not have access to the mineral and natural resources of our land. The determination of expropriation, in a matter like this, cannot therefore be merely surgical or mechanical. A fine balance must be struck between the interest of those deprived by the MPRDA, and the need to create jobs, grow the economy through the expanded development of the mining industry and open up opportunities for those sought to be made fellow partakers in the equitable access to mineral resources, brought into being by the MPRDA.

[66] What the MPRDA in effect did was to put an end to the: (i) ability to sterilise or not to exploit minerals; (ii) previously unfettered entitlement to sell, lease or cede the mineral right at any time; and (iii) mineral right or unused old order right for which a prospecting or mining right could not be acquired in terms of the transitional provisions. All this was however done within the context of Parliament, through the MPRDA, having painstakingly done everything reasonably possible to help the holders comply with the requirements so as to preserve their rights. And once the

requirements were met, the rights could be disposed of or enjoyed under a much more secure tenure than ever before.

[67] Sebenza was deprived of components of its mineral rights in that the MPRDA brought about a substantial interference and limitation that went beyond the normal restrictions on the use or enjoyment of its property found in an open and democratic society.[96] Although expropriation is a species of deprivation, there are additional requirements that set expropriation apart from mere deprivation. They are (i) compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.

[68] The MPRDA is the legal instrument through which Sebenza was deprived of its coal rights. This therefore is a compulsory deprivation. The custodianship of this and other mineral and petroleum resources is, in terms of the MPRDA, vested in the state on behalf of the people of South Africa. The critical question is, however, whether this deprivation, the assumption of custodianship and the power to grant others what could previously have been granted only by holders, means that the state acquired ownership of rights to these mineral and petroleum resources. The answer is no. Unlike in the case of the state (i) acquiring land for governmental projects such as road infrastructure, industrial development or other purposes, and (ii) acquiring mineral rights so that it could exploit them, in this case the state did not acquire any mineral rights, including those of Sebenza, at the commencement of the MPRDA.

[96] *Mkontwana* above n 79 at para 32.

The state, as the custodian of these resources, is not seeking or supposed to be a co-contender with people or business entities for the right to prospect for or mine these minerals.[97] It is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.

[69] A contention that, although the state has admittedly not acquired Sebenza's rights to own and to exploit minerals, it has nevertheless expropriated these rights is without merit. The deprivation in this matter evidently has no known comparable expropriation-equivalent that could be cited by Agri SA. An assertion by Agri SA that the state has in terms of the correct interpretation of section 25 expropriated the mineral rights, is an overly liberal one. It disregards the public interest and constitutional imperative to transform and facilitate equitable access to our mineral and natural resources, to which courts are enjoined to have regard when construing section 25.

[70] Agri SA's contention that because the Minerals Act treated or classified the forced exploitation of privately owned mineral rights as compensable expropriation, so should the MPRDA, misses the point. The previous legislation regulated access to minerals and their exploitation within the context of the apartheid regime which was all about the exclusion of black people from access to private landownership and the exploitation of mineral and natural resources, and the protection of the privileges of their white compatriots. An important difference-maker in this case is section 25

[97] See the Preamble to the MPRDA above n 45. The MPRDA makes no provision for the state to be a beneficiary of the new mineral and petroleum dispensation.

which could never before have been a factor in interpreting the minerals legislation in relation to expropriation. Now, unlike before, private mineral ownership rights are not to be over-emphasised at the expense of the urgent and critical need to open up equitable access to, and promote economic development through the exploitation of our mineral and petroleum resources.

[71] While it is correct that the state is the custodian of all our mineral and petroleum resources on behalf of the people of South Africa, this did not however take away the substance of unused old order rights from their holders. But for sterilisation, the core right was left intact and capable of full enjoyment by those who wished to and were able to exploit it. Neither the state nor other entities or people acquired the rights to sterilise, monopolise the exploitation of minerals or sell, lease or cede Sebenza's old order rights on 1 May 2004. The MPRDA, subject to the transitional arrangements, put an end to the rights without necessarily transferring them to the state. For purposes of this case, it is not necessary to define the word "custodian". What is however clear is that, whatever "custodian" means, it does not mean that the state has acquired and thus has become owner of the mineral rights concerned.

[72] Sebenza could not convert and exploit its coal rights because of its precarious financial position. The possibility to preserve and continue to enjoy the unused old order right was available to Sebenza and similarly-situated holders. But Sebenza failed to take advantage of it. The MPRDA cannot therefore be held to be an

instrument by which Sebenza's rights were expropriated at commencement. The appeal must fail.

Conclusion

[73] The MPRDA constitutes a break through the barriers of exclusivity to equal opportunity and to the commanding heights of wealth-generation, economic development and power. It seeks to address the injustices of the past in the economic sector of our country in a more balanced way, by treating individual property rights with the care, fairness and sensitivity they deserve.

[74] It is for this reason that the transitional arrangements exist and were so carefully designed to alleviate potential hardship and prevent expropriation. That the MPRDA does make provision for expropriation was, in my view, more of a cautious approach to provide for unforeseeable eventualities, than an acknowledgment or reinforcement of an accepted reality that the MPRDA necessarily has signposts of expropriation.

[75] It would, however, be inappropriate to decide definitively, that expropriation is in terms of the MPRDA incapable of ever being established. Like the Supreme Court of Appeal, I accept that a case could be properly pleaded and argued, to demonstrate that expropriation did take place. That is the avenue that must be left open, particularly when regard is had to the express provision made for expropriation in item 12 of Schedule II to the MPRDA.

Order

[76] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There will be no order for costs.

CAMERON J:

[77] I concur in the order and, subject to one reservation, support the reasoning the judgment of Mogoeng CJ lucidly sets out. The reservation is this. I share the caution Froneman J expresses regarding the main judgment's finding that acquisition by the state is a necessary feature of expropriation under section 25 of the Constitution.

[78] Acquisition by the state is, in my view, a general hallmark of expropriation. But not necessarily and inevitably so. Whether an expropriation contemplated by section 25 has occurred is – as the main judgment finds– a context-based enquiry, demanding a case by case approach. I therefore agree with Froneman J that it is inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement for all cases.

FRONEMAN J (Van der Westhuizen J concurring):

[79] I agree that the appeal should be dismissed, but solely on the basis that the unused old order rights[98] conferred on the applicant under the Mineral and Petroleum Resources Development Act[99] (MPRDA) constituted just and equitable compensation for what it previously had and has now lost. I believe that this is also the substantive reason that underlies the judgment of the Chief Justice (main judgment), but the judgment ultimately grounds its conclusion in the propositions that (1) state acquisition is an essential requirement for expropriation,[100] and (2) in this case there was no state acquisition.[101] I am unable to agree with either assertion.

[80] The MPRDA abolished private ownership of minerals, based either on land ownership or the holding of severed real rights to the minerals, which existed under the mining law dispensation enacted prior to the Constitution.[102] In its stead the MPRDA introduced a mineral law dispensation in terms of which the state became the custodian of mineral resources with the power to allow exploitative access to those resources to all the people of South Africa.[103] In view of our history it can hardly be

[98] As explained in [28] of the main judgment.

[99] 28 of 2002.

[100] See [67] above.

[101] See [68] above.

[102] See [7]-[20] above.

[103] Compare Mostert *Mineral Law Principles and Policies in Perspective* (Juta and Co. Ltd., Cape Town 2012) at 129:

> "Under the previous generation of mineral law, access to the mining industry was controlled by mineral right holders, whilst activity within the industry was regulated by the state. The MPRDA replaces 'mineral rights' with a system of state-granted rights to prospect and/or mine." (Footnotes omitted.)

argued that the institutional change of legal regime is not just and equitable.[104] But I find it unconvincing, both in plain language and legal conceptualisation, to say that the power of disposition that private mineral ownership entailed was not acquired or does not now vest in the state.

[81] Previously, private owners of minerals had the power or competence to decide whether to exploit minerals they owned and to whom they could give their exploitation rights. It was an incidence of ownership.[105] Now the state has that power or competence by virtue of its custodianship of mineral resources under the MPRDA.[106] It may not have acquired the right to exploit the minerals, but it has acquired the power to allocate and dispose of the exploitation rights. What private owners of minerals previously had in this regard, the state now has. It really seems as

[104] Id at 131-5. See also Van der Walt *Constitutional Property Law* 3 ed (Juta and Co. Ltd., Cape Town 2011) at 410 et seq.

[105] Mostert above n 103 at 11-3.

[106] Section 3 of the MPRDA 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.
>
> (3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development."

There are also other differences between the nature, content and duration of transitional and eventual substantive rights under the MPRDA, and pre-existing mineral ownership rights, but it is not necessary to deal with these as well.

plain and simple as that to me. In my view plain speaking is what the Constitution requires of us when the contested subject of property rights arises, as is the case here.

[82] Access to the generous mineral resources of South Africa has to a large extent, determined the course of this country's history. It is a history with many dimensions, but inescapably part of it is one of racial dispossession and capitalist development. Within that context there remain contested aspects, different histories.[107] Fortunately the Constitution and the MPRDA allow us to transcend that contested past. The former providing us with the means to deal with property contestation, and the latter giving concrete expression, in a particular way, to the use of that constitutional approach.

[83] In the *First Certification case* it was stated that our past was—

> "aptly described as that of 'a deeply divided society characterised by strife, conflict, untold suffering and injustice' which 'generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'".[108]

[107] The discovery of diamonds in 1867 not only resulted in the dispossession of the Griqua people of their land, but also in the replacement of the initial and relatively egalitarian model of 'digger democracy' with one of capital accumulation and industrialisation in the hands of a privileged few. That set in train events which to some served as the leading example of imperialism and monopoly capitalism. See Innes *Anglo American and the Rise of Modern South Africa* (Raven Press, Johannesburg 1984) for a critical account of this development. For a more benign account, see Gregory *Ernest Oppenheimer and the Economic Development of Southern Africa* (Oxford University Press, Cape Town 1962) and Lipton *Capitalism and Apartheid: South Africa, 1910-1986* (Wildwood House, London 1986). For a more general discussion on the contestation about the past in historical writing, see Lipton *Liberals, Marxists, and Nationalists: Competing Interpretations of South African History* (Palgrave Macmillan, New York 2007) and De Vos "South Africa's Constitutional Court: Starry-Eyed in the Face of History?" (2002) 26 *Vermont Law Review* 837 for a critical discussion of this Court's use of contested versions of history.

[108] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification case*) at para 5.

The choice made to deal with this past was that of the "historic compromise"[109] that eventually resulted in the adoption of the Constitution by the Constitutional Assembly and its certification by this Court.[110]

[84] An important part of the content of that compromise is to be found in section 25 of the Constitution.[111] In *FNB*[112] this Court found, in the words of Ackermann J, that—

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[109] Id at para 9-10. See also *African National Congress and Another v Minister of Local Government and Housing, Kwazulu-Natal, and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 18 and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 108.

[110] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) (*Second Certification case*).

[111] Section 25 of the Constitution provides 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.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;
>
> (c) the market value of the property;
>
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>
> (e) the purpose of the expropriation.
>
> (4) For the purposes of this section—
>
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
>
> (b) property is not limited to land.
>
> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

> "the purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between those two functions."[113]

[85] The MPRDA is not legislation that explicitly seeks to give effect to and circumscribe a fundamental right in the manner of, for example, the Promotion of Administrative Justice Act,[114] Promotion of Access to Information Act[115] or the Labour Relations Act,[116] but in my view its provisions need to be interpreted in a manner that is best consistent with section 25. An interpretation that best accords with the "spirit, purport and objects"[117] of section 25 is what is called for.[118]

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(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

[112] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*).

[113] Id at para 50.

[114] 3 of 2000.

[115] 2 of 2000.

[116] 66 of 1995.

[117] Section 39(2) of the Constitution reads as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[118] Compare *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

[86] One way of approaching the issue here is to lay down general and definitive requirements of what constitutes expropriation and then to determine whether these requirements were met in the present case, as was done in the main judgment. I do not think that is an appropriate approach to the provisions of the MPRDA.

[87] The MPRDA seeks to introduce a completely new legal regime in respect of our mineral and petroleum resources. Its transitional provisions are clearly aimed at making the transition fair and equitable to pre-existing rights holders, as well as to those who were previously deprived from the benefits of exploiting the country's mineral and petroleum resources. But the provision for compensation[119] upon proof of expropriation appears to acknowledge the existence of the possibility that the legislative balancing of competing interests might, in individual cases, not have met the required standard of justice and equity. Is there an acceptable alternative interpretive approach that would justify not using the conventional one used in adjudging normal expropriation cases? I believe there is.

[88] Section 25 provides the constitutional norm when pre-existing property is taken away and distributed or allocated under a new legal dispensation. As explained in *FNB*, section 25 seeks to balance existing rights with the public interest. That is also what the MPRDA seeks to do, albeit not in the form of monetary compensation. The balance consists in ensuring the continuation of a substituted form of the pre-existing right for a limited period of time within which the pre-existing rights holder has the

[119] Item 12 of Schedule II to the MPRDA.

exclusive right to convert this into MPRDA rights. For convenience this can be called 'compensation in kind'. It seems to me that interpreting the MPRDA on the basis that its 'compensation in kind' should be read as giving alternative legislative content to the just and equitable compensation provision for expropriation in section 25(3) of the Constitution[120] is justified. In my view it is the interpretation that will give best effect to the dictates of section 25. It will be an acknowledgement that pre-existing rights have been taken away to be allocated by the state under a new legal dispensation, but that the Legislature has attempted to compensate for the loss in a just and equitable manner. And it will have the practical advantage that courts may cut to the chase to determine whether the 'compensation in kind' provided by the provisions of the MPRDA is substantively equivalent to the just and equitable compensation required by section 25 without having to wrestle their way through formalistic requirements for expropriation. This approach to interpretation does not mean that the mere inclusion of 'compensation in kind' provisions immunises legislation from a finding that expropriation occurred and that compensation may yet be payable.

[89] There is another advantage to locating the equivalence issue within the just and equitable compensation provision of section 25, one that has a deep resonance with the "historic compromise" that section 25 exemplifies. All that section 25 asks for is an acknowledgement when pre-existing property is taken away by the state and allocated differently. When that acknowledgement is made, the previously

[120] Section 25(3) in relevant part reads as follows:

> "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected".

advantaged may only expect fair and equitable compensation in the context of the need to redress past wrongs for what they have lost, not the equivalent of that loss.

[90] The constitutionally best interpretation of the MPRDA is thus, in my view, that the transitional measures should be interpreted as 'compensation in kind' measures that seek to give effect to the just and equitable compensation for property in terms of the provisions of section 25 of the Constitution. In a compensation case brought in terms of item 12 of Schedule II to the MPRDA the crucial issue to be determined will be whether, on the facts of the particular case, the 'compensation in kind' provided for by the MPRDA is substantively equivalent to "just and equitable compensation" in terms of section 25.

[91] I acknowledge that there is no precedent for this approach. That is because this Court is faced for the first time with legislation that seeks to effect an institutional change to the legal regime that applies to the exploitation of this country's mineral and petroleum resources.[121] Large-scale transformational legislation of this nature presents challenges of a special kind. There is no binding precedent of this Court that precludes a new and fresh approach to the issue.

[92] Approaching the provisions of the MPRDA from this perspective also dispenses with the need to enter into a formal analysis of when a deprivation becomes expropriation. I consider that to be an advantage here. Before this Court it was

[121] I borrow the "institutional change" terminology from Van der Walt above n 104 at 410.

common cause that a non-arbitrary deprivation occurred. The first step of the *FNB* analysis thus needs no further attention.

[93] Section 25 does not tell us what the difference between deprivation and expropriation of property is, only that compensation is payable when there is expropriation. That begs the question when compensation is payable. *FNB*[122] established that expropriation is a subset of deprivation and that sometimes one need go no further than a purely deprivation analysis to decide expropriation disputes, namely, when the deprivation is arbitrary.[123] In *Harksen*[124] on the other hand, the deprivation analysis was skipped and this Court went directly to a discussion of expropriation. What this conveys is the need for flexibility in approaching expropriation issues in different contexts.

[94] There is no harm in admitting that the deprivation/expropriation distinction is merely a conceptualisation in legal terms, made in order to arrive at a conclusion of when compensation ought to be payable under section 25. And almost invariably the formal distinction in terms of the legal analysis is based on a substantive notion of when it is just to pay compensation. That means that when it is possible directly to assess the justness and equity of whether compensation should follow, it is not necessary to use the intermediate road of formal analysis. If the MPRDA's

[122] *FNB* above n 112.

[123] Id at paras 57-61.

[124] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

'compensation in kind' equals the just and equitable standard of section 25(3), viewed in our historical context, it is enough; there is no need to go further.

[95] But if letting go of the formal deprivation/expropriation analysis is too difficult to stomach, the same result may be reached in a different manner, as experiences in other jurisdictions show.

[96] The German Constitution allows for the deprivation of property without payment of compensation in certain circumstances.[125] In the case of *Jahn v Germany*[126] the European Court of Human Rights (ECHR) was called upon to decide whether the failure to pay compensation to the applicants breached the provisions of article 1 of Protocol 1 to the European Convention on Human Rights.[127]

[97] The applicants in *Jahn* relied on their inherited right to property in East Germany before reunification. After the occupation of East Germany in 1945 the right to dispose of property in relation to agricultural land was abolished. Agricultural land reverted back to a pool of state land when the holder of the right to the land lost

[125] For examples see Mostert above n 103 at 152-3 and Van der Walt above n 104 at 414-6.

[126] (2006) 42 E.H.R.R 49.

[127] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), available at: http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm, accessed on 20 March 2013. Protocol 1 to the European Convention on Human Rights was adopted on 20 March 1952. Article 1 of Protocol 1 to the European Convention on Human Rights reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

that right. After the fall of the Berlin Wall and before reunification, the East German parliament passed a law that reinstated the rights of disposal to holders of property. Within a couple of years of reunification the German parliament reversed this, with the result that the applicants, who had obtained their right to the property through inheritance and not original acquisition, were dispossessed of those rights. No compensation was paid to them. The German Federal Constitutional Court held that this was not unconstitutional. The applicants turned, eventually, to the ECHR.

[98] By a majority of 11 votes to 6 the ECHR held that there had been no breach of article 1 of Protocol 1. What is of particular relevance is the Court's treatment of its requirement that "a total lack of compensation can be considered justifiable under article 1 of Protocol 1 only in exceptional circumstances".[128] The ECHR held that exceptional circumstances did exist on the basis of the following reasoning of the German Federal Constitutional Court:

> "Three factors seem to it to be decisive in that connection:
>
> (i) first, the circumstances of the enactment of the Modrow Law, which was passed by a parliament that had not been democratically elected, during a transitional period between two regimes that was inevitably marked by upheavals and uncertainties. In those conditions, even if the applicants had acquired a formal property title, they could not be sure that their legal position would be maintained, particularly as in the absence of any reference to heirs in the Modrow Law, the position of those among them who were not farming the land themselves and were not members of an agricultural co-operative remained precarious even after that Law had come into force;
>
> (ii) secondly, the fairly short period of time that elapsed between German reunification becoming effective and the enactment of the second Property

[128] *Jahn* above n 126 at para 111.

> Rights Amendment Act. Having regard to the huge task facing the German legislature when dealing with, among other things, all the complex issues relating to property rights during the transition to a democratic, market-economy regime, including those relating to the liquidation of the land reform, the German legislature can be deemed to have intervened within a reasonable time to correct the - in its view unjust - effects of the Modrow Law. It cannot be criticised for having failed to realise the full effect of this Law on the very day on which German reunification took effect;
>
> (iii) thirdly, the reasons for the second Property Rights Amendment Act. In that connection the FRG Parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice so that the acquisition of full ownership by the heirs of land acquired under the land reform did not depend on the action or non-action of the GDR authorities at the time. Likewise, the balancing exercise between the relevant interests carried out by the Federal Constitutional Court, particularly in its leading decision of October 6, 2000, in examining the compatibility of that amending Law with the Basic Law, does not appear to have been arbitrary. Given the 'windfall' from which the applicants undeniably benefited as a result of the Modrow Law under the rules applicable in the GDR to the heirs to land acquired under the land reform, the fact that this was done without paying any compensation was not disproportionate. It should also be noted in that connection that the second Property Rights Amendment Act did not benefit the State only, but in some cases also provided for the redistribution of land to farmers.
>
> Having regard to all the foregoing considerations and taking account, in particular, of the uncertainty of the legal position of heirs and the grounds of social justice relied on by the German authorities, the Court concludes that in the unique context of German reunification, the lack of any compensation does not upset the 'fair balance' which has to be struck between the protection of property and the requirements of the general interest."[129] (Footnotes omitted.)

[99] The parallels with the situation in our country are striking: property derived from a tainted past; the challenges of transformation; and the demands of justice. In

[129] Id at para 116-7.

its particular context the ECHR's decision may be seen as refusing compensation even where there has, in our language, been expropriation. This Court recognised the possibility of expropriation without compensation in *FNB*,[130] and the same result that I have reached by a direct 'compensation in kind' approach may be reached by this more conventional route on a case by case basis under the MPRDA.[131]

[100] It remains to deal directly with the findings in the main judgment that acquisition by the state is a necessary requirement for expropriation in terms of section 25, and that the state acquired nothing of the sort under the MPRDA.

[101] I stated earlier[132] that there is no binding precedent of this Court in relation to the kind of institutional change of the legal dispensation which is at stake under the MPRDA. *Harksen*[133] dealt with a provision of the Insolvency Act[134] and *Reflect-All*[135] with regulatory provisions that did not seek to change the institutional legal system in

[130] Above n 112 at para 98.

[131] The provisions of item 12 of Schedule II to the MPRDA appear to make provision for expropriation without compensation in section 12(3) which reads:

> "Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including—
>
> (a) the need to promote equitable access to the nation's mineral resources;
>
> (b) the financial position of the applicant;
>
> (c) the need to transform the ownership structure of the minerals and mining industry; and
>
> (d) the extent to which the proposed prospecting or mining project meets the objects referred to in section 2 (c), (d), (e), (f) and (i)."

[132] See [91] above.

[133] Above n 124 at para 82.

[134] 24 of 1936.

[135] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (*Reflect-All*).

any way.[136] Neither case dealt with the nature of change brought about by vesting the natural resources of the country in the state as custodian of those resources for the benefit of the people of South Africa. Nor does the main judgment address the issue squarely.[137]

[102] *FNB* laid down no requirement of state acquisition as an inflexible requirement for expropriation.[138] It would be inadvisable to extrapolate an inflexible general rule of state acquisition as a necessary requirement from these cases to the current one. I say so for the following reasons.

[103] First, foreign jurisprudence recognises that expropriation may take place even if the disposed rights or property have not been acquired by the state.[139]

[104] The second is illustrated by the discussion in the main judgment of the need to steer between an overly generous approach to the notion of acquisition and a too

[136] Id at para 76.

[137] Custodianship is a new concept in our law and has generated much discussion: see the discussion and references to the literature in Mostert above n 103 at 133-5.

[138] *FNB* above n 112.

[139] See the thorough and illuminating discussion in *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) at paras 21-3. See also International Investment Law cases involving expropriation. *Starrett Housing Corporation, Starrett Systems, Inc, Starrett Housing International, Inc v The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat* (1983) 4 Iran-U.S.C.T.R. 122 at 154:

> "[I]t is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."

See also *Compañia del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica* (2000) (ICSID Case No. ARB/96/1) at para 77:

> "[P]roperty has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property."

restrictive one.[140] The resulting choice inevitably is a definitional exclusion of possibly worthy individual cases. I do not see how, on the approach adopted in the main judgment, there can be any sustainable argument that the MPRDA expropriated any rights under the previous mining dispensation. The MPRDA is foundationally based on a system where the state, as custodian, allocates mining entitlements. If that foundation does not mean that the state has acquired a competence previously held by private owners of minerals, then none of the pre-existing rights have been expropriated. It is even difficult to imagine, given that definitional foundation, how there can be 'administrative' expropriation of rights under the MPRDA itself. If, no matter what rights are taken away and to whom they are allocated, the necessary requirement of state acquisition is absent, how can there ever be expropriation?

[105] This leads to the final reason. If private ownership of minerals can be abolished without just and equitable compensation - by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights - what prevents the abolition of private ownership of any, or all, property in the same way? This construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country's resources, from being recognised as expropriation.[141] This is done without a thorough examination of what the entirely new legal concept of state custodianship holds for our law or whether the transfer will be just and equitable. In that way one of the crucial aspects of our historical compromise, the equitable

[140] See [63]-[64] above.

[141] It seems to exclude even the kind of case mentioned by Mostert above n 103 at 106.

balancing between the protection of existing property rights and the public interest under section 25, is bypassed. I find that unfortunate.

[106] But even if acquisition is a necessary requirement for expropriation, as the main judgment holds, I do not see how it can be avoided that the state acquired, in a material and substantive sense, at least some of the power and competencies that previously vested in private ownership. As a last illustration: under the Minerals Act[142] the state could enforce exploitation of minerals against the will of the holder of the mineral rights, but then the owner was entitled to compensation.[143] Under the MPRDA the right to compensation has been lost. In ordinary language that means that the money that the owner would have received under the Minerals Act is now kept by the state. To me that looks like the acquisition of the benefit by the state.

[107] To return then, to the facts and the reasons why, under the 'compensation in kind' approach, I nevertheless think the appeal must fail. As already indicated there are in my view substantive differences between the nature, content and duration of transitional and eventual substantive rights under the MPRDA and pre-existing mineral ownership rights. Those general differences at first blush seem to be justified by equivalence between the 'compensation in kind' measures of the MPRDA and the "just and equitable compensation" requirements under section 25. More particularly, the transitional provisions of the MPRDA seek to provide 'compensation in kind' to those who were already exploiting the minerals, or those who contemplated doing so.

[142] 50 of 1991.

[143] Section 42 of the Minerals Act.

This emphasis on the effective exploitation of minerals is legitimate and rational when viewed from a public interest or public purpose perspective.

[108] For those who acquired mineral ownership pre-MPRDA with a view to exploitation of the minerals, it might prove difficult to show that the MPRDA's 'compensation in kind' provisions do not measure up to section 25 "just and equitable compensation" standards. But the MPRDA provides no 'compensation in kind' to those who did not want to exploit the minerals they owned previously. As pointed out earlier in the main judgment,[144] pre-MPRDA mineral ownership also had non-exploitation value. It may well be that persons falling within this category have the best chance of proving that the lack of 'compensation in kind' under the MPRDA translates to compensable expropriation under item 12 of Schedule II to the MPRDA.

[109] Sebenza (Pty) Ltd does not fall within this category. It wanted to exploit its mineral ownership, but could not do so because of intervening insolvency. It was not the inadequacy of the MPRDA's 'compensation in kind' provisions that caused it not to utilise those provisions.

[110] I thus agree that the appeal must fail and concur in the order made in the main judgment.

[144] See [45] above.

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