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**A CRITICAL ANALYSIS OF THE EXTENT TO WHICH SA LAW PROTECTS THE
SURFACE RIGHTS OF LANDOWNERS OVER WHOSE PROPERTY MINING
RIGHTS HAVE BEEN GRANTED**

By

**THOMAS TSEKO RATSHEKO
(Student No. 97289028)**

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Prepared under the supervision of

Adv. Leonardus J. Gerber

Department of Public Law

Faculty of Law

University of Pretoria

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DECLARATION

I declare that the work presented in this LLM dissertation is my own, that it has not been submitted for any degree or examination at any other university, and that all the sources I have used or quoted have been acknowledged by complete reference.

Signature of the Student.....

Signature of the Supervisor.....

ABSTRACT

The MPRDA has drastically changed the regulation of mining by placing the mineral resources of South Africa under the custodianship of the State. The MPRDA does not recognise the existence of the common law mineral rights as they existed prior to the promulgation of the MPRDA.

Whereas anyone is now free to apply for mining rights from the State and once granted the holder of the mining right is entitled to access the land upon which the mining right is granted, the surface rights landowner on the other hand, is required by law to sacrifice some of his/her rights to facilitate mining activities. The surface rights landowners are however not entitled to compensation for the loss of minerals that are part of their ownership of the land.

The focus of this Study is to conduct a critical analysis of the South African law – to establish to what extent it protects the surface rights of the landowners. In the process of analysing the available remedies, the author will focus on how compensation for loss or damage as a remedy, developed through the South African common law (Roman and Roman Dutch Law), and how this remedy worked pre-MPRDA and how it is provided for in the MPRDA.

The Study will also undertake a brief comparative analysis of mining legislation of Western Australia and Ghana to bench mark the MPRDA compensation provisions and will conclude by recommending possible ways in which the MPRDA could be improved to alleviate the surface rights landowner's loss or damage of their ownership of land.

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LIST OF ACRONYMS

EMPR	Environmental Management Programme
IPILRA	Interim Protection of Informal Land Rights Act
MA	Minerals Act
MTRA	Mining Titles Registration Act
MTRAA	Mining Titles Registration Amendment Act
MPRDA	Mineral and Petroleum Resources Development Act
MPRDAA	Mineral and Petroleum Resources Development Amendment Act
NDP	National Development Plan
NEMA	National Environmental Management Act
LUPO	Land Use Planning Ordinance
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Just Administrative Action Act
REMDEC	Regional Mining Development and Environmental Committee
SPLUMA	Spatial Planning and Land Use Management Act

KEYWORDS

Mining rights entitlements, deprivation of rights, limitation of surface rights of landowners, compensation for damages, servitudes, consultation.

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CHAPTER 1- INTRODUCTION

1.1. Background

It has become a well-accepted principle in South Africa that the State has sovereignty and custodianship over minerals for the benefit for all South Africans.¹ This implies that the State is free to grant mining rights over private land and that land owners upon whose land mineral rights have been granted cannot prevent others from coming into the land for purposes of exercising prospecting and/or mining activities.²

The mining right holder is therefore entitled to enter the relevant area together with his or her employees and may bring onto the land any plant, machinery or equipment and build, construct or lay down any surface infrastructure which may be required for purposes of mining.³ For example he may construct roads and dwellings, open shafts, drill boreholes, lay railway lines. These activities detract from the landowner the ability to use and enjoy his land as a result of pollution (water, light, dust or noise) erosion, fire hazards, depletion of boreholes or other water resources, excavation and subsidence of the soil associated with mining.⁴

The MPRDA has provided the land owner with two opportunities to resist mining on his property. The first opportunity is provided by section 10(2) wherein he is free to submit an objection to the Regional Manager who must refer the objection to the Regional Mining Development and Environmental Committee (REMDEC) to consider the objection and to advise the Minister thereon. The second opportunity is to resist the mining rights holder right of access to his property and thereby trigger section 54 negotiations. *Hulme Scholes* pointed out the seemingly unintended consequences of this section, which effectively means that the surface rights landowner must first obstruct the mining right holder's

¹ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA1 (C C). Hereinafter *AgriSA*-case.

² See Chapter 2 regarding analysis of the development of the law in this regard.

³ *Sechaba v Kotze and Others* (869/2006) [2007] ZANHC 4 All SA 811 (NC) (29 June 2007) at paragraph 15. Hereinafter *Sechaba* –case].

⁴ *Ibid.*

legitimate right to access the land, which it enjoys under section 5, before negotiations on compensation can be triggered.⁵ Whilst this position remains the law today in South Africa, the Constitutional Court has recently clarified that this procedure must be completed before the mining rights holder could apply for an interdict.⁶ The full impact of mining activities on the land is never fully appreciated, especially by the surface rights landowners. Compensation would therefore ordinarily be for the obvious mining activities impacting the land surface⁷ (i.e. the land modifying impacts – including the destruction of wetlands and threats to fauna and flora.)⁸ There are other impacts that the surface rights landowners endure because of mining but are not accounted for - mainly because the MPRDA seems to be silent on such claims.⁹ The landowners are left to their own devices to fathom and negotiate compensation of these claims without the regulatory backing. Similarly, the exploration of minerals has also been associated with violation of human rights.¹⁰ Surface rights owners loses may include restrictions on land use and property rights,¹¹ loss of livelihoods, forced resettlement, destruction of ritually or culturally significant sites as well as labour rights violations.¹²

1.2. Objectives of the research

The ultimate objective of the research is to clarify and critique the extent of surface rights landowner's protection in terms of the current South African regulatory framework focusing mainly on the provisions of the MPRDA.

⁵ Hulme "Surface rights and SA's new mine law" – *Mining Weekly* 18th July 2013

⁶ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty)Limited and Another* [2018] ZACC 41. Hereinafter referred to a *Maledu and Others*.

⁷ Section 54 refers to 'loss or damage'. - which ordinarily refers physical damage and pecuniary loss, and loss is a synonym for damage. See Dale South African Mineral and Petroleum Law April 2018 at page 472.

⁸ *Director, Mineral Development Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (ACA) at paragraph 6.

⁹ This weakness in the MPRDA is benchmarked against the Ghana and Western Australia specify a set of claims that the surface rights landowner may claim for compensation.

¹⁰ *Minerals and Africa's Development - The International Study Group Report on Africa's Mineral Regime - Economic Commission for Africa – African Union - Mining in Africa: Managing the Impacts*, at page 50.

¹¹ *Director Mineral Development Gauteng Region v Save the Vaal Environment*, *supra* at para 15, *supra* note 8.

¹² *Minerals and Africa's Development – The International Study Group Report on Africa's Mineral Regime Economic Commission for Africa – African Union - Mining in Africa: Managing the Impacts*, *supra* note 10 at 59.

The author reviews remedies available to the surface rights landowners – mainly the compensation provision of the MPRDA under section 54. To achieve this objective, the author will investigate the historical development and current jurisprudence on the subject matter (i.e. statutory development, precedents by the courts and commentary by legal writers). It is therefore critical to ensure that the regulatory framework is well understood by surface rights landowners and regulators when embarking on negotiations under section 54.

The research will consider the legislative arrangements in Ghana and Western Australia as case studies in other jurisdiction, regarding the status of protection of surface rights landowners over whose property mining rights have been granted.

The main objective is to highlight legislative vacuums in the MPRDA regarding the formulation of the current compensation regime as a protection mechanism for surface rights landowners.

Therefore, the aim of this research is as follows:

- To ensure that section 54 of the MPRDA and its place in the regulatory framework is well understood by mining rights holders, surface rights landowners and regulators; and
- To ensure that legislators consider identified shortcomings and pitfalls gleaned from this research and hopefully consider them during the development of future legislation.

1.3. Research questions

The focus of this dissertation is to critically analyse whether the South African law protects the surface rights of landowners over whose property mining rights have been granted.

The main question is whether section 54 of the MPRDA is well structured and formulated to provide fair protection to surface rights landowners?

In doing so the following questions will be investigated:

- What was the position during the common law period?
- What was the statutory position before the MPRDA?
- What is the position in other jurisdictions (in this dissertation focus will be limited to Ghana and Western Australia)?
- Whether there are any other remedies available to landowners to protect their surface rights?

1.4. Methodology

The author intends to critique the present regulatory regime, specifically the MPRDA and compare same with other similar countries regulatory schemes as case studies (Ghana and Western Australia status quo). The research methodology to be employed will be a desktop study investigating the common law jurisprudence, legislation, case law, and legal writes contributions.

The research will be conducted as follows:

- A literature review; which focuses on a critical analysis of the South African legal framework applicable to the protection of surface rights of landowners (both common law and statutory law);
- A critical analysis of the Statutory development of compensation as remedy;
- A review of legal framework from Ghana and Western Australia – as case studies; and
- Analysis and recommendations.

No interviews will be conducted. The researcher will use library material, the internet and other written sources.

1.5. Scope of the study

In *Sechaba v Kotze* the court made the following remark:

“Since the granting of a prospecting right as a necessary consequence results in inroads being made on the property rights of a landowner, it is no surprising that the legislature has attempted to alleviate those consequences by providing for a due consultation between a landowner and the holder of or an applicant for a prospecting right. It appears that, apart from the mechanisms provided for in sections 10(2) and 54 of the MPRDA, which mechanisms are designed to resolve objections or disputes between the applicant for or a holder of a prospecting right and a landowner, consultation is the only prescribed means whereby a landowner is to be appraised of the impact of prospecting activities may have on his land and, for instance, his farming activities.

[My emphasis] ¹³

According to the above quotation, the MPRDA has provided the landowner with two opportunities to alleviate impacts of mining on his property. The first opportunity is provided by section 10(2) wherein he is free to submit an objection to the Regional Manager who must refer the objection to the Regional Mining Development and Environmental Committee (“REMDEC”) to consider the objection and to advise the Minister thereon.¹⁴ The second opportunity is to resist¹⁵ the mining rights holder right of access to his property and thereby trigger section 54 negotiations.¹⁶ Dale ¹⁷notes as follows:

“However, the right of entry in section 5(3)(a) falls to be read subject to section 54(1)(a). That section contemplates the possibility of the owner or lawful occupier of the land refusing to allow the holder to enter the land, placing unreasonable demands in return for access to the land or not being capable of being found. In such a case the holder must “apply for” access and the section concerned outlines the procedure that is then to be followed.”

¹³ The same is equally applicable with respect to mining rights. *Sechaba v Kotze* 2007 (4) All SA 811 (NC)

¹⁴ Section 10(2) of the MPRDA. Also see *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (C C) “

¹⁵ See Hulme “*Surface rights and SA’s new mine law*” in Mining Weekly supra note 5.

¹⁶ See Dale *South African Mineral and Petroleum Law*, LexisNexis, Service Issue 24 April 2018 at page 468. Mining rights are granted in terms of section 5(3) are qualified by the words “Subject to this Act”; which therefore brings section 54 into play..

¹⁷ *Ibid* at page 149.

Therefore, from the above outline, it is clear that compensation remains the ultimate “protection” the surface rights landowners have, to alleviate mining impacts on his land. Consultation is but just a means by which the surface rights owner is given sufficient information regarding environmental impacts, technical and financial ability of the applicant, to effectively exercise the right and the opportunity to meaningfully engage with the mining right applicant in this regard.¹⁸ Compensation referred to above is compensation for the damage or loss incurred by the surface rights owner linked to the use of his land; it is not compensation for the loss of minerals attached to his land. This is so because the Constitutional Court in the *Agri SA v Minister of Minerals and Energy*¹⁹ – held that all mineral rights that existed under the repealed Minerals Act 50 of 1991 were not expropriated by the enactment of the MPRDA because deprivation of property as requirement of an act of expropriation, was not established. Agri South Africa had argued that the MPRDA expropriated rights (mineral rights) that existed prior to its coming into force – which must therefore be subject to the payment of compensation. The court disagreed – and concluded that the MPRDA did not expropriate rights, as such no compensation was payable.²⁰

The research will therefore focus on the common law development of the surface rights of landowner’s position versus the position of mining rights holders with respect to protection for damage or loss as a result of mining operations and how the compensation provisions under the current section 54 developed overtime as a legal remedy.²¹ Section 42 of the Minerals Act 1991 will be briefly reviewed to compare the ambit of its provisions to the current section 54 provisions.

¹⁸ Felix Majoni “*Mine or Yours? – A closer look at section 5 of the Mineral and Petroleum Resources Development Act*” in De Rebus; August 1st, 2013. The author commented that consultation with the landowner and or the lawful occupier before given away the mining right, only helps to assess whether a balance can be struck between the mining right holder and the landowner insofar as interference with landowners’ or occupiers rights is concerned.

¹⁹ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC).

²⁰ Also see the Constitutional Court judgment in *Maledu and Others*, supra note 6.).

²¹ Section 54 of MPRDA.

However, it is important to note that section 54 does not prohibit against other common law remedies.²² It is open to the surface rights landowner to apply to court for a spoliation order should the holder enter the land notwithstanding having been refused entry.²³

The author will discuss briefly the Western Australia and Ghana mining laws regulating the claims for compensation²⁴ and other statutory remedies available to the surface rights landowner to bench mark the MPRDA section 54. Mining and agriculture are major competing land use economic sectors in these countries.²⁵ This legal dynamic is therefore definitely a paramount concern in these jurisdictions as well. Given that the legal jurisprudence of these countries has also been influenced by English law, the comparison with South African law is justifiable. Most importantly, mineral resources in these countries are similarly under the custodianship of the State or the Crown for and on behalf of the people of these countries. Both these jurisdictions recognize payment of compensation to the surface rights holder for the loss or damage caused by mining operations.

In Western Australia the Crown owns all minerals within the land.²⁶ Since January 1899, all new grants of freehold titles in Western Australia have provided that, all minerals are reserved to the Crown. Private landowners no longer control the minerals found within their sub-surface soil even though they continued to own the land itself. The Mining Act²⁷ establishes a process for the application and grant of access to land as well as a mining tenement in respect of any private land. A permit to enter is a prerequisite for the grant of a mining tenement and the holder of the permit must give notice to the landowner and/or occupier of the land.²⁸ The consent of the landholder or occupier must be obtained before

²² Dale *South African Mineral and Petroleum Law*, LexisNexis, Service Issue 24 April 2018, supra note 16 at page 468.

²³ *Ibid* at page 149.

²⁴ This will be discussed in Chapter 3 below.

²⁵ The conflicting and competing land uses between mining rights holder and surface rights landowners is more acute in the mining and agriculture land use scenario.

²⁶ Section 9 of the Western Australia Mining Act 1978.

²⁷ *Ibid* section 8.

²⁸ Julian Bodenmann et al Research Note Titled: “A comparative study into the rights of landowners to prevent access to land by mining companies” produced for the Queensland Council for Civil Liberties (QCCL), T.C Beirne School of Law - University of Queensland 14.

entering onto private land for the purposes of prospecting.²⁹This permit requires the permit holder to pay compensation for damage to the landholder before it is granted, and if dispute arises the matter is settled by the Warden's Court.³⁰ The Western Australian approach will be discussed further below.

In Ghana, every mineral in its natural state is the property of the Republic of Ghana and is vested in the President for and on behalf of and in trust for the people of Ghana. Within the Ghanaian context, a mining concession is an area of land that is allocated for mining purposes, whereas mineral rights confer to the holder the right to exploit an area for minerals.³¹

The laws governing land acquisition for mining purposes are the Mineral and Mining Act,³² ("the Ghana Mineral and Mining Act") and the 1992 Constitution. In terms of section 1:

"Every mineral in its natural state in, under or upon land in Ghana, rivers, streams, waters-courses throughout the country, the exclusive economic zone and area covered by the territorial sea or continental shelf is the property of the Republic and is vested in the President in trust for the people of Ghana."

Article 257(6) of the 1992 Constitution reads the same.³³ The ownership of the mineral resources is vested in the President and held in trust for the citizens of Ghana. The State grants these rights to mining companies through concessions or permits on either publicly or privately owned...

The Ghana Mineral and Mining Act gives the central government the power to authorise the occupation of land and use of lands for mining purposes³⁴ subject to payment of

²⁹ *Ibid.*

³⁰ *Ibid* 14.

³¹ Owusu-Ansah "Mining and Agriculture in Ghana: A contested terrain" in *International Journal of Environment and Sustainable Development*, January 2015 at page 381.

³² Act 703 of 2006.

³³ Ghana Constitution of 1992.

³⁴ Andrews "Lands versus Livelihoods: Community perspectives on dispossession and marginalisation in Ghana's mining sector" in *Resources Policy*. May 2018 at page 244.

compensation. The Act also authorises compulsory acquisition of any land from the owner for mineral exploitation. This is contained in section (2) of the Act:

“Where land is required to secure the development or utilization of mineral resources, the President may acquire the land or authorise its occupation and use under applicable enactment for the time being in force.”

The law requires that when any land is compulsorily acquired for mining purpose or mining rights granted over the land, the owner or lawful occupier be compensated by the holder of the mineral right.³⁵ The principles governing the forms of compensation claims are captured in both the Act and the regulations. The details of these principles will be discussed below.

1.6. Limitations of the study

The limitations to this research are, *inter alia*, as follows:

- Section 54 of the MPRDA came into effect only in 2002. Whilst there has been a significant number of judicial precedents developed under the MPRDA not much of it focused on section 54. The reason is that, the surface rights owners (landowners) almost always prefer to sell their land rather than to engage in compensation negotiations with mining companies;
- The disputes on compensation are referred to REMDEC – which, unfortunately, does not publish its decisions on these matters; and
- The comparison of Ghana and Western Australia will be limited only to statutory analysis without going into the jurisprudential basis of such laws.

It is however, the author's considered view that, despite these limitations, the research establishes a solid practical basis, with sufficient academic merit, to justify its validity and

³⁵ Section 73. Also see Gyasi “*Compulsory Land Acquisition and Payment of Compensation in Ghana. Case Study: Diya National Park, Digya*”. A thesis submitted to the Department of Land, Economy, Kwame Nkrumah University of Science and Technology in partial fulfilment of the requirements for the degree of Master of Philosophy in Land Management, Department of Land Economy, College of Art and Build Environment”, September 2016 at page 16.

contribution to the subject matter. The author believes its recommendation creates a significant base for future research to expand on or to influence the development of statutory intervention to improve the law in this regard.

1.7. Relevance of the study

The very nature of mining activities, whether it is open cast or underground mining, makes it difficult to reconcile with other users of land, be it agricultural or residential. The dissertation explores the position of the landowner with respect to protection of his surface rights in whose land mining rights have been granted.

The anecdote below, from one of the objectors of mining, sets out the context of the research: He laments:

“That minerals department will just tell you that they have heard your complaint and now you can fuck off...I bought this farm 12 years ago because it has good water. That’s your main consideration here...the 50 hectares of potato fields, dotted with baobab trees, grow next to vines sagging under the weight of the ripe red tomatoes ...Now all is threatened. The 93 mines applying for licenses are mostly in the green band of productive land from the Soutpansberg mountain range down to the south of Limpopo...This band produces 80% of South African tomatoes, 70% of its mangos and 30% of its cotton, according to the government’s Agricultural Research Council. ...the problem with the proposed mining is that it is in the most agriculturally important areas of Limpopo ...What we need is for government to see that short- term mining will destroy land that gives centuries of employment and feeds our country...They can try and buy my farm, but they cannot afford it. To me this is worth a hundred million because it is mine.”³⁶

The history of the law relating to the prospecting for, extraction and disposing of minerals, as well as the relationships between the surface rights owner and the mineral rights holder has shown the bias reflected in the above anecdotal account. As will be shown below, this legal structure in the South African context has been developed over the years

³⁶ Siphso Kings in News Environment| Mail & Guardian “*Mines turning our farms to dust*” published at <http://mg.co.za/article/2015-03-12-mines-turning-our-farms-to-dust>. (Date of use 10 January 2017).

through Roman and Roman-Dutch common law; by the courts and by various legislatures. The stated objectives of the MPRDA also promotes this bias to promote equitable access to the nation's mineral resources; to promote economic growth and mineral development in the Republic; to promote employment and advance the social and economic welfare of all South Africans; and to provide security of tenure in respect prospecting, exploration, mining and production operations.³⁷

The view has been expressed that mining law, both evolving from statutes and judicial interpretation, is based on a utilitarian theory of what was needed in the economy. In postulating this point, *Anthony Scott* book cites a passage in *Chartiers Block Co v Mellon (1893)*:

“If the mineral owner could not reach and work his minerals the public might be debarred from the use of the hidden treasures which the great laboratory of nature has provided for man's use in the bowels of the earth...To place them beyond the reach of the public would be a great public wrong. The question we are considering becomes of a quasi-public character. It is not to be treated as a mere contest between A and B over a little corner of the earth.”

In addition to the above, South Africa has recently adopted a mining Phakisa³⁸, under the auspices of the Office of the Presidency – involving government, labour and business. The purpose of the mining Phakisa is to identify key constraints to investment and growth in the mining industry as well as develop a shared vision and growth strategy for the long term, in accordance with the National Development Plan (“NDP”).³⁹ The NDP states *“that in order to address the major constraints inhibiting accelerated growth and development in mining sector and thus the growth of the investment, outputs, exports and employment in the mining sector, the government must, among other things, ensure certainty in respect of property rights; to ensure a predictable, competitive, and stable mining regulatory framework.”*⁴⁰

³⁷ Section 2 of the MPRDA.

³⁸ It is a fast results government delivery programme that was launched in July 2014.

³⁹ *National Development Plan 2030*. National Planning Commission published on 15 August 2012.

⁴⁰ See Chapter 3 and 4 of the National Development Plan.

One of the outcomes of the mining Phakisa is the 300 days mining right application process which will include authorisation of all related environmental licenses within this period.⁴¹The Ministers of Environmental Affairs, Mineral Resources and Water and Sanitation have agreed on fixed time-frames for the consideration and issuing of the permits, licenses and authorisations in their respective legislation. It was also agreed to synchronise the process for the issuing of permits, licenses and authorisations within a 300day period.⁴² If a decision is appealed, an additional maximum period of 90 days will be required to finalise the process.⁴³

The author believes that one of the ‘potential challenges’ is the inadvertent risk that surface rights of landowner’s will further be curtailed in the fast track process – unless surface rights owners are given adequate opportunity to engage with the mining right applicant. Adequate opportunity to engage does not mean to be obstructive or subversive of the objects of the MPRDA. The Supreme Court of Appeal in Maranda held that it would be absurd for the MPRDA to permit an unreasonable refusal of access based on clear objectives to frustrate the legitimate endeavours of a permit holder.⁴⁴

Therefore, research like this is opportune, and can greatly assist all the relevant stakeholders to proactively identify areas requiring further legislative attention, and/or further academic research on the same subject and even guide compensation negotiations during the section 54 process – more specially, assist the Regional Managers and REMDEC officials in developing a fair system of negotiations and compensation. The Constitutional Court, as recent as 25th October 2018, held as follows:⁴⁵

⁴¹ Mineral and Petroleum Development Amendment Act, 2014 (MPRDAA, 2014). Also see the National Environmental Management Laws Amendment Act (Act No. 25 of 2014) (NEMLA 3) published on 2 June 2014 came into effect yesterday, 3 September 2014.

⁴² This imposes stricter timelines for both the regulator and the interested and affected persons.

⁴³ This system came into effect on 8 December 2014. introduced by the Mineral and Petroleum Resources Development Amendment Act, 2014 and the National Environmental Management Laws Amendment Act, 2014 (published on 2 June 2014 and came into effect on 3 September 2014).

⁴⁴ *Joubert v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GN) at paragraphs 16-17.

⁴⁵ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty)Limited and Another*, , supra note 6 at paragraph 92.

“[92] The respondents further submitted that in the event that this Court holds that section 54 must be exhausted before and interdict can be sought, then mining right holders would be unjustifiably prevented from commencing with mining pending the finalisation of section 54 proceedings. But this submission entirely overlooks the fact that section 54 itself provides for a speedy dispute resolution process that is premised on parties reaching some sort agreement through mediation. It also provides if the parties failed to reach an agreement, then they may approach the court. It is unclear why, pending the finalisation of this process, a mining rights holder should be entitled to mine. On the contrary, to allow them to do so will undermine the purpose of section 54: to strike the balance between the interests of the mining right holder and the owner. It bears mentioning that section 54(5) contemplates that if negotiations between the affected parties and the mining right holder are deadlocked, and the Regional Manager concludes that any further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in terms of section 55.”

The import of the underlined words or concepts will be critically analysed in Chapter 5 below.

1.8. Organisation of the Chapters

This dissertation contains six Chapters which are summarized as follows:

- Chapter 1 provides an introduction and sets out aims and objectives of the research; the research questions; scope and limitations of the study – including the relevance of the study.
- Chapter 2 offers a brief overview of the content and entitlements embodied in the mining right (i.e. the legal nature of mining rights). This is followed by an overview of the application of such entitlements in the common law jurisprudence, and current SA legislative regime (the MPRDA). The enforceability of such rights by interdicts is tracked through case law development both in favour of the mining right owner and the landowner.
- Chapter 3 explores the construct of the compensation provisions or arrangements in the common law position; the Minerals Act 1956 dispensation and the MPRDA

position. Chapter 4 provides a brief comparative overview of the structure of the compensation regulation in Ghana and Western Australia current legislation.

- Chapter 5 is an evaluation chapter wherein the author draws the actual comparison between the MPRDA, Ghana and Western Australia legislation. Limitations and restrictions on this analysis are also expressed in this chapter and its conclusion.
- Chapter 6 is the overall conclusion of the research, summarising the author's findings; answering the research questions and making recommendations.

CHAPTER 2 – LITERATURE STUDY

2.1. Introduction

The author turns to the evaluation of the nature and extent of a mining right holder's rights versus the surface rights owners. The Chapter traces the development of the concept of servitude – as an accepted principle to rely on when dealing with conflicts between mining rights holders and the surface rights owners. This covers both the pre and post MPRDA period.

2.2. Literature review

The literature review focuses on historical and current jurisprudence regarding remedies afforded to the surface rights owners where mining rights have been granted.

2.2.1. Ownership of the land protecting surface rights landowners

The legal position of mining rights holders versus the surface rights landowners has always pivoted on the basic common law concept of ownership. Minerals are part of the dominium of the surface rights of the landowner.⁴⁶ The South African jurisprudence has also embraced this basic position despite changes in the legislative setup over the years.⁴⁷ Badenhorst in his 1990 inaugural address as Professor of Private Law (University of the North)⁴⁸ observed as follows: “*In terms of the doctrine of private law rights an entitlement constitutes the contents of a right and denotes what a person, by virtue of having a right to a particular legal object, may lawfully do with the object of his right.*”

⁴⁶ *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240. The common law principle position that the surface landowner should have superior rights to those with ancillary rights, such as mining right holders unless they have servitudes

⁴⁷ *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Webb v Beaver Investments (Pty) Ltd* 1954 (1) SA 13 (T).

⁴⁸ Badenhorst “*The re-visiting of state held entitlements to exploit minerals in South Africa: Privatisation or Deregulation?*” 1991 TSAR 113-131.

Therefore, according to common law, full ownership of land, has entitlements as its content. The following entitlements – (a) possession, i.e. the entitlement to have the land under your control; (b) use and enjoyment, i.e. the entitlement to use and enjoy the land; (c) disposition, i.e. the entitlement to determine what may and what may not be done with the land; (d) consumption and destruction, i.e. the entitlement to consume and destroy the land; (e) alienation, i.e. the entitlement to transfer the ownership of the land to another legal subject; (f) mineral exploitation, i.e. the entitlement to exploit the minerals of the land.⁴⁹

Based on the above, the surface landowner had superior rights to those with ancillary rights, such as mining right holders unless they had servitudes registered against the land.⁵⁰ The superior right meant, as a general rule, the owner of land cannot be deprived of their property against their will: *Nemo plus iuris transferre potest quam ipse habet*.⁵¹ Therefore, no other person who is not an owner of the land could transfer the right of ownership of the land to another person or limit the ownership on the land without consent of the owner. Various remedies, depending on the circumstances in each case, are available to owners once their ownership or entitlements have been impaired.

However Roman law and Roman Dutch law recognised the system of servitude which land owner could grant over their land. A servitude is a limited real right or *ius in re aliena* which entitles its holder either to the use and enjoyment of another person's property or to insist that such other person shall refrain from exercising certain entitlements flowing from his or her right of ownership over and in respect of his or property which he or she would have if the servitude did not exist.⁵²

⁴⁹ *Ibid* at 5. By virtue of full ownership of land an owner is entitled to exercise the entitlements to exploit minerals.

⁵⁰ See *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 where it was held that subterranean water not flowing in a known and defined channel, but percolating through private property, may be intercepted and appropriated by the owner and this position may be modified by servitude.

⁵¹ Silbergerg and Schoemans “*The Law of Property*” (5th Edition) page 241.

⁵² *Ibid* at 321

The Roman Dutch law upon which the South African legal system is based did not have mining law. The concept of a mineral right (including prospecting and mining rights) was developed by the courts using an analogy to the notion of a servitude.⁵³

In Roman Dutch law there were *praedial* servitudes which bore some resemblance to current mining activities, for example – servitude to remove clay and or servitudes to burn lime. Roman law had already established the principle that private ownership of land extended up to the heavens and down to the centre of the earth. Minerals were then regarded as the fruits (*fructus*) of the land.⁵⁴ The owners of the land – as well as the *usufructuary* and fiduciary were entitled to the fruits of the land – subject to the rules of the usufruct.⁵⁵ The main rule being that the usufructuary may not destroy the substance of the property.⁵⁶ In *Master v African Corporation Ltd*, the court explained the Roman law position and held that during this period the usufructuary was entitled to mine for minerals and to the benefit of the interest on the price realised, but must at the termination of his usufruct restore to the *dominus* the value of minerals taken, and was liable to give security for such restoration. Therefore, *usufructus* had to exploit the quarries as a reasonable person (*bonus paterfamilias*) and had to use the land without impairment of its essential qualities (*fundus salva rei substantia*),⁵⁷ and was only entitled to the interest on the price realised.⁵⁸

This legal thinking continued into the Roman Dutch law system and which also recognized the concept of minerals in the context of *usufruct*⁵⁹ – and therefore the *usufructuary* was entitled to extract minerals without impairment of the essential qualities of the land.⁶⁰ The

⁵³ Badenhorst and Mostert, *Minerals and Petroleum Law of South Africa: Commentary and Statutes*. Revision Service 7 Juta. Cape Town (2011) at pages 1-2.

⁵⁴ *Union Government v Marais* 1920 AD 240.

⁵⁵ *Master v African Mines Corporation* 1907 TS 925.

⁵⁶ *Ibid.*

⁵⁷ Badenhorst and Mostert *Minerals and Petroleum Law of South Africa: Commentary and Statutes*. supra note 53 at pages 1-3..

⁵⁸ *Master v African Mines Corporation*, supra note 55.

⁵⁹ *Usufruct* is a kind of a personal servitude established in favour of a particular person. It is a real right that cannot be transferred.

⁶⁰ In *Master v African Mines Corporation*, supra note 55 at page 1. The court notes that “*The Roman-Dutch writers draw a distinction between minerals which are renascentia and those which are no-renascentia, and*

owner of the land, given the invasive nature of the activities, was however protected by a restriction *fundus salva rei substantia* as indicated above.

This concept of *fundus salva rei substantia* was later developed into a *civilliter modo* – which simply means exercising your rights in a manner least injurious to the property of the surface owner.⁶¹

In Neeba v Registrar,⁶² the applicant in this case was, prior to the outbreak of war on October 11th, 1899, the holder of 50 prospecting licenses. He had failed to pay license fees for these rights due to the existence of a state of war and his claims had expired due to failure to pay. He argued that a prospecting or diggers' claim held under the provisions of the Gold Law of 1898 is in effect a lease by the State of the mineral rights, and that the applicant is therefore entitled to the remission of rent which, under the Roman -Dutch law, a lessee who was deprived of the beneficial occupation of the property by various causes – of which state of war is one, could claim. In the alternative, it was contended that this is the case of a usufruct. The court held that this should be distinguished from usufruct because the usufructuary is bound on expiration of the usufruct to repay the value of the produce extracted⁶³ which was not a condition in this case. The court held that the interest of a claim-holder is not the type included within any of the classes of interest in property known to the Roman-Dutch law, but it is *sui generis* the creation of the Gold Law and must be governed entirely by the provisions of that law.

A usufruct is a personal right, held by the usufructuary only, to the use of the property and its fruits. It does not diminish the rights of ownership such as a real or praedial servitude does, and which confers on the holder of the servitude a right in the property adverse to the dominium holder. The existence of the usufruct may well limit or restrict the enjoyment by the owner of certain rights of possession, and of benefits accruing from the property,

even when minerals are non-renascentia they allow the usufructuary to mine subject to his restoring the value upon the expiration of the usufruct."

⁶¹ This is a concept that is still applied by the South African courts. See *Hudson v Mann and Another* 1950 (4) SA 485 (T)

⁶² *Neeba v Registrar of Mining Rights* 1902 TS 65

⁶³ *Master v African Corporation*, supra note 55 at paragraph 92.

but it does not diminish in any way any of the rights of ownership or dominium.⁶⁴ In terms of the common law principle, minerals are part of the dominium of the surface landowner. Therefore, in general, the owners of property are free to do with it what they wish and the right to mine vests in the owner of the land and is one of the entitlements arising from the ownership of land. Under common law a landowner owns everything above and below the land, including minerals.⁶⁵ One of the incidents of landownership was the entitlement to search for, mine and dispose of minerals for own account.⁶⁶ As with most rights in property, it was exclusive and could not be appropriated by third parties for their use, benefit or enjoyment without the owner's consent.⁶⁷

With this separation, the holder of the mineral rights is entitled to go upon the land to which it relates, to search for minerals and if he finds any to sever them and carry them away. This is a real right to exploit the minerals.⁶⁸ Minerals not removed from the soil were considered to form part of the land and could subsequently become the property of an individual other than the owner.⁶⁹ Surface rights owners were entitled to make arrangements with third parties who wanted to extract minerals from their land. Thus, surface rights owners were entitled to confer with third parties regarding mining activities, in terms of which the latter could infringe on the surface rights of land owners once the applicable right was granted and registered.⁷⁰

It is clear that, even in common law perspective,⁷¹ the full dominium of land ownership could be decreased by the separation of the entitlements to exploit minerals in the land –

⁶⁴ *Cowley and Another v Hahn* 1987 1 SA 440 (E) at 4451.

⁶⁵ See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at para 16; *Union Government (Minister of Railways and Harbours) v Marais and Others*, supra note 50. at 246; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315.

⁶⁶ Badenhorst "Ownership of minerals in situ in South Africa: Australian darning to the rescue" (2010) 127 *South African Law Journal (SALJ)* at page 649.

⁶⁷ *Agri South Africa v Minister of Minerals and Energy*, 2013 (4) SA 1 (C C) at paragraph 7

⁶⁸ *Ibid* at paragraph 8.

⁶⁹ In *Hudson v Mann and Another*, supra note 61. at 488 E-F the court held that, for as 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.

⁷⁰ *Rocher v Registrar of Deeds* 1911 TPD 311.

⁷¹ The idea of ownership is reflected in the maxim *superficies solo credit* – meaning: Everything attached to a specific piece of land belongs to the owner of that land. In *Gien v Gien* 1979 (2) SA 1113(T), the court

which rights may therefore be held under a separate title by a third party.⁷² As indicated above, this entitlement was constituted in the form of a servitude which afforded the rights holder the right to go upon the property, to search for minerals and, if any are found, to extract and remove them from the property⁷³ in so doing limit the rights of the land owner.

2.2.2. Registered servitudes: Limitation to surface rights of landowners

Considering the above, it is inevitable that the servitude holder for mining activities, will, at least to some extent, interfere with the surface rights of the land owner. This is a common law position which was confirmed in *Union Government (Minister of Railways and Harbours) v Marais and Others*⁷⁴ that the surface rights owner should have superior rights to those with ancillary rights, such as mining right holders unless they have servitudes. As will be explained below, servitude holder is of course bound to act *bona fide* and reasonable in the exercise of his rights, but is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface rights owner.⁷⁵ But in the case of an irreconcilable conflict, the use of the surface rights must be subordinated to the mineral right owner. We therefore need to investigate on what basis is this subordination founded.

A servitude usually originates from an agreement between the owner of the dominant tenement and the owner of the servient tenement. The agreement will contain, amongst others, the extent of the servitude rights, the amount payable, its duration, unless it is intended to remain in force indefinitely. The servitude as a real right, however, comes into existence only when the agreement has been registered in terms of the Deeds Registry system. Therefore, the essence of the servitude is that it confers, upon registration, a real

held that “*The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law.*”

⁷² *Rocher v Registrar of Deeds*, supra note 70.

⁷³ See generally, *Van Vuren v Registrar of Deeds* 1907 TS 289; *Gluckman v Solomon* 1921 TPD 335; *Hudson v Mann and Another*, supra note 61. Also see Moxon “*Mine Your Business – A Study of the Relationship between the Landowner, Mineral Rights Holder and the State*” in LandLaw Watch at page 3.

⁷⁴ *Union Government (Minister of Railways and Harbours) v Marais and Others*, supra note 50.

⁷⁵ In *Van Vuren v Registrar of Deeds*, supra note 73. The court confirmed that mining rights are ‘real rights’ and their exercise may conflict with the interest of the landowner.

right to an advantage out of the property of another, and it is this direct relationship between the holder of the servitude and the land to which it relates that distinguishes it from mere contractual right against the owner of the land.

Registration of this real right is therefore key aspect in creating the subordination of the surface rights land owner to the servitude holder.⁷⁶

In the past, in certain circumstances, the courts were reluctant to recognise certain grants of mining rights as registrable servitudes. In *Rocher v Registrar*⁷⁷ the court held that:

“[N]evertheless, our law recognises the constitution of real rights in minerals or in another’s person’s property. Those rights are given names. Sometimes they are of the nature of personal servitudes; sometimes they are of the nature of praedial servitudes. In the present case it is not perhaps easy to determine exactly under which category these rights ought to come. I am satisfied that they are not praedial servitudes – that is, servitudes appurtenant to the land only – because, if they were servitude appurtenant to the land only, then they could not be alienated apart from the land...”

In this case the Registrar of Deeds had refused to register a deed of transfer conveying rights other than rights to land to joint owners of certain properties, in pursuance of a partition agreement, transferring to each other certain shares in the land, subject to the condition that the mineral rights of the whole should remain undivided and be held by all “owners” jointly in proportion to their divided interests. The Registrar of Deeds refused to register the deed on the basis that the condition as to the reservation of minerals rights in common imposed a personal obligation. The court agreed that these rights are not land, and not, for purposes of transfer, fixed property, and as they are not *praedial* servitudes therefore could not consent to the inclusion of the transfer of personal rights in a deed of transfer which is only applicable to land or things in the nature of real rights. Therefore, personal undertakings between co-owners of the land could not be considered a real right.

⁷⁶ *Ex parte Frost* 1956 (2) [OPD] 111.

⁷⁷ *Rocher v Registrar of Deeds*, supra note 70.

In *Webb v Beaver Investments (Pty) Ltd and Another*⁷⁸ the court held that the granting of mineral rights creates a personal quasi-servitude and is freely transferable. However, in the case where the land owner sold the land without reference in the deed of sale to any mineral rights held by him in his personal capacity over the land, the court held that the transfer did not convert the personal quasi-servitude over the land into a praedial servitude.

In *Grant and Another v Stonestreet and Others*⁷⁹, the question regarding the legal effect of unregistered limited real right was debated. According to the court, and having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will be bound by it, notwithstanding the absence of registration. The court argued that the basis of this obligation is that in attempting, under such circumstances, to repudiate the servitude; the purchaser is *mala fide*, and that the law refuses to countenance any such attempted repudiation because it amounts to a species of fraud. The court further empathised that clear proof of knowledge on his part is required before the court will hold a purchaser bound by an unregistered servitude.

The court in an *obiter dictum* made the comment: “*If a person willfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to be sound in principle and to merit the approval of this court.*”

In *Willowoughby's Consolidated Co Ltd v Cophall Stores*⁸⁰ 1918 AD at paragraph {16} Innes CJ held that:

“*Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of*”

⁷⁸ *Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T)

⁷⁹ *Grant and Another v Stonestreet and Others* 1968 4 SA 1 (A),

⁸⁰ *Willowoughby's Consolidated Co Ltd v Cophall Stores* 1918 AD 1.

land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected coram lege loci by an entry made in the Register and endorsed upon the title deeds of the servient property.”

2.2.3. Content of the mining rights holder’s entitlements

The content of mining rights holder’s entitlements starts with mining operations and in includes any operation or activity incidental thereto.⁸¹ It is the use and enjoyment of these operations and activities incidental to them that forms the content of the entitlements. The courts have also accepted the principle of relying on the law relating to servitudes to explain rights holder’s entitlements against the surface rights landowners and how conflicts between them should be resolved.⁸²

As indicated above, a servitude entitles its holder to specific entitlements of use and enjoyment over another property.⁸³ In some cases, the holder of a servitude is also entitled to insist that the landowner refrain from exercise of certain entitlements flowing from the ownership in a way which will negatively impact on the rights of the servitude holder.⁸⁴ Therefore under common law, surface rights landowner could not use the land in a way which would interfere with the mineral right holder’s use, and if the landowner did so, the mineral right holder could interdict the landowners’ use or intended use.⁸⁵ This principles evolved from the jurisprudence with respect to the nature of servitude.

To elaborate on this, the mineral (or mining) rights have been held to be in the nature of quasi – servitudes (because these rights do not conform exactly to the definition of

⁸¹ Section 5(3) (c) of the MPRDA.

⁸² *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996(4) SA 499.

⁸³ South African law does not have a closed system of real rights. New real rights, depending on the market demands or requirements of individuals or institutions may be developed. See Silberberg and Schoeman’s *“The Law of Property”* (5th Edition), supra note 52 at page 322.

⁸⁴ Cronje “The legal position of township developers and holders of coal-mining rights in respect of the same land”, *Master of Laws Dissertation*, University of South Africa, December 2014 at page 20. As a general rule a servitude cannot exist in the imposition of an active or positive duty on the owner of the land. See Silberberg and Schoemans *“The Law of Property”* 5th Edition, supra note 51 at page 324

⁸⁵ *Maledu and Others*, supra note 6 at paragraph 104

servitudes).⁸⁶ Others referred to mining rights as similar to personal servitudes (however unlike personal servitudes, they do not terminate upon death or dissolution of the right of the holder).⁸⁷ They are also referred to as praedial servitudes because they are granted in favour of a specific person not in favour of the dominant tenement. Others prefer to classify the mining rights as sui generis real rights.⁸⁸

With a granted and registered servitude on the land, means that the surface landowner's rights are now only exclusive up to a point, in time and space. Beyond that point the mineral rights holder has entitlements. Finding where that point is, and enforcing it is the quintessential problem in mining law jurisprudence.⁸⁹ Others call this challenge "the legal ramifications of the 'split estate'" (the mining estate and the surface estate).⁹⁰ Each estate existing in abstract isolation, and an interest in any one estate could be conceptualised as mutually exclusive from the other, regardless of their physical proximity to each other.⁹¹ However, according to Van der Merwe the servient owner's entitlements of use and enjoyment – as limited by the particular servitude – are merely suspended for the duration of the servitude's existence. "*In other words, they are inherently part of the servient owner's ownership and are therefore incapable of being split off from the ownership of the land so as to be "given" to the holder of the limited real right.*"⁹²

⁸⁶ *Ibid.* Also note that it was stated in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*, 2006 (1) SA 350 (T) 364, that it is settled principle of our law that a right to minerals in the property of another is in the nature of a quasi-servitude over that property. Also see. *Rocher v Registrar of Deeds*, supra note 70. *Coronation Collieries v Malan* 1911 TPD 577 591. *Webb v Beaver Investments*, supra note 77. *Witbank Colliery Ltd v Malan and Coronation Colliery Co, Ltd* 1910 TPD.

⁸⁷. Badenhorst and Mostert "*Minerals and Petroleum Law of South Africa: Commentary and Statutes*. Revision Service" supra note 53 at pages 1-3. Mineral rights cannot be regarded as personal servitudes because – unlike personal servitudes, mineral rights are freely assignable or transferrable and capable of being transmitted to the heirs of the holder; minerals rights endure beyond the lifetime or legal existence of the holder thereof; and mineral rights are not exercised *salva rei substantia*.

⁸⁸ *Ep Pierce* 1950 (3) SA 628(0); *Erasmus v Afrikander* 1976 (1) SA 950 (W).

⁸⁹ Upon extinguishment of the limited real right, ownership reverts to its unencumbered extent.

⁹⁰ Scott "*The Evolution of Resource Property Rights*" Oxford University Press (2008) at page 318

⁹¹ *Ibid* at 319.

⁹² Marais "*When does state interference with property (now) amount to expropriation? An analysis of the AgriSA court's state acquisition requirement*" ISSN 1727 – 3781 PER/PELJ 2015 (18) 1 at page 3004. This comment is stated in this article as a critique by Van der Merwe of Maarsdorp Institute 146, where the latter author defines servitude as "*a detachment of some of the rights of ownership from the ownership of some particular property and conferring them upon a person other than the owner or attaching them as an adjunct to the ownership of another separately owned property.*" According to Van der Merwe this argument is unsound, as it perceives ownership as a bundle of sticks where certain entitlements can be split off from ownership and given to someone else.

In the pre-MPRDA period the conflicts of entitlements between the mining right holder and the surface rights owner could ordinarily be appealed to both private law, contract law and property law. Contract law because the entitlement details and characteristics of the mining rights holder was flowing from the individual lease or mining contracts.⁹³ In contract law, it was within this contractual freedom that the surface rights owners could exercise choices and determine the fate of his/or land use and enjoyment. Given the fact that the land owner was also the owner of the minerals under his land. The land owner could choose to hold minerals inactively or may freely decide when to bring them into production; conditional on this decision was how to do so. Sometimes rights could be exercised directly by himself or his family or he may make arrangements with a third party to mine on his land in a form of a lease agreement or do the outright sale of the mineralised property, with or without the surface attached. In such circumstances, the majority of mining rights holders versus surface rights landowner's disputes where not about the rights to occupy, but instead concerned the meaning of the lease's covenants.⁹⁴ For example, in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*⁹⁵ the appeal involved the interpretation of a clause in a contract. The contract concerned was embodied in a notarial deed of cession of mineral rights intended to be registered in terms of the Deeds Registration Act. The question before the court was, *inter alia*, whether the "rights to minerals" ceded in terms of the notarial deed include rights to stone. The court held that:

"One must guard, perhaps, against an assumption that in colloquial speech the word "minerals" is a static or rigid concept having an immutable content. To a particular community at a particular stage of its history and development the ambit of that word in colloquial language will be governed by a number of considerations, not the least significant among which are likely to be intrinsic value and the possibility of commercial exploitation of the

⁹³ See *Lazarus and Jackson v Wessels, Oliver, and the Coronation Freshhold Estates, Town and Mines, Ltd*, Supreme Court of the Transvaal, 1903, TS 499.

⁹⁴ The respective rights and duties of the dominant and servient land holders are depended, in the first instance, on the terms of the agreement constituting the servitude.

⁹⁵ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others* (129/84) [1985] ZASCA 71 [1985] 4 All SA 388 (AD) (6 September 1985)

*various non-organic substances to be found in the soil of the country in which the community lives....In this way the range of the popular meaning assigned to the word “minerals” may with the passage of time undergo evolutionary change.”*⁹⁶

The court concluded that with all respect to the contrary judicial opinions expressed in some of the older decisions cited in this judgment, the word “mineral” is wide enough to include such stone as it has a value apart from its mere bulk and weight, and which is obtained from the crust of the earth for purposes of profit.⁹⁷

This meant that the mining lease agreements (servitudes) needed to have detailed clauses about minerals to be mined, mining methods, mining areas, time, duration of the mine, prevention of damage and rehabilitation. The disputes were mainly dealt with in terms of contract law. When the courts were called upon to deal with disputes, they relied heavily on the common law as explained briefly above.⁹⁸

In private law context, the limitations imposed on ownership flow from the rights of other persons, which consist primarily of the rights of neighbours. The landowner may not encroach on any of his neighbour’s rights or by digging too close to the neighbour’s property. This is termed the right to lateral support.⁹⁹ In addition to lateral support, the surface rights landowner is entitled to subjacent support. This is the vertical support to the surface.¹⁰⁰

According to *Silberberg*, in common law, the owner of surface rights could bring the *actio negatoria*, which is a real action (action in rem) against any persons who seeks to exercise servitudes which they do not have, or who exceeds the bounds of his or her servitude.¹⁰¹

⁹⁶ *Ibid* at paragraph 67.

⁹⁷ *Ibid* at paragraph 83.

⁹⁸ In addition, certain well-established principles relating specifically to servitudes governed the construction of the agreement. Agreements were construed in a manner which was least burdensome to the surface rights owner. See Silberberg and Schoemans “*The Law of Property*” 5th edition, supra note 51 at page 241 at page 331

⁹⁹ *Anglo Operations Ltd v Sandhurst Estate (Pty)*, supra note 85

¹⁰⁰ *Ibid*.

¹⁰¹ Silberberg and Schoemans “*The Law of Property*” (5th Edition) supra note 51 at page 262

In this action the plaintiff could claim the removal of any structures unlawfully erected and claim damages. Whether this form of real action is still part of our law or has been replaced by action *legis aquiliae* is not clear.¹⁰² *Actio legis aquiliae*, is a remedy available to the surface rights owner who has suffered damage or destruction of his property through the negligent or intentional action of another person. By means of this action the surface rights landowners may claim compensation.¹⁰³

In the case of *Minister of Land Affairs v Rand Mines* which was decided before the promulgation of the MPRDA. Farlam AJA, in this Supreme Court of Appeal case,¹⁰⁴ reading from the certificate of mineral rights registration in favour of the respondent (“the Company”) held that:

- “(1) *The Company has the sole and exclusive rights to prospect, exploit and mine for such minerals, mineral substances and metals, precious stones, oil and coal at any time located on, in and under the land, and to deal with and turn to account, alienate and dispose of such rights from time to time at pleasure. At the termination of prospecting operations all shafts and other open places made by the Company shall be properly filled up or fenced in by the Company at its own expenses.*
- (2) *The Company has the right to take any of the land it may from time to time require for the erection of buildings, works, machinery and dwelling houses for depositing sites for ore and/or tailings for the storage of water, and for all other purposes directly or indirectly connected with prospecting, exploiting or mining on the said land; the land so taken shall be re-retransferred to the Company at its expense, and upon re-transfer shall pay to the Owner in respect of any such area a price to be mutually agreed upon provided that if any dispute shall arise to the price to be so paid, the same shall be submitted to arbitration in the usual way. It is however distinctly understood that in the event of any dispute as above arising the arbitrator or arbitrators shall consider and decide upon only the agricultural value of any land which the Company may decide to retake, which agricultural value shall be taken to be in any way affected by the values of the mineral rights of the property.*

¹⁰² *Ibid* at 263.

¹⁰³ *Ibid* at 266

¹⁰⁴ *Minister of Land Affairs v Rand Mines Ltd* (320/95) [1998] ZA SCA 32.

- (3) *As far as possible the Company shall not interfere with crops standing at the commencement of any prospecting operations on the property but should such interference be unavoidable, of which the Company shall be the sole judge, the Company shall compensate the Owner for all damage caused by such operations to the Owners then standing crops, the amount of such compensation failing, mutual agreement, to be fixed by arbitration as herein provided for.*

The above quotation, and the description of entitlements in the certificate of registration illustrates how this relationship was seen over the years and to what extent the content of the entitlements of the mining right holder could go.¹⁰⁵

In post-MPRDA section 5(1) of the Act stipulates that the new order¹⁰⁶ prospecting and mining rights are limited real rights in respect of the mineral and the land to which they relate. Section 5(1) of the MPRDA provides as follows:

“A ...mining right ...granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No 16 of 1967), is a limited real right in respect of the mineral ...and the land to which it relates.”

Post MPRDA mining rights, despite the real character of these rights they are generally understood to be weaker and lesser in content than their old order counterparts.¹⁰⁷ Firstly, new order rights are – unlike old order rights- not perpetual in nature,¹⁰⁸ since the MPRDA limits both their period of existence as well as the periods for which they may be subsequently renewed.¹⁰⁹ While holders of unused old order mineral rights could freely transfer or encumber them during the pre-MPRDA regime (*ius disponendi*),¹¹⁰ new order

¹⁰⁵ *Rand Leases (Vogelstruisfontein) G.M Co, Ltd v Registrar of Mining Titles 1938 TPD 383.*

¹⁰⁶ Mining rights created by the MPRDA.

¹⁰⁷ Marais “*When does state interference with property (NOW) amount to expropriation? An analysis of the Agri SA courts’ State acquisition requirements.*” supra note 91 at page 2989.

¹⁰⁸ Section 17(6) A prospecting right is valid for the period specified in the right, which may not exceed five years. In terms of section 23 (6) A mining right is valid for a period specified, which period may not exceed 30 years.

¹⁰⁹ *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa (278/10)[2011] ZASCA 49 (30 March 2011).*

¹¹⁰ Marais *When does state interference with property (NOW) amount to expropriation? An analysis of the AgriSA courts’s State acquisition requirements.*” supra note 91 at page 2989.

prospecting and mining rights may be transferred or encumbered only with written consent of the Minister.¹¹¹ Furthermore, holders of unused old order rights lost the entitlement to sterilise the minerals to which these rights pertain by opting to leave them unexploited.¹¹² However, the old order rights which were converted during the transitional period, were transformed into new order rights. *In Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd*¹¹³ - for example, the respondents had refused the Appellant access to their properties to commence prospecting and mining activities. Their argument was that the Appellants' unused old order mining right has ceased to exist.¹¹⁴ The court held that the old order right was protected by the Transitional Arrangements in the MPRDA. Therefore, the Appellant's old order right consequently included access to the properties of the Respondents and they were bound to grant access to the Appellant to allow it to exercise its mining right.¹¹⁵ The Respondents were further interdicted from refusing or preventing the Appellants and its contractors' access to the properties for the purpose of mining activities.

Under the MPRDA, the surface rights landowner cannot stop or veto the grant and exercise of rights to minerals upon compliance by the mineral right holder with the notification and consultation provisions of the MPRDA.¹¹⁶ What is left for the surface rights owner is to note the effective date of the granting of rights; the execution and registration of the rights; and to engage fully in the consultation and the notification procedures.¹¹⁷

2.2.4. Granting, execution and registration of rights

A prospecting right is granted by the Deputy Director General (DDG) upon compliance with the requirements of a prospecting right. A prospecting right is valid for a specified

¹¹¹ Section 11 (1) of the MPRDA provides that a prospecting right or mining right may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister.

¹¹² *Agri South Africa v Minister for Minerals and Energy*, supra note 67.

¹¹³ *Holcim (South Africa) Pty Ltd v Prudent Investors (Pty) Ltd* 2010 SACLR 392 (A.).

¹¹⁴ *ibid* at paragraph 7.

¹¹⁵ *ibid* at paragraph 43.

¹¹⁶ *Joubert v Maranda Mining Company (Pty) Ltd*, supra note 44.

¹¹⁷ If the procedures are not fully complied with, the surface rights owners, may appeal the granting or and if unsuccessful, institute review proceeding against its granting or challenge it on the basis of inadequacy of consultation prior to the granting or the fact that the right is not executed or registered.

period not exceeding five years.¹¹⁸ An applicant may apply for a mining permit if the mineral can be mined optimally within two years and the mining area does not exceed 1.5 hectares in extent. Upon compliance with the requirements a mining permit is granted by the regional manager or chief director¹¹⁹ and it is valid for a specified period which may not exceed two years.¹²⁰ A mining right is granted by the Director-General (DG) upon compliance with the requirements for a mining right¹²¹ and it is valid for a specified period, which may not exceed 30 years.¹²²

The full bench of the Northern Cape Provincial Division in *Meepo v Kotze*¹²³ the court held that no rights accrued to an applicant for a prospecting right at the time of the approval by the DDG of a recommendation before any terms or conditions in respect of the prospecting right, as well as the period of its validity, had been determined and communicated to the applicant for his acceptance; this occurs when the notarial deed is executed. According to the *Meepo* judgment, the legal nature of granting of a prospecting right is contractual. The Minister consensually agrees to grant to an applicant a limited real right to prospect for a specific mineral on a specified land for a specific period under specific conditions. Until such terms and conditions have been determined and consensually agreed upon or consented to by the applicant, it cannot be said that a prospecting right has been granted to an applicant.

In a recent decision of the Supreme Court of Appeal of South Africa in the case of the *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd*¹²⁴ (20069/14) – handed down on 28 May 2015, the court was asked to determine whether the prospecting right had been lawfully granted to the appellant and if so, whether the appellant may lawfully exercise that right. The court referred to section 17 which concerns the granting and duration of prospecting rights.

¹¹⁸ Section 17(1) of the MPRDA. Item 5 of the Ministerial Delegation.

¹¹⁹ Section 27(6) of the MPRDA. Item 10 of the Ministerial Delegation.

¹²⁰ Section 27(8)(a) of the MPRDA.

¹²¹ Section 23(1) of the MPRDA. Item 9(a) of the Ministerial Delegation.

¹²² Section 23 (6) of the MPRDA.

¹²³ *Meepo v Kotze* 2008 (1) SA 104 (NC)

¹²⁴ *Minister of Minerals Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA)

The court held that¹²⁵ there are three distinct legal processes which must be distinguished from each other, namely the granting of, execution of and the coming into effect of the right. According to the court, a prospecting right is granted in terms of section 17(1) on the date that the delegated authority approves the recommendation to grant. From the date of the grant the appellant became the holder of a valid prospecting right as defined in the MPRDA is the date from which a successful applicant can actively start prospecting. Nonetheless in terms of section 19(2)(a) that right still must be registered in the Mineral and Petroleum Titles Office. The court held that the provisions appear at face value to be contradictory regarding the nature of the right and its legal consequences. However, the court accepted that the right becomes a limited real right only upon registration. The court held that

*“[T]he purpose and effect of registration is not only that the right becomes binding on third parties, but it also serves as notice to the public, akin to registration of immovable property in the Deeds Office.”*¹²⁶

The court in *Mawetse* disagreed with the *Meepo* approach on the basis that the granting of a prospecting right, as is the case with all other rights under the MPRDA, is not contractual in nature, but a unilateral administrative act by the Minister or her delegate in terms of their statutory powers under the MPRDA. Although the two cases above relate to prospecting rights, a similar three tier process apply to the granting of mineral rights. The mining right is granted, executed and then registered at the Mining Titles Registration Office.

Once a new order¹²⁷ mining right is granted, it must also be registered¹²⁸ in accordance with the provisions the Mining Titles Registration Act (“MTRA”)¹²⁹ as amended by the

¹²⁵ *Ibid* at paragraph [19.]

¹²⁶ *Ibid*.

¹²⁷ See *Rand Leases (Vogelsstruisfontein) G.M Co, Ltd v Registrar of Mining Titles* 1938 TPD 383 with regards to registration of mineral leases at the Mining Titles Office.

¹²⁸ The registration principle is necessary to give effect to the concept that registered prospecting and mining rights are limited real rights in respect of the relevant mineral and land and are binding to third parties. Also see Dale” *South African Mineral and Petroleum Law*”, supra note 22 at page 67.

¹²⁹ Act 16 of 1967.

Mining Titles Registration Amendment Act (the Amendment Act”).¹³⁰ The purpose of the MTRA is to regulate the registration of mining titles, other rights connected with prospecting and mining, stand titles and certain other deeds and documents, and to provide for matters connected thereto.¹³¹ It therefore to provide support for the implementation of the MPRDA by creating and enabling the setting up of a deeds and information service at a central location in South Africa.¹³² The two Acts are linked by section 54 of the Amendment Act and came into operation simultaneously on 1 May 2004.¹³³ Section (1) of the Amendment Act provides that the a prospecting right and mining right granted in terms of this Act is a limited real right in respect of the mineral and the land to which it relates. In terms of section 2(4) of the Amendment Act these rights become real upon registration thereof, in which case they become binding on third parties¹³⁴.

*Badenhorst and Mostert*¹³⁵ have also commented on this seemingly confusing situation. They noted as follows: ‘If section 5(1) of the MPRDA Act and section 5(1) of the MTRA Act are read together, the different interpretations are possible; First, section 5(1) of the MPRDA Act may be interpreted as an *ex ledge* creation of real rights upon granting by the Minister (this is *Mawetse* approach). Secondly, it can be argued that the granting of a right in terms of the MPRDA by the Minister to a holder must be consensual agreement (this is *Meepo* approach).¹³⁶ Upon such granting, personal rights are created by such agreement. This could be interpreted as only granting security of tenure. Thirdly, a combination of the first and second interpretation may also be possible. However, Badenhorst concede that section 5(1) of the MPRDA and section 5(1) of the Amendment Act should be interpreted with reference to property and mining law doctrine. In this way, the granting of mining rights by the Minister to a holder, must be seen as a consensual

¹³⁰ Act 24 of 2003.

¹³¹ Preamble of Act 16 of 1967. This is similar to the purpose in the 2003 Amendment Act.

¹³² Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa: Commentary and Statutes.*” supra note 53 at pages 27-5.

¹³³ *Ibid* at 28-1.

¹³⁴ *Ibid* at 13 – 13.

¹³⁵ *Ibid*.

¹³⁶ It can sometimes be granted by the Minister’s delegate – eg the Regional Manager acting on behalf of the Minister.

agreement creating personal rights to undertake the various activities permitted by the MPRDA.¹³⁷ However, the holder of the granted right has the duty to register the right in the Mineral and Petroleum Titles Registration Office.¹³⁸

It is only upon registration that a limited real right is created. Therefore, it is upon the registration of the mining right that a right holder is empowered to enter upon the land of the surface right owner to commence mining activities. However, in *Coal of Africa and another v Akkerland Boerdery (Pty) Ltd*¹³⁹ the court held that - it is not necessary for a prospecting right to be registered in the Mining Titles Office for it to be effective and enforceable; and that an administrative action (e.g. the granting of a prospecting right) remains valid and enforceable – even when it is potentially voidable based on an irregularity – up and until a court of law pronounces authoritatively on its invalidity. The court also held that a person contending that an administrative action is invalid (as in this case of *Akkerland Boerdery*) has a responsibility to initiate judicial proceedings and cannot adopt an indifferent attitude. Conduct pursued in the light of a voidable administrative act is similarly valid until a court pronounces otherwise. This means that the surface rights landowner cannot refuse to grant access based on a subjective belief that the administrative action is unlawful. He or she must take steps to take that decision on judicial review.

In *Anglo American Inyosi Coal (Pty) Ltd v Claassen and Another*¹⁴⁰ the respondents argued that applicant is not entitled to enter upon the property because they (respondents) have lodged an appeal against the decision of the approval of the EMP addendum by the Regional Manager. The applicant's argued that it had complied with the requirements of the Act in that the Regional Manager had approved the EMP addendum and that the launch of the appeal by the Respondents does not suspend the approval. According to the Appellant, the decision of the Regional Manager stands until set aside

¹³⁷ Dale *South African Mineral and Petroleum Law*, supra note 22.. Dale also says prior to registration only personal rights are created between the State and the grantee. And that registration provides best proof of ownership.

¹³⁸ Badenhorst and Mostert "*Minerals and Petroleum Law of South Africa: Commentary and Statutes*. Revision Service" supra note 53 at pages 13- 14.

¹³⁹ *Coal of Africa and Another v Akkerland Boerdery (Pty) Ltd* NGP 38528/2012 February 2014.

¹⁴⁰ *Anglo American Inyosi Coal (Pty) Ltd v Claassen and Another* CDP 40387/2013, 28 March 2014.

by the decision of the Director General if the appeal is decided in favour of the respondents.¹⁴¹ The court held that in terms of section 96(2) of the Act, an appeal does not suspend the administrative decision, unless it is suspended by the Director General or the Minister, as the case may be. It is also not suspended by the lodgment of an appeal. It is also not suspended by the request to the Director General to suspend the decision.¹⁴²

In the circumstances, the court ordered the respondents to grant access to the Applicant and its contractors to the property for purposes of drilling the boreholes envisaged in the applicant's approved EMP Addendum, failing which the Deputy Sheriff is authorized and directed to grant the applicant access to the property.¹⁴³ The surface rights landowner will still be affected and mining may operations may commence despite the fact that he or she launched an appeal against its granting.

2.2.5. Right to be consulted prior to the granting of the mining right

The MPRDA in Sections 16¹⁴⁴ and 22¹⁴⁵ require the applicant for a right, after acceptance of the application by the Regional Manager, to notify and consult with the land owner or lawful occupier and any other affected parties (the surface rights owner will be affected party). In the case of *Bengwanyama Minerals(Pty) Ltd v Genorah Resources (Pty) Ltd*¹⁴⁶ the Constitutional Court indicated that the process envisaged by section 16(4)(b) requires of the applicant (a) to inform the landowner in writing that his application for prospecting rights on the land has been accepted; (b) to inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of land; (c) to consult with the landowner with a view to reaching an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) to submit the result

¹⁴¹ *Ibid* at paragraph 13.

¹⁴² *Ibid* at paragraph 18.

¹⁴³ *Ibid* at paragraph 23(a).

¹⁴⁴ Application for prospecting rights.

¹⁴⁵ Application for mining rights.

¹⁴⁶ *Bengwanyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

of the consultation process to the Regional Manager.¹⁴⁷ This principle will also apply with respect to section 22 application of mining rights.

On the other hand, Section 10 provides the surface rights owner with the right to object to the granting of the prospecting right or mining right. It requires the Regional Manager, to whom an application for a mining right has been applied for, to invite any Interested and Affected Parties (I&APs) to submit their comments as to the application in 30 days. The surface rights landowner as an affected party may submit comments or object. If the surface rights landowner objects to the acceptance of the application, the objection is considered by the Regional Mining Development and Environmental Committee.¹⁴⁸

The section 10 consultation is referred to a “first round of consultation” and the sections 16(4) and 22(4), respectively, consultations as the “second round of consultation”.¹⁴⁹

Once the rights have been granted, section 5 comes into the picture- and thus henceforth the horses have bolted. Section 5(2) and (3) provide that the holders of prospecting and/or mining rights are now entitled to the rights referred to in section 5 and to such other rights as may be granted under the MPRDA or any other law.

The holder of such rights has a statutory right to enter the land. The refusal of the land owner or occupier of the land is thus unlawful. There would be nothing to prevent the holder from exercising such holder’s right to apply to court to obtain an interdict against such refusal or to claim damages.¹⁵⁰

¹⁴⁷ *Ibid.*

¹⁴⁸ Section 10 (2).

¹⁴⁹ Claire Tucker “*Community veto over mining?*”. Files\Content.Outlook\MCR3AU11\community veto over mining.doc

¹⁵⁰ Dale *South African Mineral and Petroleum Law*, supra note 22 at page 470.

2.2.6. Consultation after granting replaced with notice

In *Meepo v Kotze*¹⁵¹ it was held that the process of consultation envisaged in section 5(4)(c) occurs after a prospecting right has been granted; and that such consultation amounts to more than notice.¹⁵² The court's view was that the prospecting rights holder must attempt to obtain the consent of the land owner regarding entry upon the land for purposes of prospecting and reaching agreement about the practical consequences of mining.¹⁵³ In *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd*¹⁵⁴ the court aligned itself with the above case law but also indicated that:

*"[i]f the imperatives of section 5(4)(c) would have included that consensus has to be reached between the holder of the prospecting right and the landowner 'it would make mockery of the purpose for which the State grants prospecting rights to the holders thereof i.e. the prevalence of State power of control over the mineral resources of the Republic of South Africa and the concomitant ousting of the mineral rights of the landowner and/or the holder of mineral rights.'"*¹⁵⁵

Section 5(4) was however replaced with section 5A which in sub-section (c) only requires 21 days written notice to the surface rights owner or lawful occupier prior to commencement of mining. The new section 5A provides that "*no person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, retain, explore for and produce any mineral or petroleum or commence with any work incidental thereto without ...giving the landowner or lawful occupier of the land in question at least 21 days written notice.*" The deleted section 5(4)(c) was key in enhancing the surface rights landowner or lawful occupier's ability to negotiate access agreements. This would have been so, given the jurisprudence which has already been developed by the Constitutional Court. For example, the Constitutional Court in *Bengwenyama* - case¹⁵⁶ noted the importance of the consultation process. The court in

¹⁵¹ *Meepo v Kotze*, supra note 121.

¹⁵² Section 5(4) (c) has been deleted.

¹⁵³ Section 5(4) has been deleted by section 4 of Act 49/2008 with effect from 7 June 2013.

¹⁵⁴ *Acquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* GNP 14612/2013, 14 March 2014.

¹⁵⁵ *Ibid* at paragraph 37.

¹⁵⁶ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, supra note 144.

Bengwenyama emphasised this by requiring that consultation should be with a view to reach an agreement to the satisfaction of both parties regarding the impact of the proposed prospecting or mining operation.¹⁵⁷ The court held that¹⁵⁸:

“These different notice and consultation requirements are indicative of a serious concern for the rights and interest of landowners and lawful occupiers in the process of granting of prospecting rights. It is not difficult to see why: the granting and execution of a prospecting right represent a grave and considerable invasion of the use and enjoyment of the land on which prospecting is to happen. This is so irrespective of whether one regards a landowner’s right as ownership of its surface and what is beneath it ‘in all the fullness that the common law allows’ or as use only of its surface, if what lies below does not belong to the landowner but resides in the custody of the state.” [footnotes omitted]

It’s a pity therefore that the consultation provisions as set out in the MPRDA have been curtailed. This may be open to a constitutional challenge.¹⁵⁹

2.3. Conclusion

From a common law, statutory law and case law point of view, the mining right holder acquires the right to access to the land upon which the relevant minerals are located - once there has been compliance with all the provisions relating to the law. Once compliant with all relevant law and legislated requirements are met, there is no much the landowner can do to protect its surface rights¹⁶⁰. *Dale* notes:

“Any demand will be unreasonable in the light of the statutory right of access accorded to the holder in sections 5(3), 15((1) and 27(7). There is furthermore nothing in the MPRDA or the common law which entitles the owner or lawful occupier to

¹⁵⁷ *Ibid* at paragraph 2.

¹⁵⁸ *Ibid* at paragraph 63

¹⁵⁹ In *Maledu and Others*, *supra* note 6. The Constitutional Court interpreted section 54 to be plucking the gap created by the repeal of section 5(4) (c).

¹⁶⁰ These rights are, however, subject to the other provisions of the MPRDA. See section 5(3)(a). And also subject to the common law obligation to exercise his rights *civilliter modo*(in a reasonable manner) so as to cause the least possible inconvenience to the surface rights landowner.

*compensation for such access, save provided in section 54(3) in regard to loss or damage therein envisaged.”*¹⁶¹

The above having been said, it must be noted that the existence of a mineral right does not extinguish the rights of a landowner to a fair process. To achieve fairness, it is imperative that landowners are provided with the necessary information on everything that is to be done, so that they can make an informed decision to make representations or use internal remedies to object or appeal and/or approach the courts for interdicts or review the decision to grant the mining right.¹⁶² The MPRDA and its regulations however do not have a detailed provision in the most critical process (i.e. with respect to conducting a consultation process.)¹⁶³

¹⁶¹ Dale *South African Mineral and Petroleum Law*, supra note xx at page 470.

¹⁶² *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, supra note 144.

¹⁶³ See Claire Tucker “Community veto over mining?“, supra at note 147.

CHAPTER 3-COMPENSATION FOR LOSS OR DAMAGE IN TERMS OF SA LAW

3.1. Introduction

Research above clearly shows that there will always be conflicts between the mining right holder and the surface rights landowner, given the invasive nature of mining operations. However, it has been argued that the rationale for limiting the landowner's rights, constitutes a legitimate and compelling government purpose (i.e. redistribution of minerals, promotion of equitable access to the nation's mineral resources).¹⁶⁴ That this limitation is to satisfy the requirement of regulation in the interest of the greater good. Therefore, compensation seems to be a reasonable way to make good the infringements visited on landowners by the grant of mineral rights over their land.

3.2. Common law Compensation for damage or loss

As indicated above, South African mineral law pre- the MPRDA has always been based on the Roman and Roman-Dutch law premise – which provides that the landowner is also the owner of the minerals embedded in and under the soil of the land he owned. Therefore, the ownership of land underlined the right to minerals. Until the year 1812 South Africa (more particularly in the Cape Colony) three modes of land tenure existed namely freehold, loan occupation and quit-rent tenure – and the first grant of freehold was made on 22 June 1657.¹⁶⁵ The nature of the freehold was that of true ownership, the owner having full dominium of his land. The dominium of the land encompassed the surface of the land and all the minerals in it.¹⁶⁶ Due to the application of the *cuius et solum eius usque ad inferos* maxim, landowners' rights to the minerals embedded in the soil of their land were traditionally recognised by the common law. Through the workings of this maxim, land owners were afforded wide-ranging powers over their land that extended to

¹⁶⁴ Cronje "The legal position of township developers and holders of coal-mining rights in respect of the same land", supra note 83 at 116.

¹⁶⁵ Van der Schyff, "A historical overview of the State's regulatory power regarding the exploitation of minerals in South African mineral laws" (Faculty of Law), North West University, Potchefstroom Campus at page 135.

¹⁶⁶ *Ibid.*

the subsurface. Land owners were entitled to arrange with third parties who wanted to extract the minerals from their land.¹⁶⁷ Thus, the land owners were entitled to confer with third parties regarding mining activities, in terms of which the latter could infringe on the landowner's rights once applicable right was granted.¹⁶⁸

As indicated in chapter 1 above, during this period the common law principles did not oblige the holder of rights to minerals to pay any compensation to the landowner for the damage incurred during mining operations. This were matters of private law and agreements between parties. In case on disputes, such disputes were resolved by determining whether the holder of the rights to minerals acted in good faith and in the way, that was least injurious to the landowner.¹⁶⁹

Therefore in terms of common law, the mandate obliging the holder of rights to minerals to pay compensation evolved as a term in a type of contract, where the owner of land in whom the rights to minerals were situated, granted to another, for a certain period the right to enter upon the land - for the purposes of prospecting and mining (including removing the minerals from the land for his own benefit).¹⁷⁰In return for these rights the grantee paid to the owner a financial remuneration, which could take various forms¹⁷¹, e.g. periodic payments similar to rental, a lump sum, a commission based on output, and so on.¹⁷² These contracts were called "mineral leases" or "leases of mineral rights" or leases of rights to minerals."¹⁷³

This contract was considered and described in *Neeba v Registrar of Mining Rights*¹⁷⁴ by Chief Justice Innes. The court pointed that the tenant "*had no right to destroy and*

¹⁶⁷ *Lazarus and Jackson v Wessels, Oliver and The Coronation Freehold Estates, Town and Mines Ltd* 1903 TS 499.

¹⁶⁸ Draper "A landowner's ability to negotiate compensation with the holder of rights to minerals." Mini-Dissertation, *Magister Legum* in Estate Planning at the University of Potchefstroom, November 2012 at page 3

¹⁶⁹ *Ibid* at page 34.

¹⁷⁰ *Ondombo Beleggings (EDMS) BPK v Minister of Mineral and Energy Affairs* 1991 (4) SA 718 AD.

¹⁷¹ *Murphy v Labuschagne and the Central Coronation Syndicate, Ltd* 1903 TS 393

¹⁷² *Wiseman v De Pinna* 1986 1 SA 38 (A) at paragraph 10.

¹⁷³ *Ibid*.

¹⁷⁴ *Neeba v Registrar of Mining Rights*, supra note 62.

appropriate the substance of the thing he hired, but only to enjoy the benefit of its use and take the fruit.”

Therefore the “*essence of his position is the right to take out portion of the soil of the claim and win the minerals from it... [I]t gives him the right, too, of destroying the whole nature of the ground he occupies, and of taking away all the minerals.*”

Therefore, the payments (compensation) in terms of the mineral lease agreement was not only for removing minerals but it could also be including the damages¹⁷⁵ for destroying the ground the lease holder occupies.¹⁷⁶ This therefore also meant that the ancillary rights to use the surface of the land for mining purposes was part of what was bought and paid for by the mineral right holder. In this instance, the common law right of freedom of contract, within the ambit of private property law, was one of the means on securing the surface landowners rights.¹⁷⁷

For example, in *Xstrata & Others v SFF Association*,¹⁷⁸ the agreement contained the following terms and conditions: responsibility for the rehabilitation, restoration and anti-pollution obligations;¹⁷⁹ the way mining was to take place, commencement of mining and the rate of mining extraction; and obligation to pay royalties.¹⁸⁰ *Draper*¹⁸¹ commented

¹⁷⁵ *Erasmus V Afrikaner Proprietary Mines Ltd 1976 (1) WLD 951.*

¹⁷⁶ *Ibid.* From early days the legislators prescribed formalities whereby, *inter alia*, mineral leases could validly be concluded. There was for example, a *Besluit of Volkstad of South African Republic*, dated 12 August 1886, requiring contracts concerning a cession of rights to minerals or concerning rights to mine to be notarially executed and registered at the Registrar of Deeds; and decreeing that any such contract which did not comply with these formalities would be void *ab initio*.

¹⁷⁷ See Kaplan and Dale *A guide to the Minerals Act 1991*, Butterworths, Durban (1992) at pages 10 and 47. Accordingly, “*Since ...a person who has acquired the written consent of such holder to prospect or to mine, who has the right to prospect or to mine must acquire the common law rights to the relevant mineral, or the common law written “consent “to prospect or to mine from such holder. These “consents” (which will probably be called “rights” would normally be contained in a prospecting contract (in the case of a consent to prospect), or a mineral lease (in the case of consent to mine).*”

¹⁷⁸ *Xstrata & Others v SFF Association (326/2011) [2012] 20 ZASCA (23 March 2012).*

¹⁷⁹ *Ibid* at paragraph 5.

¹⁸⁰ *Ibid* at paragraph 6.

¹⁸¹ Draper “*A landowner’s ability to negotiate compensation with the holder to rights to minerals*” a mini-dissertation submitted in fulfilment of the requirements for the degree *Magister Legum*, supra note 165 at page 4.

and supported the view expressed above that these agreements usually stipulated compensation payable to the landowner. That:

“[C]ompensation was usually provided for the loss of the land’s minerals as well as the infringement of a landowner’s ownership attributable to losses suffered or harm incurred due to or during the mining activities. The second category could inter alia include surface damage, dust deposits on crops or the inability to continue with farming activities on a particular portion of the land.”

3.3. Minerals Act 50 of 1991 compensation provisions

In 1992 the Minerals Act was introduced as part of the government’s new policy of privatization and deregulation of mineral resources.¹⁸² The Act restated the common law position relating to ownership of minerals by the landowner.¹⁸³ It provided that the landowners had the prerogative to decide if prospecting and mining operations could take place on their land, and by whom they could be performed.¹⁸⁴ The owner could however not exercise his right unless a mining authorization had been acquired from the State.¹⁸⁵ Section 5 of the Act granted the holder of a mineral right the right to enter upon the land, to mine the mineral which it had a right to extract and dispose of the mineral mined. All rights to prospect or mine in respect of all minerals had to be acquired by way of a written contract with the mineral rights holder, whether that holder was a private person, a juristic person or the state.¹⁸⁶

However, section 42 provided landowners with a right to compensation for the loss of minerals on their land, as well as the infringement of a landowner’s ownership attributable

¹⁸² The Minerals Act 50 of 1991 was enacted on 22 May 1991, and in terms of Proclamation R123 published in the Government Gazette 13682 dated 20 December 1991, came into operation on 1 January 1992. The Minerals Act repeals inter alia the Mines and Works Act 27 of 1956, the Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Minerals Laws Supplementary Act 10 of 1975, the Tiger’s Eye Control Act 77 of 1977.

¹⁸³ *Natal Navigation Collieries and Estate Co. Ltd v Minister of Mines and Another* 1955 (2) AD.

¹⁸⁴ Section 5(1) of the Minerals Act provides that the holder of the right is the landowner but he may give consent to other persons to mine in their own account.

¹⁸⁵ Section 5(2) of Minerals Act.

¹⁸⁶ Draper “A landowner’s ability to negotiate compensation with the holder to rights to minerals” a mini-dissertation submitted in fulfilment of the requirements for the degree *Magister Legum*, supra note 165 at pages 36 – 37.

to losses suffered or harm incurred due to or during the mining activities in certain circumstances.¹⁸⁷

Section 42 at subsection (2)(e) provided as follows:

42(1)(d) – Notwithstanding the provisions of paragraph (a), no right to acquire any land shall be vested in the State by virtue of any notification under that paragraph if the Minister or the Director-General within three months after the date of such notification has been notified in writing –

- (i) by the owner of such land that he desires to retain the ownership of such land irrespective of the way in which such land is or is likely to be disturbed or damaged or be used for mining purposes or purposes in connection therewith by the person referred to in paragraph (a); or*
- (ii) by such owner and such person that they have entered into an agreement with each other for the payment of compensation for the damage caused or likely to be caused as a result of mining operations or operations in connection therewith on such land.*

42(1)(e) If the Minister is satisfied, after considering any written representations submitted to him by the owner referred to in paragraph (d) (i) , and after such investigations as the Minister may deem necessary –

- (i) That such owner has suffered or is likely to suffer damage as result of –*
 - (aa) disturbances or subsidence land caused by mining operations or operations in connection therewith; or*
 - (bb) any obstruction established on land by any person entitled to mine on such land and who mines or intends to mine thereon for any minerals*
- (ii) That the owner has made all reasonable efforts to negotiate a settlement with the other person for payment of compensation for the damage referred to in subparagraph (i); he shall, subject to paragraph (f), in writing direct such other person to negotiate a settlement with such owner for the payment of compensation for such damage.*

¹⁸⁷ Section 42(1)(e) of the Minerals Act.

Section 42 is specific and detailed - clearly guiding the terms and conditions upon which compensation will be available. It provided for disturbances¹⁸⁸ or subsidence of land caused by mining operations or operations in connection therewith. It also provided compensation for any “obstruction”¹⁸⁹ established on land by any person entitled to mine. If the miner and the surface rights landowner failed to reach a settlement, compensation had to be determined by Arbitration or by a competent court. If the Minister believed such failure was due to default on the part of the miner, the Minister could prohibit the miner from continuing with the operations. Compensation was determined by using the provisions of section 12 of the Expropriation Act.¹⁹⁰

The most important aspect of section 42 is sub-section 42(4)(a) which states that – “if any person upon whom a direction referred to in subsection (1)(e) or upon whom notice referred to in subsection (2)(1) has been served, fails to enter into an agreement in writing with the owner of the land concerned for the payment of compensation or for the purchase of such land, within a period of three months – from the date of such direction or such notice or from the date on which the compensation or the purchase price of such land was determined by arbitration or by such court, the Minister may prohibit him from commencing with mining operations.”

Section 42 supplemented the common law principles with regards to mining by providing certain remedies to protect the surface rights landowner. It Consequently, it enhanced the common law position with regards to the introduction of strict provisions for the payment of compensation to the surface landowners for mining operations on their land.¹⁹¹

¹⁸⁸ In *Anglo Operations v Sandhurst*, supra note 85 at pages 17 to 18. The following disturbances were raised by the respondent – i.e. mining sterilising approximately 50 hectares of irrigable land; diversion of the river – creating cut off water to the existing dam and thereby affecting the irrigation on the farm; loss of cattle watering –holes in the bed of the stream; create an obstruction in the path along which cattle are herded once a week in order to be dipped.

¹⁸⁹ Section 42(8)(b) defines “obstruction” as “any immovable property established on land for mining operations or operation in connection therewith by the person entitled to mine on such land, and includes any dam, or dump of slimes, rock or any other residue produced in the course of such mining operations on such land.”

¹⁹⁰ Section 42(3)(a). Also note that section 42(3)(b) also provided that such compensation shall take due consideration to any rehabilitation that has been or will be undertaken on such land.

¹⁹¹ Kaplan and Dale *A guide to the Minerals Act 1991*, supra note 171 at 38.

Kaplan and Dale had this to say: “[T]o the extent that compensation is payable in terms of section 42, it reverses the common law position, such reversal being, however, expressly contemplated in the Minerals Act.”¹⁹² Noting further that “[T]he potential destruction of the surface is recognized, but it is the right to compensation that is being preserved.”¹⁹³

3.4. MPRDA Compensation Provisions

As discussed briefly in Chapter 1 and 2 above, once the mining right has been granted, the mining rights holder is entitled to enter the land to commence mining. If the surface rights landowner is still unhappy, he may still trigger a procedure that may force further consultation under the supervision of the Regional Manager.¹⁹⁴ To do so he must make demands in return for access which the mining rights holder considers unreasonable.¹⁹⁵ This will force the mining rights owner to notify the Regional Manager in terms of section 54(1) of the MPRDA.¹⁹⁶ Therefore section 54, at the first instance, is the remedy available to the mining rights holder. It is activated by the mining rights holder if he/she is prevented from entering the mining right area by the surface rights landowner (or lawful occupier),¹⁹⁷ or places unreasonable demands in return for access to the land;¹⁹⁸ or cannot be found for the mining right holder to apply for access.¹⁹⁹ The Constitutional Court held that section 54 must be exhausted to ensure that the MPRDA’s purpose of balancing the rights of mining rights holders on the one hand and those of the surface rights landholders on the other hand is fulfilled.²⁰⁰

¹⁹² *Ibid* at 190.

¹⁹³ *Ibid* at 191.

¹⁹⁴ In terms of section 54(2)(a) the Regional Manager must call upon the land owner to make written representation regarding the issue raised by the mining right holder.

¹⁹⁵ *Joubert v Maranda Mining Company (Pty) Ltd* supra note 44.

¹⁹⁶ *Ibid*. The court held that it is not necessary to exhaust the section 54 process before approaching a court for an interdict.

¹⁹⁷ Section 54(1) (a). includes lawful occupier.

¹⁹⁸ Section 54(1) (b). Demands may be anything including mining methods, operating method, operating times, construction of roads, placing of tailing dams, pollution control dams; noise, pollution abatement and/or compensation.

¹⁹⁹ Section 54 (1) (c).

²⁰⁰ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 38

For ease of reference, the whole of section 54 is set out below. It provides:

- (1) *The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question –*

 - (a) *refuses to allow such holder to enter the land;*
 - (b) *places unreasonable demands in return for access to the land; or*
 - (c) *cannot be found in order to apply for access.*

- (2) *The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1) –*

 - (a) *Call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;*
 - (b) *Inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;*
 - (c) *Set out the provisions of this Act which such owner or occupier is contravening; and*
 - (d) *Inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.*

- (3) *If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer any loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.*

- (4) *If the parties failed to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act no 42 of 1965), or by a competent court.*

Section 54(3) provides that the Regional Manager must believe the surface rights landowner “*has suffered or is likely to suffer any loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation.*”²⁰¹ [my emphasis]

At this stage, the damage suffered by the surface rights owner is so minimal, if any, given the fact that mining operations have not yet commenced. Therefore, the compensation negotiations are mainly for loss or damages to be suffered because of the planned mining. The surface rights landowner must have clearly set out this loss or damage he/she is likely to suffer in written representation to the Regional Manager. The role of the Regional Manager with respect to the rights of the landowner, is massive. In *Maledu and Others*²⁰², the Constitutional Court held that, [I]n bypassing the express provisions of section 54, the respondents undermined the supervisory role and powers of the Regional Manager who is charged with the responsibility of administering and implementing the MPRDA as the Director General’s delegate.”²⁰³ The court further held that section 54 provides for a speedy dispute resolution process, under the direction of the Regional Manager, that is premised on parties reaching some sort of agreement through mediation. ²⁰⁴Section 54(5) contemplates that if negotiations fails between the affected parties and the mining right holder are deadlocked, and the Regional Manager concludes that any further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in terms of section 55.

²⁰¹ Section 54(3). Where a surface rights owner is likely to suffer damage as a result of the planned mining, but does not refuse access and as result the process provided in section 54 has not been initiated, he may weaken his ability to claim compensation.

²⁰² *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 46

²⁰³ *Ibid*

²⁰⁴ *Ibid*.

3.5. Conclusion

According to Badenhorst, section 54 is another example of “a situation where the MPRDA resulted in a lopsided legal triangle skewed in favour of the holder of mining rights at the expense of the owner of the land.”²⁰⁵ According to Badenhorst the mining systems involve three parties: the surface rights landowner; the holder of mining rights; and the state.²⁰⁶ He notes that, before the adoption of the MPRDA this triangle was balanced in the sense that surface rights owners received direct or indirect compensation for disposing of their ownership in minerals and subsequent infringement on the use of their land.²⁰⁷ Surface rights landowners were therefore compensated for the inroads they had to allow into the use and enjoyment of their land. The Constitutional Court²⁰⁸ has however held that the current section 54 balances the rights of the mining right holder and the surface rights landowner. It provides a remedy for the mining right holder.²⁰⁹ However it gives the surface rights landowner another opportunity for consultation and for the surface right landowner to insist that he /she compensated for his/her loss or damage.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid* at 184.

²⁰⁷ *Ibid* at 185.

²⁰⁸ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 38.

²⁰⁹ *Ibid.*

CHAPTER 4 - COMPENSATION IN TERMS OF COMPARATIVE JURISDICTIONS

4.1. Ghana

The current law governing mining activities in Ghana is the Mineral and Mining Act,²¹⁰ and the Ghana 1992 Constitution. Before the enactment of the 2006 Act, the basic law, which regulated mining activities was the Mining and Minerals Law.²¹¹ As indicated above minerals in Ghana are vested in the State. On the other hand, the surface rights to land are publicly and privately owned in Ghana and about 80% of the lands are privately held. These surface rights include farming rights, right to build, right to possess and enjoyment of economic trees both naturally and artificial, right to alienate. The content of these surface rights can be derived from allodial interest, usufructural or customary freehold interest, lease-hold or even lesser interest like ‘Abusa’ and ‘Abunu” sytem of agriculture tenure arrangement.²¹² In Ghana the ownership of any of the interests in land does not include the right to minerals found on or beneath it except where state is the owner or vested with such interest.

The State can however compulsorily acquire any land for mineral exploitation. Land can also be acquired through private negotiations for any purposes – including mineral prospecting and mining. in all cases, the law requires prompt payment of fair and equitable compensation and resettlement of people where the proposed mining operations would lead to their displacement.²¹³

According to section 73 of the Ghana Mineral and Mining Act²¹⁴, the owner or lawful occupier of any land subject to a mineral right is entitled to and may claim from the holder

²¹⁰ Act 73 of 2006,

²¹¹ Act 13 of 1986.

²¹² Frederick et al “*Management of natural resources in a conflicting environment in Ghana: unmasking a messy policy problem*” in (2014) *Journal of Environmental Planning and Management*, 57:11. 1724-1745 at page 1737.

²¹³ Owusu -Ansah “*Mining and Agriculture in Ghana: A contested terrain*” in *International Journal of Environment and Sustainable Development*, (January 2015) at page 371.

²¹⁴ Act 73 of 2006.

of the mineral right compensation for the disturbances of the rights of the owner or occupier, in accordance with section 74 of the Act.

The amount of compensation payable is determined by agreement between the parties but if the parties fail to reach an agreement as to the amount of compensation, the matter is referred to the to the Minister who shall, in consultation with the government Agency responsible for land valuation, determine the compensation payable by the holder of the mineral right ²¹⁵

The compensation principle under the Act is set out in detail in section 74(1):

“The compensation to which an owner or lawful occupier may be entitled, may include compensation for,

- (a) deprivation of the use or a particular use of the natural surface of the land or part of the land’
- (b) loss of or damage to immovable properties,
- (c) in the case of land under cultivation, loss of earnings or sustenance suffered by the owner or lawful occupier, having due regard to the nature of their interest in the land,
- (d) loss of expected income, depending on the nature of crops on the land and their life expectancy,
- (e) ...

The section is expansive and covers four categories (heads of claims) of compensable limitations of rights of surface landowners. Section 74(1) (a) refers to deprivation of the use of land or a particular use of the natural surface of the land or part of the land. This allows compensation for deprivation of both vacant land (uncropped, bare or fallow land) – and cropped land. Section 74(1)(b) refers to compensation for loss of or damage to immovable properties.

Section 74(2) (c) relates to loss of cultivation earnings or loss of sustenance suffered by the owner or lawful occupier. Section 74(2) (d) relates to loss of expected income,

²¹⁵ *Ibid.*

depending on the nature of crops on the land and their life expectancy. According to *Ayitey, J. Z*²¹⁶ deprivation of the use of land or a particular use of natural surface of the land refers to the prevention or denial of economic and beneficial use of land or restriction of use rights. Compensation for deprivation of the use of land is to be for the duration of the mining lease plus some time period for regeneration of the mined land. Deprivation of use of land can also be, in limited situations, be in perpetuity when the anticipated impact would permanently derelict the land beyond any future beneficial use. Unfortunately, the compensation assessment process or method of calculating compensation for deprivation of the use of the natural surface of the land has not been stipulated in the Act but in the regulations.

Ghana implemented regulations to guide compensation and resettlement in the minerals and mining sector.²¹⁷ Ghana's Land Commission is the body charged with the responsibility to ensure the judicious management of the country's land.²¹⁸ The Land Valuation Board, a division of the Commission involved in the valuation of land and other properties, assist the mining sector in issues relating to the determination of compensation. The Board applies the principles set out in the Compensation and Resettlement Regulations.²¹⁹ The regulation has extended the scope of what can be claimed under the Act. For instance, compensation for the loss of expected income from business, land use and expected income from the crops. The regulations require that the assessment of compensation should be based on a four tier principle: In respect of crops on land granted for mining purposes, the assessment must take into consideration the loss of expected income, which depends on the nature of the crops and their life expectancy; loss of earnings or sustenance suffered by the farmer under any customary tenancy or any other interests the farmer may have; and other disturbances suffered as a result of the grant the mineral right.²²⁰ With regard to the deprivation of use of land, the

²¹⁶ Ayitey, et al (eds) "*Compensation for the Land Use Deprivation in mining Communities. The Law and Practice: Case Study on Newmont Gold Ghana Limited*" in *The Ghana Surveyor Journal*, 2011 at pages 40-43.

²¹⁷ Minerals and Mining (Compensation and Resettlements) Regulations (2012).

²¹⁸ Section 73(3) Ghana's Minerals and Mining Act 2006 supra note 203.

²¹⁹ Section 154 states that the Warden will decide on the basis of the evidence presented and the argument submitted and in accordance with the principles of compensation.

²²⁰ Section 3(1) (a) of the Minerals and Mining (Compensation and Resettlement) Regulations 2012.

regulations provide that the assessment must take into count the disruption of the socio-economic activities of the claimant; change or conversion of use of the land after mine closure; duration of the mining lease; diminution of the value of the land as a result of the diminution of the use made of or which may be made of the land; severance of any part of the land from the other parts and any surface rights or access.²²¹ Where there are commercial structures on the land subject to a mineral right, the compensation principles will be cost of re-establishing commercial activities elsewhere in a similar locality; loss of net income during the period of transition; and the costs of the transfer and re-installation of the plant, machinery and equipment.²²² In respect of immovable property, where is a loss or damage, the payment of compensation must be based on full replacement cost.²²³ The Land Valuation Board and the Ministry responsible for Agriculture shall publish a price list for crops annually, which shall be used in the assessment of compensation for crops.²²⁴

In the event of dissatisfaction with the terms of compensation offered by the holder of the mineral or as determined by the Land Valuation Board, claimants or the right holder may approach the High court to resolve the compensation issue.²²⁵ In terms of the Regulations,²²⁶ the holder of the mining right shall not later than three months after the amount of compensation has been determined, pay that compensation to the persons who are entitled to the compensation. A holder who fails to pay the determined amount of compensation within the time specified is liable to pay interest of ten percent on the amount of compensation for each month that the compensation remain unpaid.²²⁷

4.2. Western Australia

The Mining Act provides that the owner and occupier of any private land where mining occurs are entitled, according to their respective interest, to compensation for all loss and

²²¹ *Ibid.* Section 3(1) (b).

²²² *Ibid.* Section 3(1) (c).

²²³ *Ibid.* Section 3(1) (d)

²²⁴ *Ibid.* Section 3(2).

²²⁵ *Ibid.* Section 5.

²²⁶ *Ibid.* Section 4(1).

²²⁷ Section 4(2).

damage suffered or likely to be suffered as a consequence of mining, whether or not lawfully carried out.²²⁸ According to the Act, compensation is to be made to an owner or lawful occupier of private land which is targeted for mining.²²⁹ Compensation is also due to any person being deprived of possession or use, or any particular use, of the surface of the land or any part of the land;²³⁰ and for damage to the land or any part of the land;²³¹ and/or severance of the land or any part of the land from other land of, or used by, that person;²³² and any loss or restriction of any right of way or other easement or right; and the loss of, or damage to, improvements;²³³ and social disruption;²³⁴ and in the case of private land that is land under cultivation, any substantial loss of earnings, delays, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agriculture holding.²³⁵

The amount payable to the owner or occupier of private land is usually determined by agreement between the holder of the mining tenement and the owner and/occupier of the private land which is then recorded in a written Compensation Agreement. However, if agreement is not achieved, compensation is determined by the Warden's Court in formal proceedings upon application of the owner, occupier or the person liable to pay compensation.²³⁶ Section 123 of the Mining Act 1978 makes provision for a Compensation - Agreement which should cover for any harm or loss suffered by the landowner before mining operations are conducted on the landowner's property.²³⁷

Before any mining activity commences on private land, the holder of the prospecting or mining rights has the obligation to compensate the landowner under the Act or decide with the land owner as to the amount, time and mode of compensation. ²³⁸

¹²¹Section 123 of the Mining Act 1978 (WA).

²²⁹ *Ibid*, section 123(4).

²³⁰ *Ibid*, section 123(4) (a).

²³¹ *Ibid*, section 123(4) (b).

²³² *Ibid*, section 123(4) (c).

²³³ *Ibid*, section 123 (4) (e).

²³⁴ *Ibid*, section 123(4) (f).

²³⁵ *Ibid*, section 123(4) (g).

²³⁶ *Ibid*, section 123(3)(b).

²³⁷ Also see Draper "A landowner's ability to negotiate compensation with the holder to rights to minerals" *mini -dissertation submitted in fulfillment of the requirements for the degree Magister Legum supra note 165 at page 51.*

²³⁸ *Ibid* at page 52.

When determining compensation under the Mining Act, the Warden's Court is bound to take into consideration certain factors which includes any work that the mining right applicant has carried out or undertakes to carry out to rehabilitate the land or to remedy the injury to anything on the surface of the land, and the amount of any compensation that the owner and occupier or either of them have or has already received in respect of the loss and damage for which compensation is being assessed, and shall deduct the amount already so received from the amount that they would otherwise be entitled to for such loss or damage.²³⁹

The Act stipulates that upon the hearing of a claim for compensation, an order may be made requiring the person by or on whose behalf mining was authorised to restore, so far as is reasonably practicable, the surface of the land that was damaged.²⁴⁰ However, before such an order is made, consideration shall be given to the geographical location of the land to which the claim for compensation relates and its environment,²⁴¹ the purpose for which such land was used before the mining operations commenced and the purpose for which such land is likely to be used after the mining operations have ceased, the cost to restore the surface of the land relative to the whole of the cost of and in relation to such mining operations and profitability thereof; and the practicability of restoring the surface of the land after such mining operations have ceased.²⁴² Compensation is not payable for minerals because in Western Australia minerals are owned by the Crown.²⁴³ In addition, the Mining Act has provided a statutory right to landholders to deny access (right of veto) to mining companies wishing to undertake mining exploration on their properties in specific restricted areas. According to section 29 (2) mining tenements cannot be granted without written consent of the owner and occupier of the private land where upon, amongst other exceptions, agricultural activities are being carried out.²⁴⁴

²³⁹ Section 124, supra note 121.

²⁴⁰ *Ibid.* Section 124(2).

²⁴¹ *Ibid.* Section 124(3) (a).

²⁴² *Ibid.* Section 124(d)

²⁴³ Draper "A landowner's ability to negotiate compensation with the holder to rights to minerals" mini - dissertation submitted in fulfillment of the requirements for the degree Magister Legum supra note 165 at page 53.

²⁴⁴ Restricted areas include agricultural land and land under cultivation.

These provisions were implemented to protect a farmer's wishes to continue farming undisturbed by mining. These exceptions include land under cultivation which includes land used for agricultural purposes such as crops, or pasture and no mining may take place within 100 meters of such an area. The exemptions further include land situated within 100 meters of any yard, stockyard, garden, cultivated field, orchard, vineyard, plantation, airstrip or airfield; or which is situated. Mining in these areas is prohibited unless the consent of the occupier has specifically been obtained, or the Warden by order directs otherwise, or the mining activity is confined to take place to the depths below 30 meters from the surface.²⁴⁵

4.3. Conclusion

The above showcases that the position about compensation regime in Ghana and Western Australia differs significantly from the position in South Africa. It should however be noted that none of the above jurisdictions afford landowners a general power of veto over land access. As has been outlined above, the land access regimes proceed on the assumption that access will ultimately be granted albeit subject to compensation to be agreed and paid by the mining rights holder to the surface rights owner.

²⁴⁵ Julian Bodenmann, *et al* "A research Note: A comparative study into the rights of landholders to prevent access to the land by mining companies." T.C Bennie School of Law, University of Queensland at page 22.

CHAPTER 5 – EVALUATION

5.1. Introduction

The author has indicated in Chapter 1 above, specifically with regards to the scope and limitations of this research that, it was not the intention to do in-depth analysis of the jurisprudential differences between the three countries. Only salient points will be considered.

5.2. Evaluation

This limited research has however revealed that the compensation legal provisions in Ghana and Western Australia are also not perfect. For example, in Ghana – the main Act lacks express provisions specifying valuation methodology to be adopted in calculating compensation.²⁴⁶ This is however captured in the Regulations and is left to the Agency responsible for land valuation to implement. There is also a concern that with regards to customary land rights, the onus lies with traditional land users and owners to present their loss or damage against corporate entities. The capacity to claim, which the communities do not have, is the main way the communities can protect their surface rights as landowners. It has been suggested that once a large-scale mining company gets granted a mining right (and/or receives official nod to operate), the conflict within the community often leads to members receiving inadequate compensation for their land.²⁴⁷ The compensation process is also criticised that it is not transparent and that the mining companies have an upper hand in determining values of compensation.²⁴⁸

²⁴⁶ Kidido *et al* “Who is the right recipient of mining compensation for land use deprivation in Ghana’ in at page

²⁴⁷ Andrews “*Land versus Livelihoods: Community perspectives on dispossession and marginalization in Ghana’s mining sector*” in Resources Policy (May 2018) at page 245.

²⁴⁸ Armah, et al “*Management of Natural Resources in a conflicting environment in Ghana: Unmasking a messy policy problem.*” In Journal of Environmental Planning and management, 2014. Vol 57, No 11 at page 1738. It is quoted that during interviews of communities the following comments were made: “*The compensation process is not transparent. Can you imagine that all mining company determines which trees will be compensated for? In one of my farms, they combined several trees into one. Their excuse was that the cocoa trees were not old enough.*”

In Western Australia, for example, in the case of *Southern Titanium NC v Heidrich & Ors* (in the Wardens's Court, 8 April 2014)²⁴⁹ concerning compensation claim by landowners, the Warden looked at the policy behind the Mining Act – which is to promote the exploitation of minerals in the State. The Warden held that the provisions to compensation under the Act were to provide equitable treatment to the landowners. The Warden considered that compensation together with conditions on the operations of the mine would protect the landowners sufficiently. Therefore, any disruption caused by the mine could in most cases be adequately compensated or dealt with appropriately by conditions imposed on the mining operation.²⁵⁰ In this case policy considerations were used to close the gaps in the compensation legislative scheme.

In South Africa it's a pity we have not been able to develop case law on the practical implementation of section 54 of the MPRDA.²⁵¹ In general, no provision is made for the compulsory compensation of the surface rights landowner for the use of the surface of the land for the purposes of prospecting or mining minerals.²⁵² This position was settled in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd* where the court held that the MPRDA does not impose compensation agreements as an outcome of consultation.²⁵³ Compensation is payable under very limited circumstances.²⁵⁴ This being so, section 39(2) of the Constitution directs every court or tribunal – when interpreting legislation or developing common law or customary law, to promote the object, purport and spirit of the Bill of Rights.²⁵⁵ The purport and objects of the Constitution finds expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. According to the Constitution, the right to property is

²⁴⁹ The case is referred to in Workman M “*Compensation to Landowners- Exempt Land in Recent Developments*” (2004) 23 ARELJ at 229.

²⁵⁰ *Ibid* at 230.

²⁵¹ In *Joubert & Others v Maranda Mining Company (Pty)Ltd* (SCA), supra note 44 at paragraph [16]. Counsel for the appellants also submitted in the alternative that the impasse created by the appellants blanket refusal to allow the respondent access to the land, meant that the regional manager had to initiate the process aimed at the expropriation of the land as envisaged in section 54(5). The court dismissed this argument.

²⁵² Badenhorst “*New Order Rights to Minerals in South Africa in African Journal of International and Comparative Law* 26.3 (2018) at page 377.

²⁵³ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, supra note 144.

²⁵⁴ *Ibid.*

²⁵⁵ The Constitution of the Republic of South Africa, Act 108 1996. (the Constitution)

a fundamental human right.²⁵⁶ It is within this constitutional framework, that it should therefore be implied that notifying and consulting with the surface rights owners should be a process where there must be an agreement between the mining right holders and the surface rights owners if the surface rights landowners is to have a meaningful benefit from the entire process. In *Maledu and Others*, the Constitutional Court recognised values-based approach as underpinning our constitutional jurisprudence and mentioned specifically rights such as dignity and equality²⁵⁷.

Notwithstanding the above, section 25 (2) (d) of the MPRDA also recognises that the granting of the mineral right is subject to any other relevant law and terms and conditions of the mining right. Other relevant laws may impose additional requirements. For example, the Interim Protection of Informal Land Rights Act²⁵⁸ (“IPILRA”) precludes the deprivation of any informal right to land without the consent of the holder thereof. Therefore, the argument may be that the holder of the informal land right is not affected by the mining right until his consent is obtained. That is, if we apply the principles set out in the SCA case, in *Joubert and others v Maranda Mining Company (Pty) Ltd* that says the right to enter the land solidifies, once the mining permit holder has complied with the provisions regarding notification and consultation with the owner of the land, or occupier of the land.²⁵⁹ This applied to IPILRA situation will therefore mean that – the right to enter the land and conduct mining operations on the land will only solidify once the provisions of section 2 of the IPILRA has been complied with. Similarly, this was the case in the following cases.

In *Swartland Municipality v Louw No*²⁶⁰ the Swartland Municipality argued that LUPO applied to the conduct of mining operations and the respondent was thus required by the MPRDA to comply with LUPO. The respondent argued that the functional competence of

²⁵⁶ *Ibid.* Section 36 of the Constitution determines that rights in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

²⁵⁷ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 40.

²⁵⁸ Act 32 of 1996.

²⁵⁹ *Joubert & Others v Maranda Mining Company (Pty) Ltd*, supra note 44 at paragraph 13.

²⁶⁰ *Swartland Municipality v Louw and Others 2010 (5) SA 314 (WCC)*.

approving mining is an exclusive national competence under the MPRDA. Therefore, reference to any other “relevant law” in the MPRDA did not include municipal requirements. The court held that the municipality is entitled to insist that holders of mining rights are required to obtain land use planning authorisations before commencing mining operations. The court granted the municipality an order interdicting the conducting of mining activities on a property which was zoned for agricultural use (and which zoning did not permit use of land for mining) notwithstanding that the fact that the Respondent had a mining right granted to it.

*In the Maccsand (Pty) Ltd v City of Cape Town and Others*²⁶¹ the Minister of the DMR had granted *Maccsand (Pty) Ltd* (“*Maccsand*”) a mining right and a mining permit in terms of sections 23 and 27 of the MPRDA over certain erven, variously zoned “public open space” and “rural” in terms LUPO and neither of which zonings authorised the use of the land for mining. As in the *Swartland* case, the Constitutional Court held that the holder of a mining right or mining permit had to obtain land use approval from the local authority before commencing mining operations.

The above notwithstanding, and as in indicated in the above Chapters, mining rights trumps ownership of land. This means, “*in the case of an irreconcilable conflict, that is when the respective claims enter into competition and there is no room for the exercise of the rights of both parties simultaneously, the use of the surface rights must be subordinated to mineral exploration.*”²⁶² . Therefore, the presence of mining rights over the land will inevitably result in the surface rights landowner being impacted or divested²⁶³, of one or more of the entitlements of ownership. In *AgriSA*, it was confirmed that a grant of a mining right does not constitute an expropriation.²⁶⁴ The court held that there was a deprivation of the common mineral rights of the holders but held that those

²⁶¹ *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) 181 (CC).

²⁶² Badenhorst; et al *The Law of Property* 4th Edition, Durban at page 338.

²⁶³ See possible exception under IPILRA.

²⁶⁴ *Agri South Africa v Minister for Minerals and Energy*, supra note 67

rights did not vest in the State.²⁶⁵ Because the state did not acquire any rights in consequence of the MPRDA coming into effect there is no expropriation.²⁶⁶

There is however still a lingering view that the surface owner's rights are already expropriated at the stage when the mining right is granted, which mining right, as stated above, already carries with it the ancillary rights to the surface.²⁶⁷ This argument means that the owner of the land remains owner of the surface but burdened with the (expropriated) limited real right.²⁶⁸

Section 54 recognises that this divestment (expropriation or deprivation) may cause a loss or damage. It recognises that compensation is to be paid for any such loss or damage. The words "loss" or "damage" are not defined in the Act and must be given, subject to their context, their ordinary meaning.

The principle underlying the duty to compensate is that, if it is in the public interest to grant mining rights, and the burden (loss or damage) on the surface rights landowner is therefore to be alleviated by compensation. The word "damage" in various and differing contexts has often been subject of judicial debate and decisions.²⁶⁹ In the case of *Sandton Town Council v Erf 89 Sandown Extension 2 (Proprietary) Limited*²⁷⁰ the court held that if the word damage if used in its ordinary sense, it should be viewed to include in its scope not only compensation for any physical damage but also for any pecuniary loss caused to the land owner by the impairment of the value or usefulness of the land in question.

Item 12(3) of schedule II to the MPRDA is also key in the determination of just and equitable compensation. The determination of just and equitable compensation may

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ See Dale *South African Mineral and Petroleum Law*, supra note 22.e

²⁶⁸ *Ibid.*

²⁶⁹ *Kangra Holdings (Pty) Ltd v The Minister of Water Affairs* case number 626/95, 22 May 1998.

²⁷⁰ *Sandton Town Council v Erf 89 Sandown Extension 2 (Proprietary) Limited* case no 93/97, 31 March 1988.

never be an arbitrary and irrational exercise. Only those factors which are relevant to the determination of compensation in the specific case may therefore be considered. In cases of land expropriation or deprivation or loss or damage, the courts have accepted that the market value is a practical point of departure. The SCA have followed this approach²⁷¹ and the Constitutional Court found it a useful point to start without elevating market value to the principal factor in determining compensation.²⁷²

Before the Constitutional Court ruling in *Maledu and Others*,²⁷³ it was an accepted principle of law that the process in section 54, to the chagrin of the surface rights landowners need not be exhausted before the mining right holder can lawfully exercise the mining right. The right to commence mining was not suspended pending the completion of the section 54 process.²⁷⁴ As indicated above, this has changed. The Constitutional Court held that section 54 must be exhausted to ensure that the MPRDA's purpose of balancing the rights of the mining right holders on the one hand and those of surface rights holders on the other hand is fulfilled.²⁷⁵

Despite clarity provided by the Constitutional Court in *Maledu and Others*,²⁷⁶ the structure of section 54 compared to the legislative set up in Ghana and Australia, it is not ensuring the practical balancing act professed by the Constitutional Court. It is in this light that possible legislative amendments will be proposed below which will align with some strong legal provisions in the Ghana and Western Australian laws and improve on such elements where relevant.

²⁷¹ See *Abrams v Allie No and Others* 2004 4 SA 534 (SCA) 543 D-J

²⁷² See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) 314

²⁷³ *Maledu and Others Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 38.

²⁷⁴ *Joubert & Others v Maranda Mining Company(Pty) Ltd*, supra note 44

²⁷⁵ *Maledu and Others Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 38.

²⁷⁶ *Ibid.*

5.3. Conclusion

As indicated above, the South African constitutional jurisprudence is not static, and in the constitutional era which requires equal treatment under the law, it is not unreasonable to expect the courts to find a way to bring the balance between the mining rights holder entitlements and the protection of the surface rights of the landowner. This said, we must also appreciate what was stated in *Finbro Furnishers* that:

“The tendency of our law is to reconcile, as far as possible, the competing claims of the mineral lease holder and the surface owner. Although our law tries to strike such a balance a situation may well arise in which the conflict of rights is insoluble.” ²⁷⁷

²⁷⁷ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*, supra note 94.

CHAPTER 6 – CONCLUSION AND RECOMMENDATIONS

6.1. Conclusion

It has been discussed in Chapter 2 above, that in terms of the above South African mining legislation, the historical perspective clearly indicates that the State role in mining activities became assertive in time. It gained the prerogative to regulate mining without requiring the consent of affected landowners. The state determined which modus of regulation would best be suited for the policy considerations of the day. The State claimed for itself the sole prerogative to decide when and where, which minerals will be mined and by whom it will be done.²⁷⁸ Therefore the ability of the law to protect the landowners should also be seen within this shifting historical context.

In Chapter 2, the literary analysis, revealed that the MPRDA is premised on multiple objectives of equitable access to resources, economic development, social welfare, black economic empowerment and the implementation of the constitutional right to environment -and these objectives “challenges the underlying property law paradigm for mineral law in ways more extreme than any previous statute...”²⁷⁹

The MPRDA states that mineral and petroleum resources are the common heritage of the people of South Africa and the state is a custodian thereof. The state exercises its custodianship by granting new order rights to successful applicants. The new order prospecting and mining rights under the MPRDA are expressly identified as limited real rights in respect of the mineral and the land, and to provide security of tenure they must be registered at the mineral and petroleum titles registration office.²⁸⁰

²⁷⁸ , Van der Schyff, “A historical overview of the State’s regulatory power regarding the exploitation on minerals in South African mineral laws” supra note xxxat 153

²⁷⁹ Humby, Book Review of Mostert H *Mineral Law: Principles and Policies Perspective* in Journal of Energy & Natural Resources Law, Vol 31 No 3 2013 at 356.

²⁸⁰ *Ibid.*

In Chapter 2 and 3, the critical analysis of common law, statutory law and case law showed²⁸¹ that there is a dual system regulating access to minerals. Firstly, by the mineral rights holder controlling access (creating first opportunity to negotiate compensation through consultation and notification), and secondly, by the State (the Regional manager controlling access to exploitation by creating second opportunity to negotiate compensation if he/she believes there is loss or damage suffered by the surface rights landowner).

In the final analysis the *Bengwenyama*-case decision has created landmark benchmark (a foundation) upon which the duty to consult and accommodate surface rights landowners is to be built on.²⁸²

In Chapter 4 it is noted that whereas surface rights landowners in South Africa are only entitled to compensation for actual loss or damage he/she suffered or likely to suffer in accordance with section 54 of the MPRDA, in Ghana and Western Australia landowners are entitled to compensation for, *inter alia*; 'deprivation of possession of the surface of the land; diminution in value of the land; diminution of the use made or that may be made of the land or any improvement on it; severance of any part of the land from other parts thereof or from other land of the owner; infringement of any surface rights of access and all loss or expense that arises as a consequence of the grant or renewal of the mining lease. The grounds on which compensation can be claimed therefore extend much further than the actual damage and from the surface rights landowner's perspective provide far greater protection than what is available in South Africa's mining regulation. In South Africa, the statutory protection afforded to owners of land under the previous minerals dispensation was also far more comprehensive. The MPRDA should have provisions that makes compensation agreement between the rights holder and the surface rights landowner compulsory for loss or damage resulting from prospecting or

²⁸¹ *Ibid.*

²⁸² Section 104 of the MPRDA creates a special category of rights for communities to have a preferent right to apply for mining right over their land. Before a prospecting right in terms of section may be granted, the community must be informed by the DMR. This is to ensure that the community could bring its own application under section 104 prior to the decision being made on the application in terms of section 16 by another entity or person. This effectively creates a veto right in favour of the community.

mining or some form of a veto right should have been given to surface rights landowners of farming land.²⁸³

It must however be noted that there are other relevant laws as indicated in Chapter 4 that may be used by the surface rights landowner to prevent the mining right holder from commencing with the mining operation on his/her land.

The legal principles which evolved from the *Maccsand* and *Swartland* cases has significant impact on this situation. The surface rights landowner is the principal person able to apply for the rezoning of any property. This right to rezone is not extended to the holder of a mining right.²⁸⁴

The main question that was posed in this research and which must be answered is to what extent South African law protects the surface rights of landowners over whose property mining rights have been granted. This research has considered several separate, apparently disconnected components of the law to provide an answer to the research question.

The research has confirmed that even though the surface rights of landowners have been protected by common law principles and statutory law overtime, the current regulatory scheme under the MPRDA has significant limitations. The research confirmed that during the period of mining leases the surface rights landowners were free to determine the level of compensation as part of the lease agreement. In the period of section 42 of the Minerals Act, the surface rights landowners could claim not only for compensation as a result of expropriation of the land, but also for other damages caused in the course of mining operations. Compensation provisions in the Minerals Act were clearly defined and surface rights landowners were certain of the fact that they could claim compensation

²⁸³Badenhorst “*New order rights to minerals in South Africa: Ten years after mayday*” in African Journal of International and Comparative Law, 26.3 (2018) at 378. See also section 53(2) which requires any person who intends to use the surface of any land in a way which may be contrary to any object of the MPRDA or likely to impede such object to apply to the Minister for approval of such intended use.

²⁸⁴ *Mtunzini Conservancy v Tronox* [2013] 2 All SA 69 (KZN). *Coal of Africa & Another v Akkerland Boerdery (Pty) Ltd*, NGP 38528/2012, February 2014.

from any person including the State if their land was acquired or purchased under certain circumstance.

Under the MPRDA, barring the right to be consulted which only alleviates the situation, the surface rights landowners will only be able to claim compensation only if the Regional Manager believes the surface rights owner has suffered or is likely to suffer a loss or damage due to mining activities conducted on his land

This having been said, the surface rights landowner will still be able to rely on other legal mechanism including interdicts, common law nuisance, expropriation²⁸⁵, and environmental law duty of care provisions – and further hope the DMR will enforce compliance with conditions of the mining right especially the environmental management programme.²⁸⁶ These alternatives remedies, are also imbued with extraordinary requirements and may therefore also, at worst of times, be unavailable to the surface rights landowner.

Whilst the MPRDA contains its own internal mechanism for resolving obstacles and resolving disputes between the mining right holder on the one hand and the landowner on the other hand,²⁸⁷ these mechanisms however needs to be improved to make their practical application easier and transparent.

6.2. Recommendations

As discussed in chapter 4 above, Western Australia has one of the protective laws for surface rights landowners. A particularly striking feature of this law is that mining companies cannot commence operations without concluding a Compensation Agreement

²⁸⁵ See Item 12 of Schedule 2 to the MPRDA. Expropriation of land by the State as a result of the parties failing to resolve their conflict, will only be possible if the Regional Manager is convinced that further negotiations between the parties will detrimentally affect the objects of the MPRDA.

²⁸⁶ *Sephaku Tin (Pty) Limited and Kransoppie Boerdery* (In the North Gauteng High Court, Pretoria) Case No: 47561/2010.

²⁸⁷ *Maledu Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 45.

with the surface rights landholder. This system encourages mining companies to negotiate in good faith to avoid delays in the process. The MPRDA should have a similar provision under section 54 which requires that entry into land should not be permitted until a Compensation Agreement has been settled.²⁸⁸ Further, confirmation of the agreement reached between the parties should be sent to the Regional Manager and REMDEC for noting. In addition, detailed statutory principles, similar to the Ghana compensation principles²⁸⁹ stated above, should be included in section 54 of the MPRDA. Such details will facilitate the determination of adequate compensation and to form the basis of negotiations between mining rights holders and surface rights landowners.

Consultation with the surface rights landowner or lawful occupiers of land, before mining starts, is no longer required as section 5(4) (c) has been deleted. Section 5(4)(c) was a significant foundation to safeguard the surface rights landowner's rights because it implied that the agreement regarding compensation could be reached, before the mining right holder have access to enter the land. The Constitutional Court in *Maledu and Others*,²⁹⁰ held that section 54 is not only triggered by disputes relating to compensation.²⁹¹ With the repeal of section 5(4) (c) section 54 provides a mechanism for further consultation and negotiations and it must be exhausted to ensure the balancing of rights of the mining right holder and the surface rights landowner. The difficulty with consultation under section 54 and as was with consultation under the repealed section 5(4) (c) is that the at this stage the horses have already bolted. The mining right has already been granted.

²⁸⁸ See Draper "A landowner's ability to negotiate compensation with the holder to rights to minerals" mini-dissertation submitted in fulfillment of the requirements for the degree Magister Legum supra note 165. 53. The similar conclusion is stated by R.W Draper referring to comments made by Badenhorst in the 2011 TSAR at page 337. "He goes further to state that because of the obvious advantages of the Western Australian system, section 54 of the MPRDA should be amended to make provision for the conclusion of a compensation-agreement prior to any mining operations conducted on the landowners' private land."

²⁸⁹ See Ghana's Resettlement and Compensation Regulations, supra note 210.

²⁹⁰ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, supra note 6 at page 38.

²⁹¹ *Ibid.*

In addition to section 54 consultation procedures, section 10(2)(b)²⁹², section 16(4)(b)²⁹³ and section 22(4) (b)²⁹⁴ also provide consultation procedures. The critical consultation procedure is in terms of section 10 which is managed by the Regional Manager²⁹⁵ and also allows the surface rights landowners to object to the granting of a prospecting right, mining right or mining permit.²⁹⁶ Unfortunately, the objecting party must submit their objection within 30 of receipt of notice. The period of 30 days is relatively short, and it is unlikely that such a brief period will be sufficient for the surface rights landowner to have a comprehensive impact assessment of the application on his land. The period should be increased to a maximum of 180 days. It must also be recognised that the surface rights owners or occupiers may be impoverished and may not afford to hire the expertise that is needed to participate fully in the consultation and objection process. The issue of appropriate funding is also essential to a fair and balanced consultation process to ensure a 'level playing field'.²⁹⁷

²⁹² Must be completed within 30 days. Interested and affected person must submit comments in 30 days.

²⁹³ Must be completed within 30 days. The applicant must consult with the landowner and submit results of the consultation within 30 days.

²⁹⁴ Must be completed in 180 days. The applicant must consult with interested and affected parties within 180 days.

²⁹⁵ Section 10(1)(a) and section 10(1)(b) of the MPRDA.

²⁹⁶ Section 10(2) of the MPRDA.

²⁹⁷ Gumbi *"Prospecting and Mining Rights – Comparative analysis of the South African duty to consult and accommodate interested and affected persons before awarding prospecting and mining rights"* in *Advocate* Volume 25 number 3 December 2012 at page 47.

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