

A tale of two expropriations: *Newcrestia* and *Agrizania*

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“(I)t was the age of wisdom, it was the age of foolishness ...”

(Charles Dickens)

OPSOMMING

'n Verhaaltjie Omtrent Twee Onteienings: *Newcrestia* en *Agrizania*

'n Regsvergelyking word getref tussen die destydse belangwekkende uitspraak van *High Court* van Australië in *Newcrest Mining (WA) Ltd v The Commonwealth* en die onlangse *Agri SA* reeks van sake teen die Departement van Minerale in Suid-Afrika. Beide die geskille het gehandel oor die vraag of die mineraalregte/mynregte deur wetgewing, wat die bedryf van mynbou of vervreemding van regte op een of ander wyse verbied het, onteien word. Die artikel fokus op die betekenis wat aan die begrippe “ontneming” en “verkryging”, as synde elemente van onteiening, toegedig word. Ondanks soortgelyke feitestelle en regsbeginsels rondom onteiening word verskillende resultate in die beslissings bereik. Daar word gepoog om die verskillende resultate te verklaar. By afloop van 'n regsvergelykende analise word tot 'n slotsom geraak omtrent die juistheid en wysheid van die onderskeie beslissings.

1 Introduction

A comparison will be made between the decision of the High Court of Australia in *Newcrest Mining (WA) Ltd v The Commonwealth*¹ (“Newcrest”) and the decisions of the South African Courts in the *Agri South Africa* line of cases.² Although the mineral law systems of the two countries differ insofar as historical development and content,³ the simplified facts of the *Newcrest* and *Agri SA* decisions and principles of expropriation law are similar enough to draw an interesting comparison between the respective cases. Both cases dealt with the issue of whether the mineral rights/mining rights of private holders were expropriated by legislation which prohibited mining in one way or another. A comparison between the cases shows the approaches towards the issues and what exactly

1 (1997) 190 CLR 513.

2 *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP) (hereafter “*Agri SA I*”); *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171. (GNP) (hereafter “*Agri SA II*”); *Minister of Minerals and Energy v Agri SA* 2012 5 SA 1 (SCA) (hereafter “*Agri SA III*”); *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) (hereafter “*Agri SA IV*”).

3 See, Badenhorst “Ownership of minerals *in situ* in South Africa: Australian darning to the rescue?” 2010 *SALJ* 646.

constitutes deprivation and/or acquisition of property for purposes of expropriation and whether deprivation and/or acquisition actually took place.

The differences between the mineral law systems of Australia and South Africa (before the enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (hereafter “MPRDA”)) and the protection afforded against the resumption/expropriation of mineral rights or mining rights will be set as background information for a better understanding of the respective decisions. The facts of the two cases will first be set out and simplified for comparative purposes before the respective decisions are discussed. At the end, a comparison will be made between the decisions and a conclusion reached about the similarity of principles and the correctness of the respective decisions.

2 Differences Between the Two Legal Systems

The mineral law systems and the protection afforded against expropriation/resumption of mineral rights/mining rights in the two systems differ and will be explained below.

2.1 Australia

The English doctrine of tenure applies to Australian law.⁴ This doctrine is based on the principle that all land is owned by the Crown, whilst the land is occupied by tenants holding it directly or indirectly of the Crown by virtue of an estate in land.⁵ By virtue of the maxim *cuius est solum eius est usque ad coelum et ad inferos*,⁶ all mines⁷ and minerals that lie beneath the soil are presumed to belong to the owner of an estate in fee simple.⁸ This principle is, however, subject to qualifications. First, all mines of gold and silver, on private or public land, belong to the Crown by royal

4 *Attorney-General NSW v Brown* (1847) 2 Legge 312; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Mabo v Queensland (No 2)* (1992) 175 (CLR) 1 47; Bradbrook, MacCallum, Moore and Grattan (2011) 41.

5 See Harpum, Bridge & Dixon *The Law of Real Property* (2012) 22; Butt *Land Law* (2010) 83.

6 As to the origin of the *cuius est solum* maxim in English law, see Gray and Gray *Elements of Land law* (2009) par 2.16; Griggs “*Cujus est solum – an unfortunate scrap of Latin, doctrine in disarray or a brocard of relevance? Its applicability to the subterranean and the United Kingdom Supreme Court decision in Star Energy v Bocardo*” (19) 2011 *Australian Property Law Journal* 155 156.

7 The word “mine” is used in English law either as a synonym for a vein, lode or ore (body of material) or the location where the mineral is recovered (*Cadia Holdings (Pty) Ltd v New South Wales* [2008] NSW 528 par 21). At present it is used as body or material.

8 *Commonwealth of Australia v New South Wales* (1923) 33 CLR 1 22 23 38; Forbes and Lang *Australian Mining and Petroleum Laws* (1987) 14.

prerogative.⁹ Secondly, ownership in minerals and mines (other than the royal mines) could, however, have been reserved in favour of the Crown upon the grant of a freehold estate¹⁰ which became the practice or policy of the Crown upon the grant of freehold estates.¹¹ Thirdly, statutes of the Australian States reserved ownership of all or the remaining minerals in the Crown (in right of the state).¹² Thus, in Australia, the general though not universal rule is that the Crown owns all minerals beneath the soil.¹³ The Crown can grant rights to third parties to explore or mine for minerals from the land and to vest ownership of minerals in such third parties upon severance of minerals from the land.¹⁴ Exploration rights are rights to enter land to explore for minerals and take minerals for non-commercial purposes. Mining rights are rights to enter land to mine or drill for minerals and take them away for commercial purposes.¹⁵ Upon separation of minerals from the land in accordance with the authorising statutory right, ownership of minerals is obtained.¹⁶ In the exceptional instances where ownership of minerals is vested in the holder of an estate in land, a *profit à prendre* could be granted to another to enter the land and mine the minerals.¹⁷ A *profit à prendre* is a right to take something, such as (a) soil and minerals, (b) natural vegetation, or (c) wild animals, from the land belonging to another person.¹⁸ A *profit à prendre* is, thus, similar to a servitude in South African law.

In Australia constitutional protection of property does take place on the federal level. The Commonwealth (Federal Government of Australia) is empowered by virtue of section 51(xxxi) of the Commonwealth Constitution to make laws for the acquisition of private property on just

9 *The Case of Mines (R v The Earl of Northumberland)* (1568) 1 Plowden 310 336; *Q v Wilson* (1874) 12 SCR (L) NSW 258 269-271 280 281; *Millar v Wildisch* (1863) W&W (E) 37 43; *Woolley v Attorney-General of Victoria* (1877) 2 App Cas 163 166-167; *Cadia Holding (Pty) Ltd v New South Wales* (2010) 269 ALR 204 parr 13, 80 & 106.

10 Forbes & Lang 17; Bradbrook *et al* 794.

11 Forbes & Lang 17; Crommelin "Australian Mineral Law as a Resource Management Regime" 14 (1981) *Australian Journal of Forensic Science* 2 8; Crommelin "Resources Law and Public Policy" (15) 1983 *University of Western Australia Law Review* 1 3.

12 S 9(1)(b) of the Mineral Resources (Sustainable Development) Act 1990 (Vic); s 8(3) and 8(2) of Mineral Resources Act 1989 (Qld); s 16(1) of Mining Act 1971 (SA); s 16(3) of Crown Lands Act 1976 (Tas); s 6(2)-(5) of the Mineral Resources Development Act 1995 (Tas); s 9(1)(b) of the Mining Act 1978 (WA); s 16 of the Mining Act 1991 (SA). In the Northern Territory reservation of ownership of all minerals was in the Crown (in right of the Commonwealth)(i.e., the federal government) (s 3 of Minerals (Acquisition) Act (NT)).

13 Hunt *Mining Law in Western Australia* (2009) 2 36.

14 See Christensen, Durrant, O'Connor and Phillips, "Regulating greenhouse gas emissions from coal mining activities in the context of climate change" (28) 2011 *Environmental and Planning Law Journal* 381 387.

15 Chambers *An Introduction to Property Law in Australia* (2013) 216.

16 See Christensen, Durrant, O'Connor and Phillips (28) 2011 *Environmental and Planning Law Journal* 387-388.

17 Hunt 38 216.

18 Chambers 184-185.

terms for any purpose in respect of which the Parliament has power to make laws.¹⁹ The compensation payable in respect of the acquisition must satisfy the requirement of “just terms”.²⁰ The Australian States are, by virtue of their sovereignty, empowered to take or acquire land with or even without payment of compensation.²¹

2 2 South Africa

South African law adheres to the civilian notion of full ownership (*dominium*) of land (allodial title). By virtue of the maxim *cuius est solum eius est usque ad coelum et ad inferos*²² the owner of the land is the owner of unsevered minerals.²³ Prior to the enactment of the MPRDA, mineral rights could, however, have been separated from the ownership of land and acquired by another person by the creation of a separate mineral right.²⁴ A holder of a mineral right was entitled to go upon the land to which the rights relate, to search for minerals, and, if he finds any, to sever the minerals and dispose of them.²⁵ Holders of mineral rights could freely transfer mineral rights²⁶ and grant prospecting or mining rights to others by virtue of a prospecting contract or a mineral lease, respectively.²⁷ Before prospecting rights or mining rights could be exercised, the necessary authorisation in the form of a prospecting permit or a mining authorisation had to be obtained from the state in accordance with the Minerals Act 50 of 1991 (hereafter “Minerals Act”).²⁸ Holders of mineral rights were not obliged to exploit the minerals.²⁹ Upon severance of minerals from the land, ownership of

19 See, for instance, the Lands Acquisition Act 1989 (Cth).

20 See *Commonwealth v Tasmania* (1983) 158 CLR 1 289; Jacobs *Law of Compulsory Land Acquisition* (2010) 23.

21 *New South Wales v Commonwealth* (1915) 20 CLR54 77; Jacobs 23.

22 As to the origin of this maxim in the South African common law, see Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 4.

23 *London and SA Exploration Co v Rouliot* (1891) 8 SC 74 91; *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Vanston v Frost* 1930 NPD; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) 371D; *Agri SA III* par 32.

24 See further, Badenhorst & Mostert, *Mineral and Petroleum Law of South Africa* (2004) Revision Service 9 ch 3.2.

25 *Van Vuren v Registrar of Deeds* 1907 TS 289 294 295; *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Ex parte Pierce* 1950 3 SA 628 (O) 634C-D; *Erasmus v Afrikander Property Mines Ltd* 1976 1 SA 950 (W) 956E; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A); 509G-H; *Agri SA II* par 23.

26 *Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town and Mines Ltd* 1903 TS 499 510; *Van Vuren v Registrar of Deeds* 294; *Ex parte Pierce* 634C; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 509H.

27 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 115 (CC) par 65.

28 *Agri SA II* parr 34-36.

29 *Idem* 29.

minerals was acquired by the holder of the mineral right or mining right.³⁰

In South Africa mineral rights (or ownership of land) could have been expropriated in terms of the Expropriation Act 63 of 1975 against payment of compensation.³¹ Constitutional protection of property was, in addition, afforded by the property clause in section 28 of the (interim) Constitution, 200 of 1993.³² Since the expiry of the term of the interim Constitution and upon enactment of the MPRDA on 1 May 2004, section 25 of the Constitution of the RSA 1966 protects property,³³ such as ownership of land and mineral rights, as a fundamental right. Protection of property is provided in the sense that deprivation of property may only take place (a) in terms of law of general application, and (b) by law which does not permit arbitrary deprivation of property.³⁴ Expropriation, as subspecies deprivation, of property can only take place (a) in terms of law of general application, (b) for public purpose or in the public interest, and (c) subject to the payment of compensation.³⁵ Compensation must be “just and equitable” reflecting an equitable balance between the public interest and the interest of the expropriated owner.³⁶ Land reform and reform to bring about equitable access to all natural resources is included under the notion of “public interest”.³⁷ Section 25(5) to (9) have a reform purpose and promote the transition of the prevalent system of property holdings.³⁸ In particular, the state is empowered by section 25(8) to enact legislation to “achieve land, water and related reform, in order to redress the results of past racial discrimination”, provided it complies with the requirements of the general limitations clause of section 36.³⁹ The enactment of the MPRDA by the legislature is a prime example of such legislation. Item 12(1) of the transitional arrangements in Schedule II of the MPRDA provides that any person who can prove

30 *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 509G-510A 534F-1.

31 *Agri SA IV* parr 41, 43 & 46; see also *De Villiers v Stadsraad van Mamelodi* 1995 4 SA 347 (T); Badenhorst & Van der Vyver “Mineraalregte as voorwerp van onteiening - *De Villiers v Stadsraad van Mamelodi*” 1996 TSAR 800.

32 See Badenhorst, Pienaar & Mostert *Silberberg and Schoeman’s The Law of Property* (2006) 521.

33 In terms of s 25(4) of the *Constitution of the Republic of South Africa, 1996* (hereafter “the Constitution”) property is not restricted to land.

34 S 25(1).

35 S 25(2) and (3).

36 S 25(3). See further s 25(3) as to the relevant circumstances that need to be taken into account in the balancing of the respective interests.

37 S 25(4).

38 Badenhorst, Pienaar & Mostert 522.

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

“that his or her property has been expropriated” in terms of any provision of the MPRDA, may claim compensation from the state.

3 Facts

3.1 *Newcrest*

The facts of *Newcrest Mining (WA) Ltd v The Commonwealth* were briefly as follows:⁴⁰ In the Northern Territory of Australia ownership of all minerals was reserved in favour of the Crown in right of the Commonwealth.⁴¹ The Commonwealth granted mining leases to Newcrest Mining (WA) Ltd over parcels of land in the Northern Territory. When self-government was accorded to the Northern Territory in 1978 the Commonwealth, broadly speaking, conferred its ownership of minerals upon the Northern Territory,⁴² but retained the fee simple and mineral interest (ownership) in the lands, over which Newcrest’s mining leases had been granted, subject to the mining leases.⁴³ The Commonwealth government extended the boundaries of the Kakadu National Park by proclamations under section 7(8) of the National Parks and Wildlife Conservation Act 1975 (Cth) to include the parcels of land covered by the mining leases.⁴⁴ The federal statute prohibited “operations for the recovery of minerals” in the Kakadu National Park and provided that compensation is not payable to any person by reason of enactment of the Act.⁴⁵

3.2 *Agri South Africa*

The facts of *Agri South Africa v Minister of Minerals and Energy* were briefly as follows:⁴⁶ Prior to enactment of the MPRDA, Sebenza Mining (Pty) Ltd (“Sebenza”) was the registered holder of mineral rights to coal in respect of two properties situated in Mpumalanga which it acquired for R1048 000. After enactment of the MPRDA the company did not exercise its exclusive right to apply for a prospecting or mining right and the “unused old order right”,⁴⁷ accordingly, ceased to exist. The company, by then in liquidation, lodged a claim for compensation in terms of item 12(1) of Schedule II of the MPRDA contending that the MPRDA expropriated its coal rights. The claim of compensation was ceded to Agri South Africa for R250 000. Agri South Africa claimed compensation in a

40 Badenhorst “Towards a theory on publicly-owned minerals in Victoria” (2014) 22 *Australian Property Law Journal* 157 177.

41 S 3 of the Minerals (Acquisition) Act 1953 (NT).

42 S 69(4) of Northern Territory (Self-Government) Act 1978 (Cth).

43 *Newcrest Mining (WA) Ltd v The Commonwealth* 526 546. Acquisition actually took place in terms of s 70 of the Northern Territory (Self Government Act) 1978 (Cth).

44 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 525-526.

45 *Idem* 530-531.

46 See *Agri SA II* par 16 & par 17-20; *Agri SA III* par 2.

47 See item 8 of Schedule II of the MPRDA.

“test case” for the alleged expropriation of the coal rights in amount of R750 000. The claim was rejected by the Department of Mineral Resources.

3 3 Simplified Facts

For purposes of a comparative analysis the facts of both cases can be simplified as follows:

“In *Newcrest*, the holder of a mining right was prohibited by statute from mining for minerals. For all intents and purposes the mining right could not be alienated and conveyed to another person. *In other words, the holder of a mining right was not entitled to mine or alienate its mining right because of a (federal) statute.* The statute did not provide for payment of compensation”.

In *Agri SA* the holder of a mineral right was prohibited by statute from (prospecting or) mining for minerals,⁴⁸ unless the mineral right was converted into a (prospecting right or) mining right in terms of the MPRDA. A company in liquidation, like Sebenza, could not have applied for new prospecting or mining rights because it would not have been able to meet the financial requirements for the application of a prospecting right⁴⁹ or mining right,⁵⁰ and even if such a right were granted it would have been terminated automatically because the holder is in liquidation.⁵¹ The particular holder was thus prohibited by the statute to apply for new rights because it was under liquidation. Alienation and transfer of the mineral rights and granting of prospecting or mining right were also prohibited by statute as these transactions could no longer be registered in the Deeds Office.⁵² *In other words, the holder of a mineral right was not entitled to (prospect) or mine for minerals and to alienate or convert its mineral rights because of a (national) statute.* The statute did provide for compensation.

Despite the similarity of the simplified facts and legal principles regarding the elements of expropriation of property, the outcomes of the respective decisions differ vastly.

4 Decisions

The respective decisions were as follows:

48 A holder of the unused old order right could only have prospected or mined during the one-year interim period if it had statutory authorisation to do so in terms of the Minerals Act, which was absent in the case of Sebenza. In other words, upon enactment of the MPRDA Sebenza could no longer prospect or mine.

49 S 17(1)(a) of the MPRDA requires inter alia that the applicant has access to financial resources to conduct the proposed prospecting operations optimally.

50 S 23(b) requires inter alia that the applicant has access to financial resources to conduct the proposed mining operations optimally.

51 S 56(d).

52 *Southern Era Resources Ltd v Farndell* 2010 4 SA 200 (SCA) par 4.

4 1 *Newcrest Mining (WA) Ltd v The Commonwealth*

One of the issues before the High Court in *Newcrest*⁵³ was whether the extension of the boundaries of the Kakadu National Park at the time of the proclamations amounted to an acquisition of Newcrest's mining leases without just terms in breach of section 51(xxxi) of the Commonwealth Constitution.

It was conceded by the Commonwealth that the mining leases were property within the meaning of section 51(xxxi) of the Constitution.⁵⁴ By a majority, the High Court decided that the extension of the boundaries amounted to an acquisition of property without just terms in breach of section 51(xxxi) of the Constitution.

Gummow J decided that the inclusion of the mineral lease areas amounted to (a) “an effective sterilisation” of the mining rights,⁵⁵ and (b) a denial of Newcrest's ability to exercise its rights under the mining leases, even though the mining leases were not extinguished.⁵⁶ Gummow J accepted that the Commonwealth acquired “identifiable and measurable advantages”, namely, the minerals were freed from the rights of Newcrest to mine them.⁵⁷ Gummow J accordingly decided that there were acquisitions of property from Newcrest contrary to the constitutional requirement of acquisition of property on just terms.⁵⁸ Toohey⁵⁹ and Gaudron JJ⁶⁰ agreed with Gummow J. Kirby J held that the outcome of the prohibition on “operations for the recovery of minerals” in the Kakadu National Park was an acquisition of Newcrest's mining rights.⁶¹ Kirby J reasoned that despite the fact that Newcrest's interests were not expressly acquired or extinguished by any federal law, the creation and extension of the Kakadu National Park by federal law effectively deprived Newcrest of “the benefit of its property in the mining tenements, principally the right to recover minerals”.⁶² Brennan CJ decided when the land was included in the Kakadu National Park by proclamation, the rights of Newcrest to carry on operations for the recovery of minerals were extinguished. The Commonwealth acquired property from Newcrest in the form of a “benefit of relief from the burden of Newcrest's rights to carry on ‘operations for the recovery of minerals’”.⁶³ Dawson J merely assumed that the proclamations together with the statutory prohibition against mining operations “constituted the

53 *Newcrest Mining (WA) Ltd v The Commonwealth* (1998) 190 CLR 513 526; Badenhorst (2014) 22 *Australian Property Law Journal* 177.

54 *Idem* 531 (Brennan CJ) & 573 (McHugh J).

55 *Idem* 635.

56 *Ibid.*

57 *Idem* 634.

58 *Idem* 635.

59 *Idem* 560.

60 *Idem* 561.

61 *Idem* 639.

62 *Idem* 638.

63 *Idem* 530.

acquisition otherwise than upon just terms of property held by Newcrest in the form of the mining leases".⁶⁴

In dissent McHugh J, however, decided as to date of judgement there has been no acquisition of property.⁶⁵ According to McHugh J the proclamations adversely affected Newcrest's right to mine⁶⁶ and merely impinged on Newcrest's rights to exploit their property interests,⁶⁷ which statements seem contradictory. McHugh J reasoned that even if there was a diminution or extinguishment of all or part of the Newcrest's property interest, there was no gain by the Commonwealth.⁶⁸ According to McHugh J the Commonwealth gained nothing which it did not already have.⁶⁹ The Commonwealth already "owned the interests in reversion in the minerals and the land".⁷⁰ This statement will be explained in more detail in 5 below. According to McHugh J in "colloquial terms, Newcrest lost but the Commonwealth did not gain".⁷¹

4 2 *Agri SA Series of Cases*

At issue in *Agri SA* series of cases was whether the mineral rights of holders of unused old order rights were expropriated by the MPRDA on 1 May 2004 (in *Agri SA III* the majority of the SCA considered a broader issue, namely, did the MPRDA on 1 May 2004 expropriate *all* mineral rights in South Africa?)⁷² The *Agri SA* series of cases will now be revisited.⁷³

These cases started with an exception being raised in proceedings before the North Gauteng High Court in *Agri SA I*.⁷⁴ The Department of Minerals raised an exception against *Agri SA*'s claim of compensation as not disclosing a cause of action. Hartzenberg J dismissed the exception⁷⁵ and decided that "it is possible for holders of old order rights to prove that their rights had been expropriated".⁷⁶ According to the court, the MPRDA could be interpreted as admitting that "holders will be deprived

64 *Idem* 547.

65 *Ibid.*

66 *Idem* 573.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.* See also *idem* 527 (Brennan CJ).

71 *Idem* 573.

72 *Agri SA III* par 4. As to the reasons for such a broad sweep, see par 3, 81 & 90.

73 See Badenhorst and Olivier "The *Agri South Africa* Constitutional Court decision 2014 *Australian Resources and Energy Law Journal* 230-232.

74 *Agri SA I* par 1 & 4; Badenhorst, "Expropriations by virtue of the Mineral and Petroleum Resources Development Act: Are there some more trees in the forest? *Agri South Africa and Van Rooyen v Minister of Minerals and Energy*" 2009 *TSAR* 600. See also, Van Niekerk and Mostert, "Expropriation of Unused Old Order Mineral Rights: The Courts have its first say" 2010 *Stell LR* 158; Leon, "Compensation for expropriation of 'old order mineral rights'" July 2011 *De Rebus* 47.

75 *Agri SA I* par 19.

76 *Ibid.*

of their rights and that such deprivation, coupled with the State's assumption of custody and administration of those rights, constitutes expropriation thereof".⁷⁷ The features of (common law) mineral rights were correctly indicated⁷⁸ by the court and the position of holders of unused old order rights before and after the enactment of the MPRDA was compared⁷⁹ in order to arrive at the decision that it is possible for holders of "old order rights" to prove that their rights have been expropriated.⁸⁰

The merits of the dispute between the parties was subsequently decided by the North Gauteng High Court. The High Court accepted in *Agri SA II*⁸¹ that coal rights constituted property for purposes of section 25 of the Constitution. The content of a mineral right was clearly indicated by the court.⁸² Du Plessis J construed a deprivation as an act which interfered with the use, enjoyment and exploitation of property.⁸³ The content of a mineral right before and after the MPRDA⁸⁴ was compared by the court to arrive at its decision that upon enactment of the MPRDA⁸⁵ the holder of the mineral rights was deprived of its entitlements⁸⁶ and the coal rights.⁸⁷ According to the court the holders of mineral rights have, since the enactment of the MPRDA, not retained one of the entitlements by virtue of the mineral right.⁸⁸ Only the right to acquire a new prospecting or mining right was conferred to holders of unused old order rights by the MPRDA.⁸⁹

For an act of expropriation to have occurred, the court in *Agri SA II* required appropriation by the expropriator of the substance of a right, and abatement or extinction of any other right held by another which is

77 *Idem* 17.

78 *Idem* 7-9.

79 *Idem* 5.

80 *Idem* 19.

81 *Agri SA II* par 62; Badenhorst "Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* saga" (2011) *Australian Resources and Energy Law Journal* 261; Badenhorst and Olivier "Expropriation of 'unused old order rights' by the MPRDA: You have lost it!" 2012 *THRHR* 329.

82 Du Plessis J stated that a holder of a mineral right was entitled to: (a) go upon the land to prospect for minerals; (b) mine the minerals and to carry them away; (c) alienate and transfer mineral rights, (d) bequeath mineral rights to his heirs; (e) grant to a third party against consideration, by way of a prospecting contract or a mineral lease, the right to prospect for or to mine the relevant minerals; and (f) deal with it to his benefit (see par 23 & par 28-30). Du Plessis J did not regard the list as exhaustive and also referred to the list of entitlements indicated in Badenhorst and Mostert 3-12 to 3-14 (par 29).

83 *Agri SA II* par 72 & 65.

84 *Idem* 22. As to the before-part of the comparison, see par 23-36. As to the after-part of the comparison, see par 37-58.

85 *Idem* 75.

86 *Idem* 50-51.

87 *Idem* 77.

88 *Idem* 50.

89 *Ibid.*

inconsistent with the appropriated right.⁹⁰ The court decided that the State acquired the substance of the former mineral rights.⁹¹ The court concluded that the coal rights had been expropriated by the MPRDA.⁹² The court reasoned that, from a reading of sections 3 and 5 of the MPRDA, the Minister was, upon commencement of the Act, “vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common law mineral rights”.⁹³ The court found that (a) the former holder of the mineral right in respect of coal, which did not apply for new prospecting or mining rights in terms of item 8(2) of the transitional arrangements, was expropriated by provisions of the MPRDA, and (b) Agri SA, as cessionary of the compensation claim, was accordingly entitled to compensation.⁹⁴

The Minister appealed the finding of the North Gauteng High Court in *Agri SA II* to the Supreme Court of Appeal (hereafter “SCA”). In *Agri SA III*⁹⁵ Wallis JA (with whom Heher and Leach JJA concurred) (majority of the court) decided that *all* mineral rights that existed under the (repealed) Minerals Act were not expropriated by the enactment of the MPRDA.⁹⁶ A “deprivation”⁹⁷ and “acquisition”⁹⁸ of property by the state were identified as defining features of an act of expropriation for purposes of section 25(2) of the Constitution. In order to be constitutionally compliant it was required that a deprivation had occurred in terms of a law of general application and it should not be arbitrary.⁹⁹ It was accepted by the majority of the SCA that expropriation is a form or subset of deprivation of property.¹⁰⁰ In order to be constitutionally compliant an expropriation had to be for public purpose or in the public interest and subject to the payment of compensation.¹⁰¹ Wallis JA regarded compensation as a prerequisite for a valid expropriation and a necessary consequence thereof but not a feature to distinguish it from a deprivation.¹⁰² According to Wallis JA the presence or absence of a provision in a statute for compensation cannot be determinative of whether there is an expropriation or not: “The absence of an obligation

90 *Idem* 78 & 80.

91 *Idem* 82.

92 *Idem* 9, 87 & 88. See, however, Van der Walt *Constitutional Property Law* (2011) 438-443.

93 *Idem* 82.

94 *Idem* 88.

95 *Agri SA III* par 99; Badenhorst “Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* fiasco” 2012 *Australian Resources and Energy Law Journal* 205; Badenhorst, “Expropriation of ‘Unused Old Order Rights’ by the MPRDA: You had nothing!” 2013 *THRHR* 472. See further Van der Vyver “Nationalisation of Mineral rights in South Africa” 2012 *De Jure* 125.

96 *Idem* 90 & 99.

97 *Idem* 85.

98 *Idem* 24.

99 *Idem* 12.

100 *Idem* 14.

101 *Idem* 12.

102 *Idem* 18.

to pay compensation is necessarily neutral, whilst its presence can never be more than a factor that may point to an expropriation”.¹⁰³

According to the majority of the SCA, deprivation is determined by comparing the position of holders of mineral rights before and after the changes brought about by the MPRDA.¹⁰⁴ Wallis JA later explained: “The comparison is between two statutory grants, namely, the rights enjoyed under the previous statutory dispensation and those enjoyed under the present dispensation”.¹⁰⁵ The court *a quo*'s before-and-after comparison of the position of common law holders of mineral rights was rejected as being incorrect.¹⁰⁶ The majority of the SCA reasoned that deprivation, as the first element of expropriation, of property was not established¹⁰⁷ because the right to mine was never vested in the holders of mineral rights,¹⁰⁸ but rather in the State.¹⁰⁹ The majority of the SCA accepted as 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”.¹¹⁰

Wallis JA was of the view that if only expropriation is contended, a court only has to determine whether the deprivation constituted an expropriation.¹¹¹ Wallis JA accepted that acquisition of property (in its constitutional sense) by the expropriator (or on behalf of others), “whether directly or indirectly, that bears some resemblance to the property that was the subject of expropriation” is one of the identifying characteristics of an act of expropriation.¹¹² It was regarded as undesirable to adopt a categorical approach in determining what constitutes acquisition for purposes of expropriation.¹¹³ Determination of acquisition was said to take place by comparing the rights the State held before and after the enactment of the MPRDA.¹¹⁴ We have seen that the majority of the SCA was of the view that prior to the MPRDA the right to mine was vested in the State, whilst section 3(1) MPRDA affirmed the “principle that the right to mine is controlled by the State, and allocated by those who wish to exercise it.”¹¹⁵ In other words, before and after the MPRDA the State had the right to mine and, therefore, acquired nothing. They accordingly found that acquisition of rights by the State, as the second element of expropriation, also did not take place.¹¹⁶ The right to

103 *Ibid.*

104 *Idem* 76.

105 *Idem* 87.

106 *Ibid.*

107 *Idem* 85.

108 *Ibid.*

109 *Idem* 48, 84-87 & 99.

110 *Idem* 69.

111 *Idem* 14.

112 *Idem* 18 & 24.

113 *Idem* 24. As to the difficulties which warranted this approach, see par 23.

114 *Idem* 76.

115 *Idem* 85.

116 *Idem* 90 & 94.

mine (or mineral rights) could not, therefore, have been expropriated by the State.¹¹⁷

Wallis JA found that holders of unused old order rights were not deprived of their rights under the Minerals Act (which required authorisation for the exercise of rights) because they not only retained a preference to apply for a prospecting right or a mining right for a year, but “would acquire more extensive rights if they sought and obtained a prospecting right or mining right”.¹¹⁸ Deprivation would take place according to the court upon “failure to apply for a right to exercise them.”¹¹⁹ The imposition of a time limit of one year to apply for new rights was not perceived as a deprivation of rights.¹²⁰

Wallis JA found, albeit *obiter*,¹²¹ that holders of old order prospecting rights¹²² or old order mining rights¹²³ who applied for conversion of their rights were not deprived of the right to prospect or mine because of the continuation of their prospecting or mining activities and the similar content of present rights and previous rights.¹²⁴ Expropriation of so-called common law mineral rights did not take place due to the absence of both the elements of deprivation and the acquisition of property.¹²⁵ The fact that the involvement of the state (unlike before) is now required by section 11(1) of the MPRDA for the transfer of converted rights and the duration of converted rights may be less than former rights did not influence the question whether expropriation took place.¹²⁶ The reason for this, according to the court was that the new rights are transferable and renewable.¹²⁷ Upon failure to convert these rights, the absence of rights, rather than absence of transmissibility, was regarded by the court as the source of loss.¹²⁸

Nugent JA (with whom Mhltantla JA concurred) concurred with the majority of the court for different reasons.¹²⁹ Despite his acceptance that the MPRD Act extinguished common law mineral rights,¹³⁰ Nugent JA denied that common law mineral rights had as their content the “right of exploitation”.¹³¹ According to Nugent JA, the right to prospect and mine

117 *Idem* 85 & 90.

118 *Idem* 97.

119 *Ibid.* If so, why did the court not find that a deprivation took place in the case of unused old order rights where there was a failure to apply for new rights?

120 *Ibid.*

121 *Idem* 103.

122 See item 6 of Schedule II of the MPRDA.

123 See item 7 of Schedule II of the MPRDA.

124 *Idem* 89-90.

125 *Idem* 90 & 94.

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 *Idem* 117.

130 *Idem* 112.

131 *Idem* 113.

for minerals was stripped from the beginning by legislation.¹³² Only the right to unsevered minerals was said to have remained as part of the ownership of land.¹³³ Although Nugent JA decided that there “can be no doubt that the MPRD Act divested unused [old order] mineral rights of the value that they had while the 1991 Act held sway”¹³⁴ the loss of the value of common law mineral rights was not attributed to the abolishment of common law mineral rights.¹³⁵ Nugent JA was of the view that the extension of exploitation rights to others by the MPRDA, which were earlier under the exclusive control of mineral right holders, did not constitute a deprivation of property.¹³⁶

Agri SA appealed against this decision of the SCA to the Constitutional Court (hereafter “CC”). In *Agri SA IV*¹³⁷ Chief Justice Mogoeng (Moseneke DCJ, Jafta J, Nkabinde J, Skweyiya J, Yacoob J and Zondo J concurring) (majority of the CC) it was accepted that pre-existing mineral rights constitute constitutional property.¹³⁸ Mogoeng CJ, to a large extent, recognised the true content¹³⁹ and features¹⁴⁰ of mineral rights. Apart from the power of parliament during the period of parliamentary supremacy to legislate on mineral matters, it was held that the state did not have any residual competence (or substantive power) to exploit minerals.¹⁴¹ Deprivation was perceived by the court as the

132 *Idem* 92.

133 *Idem* 104. It would only be correct if the mineral rights had been separated from the ownership of land.

134 *Idem* 111.

135 *Idem* 114-115.

136 *Idem* 117.

137 Badenhorst “Onteiening van onbenutte ou-orde regte: Het iets niets geword? *Agri South Africa v Minister of Minerals and Energy* (2013 (4) SA 1 (CC)” 2014 *THRHR*; Badenhorst and Olivier “Large scale Expropriations of Mineral rights in South Africa: The Agri SA finale” 2014 *Australian Resources and Energy Law Journal*.

138 *Agri SA IV* par 50. See also *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 61.

139 The following “incidents” (par 7) or “essential components” (par 43) of mineral rights were recognised by Mogoeng CJ, namely, the entitlement: (a) to prospect, mine and dispose of minerals (*ius utendi*) (parr 7 & 51); (b) to sell, lease or cede mineral rights (*ius disponendi*) (parr 51 & 66); (c) not to mine or to sterilise minerals (*ius abutendi*) (parr 2, 43 & 66); and (d) to encumber minerals by mortgage (parr 10 & 50). As to a list of more entitlements of holders of minerals rights, see Badenhorst and Mostert 3-12 to 3-13; Mostert *Mineral Law Principles and Policies in Perspective* (2012) 136.

140 The following features of mineral rights were recognised by Mogoeng CJ, namely, mineral rights were: (a) registrable in the deeds office (par 12); (b) recognised as limited real rights that are enforceable against the whole world (par 9); (c) assets (par 10); (d) alienable by sale or lease (par 10); (e) alienable by the grant of a prospecting contract or mining lease (par 10); (f) transferable (par 10); (g) capable of encumbrance by mortgage or usufruct (see par 10); (h) capable of inheritance (par 10); (i) valuable (par 41); and capable of expropriation upon payment of compensation (see par 41 & 43). As to a list of more features of mineral rights, see Badenhorst and Mostert 3-23 to 3-24.

141 *Agri SA IV* par 35.

extinguishment of a “right previously enjoyed” or the taking away of rights or property or a significant interference with rights or property.¹⁴² Mogoeng CJ decided that holders of unused old order rights were deprived of (a) the “free or unregulated right to sterilise mineral rights”, (b) the “right to sell or lease mineral rights” (if such suspended right was not revived in terms of transitional arrangements),¹⁴³ and (c) their mineral right/unused old order right (for which a prospecting right or mining right could not be acquired in terms of the transitional arrangements).¹⁴⁴ It was reasoned that deprivation took place because 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”.¹⁴⁵ The majority of the CC further decided that upon failure to apply for new rights or an unsuccessful application for new rights, the loss of mineral rights was total and permanent.¹⁴⁶ The possibility of Agri SA recouping the purchase price of the mineral rights was also found to have been lost.¹⁴⁷ The majority of the CC, thus, decided that entitlements or components of the pre-existing mineral right were deprived by the MPRDA.¹⁴⁸ The assumption by the state of custodianship and the power to grant rights which previously could only be granted by holders of mineral rights were described as a deprivation.¹⁴⁹ Froneman J (Van der Westhuizen J concurring) in a separate judgement (minority judgement) also decided that a deprivation of property took place and that such deprivation was not of an arbitrary nature.¹⁵⁰

For an expropriation, acquisition of entitlements or rights of property was required by the majority of the CC.¹⁵¹ Determination of an acquisition on a case-by-case basis was regarded as the most appropriate method.¹⁵² Mogoeng CJ required that a claimant must establish that the state has acquired the substance or core content of what it was deprived of or similar rights.¹⁵³ Exact correlation between what was lost and what was acquired was, however, not required.¹⁵⁴ Mogoeng CJ found that despite the “assumption by the State of custodianship of mineral resources on behalf of ‘all the people of South Africa’¹⁵⁵ and the power to grant to others rights¹⁵⁶ that could previously have been granted by

142 *Idem* 48.

143 *Idem* 51. See also parr 2 & 66.

144 *Idem* 66.

145 *Idem* 67.

146 *Idem* 52.

147 *Ibid.*

148 *Idem* 53.

149 *Idem* 68.

150 *Idem* 92.

151 *Idem* 48.

152 *Idem* 64.

153 *Idem* 58.

154 *Ibid.*

155 In terms of s 3(1) of the MPRDA.

156 In terms of s 3(2) of the MPRDA prospecting rights or mining rights can *inter alia* be granted by the Minister.

holders of mineral rights”, the state did not acquire any mineral rights (including those of Sebenza) at commencement of the MPRDA.¹⁵⁷ Mogoeng CJ found that “(n)either 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”.¹⁵⁸ Despite the termination of the right by the state, a transfer to the state did not take place.¹⁵⁹ The appeal was dismissed.¹⁶⁰ Cameron J also concurred with the majority of the CC but decided that acquisition by the state is not a necessary feature of an expropriation under section 25 of the Constitution.¹⁶¹

Froneman J, however, did decide that the state acquired the “power of disposition that private mineral ownership entailed”,¹⁶² “power to allocate and dispose of the exploitation rights”¹⁶³ or “at least some of the powers and competencies”¹⁶⁴ of holders of unused old order rights. The minority of the CC also decided that acquisition of property by the state is not an essential requirement for expropriation.¹⁶⁵ The appeal was, however, also dismissed by the minority of the CC who decided that the transitional arrangements, as “compensation in kind”, constituted “just and equitable compensation” as required in terms of section 25(3) of the Constitution.¹⁶⁶

5 Comparison

The courts in *Newcrest* and the *Agri SA* line of decisions recognised mineral rights/mining rights worthy of protection under their respective Constitutions. These courts required deprivation and acquisition as elements of an act of expropriation/resumption. We have seen that only the minority of the CC in *Agri SA IV* and Cameron J did not require acquisition as an element of expropriation.

Deprivation, as perceived by these courts, varied from interference with the exercising of entitlements, sterilisation of entitlements, prohibition of the exercising of entitlements and extinguishment of entitlements of mineral rights/mining rights. The views of the respective courts as to what constitutes a deprivation were basically the same. In order to determine whether deprivation has taken place, one has to be able to identify the content of the mineral right or mining right and do a

157 *Agri SA IV* parr 68 & 71.

158 *Ibid.*

159 *Ibid.* Insofar as expropriation is an original mode of acquisition of rights, transfer of rights does not, strictly speaking, take place.

160 *Idem* 76.

161 *Idem* 78.

162 *Idem* 80.

163 *Idem* 81.

164 *Idem* 106.

165 *Idem* 79 & 102.

166 *Idem* 79, 88 & 90.

proper before-and-after analysis of the content of such right with reference to the statute in question.

The content of a mineral right was determined or largely recognised by the respective courts in *Agri SA I, II and IV*. The same can be said for the determination of the content of a mining right in *Newcrest*. The majority of the High Court in *Newcrest*, in effect, decided that the holder of the mining right was deprived of the entitlements of a mining right, and more particularly the entitlements to mine or recover minerals. A similar approach was followed in *Agri SA I and II and IV*. The denial by (a) the majority of the SCA in *Agri SA III* that: (i) the “right” to mine base minerals in the former Transvaal prior to¹⁶⁷ and during¹⁶⁸ the existence

167 *Idem* 48. Wallis JA ascribed to the view of Mostert (20) that: “The right to seek for and extract minerals was, however, in many respects, the prerogative of the state” (par 48). In her discussion of the period of 1860 to 1964 Mostert clearly indicates that the right to prospect and mine for base minerals in the Transvaal remained vested in the owner of land (see par 29-30). Mostert’s statement is only applicable to the right of the state to prospect and mine for natural oil and the right to mine for precious stones and precious metals. Only those rights, held by governments of the Republics and Colonies, were vested in the Governor-General-in-Council by s 123 Union of South Africa Act 1909 (see par 53) and not the right to mine all minerals (including base minerals) in the Union of South Africa. The same can be said about other Union mining legislation to which Wallis JA referred (par 53-56). Those statutes did not vest the right to mine base minerals in the state. The general statements of Wallis JA about the right to mine minerals did not reflect the correct position in respect of base minerals. If Mostert’s use of the term prerogative can be construed as a prerogative power it can be noted that it was recently decided in *General Council of the Bar v Mansingh* (2013 3 SA 294 (SCA) par 18) that the royal prerogative power was retained in Union of South Africa by s 8 of the Union of South Africa Act 1909 and s 4 of the Status of the Union Act 69 of 1934 and its ambit had to be determined by English law. The prerogative power was partially codified by s 7(3) of the Constitution of the Republic of South Africa Act 32 of 1961, whilst the uncodified prerogative powers were preserved by s 7(4) (par 20). Even if the English prerogative to minerals was retained in South Africa (and not changed by mining legislation) the Crown’s prerogative right did not extend to base metals (see *Commonwealth v New South Wales* (1923) 33 CLR 1 58; *Cadia Holdings (Pty) Ltd v New South Wales* (2010) 269 ALR 204 par 17).

168 According to Wallis JA, only the “entitlement to exercise the right to mine” was vested in the holder of a base mineral right by the Mining Rights Act, whilst the state held the “entitlement to control and allocate the right to mine” par 61. It is submitted that this would mean if the State had such entitlement it must have been the holder of the right to mine base minerals, which is clearly not correct. Wallis JA relied on a statement by Mostert (55) that: “The philosophy of state control over minerals during the period 1964 to 1990 resulted in a system whereby the state, in which the right to mine was vested, conferred rights to mine and prospect to mineral rights holders” (par 61). Mostert, in turn, relied on Kaplan and Dale *A Guide to the Minerals Act 1991* (1992) 5. Kaplan and Dale referred to such philosophy in regard to natural oil, precious metals and precious stones where the right to mine was indeed vested in the State. They indicated that in these instances the state granted subordinated rights (and not mere licences or authorisations) to third parties to mine. The statement of Mostert does not apply to all minerals during this period. It is only

of the Mining Rights Act 20 of 1967; (ii) the “right” to mine minerals during the existence of the Minerals Act;¹⁶⁹ and (b) the minority of the SCA that the entitlements of mineral rights¹⁷⁰ were vested in the holder of mineral rights, was used as a basis for its decision that no deprivation (or acquisition) of property took place. The denials were not only contrary to the express provisions of the relevant statutes,¹⁷¹ but also more than a hundred years of case law¹⁷² which recognised the content of mineral rights. We have seen, in determining the question of whether expropriation took place, that features of former mineral rights, such as being unrestricted in duration and transferable, were also disregarded by Wallis JA in *Agri SA III*. Once the well-established content and some of the features of a mineral right were disregarded by the SCA, the question of whether deprivation took place becomes nonsensical because the former mineral right becomes devoid of much of its content and features. For argument’s sake, even if the content of a mineral right or mining right is restricted to the entitlement to prospect, mine and remove minerals and to alienate or dispose of the mineral right or mining right, it is clear that a statute which prohibited the mining of minerals and the

applicable to the right to mine precious metals and precious stones and the right to prospect and mine natural oil. It is not applicable to base minerals in which case the right to mine was vested in the holder of mineral rights. Mostert (48) clearly maintained earlier that the common-law position applied to base minerals.

169 Even though the vesting of the right to mine was recognised by Wallis JA it was said to be subject to obtaining statutory authorisation (parr 64 & 66). Unfortunately, Wallis JA did not distinguish between the vesting of a right and the exercise of a right (although regulation during the exercise of a right is recognised at par 66). Only the exercise of the (acquired) right was regulated by the Minerals Act. The rejection by Wallis JA (parr 63-67) of the view that s 5(1) of the Minerals Act amounted to a privatisation of state-held rights to precious metals, precious stones and natural oil (or a restatement of the common law position) (see Kaplan and Dale 5-6 46-48; Badenhorst “The re-vesting of State-held entitlements to exploit minerals in South Africa: Privatisation or deregulation?” 1991 *TSAR* 113 124–125) did not apply to base minerals. The vesting of the entitlements to prospect for and mine base minerals in the holder of a base mineral right remained unchanged. Only the regulation of the exercise of the right to base minerals was increased by the Minerals Act (see further, Badenhorst 2013 *THRHR* 479).

170 *Agri SA III* par 104.

171 For the wording of statutes of the former South African Republic, Transvaal colony and province, see Badenhorst and Mostert 1-16 to 1-20. S 2(1)(b) of the Mining Rights states expressly that “the right of and mining for and disposing of base minerals on any land is vested in the holder of the right to base minerals in respect of the land”. S 5(1) of the Minerals Act states: “[T]he holder of the right to any mineral in respect of land shall have *the right to enter upon such land ... 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 and to dispose thereof*” (italicised).

172 See 2.2 above and cases cited in n 25 above.

alienation/transfer of the underlying right¹⁷³ is interfering to such an extent with such rights that it constitutes a deprivation. It is submitted this happened in *Newcrest* and the *Agri SA* line of cases.

For purposes of acquisition it seems that the cases required that the state acquires some entitlements of a mineral right/mining right or something which resembles these entitlements or some form of property. For present purposes the question as to what constitutes property in Australia and South Africa is not further discussed. The views of the respective courts as to what constitutes acquisition were basically the same. The majority in *Newcrest* found that such acquisition took place. In *Agri SA II* it was correctly found that an acquisition of former entitlements of the holders of mineral rights took place in favour of the state. It was shown that some of these entitlements were now vested in the state. The majority in *Newcrest* used a further criterion which could have been useful in the *Agri SA* line of decisions, namely, whether the advantages or benefits of a right or property were acquired by the expropriator.¹⁷⁴ In *Newcrest* it was found that the advantage or benefit lies therein that the mineral interest of the Commonwealth was no longer burdened by a mining right in favour of *Newcrest*. It was consequently correctly decided that a resumption (expropriation) took place.

As indicated above, the minority of the High Court in *Newcrest* also decided that even if there was a deprivation of entitlements of a mining right, acquisition thereof did not take place because the Crown already owned the "interest in reversion in the minerals and the land". This reminds one of the thinking of the SCA in *Agri SA III*: the state cannot acquire something which it already holds. This minority view in *Newcrest* requires some further explanation of the English tenurial system:¹⁷⁵ If, for instance, the holder of a fee simple title (which endures indefinitely in time) grants a life estate (which only endures for the duration of a life) for the life of a grantee and the surplus of the life estate is not dealt with, a so-called reversion interest is created presumptively in favour of the original grantor. In short, the grantee holds a life estate whilst, the grantor holds a reversion interest in the estate. Upon death of the grantee, the grantor regains the (full) fee estate simple because he was holding the reversion interest. The same construction applies to the grant of a mining right by the owner of the mineral interest in the land. In the present case the Commonwealth granted a mining right to *Newcrest* but retained the reversion interest in the minerals. In short, the grantee holds

173 We have seen that Wallis JA, in *Agri SA III*, disregarded transferability of rights in the determination of whether expropriation took place because converted rights are capable of transfer with ministerial consent (par 91). Due to it being in liquidation, however, it was not possible for Sebenza to convert its mineral rights.

174 This test was, however, rejected by Wallis JA in *Agri SA III* because it "ignores the reality that deprivations of property can take different forms and be effected in various different ways" (par 23).

175 See Hepburn *Australian Property Law Cases, Materials and Analysis* (2012) 231-233.

a mining right (for the duration of the mining lease), whilst the grantor holds a reversion interest in the minerals. Only upon expiry of the term of the mining lease would the mining right or entitlements have been regained by the Commonwealth due to it holding the reversion interest in the minerals.¹⁷⁶ Whilst, McHugh J was correct in deciding that the Commonwealth retained the reversion interest in the minerals, he was incorrect in deciding that no acquisition took place. At issue was not the acquisition of the reversion interest in the minerals but the entitlements (or incidents) of the mining right which was granted by the Commonwealth to Newcrest. As correctly indicated by the majority of the High Court, the holder of the mining lease was deprived of the entitlements of the mining right which were acquired by the Commonwealth. There was, indeed, a gain by the Commonwealth. The Commonwealth no longer had the mining right or entitlements by virtue of such a right during the duration of the lease. Because of the statute the mining right was acquired (prior to the expiry of the term of the lessee's mining right). The existence of the Newcrest's mining right (or entitlements thereof) was (incorrectly) not perceived or recognised by McHugh J.

Wallis JA did refer to and provided a brief summary of the *Newcrest* decision in *Agri SA III*. The decision of McHugh J is summarised as follows:

“(I)n dissent, McHugh J pointed out that the Commonwealth gained nothing thereby. It was not enabled to exploit the minerals and, had the [statutory] prohibition [on the recovery of minerals] been lifted, the claimant could have exploited them under the mineral leases. He accordingly held that there was no acquisition”.¹⁷⁷

It is submitted that, as seen before, McHugh J rather reasoned that acquisition was absent because of the presence of the Commonwealth's mineral interest reversion and not because of a statutory prohibition. Just like McHugh J, Wallis JA denied that acquisition by the State had taken place because the State always had the right to mine. As indicated before, in the case of *Newcrest* the mineral interest reversion was held by the Commonwealth but the right to mine was deprived and acquired by the Commonwealth because of the statutory prohibition against mining in the National Park. Whilst McHugh J was correct about the Commonwealth already holding the mineral interest reversion, Wallis JA was not correct in holding that the right to mine has always vested in the State. Even if the right to mine was vested under the (newly discovered)

¹⁷⁶ In passing, it can be mentioned that in identifying the content of a mineral right in the South African system the grant of a prospecting or mining right to another person by a mineral right holder was explained by reference to a reversionary entitlement that was held by the holder of a mineral right. Upon termination of the prospecting right or mining right, the mineral right expanded back to its original content by virtue of the residuary entitlement.

¹⁷⁷ *Agri SA III* par 22.

suzerainty or public power of the State,¹⁷⁸ allocation and vesting of mineral rights and or entitlements thereof took place by virtue of deeds registration legislation and mining legislation. Whilst, a form of a right to mine may have been under the suzerainty of the State, the allocated mineral rights or entitlements (to base minerals) were not vested in the State, and holders were deprived thereof and these allocated rights or entitlements were acquired by the State upon enactment of the MPRDA. Just as McHugh J failed to recognise acquisition of Newcrest's mining right by the Commonwealth because he erroneously focussed on the mineral interest reversion, Wallis JA failed to see the deprivation and acquisition of Sebenza's mineral right because he erroneously focussed on the so-called right to mine which was claimed to have been vested in the State by virtue of its suzerainty.

We have seen that the CC in *Agri SA IV* recognised a deprivation of entitlements, but the majority of the CC could not recognise the acquisition of these entitlements by the State (on behalf of future applicants). It was reasoned that acquisition does not take place in terms of the construction that the state is merely the custodian and allocator of mineral resources. The view of the majority of the CC can be attributed to its view on the need for transformation of the mining industry due to the inability of the majority of black South Africans to benefit directly from the exploitation of mineral resources by reason of their landlessness, exclusion and poverty caused by apartheid.¹⁷⁹ The transformative nature of the MPRDA¹⁸⁰ and section 25 of Constitution¹⁸¹ was indicated by the court. According to the majority of the CC, section 25 imposed an obligation not to over-emphasise property rights at the expense of the state's social responsibilities.¹⁸² Mogoeng CJ was of the view that if a proper meaning is given to the notion of acquisition for purposes of section 25(2) of the Constitution, it "should pose no threat to the possibility of maintaining a sensitive balance between existing private property rights and the pursuit of transformation that s 25 was designed to facilitate".¹⁸³ Such proper meaning should, according to Mogoeng CJ, not be too narrow or too wide. If the meaning is too narrow, it could work against the constitutional protection sought to be given to property; if the meaning is too wide it could: (a) blur the line drawn by the Constitution between deprivation and expropriation;¹⁸⁴ (b) "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

178 In *Agri SA IV*, Mogoeng CJ, however, correctly stated: "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'" (par 35).

179 *Agri SA IV* par 1. See further par 22.

180 *Idem* 2, 26 & 65-66.

181 *Idem* 60-61.

182 *Idem* 62.

183 *Idem* 63.

184 *Ibid.*

envisaged by section 25(4) of the Constitution;¹⁸⁵ (c) “affect the need to create jobs, grow the economy by developing these resources in a sustainable way”, and (d) “guarantee security of tenure to those prospecting for or exploiting mineral and petroleum resources”.¹⁸⁶ The MPRDA does have security of tenure¹⁸⁷ of prospecting and mining operations as one of its objectives.¹⁸⁸ Mogoeng CJ reasoned that a finding of expropriation would have disregarded the public interest and constitutional imperative to transform and facilitate equitable access to mineral resources.¹⁸⁹ It is not explained why expropriation with compensation cannot take place during constitutionally mandated transformation which provides for compensation.

The minority of the CC acknowledged that the state acquired some of the entitlements of holders of unused old order rights¹⁹⁰ which is in line with the *Newcrest* decision and in line with legal reality. The attempt by the minority of the CC to dump acquisition of entitlements as a requirement of expropriation is not serving much of a purpose, given that they did recognise the acquisition of entitlements by the State but reasoned that the loss was, in any event, compensated. The fact that the majority of the CC was not able to recognise the acquisition by the State is more a cause for concern, which is apparent from the following statement by Froneman J:

“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?”¹⁹¹

The denial by the CC of any acquisition whatsoever defies legal reality and logic insofar as an entitlement without an encompassing right, whether public or private in nature, or a right not being held by anybody is not possible. The fact that the State is, since enactment of the MPRDA, capable of granting rights to minerals to applicants can only mean that the State acquired former rights or entitlements or (as a conduit) is holding them on behalf of future successful applicants.¹⁹² Or, in the words of Mogoeng CJ, there was actually some correlation between what was lost and what was indeed acquired. The entitlements to exploit mineral rights that were lost do correlate with the rights to minerals that

185 *Ibid.*

186 *Ibid.*

187 According to Otto “Security of Mineral Tenure: Time-Limits”, in Bastida, Wälde and Warden-Fernandez (Eds) *International and Comparative Mineral Law and Policy* (2005) 353 362, security of mineral tenure broadly means the stability of rights granted to an investor to implement the three phases of the mining sequence, namely, exploration, development and mining.

188 S 2(g) and item 2(a) of Schedule II of the MPRDA.

189 *Agri SA IV* par 69.

190 *Idem* 106.

191 *Idem* 105.

192 See Badenhorst 2014 *THRHR*.

the State is empowered in terms of the MPRDA to grant to applicants. If the advantage test of *Newcrest* had been applied, the majority of the CC would have had to recognise that the State has acquired the benefit of Sebenza's former "mining land" free from the encumbrance of its mineral rights and could now grant new prospecting rights and mining rights to applicants. That advantage had clearly shifted because the MPRDA prohibited Sebenza from mining unless its mineral right was converted (which was not legally possible). The same decision as the one in *Newcrest* should have been arrived at in *Agri SA III* and *IV*. The compensation provided for in the Constitutional property clause and item 12 of schedule II of the MPRDA should have made it even easier to arrive at such a decision.¹⁹³ We have seen that the majority of the SCA in *Agri SA III* accepted that the presence of compensation is a factor that may point to an expropriation.¹⁹⁴ The fact that item 12 of the transitional arrangements made provision for compensation was, however, dismissed as follows by Mogoeng CJ in *Agri SA IV*:

"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".¹⁹⁵

Despite the absence of a provision of compensation, the High Court in *Newcrest* nevertheless recognised that resumption took place. Such recognition enhanced the security of mineral tenure on the federal level in Australia. Despite the presence of a property clause and a statute authorising payment of compensation, the SCA and CC in the *Agri SA* line of decisions did not recognise that expropriation took place. These decisions do not enhance security of mineral tenure¹⁹⁶ nor the sanctity of constitutional property in South Africa.

6 Conclusion

Despite differences between the Mineral law of Australia and South Africa (prior to the MPRDA), a useful comparison can be drawn between the *Newcrest* decision and the *Agri SA* line of decisions. Both cases dealt with the issue of whether holders of mineral rights/mining rights were expropriated by a statute which in effect prohibited mining of minerals and alienation of rights. The Australian statute did not provide for a claim of compensation, whereas, the South African statute did. The decisions were arrived at by looking at the content or entitlements (or incidents) of mineral rights or mining rights, and the meaning of deprivation and

193 Van der Vyver 2012 *De Jure* 142 states: "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 s 25 of the Constitution" (see also Froneman J (par 80)).

194 *Agri SA III* par 18.

195 *Agri SA IV* par 74.

196 See further, Badenhorst "Security of mineral tenure in South Africa: Carrot or stick?" 2014 (32.1) *Journal of Energy & Natural Resources Law* 5.

acquisition as elements of an act of expropriation under both systems. The views as to what constitute acts of deprivation and acquisition were similar. Deprivation was perceived as an interference with/prohibition of the exercise of entitlements, sterilisation of entitlements, or extinguishment of entitlements of mineral rights/mining rights. For purposes of acquisition, it was required that the State acquires some entitlements of a mineral right/mining right, something which resembles these entitlements, benefits or some form of property. Even though the simplified facts of the two cases and views about deprivation and acquisition were largely the same, the views of the courts differed as to whether deprivation and/or acquisition of property actually took place.

In *Newcrest* the majority of the High Court recognised that deprivation and acquisition of entitlements, rights or advantages by the Commonwealth took place. The findings and reasoning of the majority of the High Court in *Newcrest* cannot be faulted. The object of the statute was achieved, namely, nature conservation by prohibiting mining in a National Park. A National Park was extended for the benefit of all Australians. Despite the absence of a statutory compensation claim, security of mineral tenure was enhanced.

In *Agri SA II* the content of mineral rights and deprivation and expropriation of mineral rights by the State were recognised. The outcome of the decision was that the object of the statute was achieved, namely, transformation of the mineral right holding of the past, whilst the expropriation of holders of mineral rights was recognised and compensated. Fair transformation was achieved.

However, in *Agri SA III* the Supreme Court of Appeal sadly refused to recognise the existence of the well-defined content of mineral rights, or the deprivation and acquisition of rights or entitlements which took place. These aspects should have been apparent to a reader of Mineral law. In *Agri SA IV* the content of mineral rights was largely resurrected and the deprivation of entitlements or mineral rights was not denied by the CC. Nevertheless, the majority of the CC still denied that acquisition thereof by the State took place because of the transformation objectives of the MPRDA and the property clause itself. Denial of acquisition entitlements was based upon the adoption of the custodian construction. Apart from cost implications, it is unclear why expropriation with compensation, as provided for in item 12(1) of Schedule II to MPRDA and section 25 of the Constitution, cannot take place during such transformation. Security of mineral tenure of unused old order rights and new prospecting and mining rights was also not enhanced. Even if the acquisition of entitlements or rights could not have been recognised by the CC, a sound principle could have been derived from the *Newcrest* decision, namely, that the State acquired the benefit of "mineral land", freed from the former unused old order rights in respect of which new prospecting and mining rights could be granted by the State. The objective of the statute was achieved by the outcomes of *Agri SA III* and *IV*, namely, as part of the transformation of the former mineral holding

in South Africa by imperceptible enlargement of the *fiscus* for eventual “distribution” by the State to “worthy” applicants. Transformation was, however, achieved at the expense of former holders of unused old order mineral rights and security of mineral tenure despite the protection afforded by the constitutional property clause and item 12(1) of Schedule II to the MPRDA. Valuable assets were taken without compensation and the fine balance between protection of property and transformation was not maintained. Rectifying the injustices of the past by denying the expropriations of today did not further the protection of property under the property clause in South Africa. The true content of mineral rights of the old order and the value of the academically much-vaunted property clause of the South African Constitution has largely been undermined by the SCA and the CC, respectively.