IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

28/4/2011 .....

DATE SIGNATURE

Case No: 55896/07

Date heard: 7/3/2011 – 18/3/2011

Date of judgment: 28/04/2011

In the matter between:

Agri South Africa	Plaintiff
and	
Minister of Minerals & Energy	Defendant
and	
Centre for Applied Legal Studies	Amicus Curiae

JUDGMENT

DU PLESSIS J:

Introduction

[1] This is a claim for compensation consequent upon an alleged expropriation by the State.

[2] The **Mineral and Petroleum Resources Development Act, 28 of 2002** ("the MPRDA") came into force on 1 May 2004. Section 3(1) thereof provides: "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans." Apart from transitional measures to which I shall refer later, the MPRDA does not recognize the existence of common law mineral rights as they existed directly before the act took effect.

[3] When the MPRDA commenced, a company, Sebenza Mining (Pty) Ltd[1] (Sebenza), held the coal rights on and under Portion 4 of the farm Goedehoop 169 and also those on and under the Remaining Extent of the same farm. (I shall refer to these two farms collectively as "the farms".)

[4] The plaintiff, as cessionary of Sebenza's alleged right to compensation, contends that Sebenza was on the date of commencement of the MPRDA expropriated of its coal rights. It is the plaintiff's case that the very enactment of the MPRDA constituted an expropriation. Accordingly, the

[1] The company was previously known as Bulgara Investment Holdings (Pty) Ltd t/a Sebenza Mining. It is common cause that its name was changed to Sebenza Mining (Pty) Ltd and that is how I shall refer to it.

plaintiff claims compensation[2] from the Minister of Mineral Resources[3] who, as the appropriate member of the National Executive, is cited for and on behalf of the State.

[5] By order of this Court, the Centre for Applied Legal Studies was allowed to intervene as *amicus curiae* ("the *amicus*) in respect of the constitutional issue that arises. The *amicus* adduced no evidence nor did its counsel cross examine any witness. At the end of the trail its counsel presented helpful written and oral argument for which the court is indebted to them.

The Issues

[6] Subsections 25(1) and (2) of the **Constitution of the Republic of South Africa, 1996** provides as follows:

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

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

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[2] Item 12 of Schedule II to the MPRDA provides for compensation. I shall in due course make more detailed reference to this provision.

[3] The Minister is cited as the Minister of Minerals and Energy. The name of the Department has since been changed.

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

[7] It is the plaintiff's case that on the commencement-date of the MPRDA, Sebenza's coal rights were expropriated in terms of section 5 as read with sections 2, 3 and 4 of the MPRDA. Accordingly, the plaintiff contends that, viewed through the prism of the Constitution[4], it is entitled to compensation determined in terms of the MPRDA[5] read with the **Expropriation Act, 63 of 1975**.

[8] Stripped of issues that have been resolved between the parties and also of amplifications that are in the defendant's plea, the plea raises essentially three issues: Did the MPRDA deprive[6] Sebenza of its coal rights? If so,[7] was Sebenza expropriated of its coal rights? If so, is Sebenza (and thus the plaintiff as cessionary) entitled to compensation?

[9] It is of note that Mr Badenhorst for the defendant and Mr Budlender for the *amicus* accepted that Sebenza's coal rights as they were before the

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[4] Section 25(3).
[5] Item 12 of Schedule II to the MPRDA.
[6] While counsel for the defendant accepted that the MPRDA destroyed common law mineral rights, he argued that such destruction was of a regulatory nature and that the rights were replaced by functional equivalent rights. Hence, the destruction did not amount to a deprivation under section 25(1).
[7] It follows from the provisions of section 25(1) and (2) of the Constitution that there can be no expropriation if there was no deprivation of property. See also **First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)** at para. 58-59.

enactment of the MPRDA constituted property as envisaged in section 25 of the Constitution. As will more fully appear from my analysis of the nature and content of common law mineral rights (of which the coal rights constitute a species), this concession was rightly made.

The Facts

[10] The plaintiff called three factual and two expert witnesses. The defendant called two factual and one expert witness.

[11] It is convenient to deal with the evidence of each witness when discussing the respective issues to which the evidence of each relates. The essential facts are uncontroversial. What follows is a brief overview thereof.

[12] Agri Suid Afrika (Agri SA) is an important role player in the field of commercial agriculture in South Africa. It is a federal association representing the interests of commercial farmers. Its members are provincial faming associations and a number of farming interest-groups. Agri SA's provincial members in turn have local agricultural unions as their members. Individual farmers belong to local agricultural unions. Although it thus has no individual farmers as members, Agri SA ultimately represents the interests of commercial farmers. In various ways and by

various means, Agri SA seeks to contribute to the well being of agriculture in this country. It regularly engages with the government regarding matters that concern farmers and agriculture in general.

[13] Agri SA established the plaintiff, an association not for gain under section 21 of the **Companies Act, 61 of 1973.** Under its articles of association, three of the plaintiff's objects are to make representations to Parliament in relation to legislation that might affect commercial farming, to institute court proceedings to challenge, in the interest of farming, such legislation and to institute legal proceedings to protect the rights and interests of the commercial farming community.

[14] Mr JF van der Merwe, one of the plaintiff's directors and the chief executive of Agri SA, explained that Agri SA took an active part in the consultation process that preceded the enactment of the MPRDA. When the MPRDA was enacted, Agri SA obtained counsel's opinion that the act constituted an expropriation of property. The Minister and the Department of Mineral Resources (DMR) did not agree. Agri SA decided to institute court proceedings in order to seek legal clarity.

[15] Agri SA instructed their attorneys, MacRobert Inc ("MacRoberts") to find a suitable case to serve as a test case and to obtain cession of the relevant right holder's right to compensation. Sebenza was identified as a

suitable cedent. I now turn to a brief account of the background to Sebenza's coal rights and the cession.

[16] Sebenza had bought the relevant coal rights in November 2001 for R1 048 000. The rights were delivered to it by way of a notarial cession. Sebenza, however, never obtained a prospecting permit or a mining authorisation under the **Minerals Act, 50 of 1991** ("the Minerals Act.)[8] There also is no evidence that Sebenza ever conducted mining or prospecting operations on the farms.

[17] On 29 April 2004 the members of Sebenza took a special resolution that the company be placed under a creditors' voluntary winding up.[9] On 18 May 2004 the resolution was registered with the Registrar of Companies and Sebenza was placed under liquidation. Provisional liquidators were appointed in September 2004 and in the same month they advertised Sebenza's coal rights for sale. It is important to note that by then the MPRDA had commenced.[10]

[18] The liquidators received an offer from Metsu Trading (Pty) Ltd (Metsu) to purchase the coal rights for R750 000. They instructed an

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[8] The MPRDA repealed the Minerals Act.
[9] See sections 349 and 351 of the Companies Act.
[10] It will be recalled that the commencement date was 1 May 2004.

auctioneer, Mr Bonini, and a mining engineer, Dr Peter Cox[11] to visit the farms so as to evaluate the coal rights. Bonini and Cox advised the liquidators that if the latter could obtain a price of R700 000, they should accept it.

[19] The liquidators accepted Metsu's offer. After the purchase price had been paid, the liquidators and Metsu respectively received legal advice that the purported sale was void in view thereof that, in terms of the MPRDA, the coal rights had ceased to exist. The liquidators repaid the R750 000 to Metsu.

[20] In March 2006 the liquidators, contending that Sebenza had been expropriated, lodged with the DMR a claim for compensation[12]. At this stage, Agri SA identified Sebenza's claim as a suitable one to serve as a "test case", and the claim for compensation was ceded to the plaintiff. The plaintiff paid the liquidators R250 000 for the ceded right. The DMR rejected the claim and these proceedings were commenced.

[21] When he cross examined Mr Van der Merwe[13], counsel for the defendant put questions that seemed to imply some sort of impropriety on the part of Agri SA and the plaintiff in launching these proceedings. On

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[11] Dr Cox later gave expert evidence for the plaintiff, expressing his opinion as to the value of Sebenza's coal rights before the MPRDA took effect.
[12] The claim was lodged under item 12 of Schedule II to the MPRDA read with regulation 82A(1) of the Regulations promulgated under the MPRDA.
[13] Agri SA's chief executive

the pleadings no such impropriety is raised. It suffices therefore to state that Mr Van der Merwe candidly and satisfactorily explained that, from the point of view of Agri SA this is a "test case" instituted in the interests of legal certainty. There is nothing in his evidence, or in the evidence of any other witness, that goes towards indicating anything other than a genuine desire to obtain clarity. Obviously, Agri SA has a viewpoint as to whether the MPRDA effected expropriation. The defendant holds a contrary viewpoint. That is ultimately what this case is about.

Rights to Minerals Before and After the MPRDA.

[22] In order to decide whether Sebenza has been expropriated by the enactment of the MPRDA, it is first necessary to determine the content of its rights as they were before the MPRDA took effect. It is also necessary to determine how the MPRDA affected, not only the coal rights as such, but also the content of those rights. I start with mineral rights as they existed before the MPRDA took effect.

Mineral Rights Before the MPRDA[14]

[14] In what follows concerning the legal position before the advent of the MPRDA, I have made free use of **Franklin and Kaplan: The Mining and Mineral Laws of South Africa** (Chapter 1, paragraph II), **Van der Merwe: Sakereg** (2nd ed., Chapter 12); **Wille's Principles of South African Law** (8th ed. by **Hutchisen *et al***, p. 277 and onwards); **Silberberg and Schoeman's the Law of Property in South Africa** (4th ed. by **Badenhorst, Pienaar and Mostert** Chapter 16,.)

[23] In principle, an owner of land is at common law also the owner of everything below the surface, including minerals[15]. Such owner was therefore, in principle, at common law entitled to prospect for valuable minerals, to mine them and to keep, sell or otherwise alienate them.[16] The owner's right to mine and dispose of minerals has, however, throughout South Africa and from early on been restricted and regulated by various statutes. It is for present purposes unnecessary to go into the nature and effect of statutory restrictions that affected landowners.

[24] A corollary of the principle that land is owned upwards and downwards from the surface is that under our law horizontal layers of land cannot be owned separately.[17] Yet, due to our mineral wealth and extensive mining activities, the need arose for the possibility that rights to minerals be separable from the land title. Relatively early in our legal history, our courts and legislatures evolved a structure whereby mineral rights could be registered separately and thus be separated from the title to the land.[18] In the result it became "generally accepted that a distinction must be made between the owner's rights on and to the surface of land, and those of the holder of mining and mineral rights."[19]

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[15] **Union Government v Marais and Others 1920 AD 240** at 246; **Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA)** at para.16.
[16] **Reed v De Beers Consolidated Mines (1892) 9 SC 335** at 350
[17] **Coronation Collieries v Malan 1911 TPD 577** at 591. **Van der Merwe: Sakereg** notes that sectional title is a statutory exception to this rule.
[18] **Van der Merwe** *op. cit.* p. 553-4.
[19] **Silberberg** *op. cit.* p. 331.

[25] From a deeds registry point of view, separation of mineral rights could be effected by way of, essentially, two methods[20]: A certificate of rights to minerals could be taken out and a notarial deed of cession of mineral rights could be registered against the title deed of the property. The underlying *causa* for the separation could, of course, vary.[21] It is in the factual context of this case of note that, with an exception that is not now relevant, separation could take place "either in respect of all minerals generally or of a particular mineral or minerals ...".[22] Thus, in this case, Sebenza held rights only to coal.

[26] "The nature of rights to minerals which had been separated from the ownership of the land, as they had developed in South Africa, was describer by Innes CJ in *Van Vuuren and Others v Registrar of Deeds 1907 TS* 289 at 294 as being the entitlement 'to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away'. As those rights could not be fitted into the traditional classification of servitudes with exactness ... they had to be given another name, and the Chief Justice dubbed them quasi-servitudes, a label that has stuck[23]. They are real rights. Their exercise may conflict with the interests of the landowner. In a case of irreconcilable conflict the interests of the latter are subordinated, for if it were otherwise

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[20] See section 70 and 71 of the **Deeds Registries Act, 47 of 1937**.
[21] **Silbergerg** *ibid.*; **Van der Merwe** *op. cit.* p.556-7.
[22] **Silberberg** *op. cit.* p. 331-2.
[23] I might add that, from the text books I have referred to it is apparent that academic writers prefer to refer to mineral rights a *sui generis* real rights.

the grant of mineral rights might be deprived of content. ... For so long as minerals remain in the ground they continue to be the property of the landowner: only when the holder of the right to minerals severs them do they become movables owned by him." (**Trojan Exploration Company (Pty) Ltd and Another v Rusteburg Platinum Mines Ltd and Another 1996 (4) SA 499 (AD)** at 509G to 510A).

[27] As to the ownership of minerals once they are severed from the land, Schutz JA, who wrote the majority judgment in the **Trojan**-case [24] said: "It has been argued, and I think that the argument is correct, that in 1966[25] already, contingent intentions were formed, by the landowner to transfer ownership of severed ore to the holders of the mineral rights, and by each of the latter to receive such ownership. The contingency was severance." Botha JA, who wrote a separate judgment concurring with the majority, expanded on this contingent ownership: "In my judgment the legal principles by which the issues are to be resolved can be briefly stated as follows. In general, when a cession of mineral rights is effected, both the cedent and the cessionary intend that the transfer of the rights will ultimately result in the transfer of the ownership in the minerals to the cessionary, if and when the minerals are severed from the land. The immediate transfer of the ownership of the minerals is impeded only by the

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[24] At page 528J to 529A.
[25] While mineral rights were in the **Trojan**-case separated from the land before that, 1966 is the year in which rights to minerals were split between two holders: Rights to precious metals were transferred to one entity while the right to base metals and minerals were retained by another. The legal relationship between the different right holders was at issue.

fact that they still form part of the land. That impediment is removed as soon as the ore containing the minerals is severed from the land. A new movable *res* is then created which is the object of separate ownership. At that moment, in my opinion, the ownership of the ore vests in the cessionary, as was envisaged in the act of the cession, and this vesting takes place automatically, by operation of law, and by virtue of the act of severance. It does not matter, in my opinion, how and by whom the act of severance is effected, whether by natural forces, or by the holder of the rights, or by the landowner, or by a thief. This is the only way of which I can conceive in which the law can give proper effect to the unique features of the reservation of mineral rights and their transfer as recognised in this country. If this manner of the passing or the acquisition of ownership does not fit into any hitherto recognised niche, a new one will have to be found to cater for it."[26]

[28] By virtue of his real right to the relevant minerals, the mineral rights holder could grant to a third party by way of a prospecting contract or a mineral lease, the right to prospect for or to mine the relevant minerals. In return for such grants, the holder of the mineral right could receive, in different forms, payment and, depending of course on the minerals in question, substantial payment. For instance, royalties received under a

[26] *The Trojan-case*, p. 534F to I.

mineral lease could, and in many cases did, serve as a handsome pension.[27]

[29] To sum up thus far, but without attempting an exhaustive list[28], the holder of mineral rights had a real right entitling him or her to go upon the land to search for minerals. If minerals were found, the holder was entitled to sever them and to carry them away[29]. Such holder held a contingent right to the ownership of the relevant minerals: Once they were severed from the land[30], the minerals became his or her property. These rights were transferable and could be sold, otherwise alienated, used as security and in general be dealt with to the benefit of the holder. The holder of mineral rights was, as a general proposition, under no obligation to exploit the minerals.

[30] It follows that the mineral right holder's rights constituted a valuable asset that he "could bequeath to his heirs. He could sell it".[31] He could in general deal with it to his advantage and he could also retain it as an investment.

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[27] During cross examination, counsel for the plaintiff illustrated this when he put the hypothetical case of Mr Khumalo to the Director-g
General of the DMR.
[28] Compare the useful summary in **Badenhorst and Mostert: Mineral and Petroleum Law of SA**, 3-11, 3-12.
[29] Before the enactment of the **Minerals Act, 50 of 1991** the right to prospect for natural oil and to mine for and dispose of precious metals, natural oil and precious stones vested in the State (**Silberberg** p. 329). The contingent ownership of these minerals, however, remained that of the holder of mineral rights.
[30] By whomsoever.
[31] **Agri SA v Minister of Minerals and Energy 2010 (1) SA 104 (GNP)** at 111, para. 9.

[31] As to the right not to exploit the mineral in question, Mr Badenhorst for the defendant emphasised that that meant that the holder of the mineral rights could sterilize or hoard the minerals. That is true. But it is equally true, as Mr Van der Merwe pointed out in his evidence, that there is also a social imperative to balance the agricultural value of the surface against the need to exploit minerals under that surface. That is of particular importance in the case of open cast mining operations. Environmental considerations also play a role. In short, the right not to exploit minerals is not necessarily negative or contrary to the public interest.

[32] I now turn to statutory regulation of mineral rights, including coal rights.

[33] The **Minerals Act, 50 of 1991** came into force on 1 January 1992. It repealed most of the preceding mining legislation[32] and it was current until the MPRDA repealed practically the whole of it.[33] The content of Sebenza's rights as they existed directly before the enactment of the MPRDA must therefore be determined in the light of the Minerals Act.

[34] Section 5 of the Minerals Act confirmed that the right "to enter upon ... (the) land ... to prospect and mine for such mineral ... and to dispose

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[32] **Silberberg** *op. cit.* 329, footnote 9.
[33] Schedule I to the MPRDA.

thereof" vested in the holder of mineral rights[34] and in persons authorised by such holder. Under the same act, the exercise of these rights was subject to regulation, however.[35]

[35] The Minerals Act provided for the issue by the State of prospecting permits[36] and mining authorisations.[37] These entitlements to prospect or mine could only be issued to the holder of the right to the mineral in question or to a person who had "acquired the written consent of such holder".[38] In the case of a mining authorisation the applicant who applied with the consent of the holder of the mineral rights also had to have the written authorisation to mine for the mineral in question on his own account and to dispose thereof.[39]

[36] In a nutshell, directly before the MPRDA came into force, Sebenza had the common law rights summarised in paragraph 28 above. Although the rights included the right to prospect and to mine, the exercise of those rights were subject to authorisation by the State. No person or entity other than Sebenza had the right to prospect for or mine coal on the farms if such person or entity had not acquired Sebenza's written consent. It is

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[34] See the definition of "holder" in section 1 of the Minerals Act.
[35] The introductory part of section 5 rendered the rights 'subject to the provisions of' the Minerals Act.
[36] Section 6.
[37] Section 9. Temporary authorizations under section 10 of the Minerals Act are not now relevant.
[38] See section 6(1), 6(2)(a), 9(1) and 9(5)(a). Section 17 provided for exceptions that are not relevant now.
[39] Section 9(1)(b).

self-evident that, apart from commercial value of the coal rights as such, the written consent to prospect or to mine also had commercial value.

The Effect of the MPRDA

[37] Schedule II of the MPRDA contains transitional arrangements that are directly relevant to the issues in this case. I shall first consider the provisions of the MPRDA itself and thereafter those of the transitional arrangements contained in Schedule II thereto

The MPRDA

[38] The enactment of the MPRDA must be understood in the context of our history of racially discriminatory property laws. As Mr Budlender for the *amicus* pointed out, the practical effect of this history is that, because property was almost exclusively owned by white people, it followed that mineral rights were also in the hands of almost exclusively white people.

[39] According to its long title, the MPRDA was enacted to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources ...". According to its preamble the enactment of the MPRDA reaffirms, *inter alia*, "the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources". By enacting the MPRDA,

Parliament also took into consideration "the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination." It is, therefore, not surprising that, in terms of section 2(c), it is one of the objects of the MPRDA to "promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa". [40] The Constitutional Court has repeatedly stressed the need for and the constitutionality of measures aimed at attaining and ensuring substantive equality.[41] In **Bengwenyama Minerals (Pty) Ltd and Others v Gemorah Resources (Pty) Ltd and Others (Bengwenyama-ye-Maswati Royal Council Intervening)**[42] the Constitutional Court pointed out that the MPRDA was enacted "amongst other things to give effect to those constitutional norms". Accordingly, the constitutionality of the MPRDA is not in issue in this case.

[40] Further objects of the MPRDA are to "recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic"[43] and to "give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources."[44]

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[40] See also section 2(d).
[41] Section 9(2) of the Constitution ensures substantive equality. See for instance **Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC)** at para. 25 to 31.
[42] **2011 (3) BCLR 229 (CCC)** at para. 3.
[43] Section 2(a). Prof. Barton, who gave expert evidence for the defendant confirmed that this is internationally accepted.
[44] Section 2(b). Prof. Barton was not familiar with this concept.

[41] In terms of section 3(1) mineral resources "are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans". Under section 3(2) the State, as the custodian of the nation's mineral resources, may through the Minister "grant, issue, refuse, control, administer and manage any ... prospecting right, permission to remove, mining right, mining permit[45] ... (and) retention permit ...".[46]

[42] Under section 16 of the MPRDA any person who wishes to do so, may apply to the Minister for a prospecting right. Such an application must comply with stated requirements and it is submitted to a Regional Manager of the DMR. If the requirements are met and no other person holds a prospecting right, mining right, mining permit or retention permit "for the same mineral and land", the Regional Manager must accept the application. On acceptance, the Regional Manager must notify the applicant to submit an environmental management plan and to give written notice to the land owner, the lawful occupier or other affected person and to consult with them. On receipt of the environmental management plan and a report as to the outcome of the consultations, the Regional Manager submits the application to the Minister.

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[45] Mining permits are dealt with in section 27. They do not confer real rights and are issued where the minerals can be exploited within 2 years.
[46] These are rights and permits created by the MPRDA. I shall deal with each one in due course. I have included only those that are now relevant.

[43] The Minister's powers and duties regarding the grant or refusal of a prospecting right are set out in section 17. A prospecting right is granted for a limited period[47] but it can be renewed.[48]

[44] Section 5 of the MPRDA determines the legal nature of prospecting rights (and other rights that are relevant in this case) and also the nature of the rights of the holders of such rights. The section provides:

> "(1) A prospecting right (or), mining right, ... granted in terms of this Act is a limited real right in respect of the mineral ... and the land to which such right relates.
>
> (2) The holder of a prospecting right (or) mining right... is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.
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> (3) Subject to this Act, any holder of a prospecting right (or) a mining right ... may --
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> (a) enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be;

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[47] Section 17(6).
[48] Section 18.

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

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

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

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

(4) No person may prospect for or remove (or) mine ... any mineral ... or commence with any work incidental thereto on any area without --

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

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit (or) retention permit ..., as the case may be; and

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

[45] In addition to the rights referred to in section 5, the holder of a prospecting right has the exclusive right to apply for a renewal of the prospecting right and for a mining right.[49] Such a holder also has an exclusive right to remove and dispose of in limited quantities any mineral to which the right relates.[50] The holder must pay to the State prospecting fees and royalties in respect of minerals removed and disposed of.[51] Prospecting rights are registered in the Mining Titles Office contemplated in section 2 of the **Mining Titles Registration Act, 16 of 1967**.[52]

[46] The holder of a prospecting right must generally commence prospecting within a limited time period.[53] Under section 31 the holder of a prospecting right may, however, apply for a retention permit. Apart from other requirements that are presently irrelevant, the holder of the prospecting right can apply for a retention permit if he or she has prospected, established the existence of a mineral reserve with mining

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[49] Section 19(1)(a) and (b).
[50] Sections 19(1)(c) and 20.
[51] Section 19(2)(f) and (g).
[52] Section 19(2)(a) and the definition of "Mining Titles Office" in section 1.
[53] Section 19(2)(b).

potential and has "studied the market and found that the mining of the mineral in question would be uneconomical due to prevailing market conditions".[54] The Minister has a discretion to refuse a retention permit.[55] A retention permit is granted for a limited period[56] and the holder thereof has an exclusive right to apply for a mining right.[57] A retention permit can be renewed.[58]

[47] The second relevant real right created by section 5 is a mining right. Section 22(1) of the MPRDA provides that any person may apply for a mining right. The application procedure is similar to that for a prospecting right albeit that the requirements are more onerous and costly. The latter is apparent from the undisputed evidence of Dr Peter Cox who gave expert evidence for the plaintiff.[59] The holder of a mining right has the exclusive right to apply for renewal thereof.[60] The holder of a mining right must pay royalties to the State.[61] Mining rights are also registered in the Mining Titles Office.

[48] Under section 11 of the MPRDA prospecting and mining rights and interests in such rights are transferable subject to the Minister's written consent. With such consent, the rights can be "ceded, transferred, let,

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[54] Section 32(1)(b), (c) and (d).
[55] Section 33.
[56] Section 32(2).
[57] Section 35(1).
[58] Section 34.
[59] See also sections 22 and 23.
[60] Sections 24(1) and 25(1).
[61] 25(2)(g).

sublet, assigned, alienated or otherwise disposed of. The Minister's power to refuse consent is limited by section 11(2). Such rights can, however, without the Minister's consent be encumbered by mortgage.[62] Transfers and mortgages are registered in the Mining Titles Office.[63]

[49] There is some debate as to the legal nature of the custodianship created in section 3 of the MPRDA and as to the effect thereof on the landowner's ownership of the minerals before they are severed from the land.[64] It is unnecessary for purposes of this judgment to consider that issue and I express no view theron.

[50] The MPRDA does not recognise the quasi-servitude of the holder of mineral rights that have been severed from the land title. In fact, it has become settled that those rights have disappeared with the enactment of the MPRDA.[65] Under the MPRDA the holder of mineral rights no longer has an asset that can be sold, otherwise alienated, used as security or kept as an investment. The mineral right holder's contingent ownership in the minerals, once severed, has similarly disappeared. The right to grant, subject to statutory regulation, the right to others to prospect for and mine has disappeared. In sum the holders of mineral rights have, since the

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[62] Section 11(3).
[63] Section 11(4).
[64] **Badenhorst and Mostert**, *op. cit.* 13-3 to 13-8; **Dale: South African Mineral and Petroleum Law**, MPRDA-125 and onwards.
[65] **Agri SA v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy 2010 (1) SA 104 (NGP)** at para. 11. **Holcum (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others (641/09) [2010] ZASCA** at para. 25.

enactment of the MPRDA, not one of the competencies that the law conferred upon them by virtue of the quasi-servitude. All that the MPRDA conferred on those holders is the right to apply, in competition with any other person, to be granted a prospecting right or a mining right. Such rights are granted on a "first-come-first-serve" basis. If applications are received on the same day, preference is given to applications from historically disadvantaged persons.[66]

[51] Although the concept of holding mineral rights as a quasi-servitude has disappeared, the content of those rights have not. As is evident from my summary of the provisions of the MPRDA, the act has conferred upon the Minister the power to grant prospecting and mining rights. The previous system of an underlying private law real right as a prerequisite for prospecting and mining entitlements have been subsumed into the Minister's power to grant mining and prospecting rights.[67]

[52] When the Minister grants a prospecting or a mining right, she grants, in terms of section 5 of the MPRDA, a limited real right the content whereof is similar to the content of the rights of the holder of mineral rights. The combined rights[68] of the holders of prospecting and mining rights are to go upon the land, search for minerals and if found, mine

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[66] Section 9.
[67] See the **Holcum**-judgment at para. 21.
[68] It must be borne in mind that the holder of a prospecting right has an exclusive right to apply for a mining right.

them, carry them away and dispose of them. It is the Minister who grants those rights. Even the right for a limited period not to exploit the minerals for economical reasons can be granted under a retention permit.

The Transitional Arrangements in Schedule II

[53] **Schedule II** to the MPRDA ("the Schedule") uses the terms "old order right", "old order mining right", "old order prospecting right" and "unused old order right". The Schedule confers on the holders of such "old order rights" entitlement to rights under the MPRDA. It is important to bear in mind that these concepts are defined in the Schedule and must therefore not simply be equated with rights that existed before the MPRDA came into force. "Old order right" is defined as 'an old order mining right, old order prospecting right or unused old order right, as the case may be". "Old order prospecting right" and "old order mining right" deal with cases of active prospecting and mining at the time of the commencement of the MPRDA. It is common cause that they are not relevant to the present case.

[54] "Unused old order right" is defined as "any right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect". The first category of rights listed in Table 3 of the Schedule

comprises: "A mineral right under the common law for which no prospecting permit or mining authorisation was issued in terms of the Minerals Act". It is not in issue that Sebenza's coal rights fall into category 1 and therefore is an "unused old order right" as defined.

[55] Item 8 of the Schedule deals with the"unused old order rights". The item provides as follows:

> "8. Processing of unused old order rights.—(1) Any unused old order right in force immediately before this Act took effect continues in force subject to the terms and conditions under which it was granted, acquired or issued or was deemed to have been granted or issued for a period not exceeding one year from the date on which this Act took effect.
>
> (2) The holder of an unused old order right has the exclusive right to apply for a prospecting right, or a mining right as the case may be, in terms of this Act within the period referred to in subitem (1).
>
> (3) An unused old order right in respect of which an application has been lodged within the period referred to in subitem (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this Act or is refused.

(4) Subject to subitems (2) and (3), an unused old order right ceases to exist upon the expiry of the period contemplated in subitem (1)."

[56] The only right that item 8 confers upon the holder of an unused old order right is, as was correctly pointed out by Mr Grobler for the plaintiff, the exclusive right for one year to apply for a prospecting or a mining right under the MPRDA.[69] Such holder's application, and the holder, had to comply with all the requirements that the MPRDA sets in respect of the respective rights.

[57] It is in the context of what the Schedule has conferred upon Sebenza that item 8(1) must be understood. In Sebenza's case, where no private law prospecting or mining rights had been granted and no prospecting permit or mining authorisation had been issued, Sebenza's old order right continued in existence for a year after the enactment of the MPRDA but the right had no content other than entitling Sebenza exclusively to apply for a right under the MPRDA. The coal rights with their content as they existed before the MPRDA had been legislated out of existence.[70]

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[69] See the **Holcum** judgment. Para. 26I; **Dale**, *op. cit.*, Sch II-212.
[70] Different considerations as to the content of the unused old order right might apply where, for instance, a prospecting permit or a mining authorisation had been issued. I need not deal therewith.

[58] For the plaintiff Dr Peter Cox, a mining engineer, gave expert evidence. His undisputed evidence was that in 2005 an application for a prospecting right under the MPRDA would have cost approximately R50 000. Also in 2005, an application for a mining right would have cost approximately R1,5 million.

Expropriation

[59] Item 12(1) of the Schedule provides as follows: "Any person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State."

[60] As with all law, the provisions of item 12 must be read and understood in the light of the relevant provisions of the Constitution. Section 25 of the Constitution provides:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

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

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

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

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

[61] When it is contended, as in this case, that a person has been expropriated as envisaged in section 25(2), the first question is whether that person has been deprived of property as envisaged in section 25(1). That is so because "deprivation" in section 25(1) encompasses a wide

variety of possible interferences with property, while "expropriation" as used in section 25(2) constitutes "a subset of deprivations".[71]

Deprivation

[62] The defendant and the *amicus* accepted that Sebenza's coal rights constituted property for purposes of section 25 of the Constitution[72]. The question thereof is whether Sebenza has been deprived of that property.

[63] There are various means by which the State could deprive a person of property, for instance, by administrative act or by an order of court. In this case it is the plaintiff's contention that the act of deprivation (and of its species, expropriation) was effected by the very enactment of the MPRDA. Neither the defendant nor the *amicus* took issue with the contention that a legislative act could amount to a deprivation.[73] The point in issue is whether the MPRDA did indeed deprive Sebenza of its coal rights.

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[71] **Chaskalson and Lewis** as quoted in **First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)** at para. 57. See also paras. 58 to 60.

[72] See section 25(4)(b) quoted above.

[73] The **First National Bank** case referred to above is an example of deprivation by legislative act.

[64] In the **First National Bank** case[74] ("**FNB**") the Constitutional Court stated: "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned".[75] The exact ambit of the term "deprivation" was, however, not at issue in that case. From later judgments[76] of the Constitutional Court it is apparent that the ambit of the word "deprivation" is not necessarily as wide as the above quotation may convey: In **Mkontwana v Nelson Mandela Metropolitan Municipality and Another**[77] the majority of the Constitutional Court found it unnecessary to determine the exact meaning of "deprivation". Yacoob J, who wrote the majority judgment, however, stated[78] that whether "there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. .... No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment in an open and democratic society would amount to deprivation". In a minority judgment O'Regan J (Mokgoro J concurring) wrote[79] that "deprivation" should "not be given too limited a meaning. It should be emphasised,

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[74] Footnotes 7, 70 and 71.
[75] Para. 57.
[76] See in addition to the **FNB** and **Mkontwana** judgments, also **Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC)** at para. 35 and 36; **Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC)** paras. 38 and 39.
[77] **Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Other; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as *Amici Curiae*) 2005 (1) SA 530 (CC)**
[78] Para. 32.
[79] Para. 90

however, that there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute 'deprivations' for the purpose of *s* 25(1)".

[65] Paraphrasing and slightly changing his submission, Mr Grobler for the plaintiff correctly summarised the jurisprudence regarding the meaning of deprivation in section 25(1): The physical taking of property is not required. It suffices if one or more of the entitlements of ownership are interfered with. In order to determine whether there has been a deprivation of property, a court must consider the extent of the interference with the use and the enjoyment of the property. I would, as a proviso, repeat the words of O'Regan J: "It should be emphasised, however, that there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute 'deprivations' for the purpose of *s* 25(1)".

[66] The main contention on behalf of the defendant and of the *amicus* was that the MPRDA did not deprive Sebenza of its coal rights but only regulated the use thereof.

[67] I cannot agree. Regulating the use of property presupposes that the person whose use is regulated still has the property, albeit with

truncated content. It is, as I have pointed out, settled that Sebenza's coal rights have been legislated out of existence. From the date that the MPRDA took effect, it no longer had coal rights the use whereof could be regulated.

[68] There is no doubt that since its commencement the MPRDA has been regulating the use of all minerals and the entitlement thereto. But it does not regulate the use of their property by holders of erstwhile quasi servitudes. Since the enactment of the MPRDA the latter do not exist.

[69] As authority for the proposition that the MPRDA only regulates the use of their property by erstwhile mineral rights holders, Mr Badenorst for the defendant referred to the judgment of the German Constitutional Court in the case of **Nassauskeisung**[80]. The question of whether there has been a deprivation of property depends to a large extent on the legal nature and content of the property right in question. That is something that can be determined only with reference to, and knowledge of, the domestic law involved. I am, therefore, hesitant to rely on the judgment referred to as an aid to decide whether the MPRDA merely regulated Sebenza's coal rights or whether it deprived Sebenza thereof. With that cautionary remark in mind, I observe that the use of groundwater in that

[80] In **FNB** the Constitutional Court referred to this case in footnote 136 (para. 88) under the reference "58 BVerfGE 300". Mr Badenhorst referred to a translation in **Alexander, The Global Debate over Constitutional Property**, University of Chicago Press, 2006 at p. 139.

case was one of the competencies of the landowner. The legislation in question, regulating the use of groundwater, deprived the owner of that competency but not of the property itself.

[70] Mr Badenhorst further submitted that the MPRDA is regulatory of the rights of the holders of quasi-servitudes in that it aims at preventing the sterilisation and hoarding of mineral resources against the public interest. To that end, counsel argued, the MPRDA introduced into our law the internationally accepted principle of "use it or lose it". Prof. Barton's evidence illustrates that the principle is indeed internationally accepted. His evidence, however, does not assist in determining the constitutional context in which the principle is internationally applied and accepted. I need not go into that because in my view the MPRDA did not introduce the use it or lose it principle. From what I have said, it is apparent that the MPRDA with Schedule II introduced a principle of "You have lost it. Now apply within a year and if you qualify, you may use it". In that sense the MPRDA is, purely as an anti-sterilisation and an anti-hoarding instrument, rather blunt. I need not consider what the position would have been if the MPRDA had indeed introduced the use it or lose principle.

[71] Its objects[81] fortify the view that the MPRDA deprived the holders of common law mineral rights of their property: The State could not exercise sovereignty over all the minerals in the country and it could not become the custodian thereof on behalf of all South Africans as long as private law mineral rights existed. As Heher JA put it in the **Holcum**-judgment[82], "The new system and the old system of common law mineral rights are mutually exclusive".

[72] It was submitted on behalf of the defendant that the MPRDA did not deprive Sebenza of its coal rights. Sebenza lost its coal rights, it6 was argued, by reason of its own failure to use the transitional arrangements under the Schedule. Deprivation of property is a legal fact. If an interference with the use, enjoyment and exploitation of property has occurred that is sufficient to constitute a deprivation, that fact cannot be undone by offering to the deprived party something in the place of the deprived property. I agree with Hartzenberg J[83] that "item 8 of Schedule II does no more than to afford an opportunity to the holders of affected rights to mitigate their damages".

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[81] Section 2.
[82] Para. 23.
[83] **Agri SA v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy 2010 (1) SA 104 (NGP)** at para. 17.

[73] Particularly in Sebenza's case the evidence shows that it was, firstly, financially unable to apply for either a prospecting right or a mining right.[84] Secondly, being a company under liquidation, it clearly did not have the access to financial resources that the MPRDA requires of an applicant for those rights. Thirdly, as Mr Grobler for the plaintiff pointed out, rights under the MPRDA lapse if the holder thereof is liquidated or sequestrated.[85] Even if Sebenza had had the required financial resources, rights could not have been granted to it: they would have lapsed immediately.

[74] In his testimony the Director-General said that Sebenza could have utilised the transitional provisions of item 8 by way of what was termed a "simultaneous cession". Mr Nogxina explained that Sebenza could have identified a willing purchaser for the rights to be obtained under the MPRDA. It could then have applied for the relevant right and at the same time have applied for a transfer of the right, once granted, to the purchaser. As was pointed out to the witness in cross examination, Sebenza could not have used this "simultaneous cession" procedure. For it to have applied and be granted rights under the MPRDA, Sebenza had to comply with all the requirements of the MPRDA for the grant of such a right. It did not, and could therefore not have been granted such rights.

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[84] The expert evidence of Dr Cox as to the cost of these applications and the evidence of the liquidator, Mr Pellow, that Sebenza could not afford it, is not in issue.
[85] Section 56(d) of the MPRDA.

Moreover, as it was in liquidation, rights could not have been granted to it. In any event, to utilise the "simultaneous cession", the purchaser also had to comply with the requirements for the grant of the right. From facts put to Mr Nogxina, facts that he could not dispute, it is clear that Metsu did not have the required access to financial resources. Generally, I am in any event of the view that the question whether holders of quasi-servitudes should or should not have used the "simultaneous cession" procedure does not inform the question as to whether there has been a deprivation of property. It informs the question as to whether reasonable steps to mitigate the loss of property have been taken.

[75] Finally, as to deprivation, Mr Badenhorst submitted that, in any event, Sebenza was not deprived of its property on 1 May 2004 (when the MPRDA commenced). The argument continued that the deprivation, if there had been one, took place a year later when the transitional right under item 8 lapsed. For the reasons that I have given, I do not agree. As Mr Grobler put it, on the day before the commencement of the MPRDA Sebenza had a real right in the form of quasi-servitude. On the following day it only had a right to apply to be granted competencies that the real right had conferred upon it.

[76] The MPRDA is a law of general application as is required by section 25(1) of the Constitution. The plaintiff did not contend that the

MPRDA arbitrarily deprived it of its property. Although arbitrariness is not in issue, I must make a few remarks about it. Counsel for the defendant and counsel for the *amicus* made much reference to the objects of the MPRDA, to the fact that it seeks to redress the effects of past racial discrimination and to the fact that its objects and it regulatory scheme are internationally accepted.[86] As I have said, deprivation of property is a legal fact resulting from an act, administrative, judicial or legislative. The object of the act in question may be of limited relevance to determine whether the interference was sufficiently substantial to qualify as a deprivation. From the judgments in **FNB**[87] and **Mkontwana**[88] it is apparent that when the court is considering section 25(1), the purpose of the act in question is really relevant as part of the inquiry into arbitrariness. It is in that context that the purpose of the act and the method of achieving, the proportionality between end and means, are relevant. Put differently, the purpose of an act of deprivation cannot change that which is a deprivation into not being a deprivation.

[77] I conclude that the MPRDA, by its very enactment, deprived, as envisaged in section 25(1) of the Constitution, Sebenza of its coal rights.

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[86] This appears from the evidence of Prof. Barton. The witness was, however, unable to give an expert opinion on the constitutional context of the international practices.
[87] **2002 (4) SA 768 (CC)** at para. 61 and onwards.
[88] **2005 (1) SA 530 (CC)** para. 34 and onwards,. See paras. 35 and 36 in particular.

Expropriation

[78] The next question is whether the deprivation constituted an expropriation as envisaged in section 25(2) of the Constitution. For an expropriation to have occurred, there must, in addition to the deprivation of property, be "appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right."[89] In the **Reflect-All** judgment[90] Nkabinde J said that "courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the State".

[79] Starting from the premise that the MPRDA has destroyed common law mineral rights, Mr Badenhorst submitted that those rights were not acquired by the State.

[80] Before dealing with the respective arguments, it is necessary to stress the following: The question of the expropriator acquiring rights must not be understood to mean that there must be a transfer of rights in

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[89] **Beckenstrater v Sand River Irrigation Board 1964 (4) SA 510 (T)** as quoted in **Harksen v Lane NO and Others 1998 (1) SA 300 (CC)** at para. 32.
[90] **Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC)** at para. 64

the legal sense. "The expropriating authority does not derive its title from its previous owner, but obtains its title by reason of the consequences attached by law to the operation of a valid notice of expropriation".[91] Expropriation is an original and not a derivate form of acquisition.[92] Also, and I understood Mr Badenhorst and Mr Budlender to have accepted this, it matters not what the right is called in the hands of the expropriator. The essential inquiry is whether the substance of the rights has been acquired by the expropriator.

[81] With a notable exception to which I shall refer, the Minister, when granting a prospecting or a mining right, is granting a real right with substantially the same content as the rights that the holders of quasi-servitudes had before the MPRDA. That is apparent from section 5 of the MPRDA that bears repetition here:

> "(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.
>
> (2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

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[91] **Stellenbosch Divisional Council v Shapiro 1953 (3) SA 418 (C)** at 423G to H.
[92] **Gildenhuys: Onteieningsreg** (2nd ed.) p. 11; **Carey Miller: The Acquisition and Protection of Ownership** (1986) 110.

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

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

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

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

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

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

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

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

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

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

[82] From a reading of sections 3 and 5 it is apparent that, when the MPRDA commenced, the State, acting through the Minister, was vested with the power to grant rights the contents whereof were substantially the same as, and in some respects identical to, the contents of the quasi-servitude of the holder of mineral rights. It follows that, by the enactment of the MPRDA, the State acquired the substance of the property rights of

the erstwhile holders of quasi-servitudes. The fact that the State's competencies are collectively called custodianship matters not.

[83] It might be argued that while the power to grant rights substantially the same as those that holders of quasi-servitudes had, the MPRDA did not vest the rights themselves in the State.[93] I would not agree with such an argument: It begs the very question whether the MPRDA offends against section 25(2); as long as their quasi-servitudes remained property in the hands of the holders thereof, the content of those rights could not be conferred on others. I nevertheless deal with the argument. In this regard it must be borne in mind that under section 25(2)(a) of the Constitution expropriation may also be "in the public interest". Under section 25(4)(a) the "public interest" includes "the nation's commitment ... to bring about equitable access to all South Africa's natural resources". That constitutional principle is reflected in section 2(c) and (d) of the MPRDA. It follows that in terms of the Constitution the content of the property rights expropriated need not always be acquired by the expropriator (the State). It would be sufficient if the property is expropriated in order in the public interest[94] to be acquired by third parties.[95]

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[93] Such an argument would offend against the property law principle that in order to confer rights, the entity conferring must have the rights.
[94] In the sense of section 25(4)(a) of the Constitution.
[95] **Southwood: The Compulsory Acquisition of Rights**, 19-24; **Budlender: Juta's New Land Law**, Chapter 1, 1-48 to 1-50; 1-7 to 1-8.

[84] Mr Badenhorst stressed that the holder of mineral rights had the competency not to use the mineral rights, for whatever reason. The State, counsel pointed out, did not acquire that competency. Save to the limited extent that retention permits can be granted under the MPRDA, the submission is correct. It does not follow, however, that there was no expropriation. Every owner of property has, subject to regulations, the right not to use the property. Every expropriation must, in terms of section 25(2) of the Constitution, be for a public purpose or in the public interest. From that it follows that, when property is expropriated, it must be used for a public purpose or in the public interest. The State cannot expropriate property in order not to use it. I hold that the mere fact that the State cannot, as a general proposition[96], decide not to use mineral rights does not mean that the State did not acquire the particular property in question, that is, Sebenza's coal rights.

[85] It is in this context important to bear in mind, as Mr Grobler has submitted, that because expropriation is an original and not derivative form of acquisition, the rights destroyed by the expropriation and those acquired by the expropriator need not be identical. As **Gildenhuys**[97] puts it: "Onteiening is die eensydige uitwissing deur die owerheid van vermoënsregte van 'n persoon ten aansien van goed, en daarmee saam

[96] There are circumstances under which the State may not grant rights to exploit minerals, for instance for environmental reasons.
[97] **Onteieningsreg** (2nd ed.) p. 8.

die eensydige verkryging van vermoënsregte oor daardie goed deur die owerheid of deur iemand anders".[98]

[86] Mr Badenhorst submitted that, in order to determine whether there has been an expropriation, not only the effect but also the purpose of the act of alleged expropriation must be had regard to. For the reasons stated the objects of the MPRDA could not be achieved without depriving mineral rights holders of their property and without vesting in the State similar rights. While not expressly stated, expropriation was one of the purposes of the MPRDA.

[87] In terms of section 25(2) of the Constitution property may only be expropriated in terms of a law of general application. That is not in issue in this case. The requirement that the expropriation must be for a public purpose or in the public interest is also not in issue.

[88] It is concluded that Sebenza's property (its coal rights) has been expropriated by the enactment of the MPRDA, specifically in terms of section 5 read with sections 2 and 3 thereof.

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[98] See also **Badenhorst: Property and the Bill of Rights** in **Bill of Rights Compendium** 3FB-29; **Badenhorst: Die Vereistes vir 'n Geldige Onteieningskennisgewing, 1989 THRHR (52)** p. 130 and onwards.

Compensation

[89] Item 12(3) of the Schedule provides that "in determining just and equitable compensation all relevant factors must be taken into account including, in addition to section 25(2) and 25(3) of the Constitution ... the State's obligation to redress the results of past racial discrimination in the allocation of and access to mineral ... resources ..., the State's obligation to bring about reforms to promote equitable access to all South Africa's mineral resources .... (and) the provisions of section 25(8) of the Constitution".

[90] By virtue of regulation 82A(7) of the regulations published under the MPRDA the method of determining compensation is, among others, informed by section 14 and 15 of the **Expropriation Act, 63 of 1975.** Under the relevant provisions of the Expropriation Act, it is for the Court to determine just and equitable compensation. In doing so, the Court is not bound by what the expropriate claims nor by the offer, if any, of the expropriator.[99]

[91] Section 25(3) of the Constitution provides that the compensation must be just and equitable "reflecting an equitable balance between the

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[99] **Dormehl v Gemeenskapsontwikkelingsraad 1979 (1) SA 900 (T).**

public interest and the interest of those affected, having regard to all relevant circumstances". Included in the relevant circumstances are the market value of the property and the purpose of the expropriation.

[92] Section 25(4)(a) of the Constitution provides that for the purpose of section 25 "the public interest includes the nation's commitment to land reform". Mr Grobler submitted that this partial definition of "public interest" cannot apply to the term as it is used in section 25(3) because, as I understand the submission, that interest is not quantifiable in money. I accept that the Court must work with monetary quantification when it determines just and equitable compensation. The court must, however, use those monetary quantifications to arrive at compensation that reflects an equitable balance between the public interest, which includes the partial definition in section 25(4)(a), and the interests of those affected. There is, in my view, no sanction for excluding the partial definition in section 25(4)(a) from the public interest as used in section 25(3).[100]

[93] Having said that, I agree with Mr Grobler that the starting point for determining just and equitable compensation in this case must be the market value of the property concerned.[101] In so using market value as a

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[100] **Du Toit v Minister of Transport 2006 (1) SA 297 (CC)** at para. 26 to 33.
[101] **Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs [2000] All SA 26 (LCC)** paras. 25 and onwards; **Khumalo and Others v Potgieter and Others [2000] 2 All SA 436 (LCC)** at para. 23.

starting point, the Court must bear in mind that it is but one of the circumstances to be taken into account.

[94] Before embarking upon the actual determination of just and equitable compensation, it is necessary to deal with two contentions put forward by the defendant. It was contended that, having regard to the circumstances and in particular to the purpose of the expropriation in this case, nil compensation should be awarded. That contention in effect seeks a result whereby Sebenza was expropriated without compensation. That is not in accordance with section 25(2) of the Constitution. It seeks, in reality, to limit the fundamental right to compensation. If, in view of the objects of the MPRDA, the State wished to expropriate mineral rights without the attendant obligation to pay compensation, it had to invoke the provisions of section 25(8) and prove the requirements of the Constitution's limitation clause, section 36(1). That was advisedly not done in this instance.

[95] A second contention that was advanced is that, if it is held that the MPRDA expropriated all mineral rights, the State would not be able to afford paying compensation. First, it is unnecessary in this case to decide whether the MPRDA expropriated all mineral rights. I accept, however, that being a "test case" interested person will probably seek to apply the principles decided herein in a wider context. Bearing that in mind, it is in

any event no defence for the State, or any expropriator, to plead that it cannot afford to pay compensation. Again, such a plea would amount to invoking a limitation of the fundamental right to compensation. That is why section 25(5) of the Constitution provides that the State "must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis" (Emphasis added). Furthermore, the evidence as to the possible cost of paying compensation for mineral rights is by no means persuasive. Mr Nogxina and Mr Alberts[102] who testified for the defendant sought to establish that if compensation had to be paid to all holders of mineral rights, it would cost approximately R90 billion. Both these witnesses had to concede in cross examination that this figure is far from accurate, and in reality has no foundation in fact. The figure was taken from notices that the DMR received in terms of the **Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002**[103]. The evidence of the plaintiff's attorney established that the figures contained in those notices do not reflect the true value of the mineral rights in question. The notices were prepared and submitted in great haste and without proper consultation. To the extent that it might be relevant, I point out that Mr Ulrich Joubert, who gave expert evidence for the plaintiff, expressed the view that, even if the figure were R90 billion, the State could afford it in view of the government's sound fiscal and monetary policies.

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[102] The head of the DMR's legal department.
[103] Such notices subsequently proved to be unnecessary.

[96] That brings me to the determination of just and equitable compensation. In November 2001 Sebenza acquired the coal rights for R1 048 000. It is the undisputed evidence of Dr Cox that, when the MPRDA came into force, the market value of the rights had risen to R2 000 000. Sebenza's liquidators, after having taken the expert advice of Dr Cox and Mr Bonini, were prepared in 2004 to accept a purchase price of R750 000.

[97] Dr Cox explained that the difference between his advice to the liquidators in 2004 and his present evaluation of the coal rights lies therein that he is now better informed than he then was. That can be accepted. The fact of the matter, however, is that the owner of the coal rights was, after the MPRDA had commenced, prepared to accept R750 000 for the rights. Mr Grobler submitted, correctly, that the price of R750 000 is not a good indicator of market value as it was accepted in the course of liquidation. It was, as counsel termed it, a "fire sale".

[98] I accept that the R750 000 is not a true reflection of the market value of the coal rights. The fact that the liquidators were prepared to accept R750 000, however, is a quantifiable circumstance that must be taken into account. It is the price they were prepared to accept after the

coal rights had been advertised for sale and after they had taken expert advice. It is true that the liquidators had to sell the coal rights, but the commencement of the MPRDA had nothing to do with that.

[99] Having regard to all the relevant circumstances R750 000 will in this case be just and equitable reflecting an equitable balance between the public interest and the interests of Sebenza. Having regard to the purpose of the MPRDA I do not think that it would be just and equitable to award the market value which is in excess of that which the liquidators were prepared to accept. I do not deem it just and equitable that Sebenza should profit from the act of expropriation.

[100] I must point out that the liquidators accepted R250 000 for the right to claim compensation. That, in my view, is not relevant because if it had not accepted the figure and ceded the claim to the plaintiff, it would have had to incur the costs of enforcing their claim.

Costs

[101] In view thereof that the defendant made no offer, costs must follow the event. There is no doubt that the employment of two counsel was warranted.

[102] The trial started before another judge who, after a few days had to recuse himself for reasons that I need not deal with. The parties were unable to resolve the issue of costs possibly wasted by the trial before that judge. They requested me to reserve those costs so as to enable them further to seek an amicable resolution of the issue. I shall do so.

In the result the following order is made:

1. The compensation to which the plaintiff is entitled in consequence of the expropriation of the coal rights of Sebenza Mining (Pty) Ltd (in liquidation) is determined in the amount of R750 000.
2. The defendant is ordered to pay the plaintiff's costs, including the costs of two counsel but excluding the costs of the trial before Fabricius J.
3. The costs of the trial before Fabricius J are reserved for determination at a later stage.

B.R. du Plessis

Judge of the High Court

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