

Nationalisation of mineral rights in South Africa

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OPSOMMING

Nasionalisering van mineraleregte in Suid-Afrika

Die Wet op die Ontwikkeling van Minerale en Petroleum Hulpbronne, Wet 28 van 2002, het grondeienaars van hulle eiendomsreg ten aansien van onontginde minerale en petroleum produkte ontnem en bepaal nou dat minerale en petroleum hulpbronne “die gemeenskaplike erfenis van die hele bevolking van Suid-Afrika” is met die Staat as die bewaarder daarvan. Prospekter- en mynregte ten aansien van “ongebruikte ou orde regte” en met betrekking tot die oorsakeling van “ou orde prospekterregte” en “ou orde mynregte” na “nuwe orde” prospekter en/of mynregte is onderworpe gestel aan ingrypende tydsbeperkings en veeleisende substantiewe voorwaardes wat deur die Minister van Minerale en Energie Aangeleenthede goedgekeur moet word. Terwyl die Staat in die verlede prospekter- en mynregte gereguleer het, hoofsaaklik met die doel om veiligheid en omgewingsbewaring te bevorder, het die wetgewer nou streng vereistes gestel vir die vergunning van prospekter en/of mynregte omdat dit eienaar geword het van minerale en petroleum hulpbronne – òf as persoonifikasie van “die bevolking van Suid-Afrika” òf as ’n openbare trustee van “die erfenis van die hele bevolking van Suid-Afrika”.

Artikel 25 van die Grondwet van die Republiek van Suid-Afrika maak ’n onderskeid tussen ontneming van eiendom, wat nie die betaling van vergoeding deur die Staat vereis nie, en onteiening, waarvoor wel vergoeding betaal moet word. Dit word algemeen aanvaar dat onteiening bestaan uit ontneming plus ’n bykomstige element of bykomstige elemente. Daar is twee moontlike faktore wat ’n ontneming in onteiening kan omskep: òf die verkryging van eiendomsreg ten aansien van dit wat ontnem is deur ’n ander entiteit, byvoorbeeld die Staat, òf soos wat in Artikel 25 aangedui word, deur die ontneming van die eienaar se regte in die openbare belang of vir ’n openbare doel. In hierdie artikel word geargumenteer dat die ontneming van minerale en petroleum hulpbronne onder enigen van die twee persepsies op onteiening neerkom.

1 Introduction

On 1 May 2004, the Mineral and Petroleum Resources Development Act¹ (MPRDA), entered into force. The MPRDA transformed the state of South African mineral law quite considerably. It abolished the existing mineral law, introduced a new system relating to the exploration and

¹ 28 of 2002.

mining of minerals, and made special provision for the transition from the old to a new order.

South Africa is a mineral rich country and probably a leading mining country in the world as far as the variety and quantity of minerals produced are concerned. Over the years regional legislation was adopted to regulate the exploration and mining of particular categories of minerals. In 1991, the legislature enacted the Minerals Act² (MA) to consolidate those laws into a single mineral law regime for the whole country. The MA afforded to the concept of “mineral” a broad meaning to include “any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and have been formed by or subjected to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil.”³ In common parlance, the concept of minerals is confined to substances such as gold, diamonds, coal, chrome, uranium, manganese, platinum and the like. In the common law the owner of land was owner of everything in the land in accordance with the rule *cuius est solum ad caelum et ad inferos* (ownership of land includes everything above the property up into the heavens and below to the centre of the earth). While minerals were not extracted from the land, they formed part of the land and were therefore owned by the owner of the land. Once they were extracted from the land, the minerals became a distinct legal object separate from the land and could consequently become the property of a person other than the landowner.

The concept of “mineral rights” came to be confined in South African law to an entitlement to search for and to mine minerals.⁴ Some judgments refer more succinctly to the “right to mine”, which has similarly come to denote “the right to prospect and mine for minerals and extract and dispose of them.”⁵ It is a real right, sometimes referred to as a quasi-servitude,⁶ and must therefore be distinguished from the *ius in re sua* (ownership) of the minerals as such. The granting of a right to explore and mine minerals could be obtained in various ways. The owner of the land could apply for a certificate of rights to minerals in respect of the land of which he or she was the owner. Mineral rights could be ceded to a third person through the registration of a notarial deed registered against the title deed of the land, or a certificate could be issued to the third person authorising that third person to explore and to mine the

2 50 of 1991.

3 S 1 MA.

4 See *Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae)* Case No 485/11 [2012] ZASCA 93 par 4 (2012-05-31) (hereafter “*Agri South Africa II*”) (noting that “mineral rights” under earlier legislation “were held either by the owner of land or, where they had been separated from the land in respect of which the rights were exercised, the holder of a separate right,” and that those rights “can for present purposes be referred to generally as mineral rights”).

5 *Agri South Africa II* par 99, par 27.

6 *Van Vuren v Registrar of Deeds* 1907 TS 289 295-96; and see *Agri South Africa II* par 25.

minerals. The right granted to the third person could apply in general or only in respect of a particular category of minerals. It was not uncommon in South Africa for landowners to separate their ownership of the land from mineral rights, for example by retaining the mineral rights relating to the land upon the sale of the land.⁷

Where mineral rights vested in a person other than the landowner, that person was “entitled to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away.”⁸ Upon separation of the minerals from the land, they became distinct legal objects, and the person with mineral rights would acquire ownership of the minerals separated from the land.

The person who has acquired mineral rights was also entitled to transfer the right to search for and to mine the minerals to a third person. This could be done through (a) a prospecting contract, or (b) a mineral lease agreement. The mineral lease agreement afforded the right for a limited period only. The repository of mineral rights could claim compensation from the third person to whom he or she had transferred the prospecting rights.

One must therefore distinguish between (a) the ownership of minerals and (b) mineral rights in the sense of searching for and extracting minerals from the land. Ownership of minerals that formed part of the land vested in the landowner, and following their extraction from the land vested in the person with mineral rights, which could be the owner of the land or a person other than the land owner.

Since early times, the State has assumed a power to regulate the exploration and mining of minerals. The State’s power of regulation must not be confused with the notion of “*eminent domain*” of English law or the exercise of “*police powers*” in American law. These concepts are imbedded in remnants of the feudal system under which the Queen or the State assumed ownership of the land and therefore owned mineral and petroleum resources in or on the land. In South African law, the State was not the owner of minerals but merely exercised control over the exploration and mining of minerals. The State, in the exercise of such regulatory powers, was primarily concerned with the maintenance of safety measures and protection of the environment.

The MA made provision (a) for the issuing by the State of a prospecting permit, and (b) for a power of the State to afford the right to mine for minerals. These rights could only be granted to the mineral rights holder, or to a person that had acquired written consent of the mineral rights holder to explore the minerals. A prospecting permit and mining rights were now subject to the granting of such rights by the State.

7 *Idem.*

8 *Idem.*

A prospecting permit could be granted, upon request, by the Department of Mineral and Energy Affairs, and could be afforded to (a) the holder of mineral rights, or (b) a person authorised by a prospecting contract or a mineral lease agreement to search for minerals. A prospecting permit could be issued for a period of 12 months or for a longer specified period and was subject to renewal. Authorisation for mining operations was also administered by the Department of Mineral and Energy Affairs, and could be granted to (a) the holder of mineral rights, or (b) a person authorised to mine the minerals on specified land.

The principles enshrined in the MA were thrown overboard by the MPRDA. Mineral rights as regulated by the MA were discarded. The ownership of minerals that vested in the landowner was abolished. Section 3(1) of the MPRDA now proclaims: "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof."

The "old order" rights remained in force for a specified period of time (one to five years) and the holder of those rights must within that period apply for prospecting and mining rights. Prospecting and mining rights are no longer registered in the Deeds Office but in the Registration Office for Mineral and Petroleum Titles in Pretoria. Rights in respect of minerals can only be transferred with the written consent of the Minister of Mineral and Energy Affairs.

The key question to be considered in this survey is whether or not the changes brought about by the MPRDA amounted to expropriation of the "old order" rights of a landowner and/or of the holder of mineral rights. The High Court, North Gauteng decided that it did amount to expropriation.⁹ However, the Supreme Court of Appeal begged to differ.¹⁰ The matter is currently pending before the Constitutional Court of South Africa.

2 The Concept of Expropriation

The South African Constitution, somewhat obscurely, makes a distinction between deprivation and expropriation of property.¹¹ It prohibits arbitrary deprivation of property, and provides that deprivation of property may only occur in terms of a law of general application.¹² Expropriation must also be authorised by a law of general application,

9 *Agri South Africa v Minister of Mineral and Energy* [2011] 3 All SA 296 (GNP) (hereafter "*Agri South Africa I*"); Leon, "Creeping Expropriation of Mining Investments: An African Perspective", 2009 *J of Energy & Natural Resources Law* 597 620-21; Badenhorst & Olivier "Expropriation of 'Unused Old Order Rights' by the MPRDA: You Have Lost It!", 2012 *THRHR* 329.

10 *Agri South Africa II*.

11 S 25(1) & (b) Constitution of the Republic of South Africa, 1996 (hereafter "SA Const").

12 S 25 (1) SA Const.

and must be sanctioned for a public purpose or in the public interest.¹³ In the case of expropriation, compensation must be paid to the person whose property is being expropriated, calculated according to principles of justice and equity specified in some detail in the Constitution.¹⁴

It must be emphasised at the outset that prior to the 1996 Constitution, a distinction between “deprivation” and “expropriation” was not part of the vocabulary of South African property law. Instead, South African property law differentiated between the regulation by public authorities of the entitlements of ownership on the one hand (based in American law on the feudal system and referred to as the exercise of “police powers”), and expropriation (referred to in American law as a “taking”) on the other. Legislation compelling farmers to fence off their land,¹⁵ to protect the natural environment,¹⁶ or to prevent the spreading of obnoxious weeds,¹⁷ belong to the first category of property constraints, while depriving an owner of his or her ownership constitutes expropriation.

Much of the confusion that emanated from the MPRDA is attributable to efforts to equate the constitutional provisions of section 25 with the traditional distinction between regulation and expropriation, and more in particular by an assumption that “deprivation” has the same meaning as “regulation”. In *Harkson v Lane NO*, Goldstone J thus had this to say:

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 falls short of compulsory acquisition has long been recognised in our law.¹⁸

In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*, Nkabinde, J explained:

The purpose of the distinction between expropriation and deprivation by regulating measures is to enable the State to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.¹⁹

It must be emphasised that linguistically and otherwise, “deprivation of property” cannot simply be likened to “regulation” of the entitlements of ownership. The literal dictionary meaning of “deprive” is the equivalent

13 S 25(2) SA Const.

14 S 25 (3) & (4) SA Const.

15 Fencing Act 31 of 1963.

16 Environmental Conservation Act 73 of 1989.

17 S 5 Conservation of Agricultural Resources Act 43 of 1983.

18 *Harkson v Lane NO* 1998 1 SA 300 (CC) par 33; see also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 63 (per Nkabinde J).

19 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 63; see also *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) par 4; Van der Walt *Constitutional Property Law* (2011) 123-25.

of concepts such as dispossess, divest, loss of something enjoyed, strip, expropriate, divest, and “deprivation” is defined as withholding, denial, withdrawal, removal, dispossession, taking away, stripping, expropriation, seizure, confiscation.²⁰ Needless to say, a basic rule of interpretation requires that words used in a statute should be given their ordinary meaning.

It has come to be commonly accepted that deprivation is a broader concept that includes expropriation.²¹ The wording of the Constitution suggests that deprivation of property may be orchestrated for reasons other than a public purpose or in the public interest, provided those reasons are not “arbitrary”. A deprivation will be arbitrary “if the law referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.”²² It would seem that the “sufficient reason” need not necessarily be related to a public purpose or be in the public interest. It is rather surprising that the drafters made the payment of compensation conditional upon the infringement of property rights being substantiated by a public purpose or in the public interest but saw fit to deny the owner compensation in cases where a deprivation by the legislature is prompted by considerations other than a public purpose or the public interest.

Nevertheless, it seems that, based on the language of section 25 of the Constitution, the only substantive difference between a deprivation of property for which compensation need not be paid and a deprivation that amounts to expropriation and which is conditional upon the payment of compensation is the fact that expropriation is authorised by the legislature in the public interest or for a public purpose. It might be noted in passing that the view attributed to some analysts that allegedly distinguished between expropriation and deprivation on the sole basis that the legislature in the one instance promises compensation and in the other not²³ was rightly rejected by the Supreme Court of Appeal: the payment of compensation is a consequence of a deprivation amounting to expropriation and is not part of the substantive definition of expropriation.²⁴

20 See for example *The Oxford Thesaurus of Current English* (1999).

21 *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZSC) par 25 (referring to “deprivation which falls short of compulsory acquisition or expropriation”); *Harkson v Lane NO* 1998 1 SA 300 (CC) par 31; *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service: First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 57; *Agri South Africa II* par 14.

22 *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service: First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 100; see also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 39.

23 Van der Walt 343-44. It should be noted that the SCA, in attributing this view to Van der Walt, misinterpreted the passages in Van der Walt to which it referred.

24 *Agri South Africa II* par 18.

It is quite commonly assumed that the common law meaning of expropriation includes an element of acquisition of ownership. In *Agri South Africa II*, the Supreme Court of Appeal more or less ignored the language of the Constitution and proceeded on the assumption that “acquisition by or through the expropriating authority is a characteristic of an expropriation in terms of [section] 25(2).”²⁵ Acquisition by whomsoever of the property expropriated is not mentioned at all in section 25(2), or elsewhere in the Constitution.²⁶ The question whether or not the right expropriated must accrue to the State has had a chequered history in South African case law. It has been decided on occasion that expropriation requires acquisition of the expropriated right by the State,²⁷ but then again that the Constitution permitted an expropriation in the public interest even if the party ultimately acquiring the property was not the State.²⁸ Gildenhuis defined “expropriation” as:

the unilateral extinction by state authority of the property rights of a person in relation to a thing, coupled with the unilateral acquisition of property rights in respect of that thing by the state authority or by someone else.²⁹

In *Agri South Africa II*, the Supreme Court of Appeal preferred the latter statement of the law.³⁰

It might also be noted that although acquisition is commonly proclaimed to be an essential element of expropriation, this has to the best of my knowledge never really been put to the test. I know of no case in which it was decided that the deprivation of a property right was not a matter of expropriation because the right of which the right’s holder was dispossessed was not transferred to or acquired by a public authority or someone else. One should also bear in mind that the concept of “deprivation” exclusively denotes the taking away of a right and does not include an element of acquisition.

²⁵ *Agri South Africa II* par 24, par 18.

²⁶ Gildenhuis *Onteieningsreg* (2001) 8: “Onteiening is die eensydige uitwissing deur die owerheid van die vermoënsregte van ’n persoon ten aansien van goed, en daarmee saam die eensydige verkryging van vermoënsregte oor daardie goed deur die owerheid of deur iemand anders.” See also Badenhorst “Die Vereistes vir ’n Geldige Onteieningskennisgewing” 1989 *THRHR* 130 137, defining expropriation as “the extinction or limitation of a subject’s right in respect of a legal object by state authority and the acquisition of a right in respect of a legal object by state authority” (“die beëindiging of beperking van ’n onderdaan se subjektiewe reg ten aansien van ’n resobjek deur die owerheid en die verkryging van ’n subjektiewe reg ten aansien van ’n regsobjek deur die owerheid”).

²⁷ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 64; see also *Harkson v Lane NO* 1998 1 SA 300 (CC) par 33 (referring to expropriation as the “acquisition of rights in property by a public authority”).

²⁸ *Offit Farming Enterprises (Pty) Ltd v Goega Development Corporation* 2010 4 SA 242 (SCA) par 14-18. This statement of the law was not challenged on appeal. See *Offit Farming Enterprises (Pty) Ltd v Goega Development Corporation* 2011 1 SA 293 (CC).

²⁹ Gildenhuis *Onteieningsreg* (2001) 8

³⁰ *Afri South Africa II* par 24, par 16 note 21, par 18.

Since the exact (common-law) meaning of “deprivation” – that is in a sense other than merely the reasonable curtailment of the entitlements of ownership – has come to be clouded in mystery, I would suggest that the constitutional distinction between deprivation and expropriation ought to be scrutinised with reference to the precise wording of Article 25. The only directive provided by the Constitution is that permissible deprivation includes all instances of the taking of property that are not arbitrary, and that those instances of deprivation authorised by legislation of general application for a public purpose or in the public interest must be treated as a matter of expropriation.

3 Deprivation/Expropriation under the MPRDA?

One must distinguish between the impact of the MPRDA on (a) the right of a landowner to mineral and petroleum resources in or on his or her land, and (b) the “mining right” of a landowner or a third person to search for and mine mineral and/or petroleum resources. Litigation in *AgriSA* was almost entirely confined to (b), ie the impact of the MPRDA on prospecting and mining rights. This approach was probably dictated by the facts in the case, since the Plaintiff in the matter was not a landowner but a voluntary association that had received session of prospecting and mining rights.

As to (a) above, it would seem that proclaiming all mineral and petroleum resources to be the common heritage of all the people of South Africa amounted to expropriation – and that, irrespective of the meaning one might prefer to attach to the concept of expropriation. It might be noted in passing that the judgment of the Transvaal Provincial Division of the High Court in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* to the effect that mineral rights are not protected by section 25 of the Constitution³¹ was clearly wrong.³² The Court based its decision on the *Certification Case*, where it was decided that in view of international conventions and foreign constitutional law mineral rights cannot be said to be “universally accepted rights” and consequently need not be specified in the constitutional Bill of Rights.³³ Excluding mineral rights from the body of rights and freedoms afforded special protection in the Bill of Rights has absolutely nothing to do with the common-law right of a landowner to everything attached to or in the land.

If one prefers to define expropriation in contradistinction to deprivation with a view to the wording of section 25(1) and (2) of the Constitution, then rendering extinct the ownership of a landowner in

31 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*, 2002 1 BCLR 23, 27 (T).

32 Van der Walt 426.

33 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) par 74.

respect of the mineral and petroleum resources in the land falls squarely within the language of section 25(2). Depriving the landowner of his or her common-law right of ownership of mineral and petroleum resources in the land was clearly intended to serve a public purpose and to be in the public interest within the constitutional meaning of expropriation. According to the Constitution, the public interest for purposes of expropriation “includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources,”³⁴ and the Preamble to the MPRDC reaffirms in almost identical mode “the State’s commitment to reform” and a solemn undertaking “to eradicating all forms of discriminatory practices in the mineral and petroleum industries.” Nationalisation of the mineral and petroleum resources is therefore verbatim a matter of expropriation within the meaning of section 25(2) of the Constitution.

If, on the other hand, acquisition of the right taken is an element of expropriation as assumed by the Court in *Agri South Africa II*, then the State as custodian of the rights taken will fill the slot. It strikes one as odd that almost no attention was paid in *Agri South Africa* to the new beneficiary of mineral and petroleum resources. According to section 3(1) of the MPRDA, mineral and petroleum resources are proclaimed to be “the common heritage of all the people of South Africa” with the State as “the custodian thereof for the benefit of all South Africans.” Proclaiming mineral and petroleum resources to be “the common heritage of all the people of South Africa” with the State as “the custodian thereof for the benefit of all South Africans” is from a legal perspective problematic. “All the people of South Africa” is not a legal subject and can therefore not become the owner of mineral and petroleum resources.³⁵ It is perhaps fair to conclude that in effect ownership of mineral and petroleum resources has been vested in the State. This could be construed on the basis of the State being the legal personification of the people of South Africa, or alternatively on the State having become the owner of mineral and petroleum resources as a public trustee. One analyst suggested that the MPRDA indeed created a public trust, which would mean that the country’s mineral and petroleum resources vest in the State, which then exercises its fiduciary responsibility through regulatory control over the award and execution of prospecting and mining operations.³⁶ Needless to say, a trustee is owner of the trust property but is under a legal obligation to use the property for the specified trust purpose only. Regarding the State as the new owner of mineral and petroleum resources, either as personification of “all the people of South Africa” or as public trustee “for the benefit of all South

34 S 25(4)(a) SA Const.

35 See Van der Walt 417; Badenhorst & Mostert “Artikel 3(1) en (2) van die *Mineral and Petroleum Resources Development Act 28 van 2002*: “n Herbeskouing” 2007 *TSAR* 469 491.

36 Van der Schyff “Who ‘Owns’ the Country’s Mineral Resources? The Possibility of Incorporating the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act” 2008 *TSAR* 757; Van der Walt 417.

Africans” is also in conformity with a provision where the objects of the MPRDC are said to include “the internationally accepted right of the State to exercise sovereignty over all the minerals and petroleum resources within the Republic.”³⁷ In *Agri South Africa II*, Wallis, JA stated somewhat superficially that the question whether or not the MPRDA introduced into South African law elements of the public trust doctrine “seems to me neither here nor there.”³⁸

Nor could one argue that the MPRDA converted the mineral and petroleum resources into *res omnium communes* or *res publicae* within the meaning of the South African (Roman-Dutch) common law. *Res omnium communes* and *res publicae* signified particular categories of things that could not be privately owned (*res nullius*) but the use and enjoyment of which were available to all members of the human race or to all members of the public of a particular country (respectively). Converting the right of the State to act as custodian of mineral and petroleum resources by granting mining rights in respect thereof to particular persons or corporations simply does not fit the substance of these common-law concepts.

4 Regulation of Prospecting and Mining Rights

In *Agri South Africa II*, the Supreme Court of Appeal decided in essence (a) that the MPRDA vested in the people of South Africa, with the State as custodian, the mineral rights or the right to mine as defined above,³⁹ and thereby “encapsulate[d] in non-technical language the notion that the right to mine vests in the State”;⁴⁰ (b) that the ultimate right to search for and to mine minerals has always been vested in the State, since it was the State that could decide who would be competent to search for and to mine mineral and petroleum resources and was entrusted with the competence to afford a right to do the same to a successful applicant;⁴¹ (c) that the MPRDA did not bring about any change in this regard and that expropriation consequently did not take place.⁴² The fallacies of this line of reasoning are twofold:

37 S 2(1) MPRDA.

38 *Agri South Africa II* par 86.

39 See *Agri South Africa II* par 81 (noting that the “right to mine” is “used throughout the judgment as the right to prospect and mine and dispose of the minerals extracted from mining”).

40 *Agri South Africa II* par 86.

41 See *Agri South Africa II* par 84, par 48 (noting that “the right to mine was a right that the State asserted for itself and controlled”), par 99 (noting that “in its broad sense ... the right to mine is vested in the State and ... the State either exercises or allocates that right”).

42 *Agri South Africa II* par 99.

The MPRDA is absolutely clear in stating explicitly that what is being nationalised is “all the mineral and petroleum resources within the Republic” of South Africa,⁴³ and:

The power of the State to exercise control over the exploration and mining of minerals is indeed deeply imbedded in the history of South African law but has in the past been confined to regulating mining operations as an inherent component of state sovereignty: the power of public authority to lay down building restrictions does not make the public authority owner of one’s house!

In the new dispensation introduced by the MPRDA this changed fundamentally. The MPRDA afforded to the State, acting through the Minister of Minerals and Energy Affairs, sweeping powers to administer prospecting and mining rights in respect of “the nation’s mineral and petroleum resources.” It provides:

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.⁴⁴

The MPRDA distinguishes between (a) prospecting and mining rights that remained dormant at the time the Act entered into force, commonly referred to as “unused old order rights”, and (b) prospecting and mining rights that were actively utilised under the old order regime, referred to as “old order prospecting rights” and “old order mining rights” respectively. In all instances, the MPRDA imposed stringent conditions for the granting of “new order” prospecting and mining rights to holders of unused old order rights and of old order prospecting and mining rights. Those conditions are no longer merely a matter of regulation by a public authority of the entitlements of the repository of a right from which those entitlements derived but are imposed on the holders of “old order” rights *because the State has become the custodian/owner of mineral and petroleum resources.*

The MPRDA accordingly deprived mineral resource owners of their basic right of control which they previously enjoyed.⁴⁵ Whereas under the old order regime, the holder of mineral rights was under no obligation to exploit his or her rights and could keep the right indefinitely and sell it at a profit, the holders of unused old order rights are now given one year

43 S 2(a) MPRDA.

44 S 3(2) MPRDA.

45 Leon, “A Fork in the Investor-State Road: South Africa’s New Mineral Regulatory Regime Four Years On” 2008 *J of World Trade* 679; and see also Leon 2009 *J of Energy & Natural Resources Law* 597 614.

in which to apply for new order prospecting and/or mining rights;⁴⁶ and as noted by Du Plessis J in *Agri South Africa I*, this is not merely a matter of “use it or lose it”, the MPRDA instead introduced the principle of “You have lost it. Now apply within a year and if you qualify, you may use it.”⁴⁷ Although the MPRDA affords to the “holder of an unused old order right ... the exclusive right to apply for a prospecting or a mining right,”⁴⁸ the requirements that must be satisfied, outlined in Chapter 4 of the Act, are extremely burdensome.⁴⁹ They include the showing of adequate financial resources and technical ability to conduct the proposed mining operations optimally,⁵⁰ demonstrating that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment,⁵¹ providing proof that the applicant has provided financially or otherwise for a prescribed social and labour plan,⁵² and professing the ability to comply⁵³ with the relevant provisions of the Mine Health and Safety Act.⁵⁴ The Minister is given broad discretionary powers in granting or refusing an application for prospecting or mining rights.⁵⁵ One should also bear in mind that most holders of old order rights did not really know whether there were mineral or petroleum resources in the land over which they held those rights and most likely lacked the financial resources to explore the feasibility of and/or to exploit those rights. In *Agri South Africa I*, the High Court decided that the objects of the MPRDA, combined with the above statutory and practical impediments, brought about generalised deprivation of all unused old-order rights;⁵⁶ and since this was done through a law of general application enacted for a public purpose and in the public interest, it amounted to expropriation within the meaning of section 25(2) of the Constitution.⁵⁷ This reasoning cannot be faulted.

Expropriation is equally evident in the case of “old order prospecting rights” and “old order mining rights”. Here, the time limit for converting old order right into new order rights is two years after the entry into force of the MPRDA in the case of old order prospecting rights,⁵⁸ and five years in the case of old order mining rights.⁵⁹ The Minister must convert an old order prospecting right, provided the applicant satisfies certain

46 It 8(1) Sch II MPRDA.

47 *Agri South Africa I* par 70.

48 It 8(2) Sch II MPRDA.

49 See Leon 2009 *J of Energy & Natural Resources Law* 597 619-21.

50 S 23(1)(b) MPRDA.

51 S 23(1)(d) MPRDA.

52 S 23(1)(e) MPRDA.

53 S 23(1)(f) MPRDA.

54 29 of 1996.

55 Ss 23(3) & 26 MPRDA.

56 *Agri South Africa I* parr 71, 73, 74; see *Holcum (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* Case No 64/109 [2010] ZASCA par 23 (noting, per Hefer, JA, “The new system and the old system of common law mineral rights are mutually exclusive”).

57 *Agri South Africa I* parr 83, 87-88.

58 It 6(1) Sch II MPRDA.

59 It 7(1) Sch II MPRDA.

requirements, such as submitting a prescribed list of particulars of the holder of the old order right,⁶⁰ an affidavit verifying that the holder of the old order right has conducted prospecting operations before the MPRDA took effect on the area of the land to which the conversion relates and setting out the periods during which such prospecting operations were conducted and the results thereof,⁶¹ an original old order right or a certified copy thereof,⁶² and evidence that the applicant has an approved environmental management program in place.⁶³

Renewal of old order mining rights are subject to similar conditions,⁶⁴ plus a number of more onerous requirements, such as having to submit a prescribed social and labour plan,⁶⁵ and an undertaking that the holder will give effect to certain objects of the new order and the manner in which he or she will do so.⁶⁶ Holders of old order rights seeking their conversion must also comply with “a broad-based socio-economic Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.”⁶⁷ The Mining Charter requires the transfer of 15 per cent of mining assets or equity to Black Economic Empowerment groups or individuals by 2009, and 26 per cent by 2014.⁶⁸ Royalties must be paid to the State in respect of any minerals removed and disposed of during the course of prospecting and mining operations.⁶⁹

It has been noted that “new order rights could generally be described as weaker, more insecure or less comprehensive than their old order counterparts.”⁷⁰ Particularly noteworthy is the fact that (a) new order rights do not automatically vest in the holder of their preceding old order rights; (b) new order rights are not permanent as were their old order counterparts; (c) new order prospecting and mining rights may not be transferred and encumbered freely as they could under the old order regime; and (d) the relative inherent value of new order rights as

60 It 7(2)(a) Sch II MPRDA.

61 It 6(2)(d) Sch II MPRDA.

62 It 6(2)(i) Sch II MPRDA.

63 It 6(3)(d) Sch II MPRDA.

64 It 7(2) Sch II MPRDA.

65 It 7(2)(f) Sch II MPRDA.

66 It 7(2)(k) Sch II MPRDA.

67 S 100(1)(b) MPRDA.

68 See Leon 2009 *J of Energy & Natural Resources Law* 597 619.

69 Ss 19(2)(g) & 25(2)(g) MPRDA; see the Mineral and Petroleum Resources Royalty Act 28 of 2008 and the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008.

70 Van der Walt 407; see also Badenhorst & Mostert, “Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 in Two Parts. Part I: Nature and Content of Rights Acknowledged by the Revised Transitional Provisions” 2003 *Stell LR* 377 396-99; Badenhorst & Mostert *Mineral and Petroleum Law of South Africa: Commentary and Statutes* (2011) ch 25; Dale *et al South African Mineral and Petroleum Law* (2006) 209-212 Sch II.

measured against their nature and content do not live up to the comparable attributes of the old order rights.⁷¹

The essence of the matter is, however, that mineral and mining rights were expropriated on the day the MPRDA entered into force,⁷² and the granting and extensive regulation of the exercise of prospecting and mining rights is a consequence of the change in ownership of mineral and petroleum resources. The State no longer regulates mining operations in a supervisory capacity, it now imposes restrictive rules and regulations because it has become the owner of mineral and petroleum resources. Its competence under the MPRDA is now comparable to eminent domain in English law and the exercise of police powers in the United States. Further evidence that the power vested in the Minister derives from expropriation of the existing prospecting and mining rights may be derived from the fact that royalties must be paid to the State in respect of minerals removed and disposed of during the course of prospecting or mining operations.⁷³

5 Constitutionality of the MPRDA

We have not taken issue with the constitutionality question relating to the MPRDA. Suffice it to say that the Constitution places an obligation on the State to make provision and enforce remedial action programs.⁷⁴ The Constitutional Court on several occasions emphasised the need for measures to bring about substantive equality in South Africa,⁷⁵ and decided that the MPRDA was enacted “amongst other things to give effect to those constitutional norms.”⁷⁶ The MPRDA was designed to “make provision for equitable access to and sustainable development of the nation’s mineral and petroleum resources,”⁷⁷ and re-affirmed “the State’s commitment to reform to bring about equitable access to South Africa’s mineral and petroleum resources.”⁷⁸ The objects of the MPRDA include a commitment to “substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from

71 Van der Walt 407-08.

72 Dale *et al* 210-12; *Agri South Africa I* parr 75, 77.

73 Ss 19(2)(g) & 25(2)(g) MPRDA; see also Mineral and Petroleum Resources Royalty Act 28 of 2008 and the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008.

74 S 9(2) SA Const (mandating “legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination”).

75 *Minister of Finance v Van Heerden* 2004 3 SA BCLR 229 (CC) pars 25-31.

76 *Bengwenyama Minerals (Pty) Ltd v Gemorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC) par 3.

77 Long title MPRDA.

78 Preamble MPRDA.

exploitation of the nation's mineral and petroleum resources."⁷⁹ The constitutionality of the MPRDA is therefore beyond dispute.⁸⁰

Constitutionality of the MPRDA does authorise the expropriation of mineral and petroleum resources and/or the prospecting and mining rights relating to mineral and petroleum resources, but this does not mean that those rights can be expropriated without compensation. The MPRDA expressly provides that "[a]ny person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State."⁸¹ It is perhaps also important to note that South Africa on 20 September 1994 – that is within less than five months of the political transition in South Africa – entered into a bilateral investment treaty with the United Kingdom which provided amongst other things:

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt, adequate and effective compensation.⁸²

There are some legislative stupidities in the MPRDA, for example including a definition of "top soil"⁸³ without any reference to "top soil" elsewhere in the Act. So, too, perhaps, is the drafters' attempt to seek justification for the nationalisation of rights in respect of minerals and petroleum resources in international law directives.

5 1 International-law Dimension

Drafters of the MPRDA based the legitimacy of the Act on "the internationally accepted right of the State to exercise sovereignty over all mineral and petroleum resources within the Republic."⁸⁴ The United Nations has indeed repeatedly proclaimed the "inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests" as an inherent aspect of sovereignty,⁸⁵ with occasional reminders that developing countries were

79 S 2(c) MPRDA.

80 *Agri South Africa I* par 39; see also Van der Walt 439-40.

81 It 12(1) Sch II MPRDA.

82 Par 5(1) *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments*, (entered into force on 1994-09-20); Leon 2009 *J of Energy & Natural Resources Law* 597 601-02.

83 S 1 MPRDA.

84 S 2(a) MPRDA.

85 See eg GA Res 626, 7 UN GAOR Supp (No 20) 18; UN Doc A/2361 (1952); GA Res 1515, 15 UN GAOR Supp (No 16) 9; UN Doc A/4684 (1960); GA Res 1803, 17 UN GAOR Supp (No 17) 15; UN Doc A/5217 (1962); GA Res 2158, 21 UN GAOR Supp (No 16) 29; UN Doc A/6316 (1966); GA Res 3016, 27 UN

in need of encouragement “in the proper use and exploitation of their natural wealth and resources.”⁸⁶ However, the emphasis of international law on the sovereign right of States over their natural resources was debated and decided in the context of colonialism, and more precisely to emphasise that the proper use and exploitation of natural wealth and resources belong to the colonised peoples and not to the colonial powers. In 1967, the General Assembly decided that the “inalienable right” to natural resources and the right to dispose of those resources in territories subject to colonial rule belonged to the peoples of the colonised territories,⁸⁷ and stated:

The colonial Powers which deprive the colonial peoples of the exercise and the full enjoyment of those rights, or which subordinate them to the economic or financial interests of their own nationals or of nationals of other countries, are violating the obligation they have assumed under ... the Charter of the United Nations.⁸⁸

The rules of international law proclaiming the sovereign right of States over natural resources thus applies to conflicts between State A and State B and not to the rights of governments *vis-à-vis* its nationals or persons within its national domain. Those decisions are therefore not applicable in South Africa.

Over time, though, the emphasis of international law relating to natural resources shifted to the right to self-determination of peoples. A people in this context denotes persons united by a common ethnic/cultural, religious, or linguistic extraction – for example, being a member of the Zulu tribe, the Roman Catholic Church, or an Afrikaans speaking community. As early as 1958, the General Assembly, in a Resolution through which the Commission on Permanent Sovereignty over Natural Resources was established,⁸⁹ stated that the “permanent sovereignty over natural wealth and resources” of States is “a basic constituent of the right to self-determination.”⁹⁰

The same principle is foundational to Article 21(1) of the African Charter on Human and Peoples’ Rights which provides:

GAOR Supp (No 30) 48; UN Doc A/8730 (1972); GA Res 3171, 28 UN GAOR Supp (No 30) 52; UN Doc A/9030 (1973); see also Res 88 on *Permanent Sovereignty over Natural Resources* of the Trade and Development Board, UN Doc A/8715, Rev 1 (1972), endorsed by the General Assembly in GA Res 3041, 27 UN GAOR Supp (No. 30) 55; UN Doc A/8730, par 16 (1972).

86 See eg ESC Res 1737, 54 UN ESCOR Supp (No 1) (1973) 1; GA Res 626, 7 UN GAOR Supp (No 20) 18; UN Doc A/2361 (1952) par 3; GA Res 1803, 17 UN GAOR Supp (No 17) 15; UN Doc A/5217 (1962) par 6; GA Res 2158, 21 UN GAOR Supp (No 16) 29; UN Doc A/6316 (1966) par 3.

87 GA Res 2288 par 2, 22 UN GAOR Supp (No 16) 48, UN Doc A/6716 (1967).

88 GA Res 2288 par 3.

89 GA Res 1314, 13 UN GAOR, Supp (No 18) 27, UN Doc A/4090 (1958).

90 See also par 2 *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, 15 UN GAOR Supp (No 16) 66, UN Doc A/4684 (1960); *Declaration on the Right to Development* par 1(2), GA Res 41/128, 41 UN GAOR Supp (No 53) 186, UN Doc A/41/53 (1986); see further GA Res 2288, 22 UN GAOR Supp (No.16) 48, UN Doc A/6716 (1967).

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.⁹¹

In the 2001 *Ogoni Decision*, the African Commission on Human and Peoples Rights (ACHPR) traced the historical basis of this provision back to colonialism, “during which the human and material resources of Africa were largely exploited for the benefit of outside powers.”⁹²

In a recent ground-breaking decision, the ACHPR decided that an indigenous community (the *Endorois*) which was displaced from their ancestral land in Kenya almost half a century ago constituted a distinct people within the meaning of Article 21(1) of the African Charter on Human and Peoples’ Rights and that their right to “freely dispose of their wealth and natural resources” has been violated.⁹³ It is respectfully submitted that the decision of Froneman, J in *Bengwenyama Minerals (Pty) Ltd & Others v Gemorah Resources (Pty) Ltd & Others* was in conformity with the international-law approach by affording preference to an interest in obtaining prospecting rights to an ethnic community that occupied the land where the search for minerals were to be conducted.⁹⁴

6 Concluding Observations

Nationalisation of the mineral and petroleum resources clearly constitutes an instance of expropriation within the meaning of section 25 of the Constitution, since (a) landowners were deprived of their common-law ownership of mineral and petroleum resources; and (b) the deprivation was orchestrated for a public purpose or in the national interest. If acquisition of the right taken is an essential component of expropriation, vesting the ownership in the State, either as the personification of “all the people of South Africa” or as a public trustee of the people’s “common heritage”, fully satisfies this demand – as was indeed conceded by the Supreme Court of Appeal in *Agri South Africa II*.

State control over prospecting and mining operations under the MPRDA is no longer merely a matter of the State’s regulatory powers over the exercise of the entitlements of ownership; it now derives from the fact that the State has become the owner of all mineral and petroleum resources in the land. It is therefore part and parcel of the act of expropriation. Equating the State’s newly acquired right of control over

91 Art 2(1) African Charter on Human and Peoples’ Rights OAU Doc CAB/LEG/67/4/Rev 5 (27 June 1981).

92 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) Communication 155/96 15th Annual Report, par 56.

93 *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 2010 *Int Legal Materials* 858; see Beukes, “The Recognition of ‘Indigenous Peoples’ and the Right as ‘a People’: An African First” 2010 *SA YB of Int Law* 216.

94 *Bengwenyama Minerals (Pty) Ltd v Gemorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC).

prospecting and mining operations relating to mineral and petroleum resources to the old order regulatory powers of the State is clearly wrong. The old order regulatory powers of prospecting and mining activities have instead been converted by the MPRA into a substantive, ownership-based, exercise of eminent domain as in English law or of police powers as in American law.

The question whether or not a landowner and/or the repository of old order prospecting and mining rights who have been deprived of their ownership and/or prospecting and mining rights can claim compensation is of course dependent on its own set of rules, taking into account the advent of actual pecuniary losses, the elements listed in Article 25(3) of the Constitution, and the rules of law applicable to the prescription of actions. That is a debate for another occasion and another time. Suffice it to say that the proven presence of minerals or petroleum in or on a plaintiff's property is not an essential component of a claim for compensation, since the mere possession of known or unknown unexplored mineral rights does have an effect on the market value of land and would therefore deserve compensation following the act of expropriation. The holders of old order prospecting or mining rights that have been forfeited due to the acquisition of ownership by the State of mineral and petroleum resources and the strict requirements for converting those old order rights into new order rights are also in principle entitled to compensation, because those newly enacted requirements are part and parcel of the act of expropriation.

And let it not remain unsaid that there is nothing scandalous or reprehensible about expropriation of rights for a public purpose or in the public interest and the payment of compensation by the State to those who have suffered losses in consequences of the act of expropriation. This is in fact the norm that should prevail *prima facie*. Deprivation that does not amount to expropriation should be the exception to the norm and a finding of such deprivation ought to be subjected to stringent scrutiny. By twisting and interpolating legal history and the rules of the common law in order to deny compensation to the holders of old order mining rights, the Supreme Court of Appeal seemed to have had the opposite mind set. Since the MPRDA was enacted for a noble cause, one would have expected a court of law to lean toward a finding of expropriation, as indeed dictated by the provisions of section 25 of the Constitution.