UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

A CRITICAL DISCUSSION OF MAWETSE V DILOKONG WITH REGARD TO THE NATURE OF MINERAL RIGHTS

By

MICHELLE DE VILLIERS
(Student No. 20011165)

Submitted in partial fulfilment of the requirements for the degree

LLM in Extractive Industry Law

Prepared under the supervision of

Adv. Leonardus J. Gerber

Department of Public Law
Faculty of Law
University of Pretoria

November 2019

DECLARATION OF ORIGINALITY

UNIVERSITY OF PRETORIA

The Department of Public Law, Faculty of Law, places great emphasis upon integrity and ethical conduct in the preparation of all written work submitted for academic evaluation.

While academic staff teach you about referencing techniques and how to avoid plagiarism, you too have a responsibility in this regard. If you are at any stage uncertain as to what is required, you should speak to your lecturer before any written work is submitted.

You are guilty of plagiarism if you copy something from another author's work (e.g. a book, an article or a website) without acknowledging the source and pass it off as your own. In effect you are stealing something that belongs to someone else. This is not only the case when you copy work word-for-word (verbatim), but also when you submit someone else's work in a slightly altered form (paraphrase) or use a line of argument without acknowledging it. You are not allowed to use work previously produced by another student. You are also not allowed to let anybody copy your work with the intention of passing if off as his/her work.

Students who commit plagiarism will not be given any credit for plagiarised work. The matter may also be referred to the Disciplinary Committee (Students) for a ruling. Plagiarism is regarded as a serious contravention of the University's rules and can lead to expulsion from the University.

The declaration which follows must accompany all written work submitted while you are a student of the Department of Public Law.

No written work will be accepted unless the declaration has been completed and attached.

Full names of student: ……

Student number: ……

Topic of work: ……..

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this mini-dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SIGNATURE ……..

ACKNOWLEDGEMENTS

It is a great pleasure to acknowledge my deepest thanks and gratitude to Adv. Leon Gerber for his kind supervision, generous advice and support, it was a great honour to work under his guidance.

Furthermore, I would like to express my extreme sincere gratitude and appreciation to Wynand Venter, practicing attorney for his endless help and support during the study.

ABSTRACT

Section 5(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 28 of 2002 stipulates that a prospecting and mining right granted in terms of the aforementioned Act and registered in terms of the Mining Titles Registration Act 16 of 1967 is a limited real right in respect of the mineral and the land to which it relates. Section 2(4) of the Mining Titles Registration Act 16 of 1967 determines that registration of a prospecting or mining right in terms of that act constitutes a limited real right binding on third parties.

Section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 defines the effective date of a prospecting or mining right to be the date of execution thereof. In the judgement of the *Minister of Mineral Resources and Others vs Mawetse (SA) Mining Corporation (Pty) Ltd*, the Supreme Court of Appeal through Majiedt, J held that a prospecting right, and by implication a mining right, becomes enforceable on date of approval of the environmental management programme related to such right. In practice the approval of an environmental management programme occurs on date of execution.

Considering this judgement and legislative provisions, it is obvious that a contradiction exist as to when a prospecting or mining right becomes enforceable against third parties such as landowners. The common law principle with regard to limited real rights are that limited real rights become enforceable upon registration against third parties on the basis that such registration serves as publication to the public of its existence and enforceability.

The question arises whether the nature of prospecting or mining rights as limited real rights has changed from the aforementioned common law principle through the enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 on whether the aforementioned act and the Mining Titles Registration Act 16 of 1967 incorporate this common law principle into the aforementioned legislation.

The *Mawetse* - judgement deviates from both the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 and the aforementioned common law principle. It also deviated from previous case law which held that prospecting- and by implication mining rights are contractual in nature, by finding that they are the result of unilateral administrative action. If contractual in nature, it is arguable that prospecting or mining rights become enforceable on date of registration through the common law principles underpinning enforceability of limited real rights and if the result of unilateral administrative action, in terms of the *Mawetse* - judgement becomes enforceable on date of approval of the environmental management programme, which coincides with the date of execution. It is of importance to ascertain whether prospecting and mining rights are contractual in

nature, the result of unilateral administrative action or hybrid of both to answer the question whether they are enforceable as limited real right before registration or only upon registration.

The methodology to answer these questions entails a critical case study of the *Mawetse* - judgement and an analysis of the interpretation of statutory and common law.

This dissertation will explore when prospecting and mining rights become enforceable against third parties such as landowners and secondary thereto, whether they are contractual in nature, the result of unilateral administrative action or a hybrid of both, in order to answer the primary and secondary questions that arise from the aforementioned.

LIST OF ACRONYMS

AC	Appeal Court
ALL ER	All England Law Reports
ALL SA	All South African Law Reports
BEE	Black Economic Empowerment
CC	Constitution Court
DDG	Deputy Director-General
DMR	Department Mineral Resources
JA	Judge of Appeal
JOL	Judgments Online South Africa
LAWSA	Law of South Africa
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MTRA	Mining Titles and Registration Act, Act No. 16 of 1976
NC	Northern Cape
QB	The Law Reports, Queen's Bench Division [England] (1891 -1901; 1952 -)
SA	South African Law Reports
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
TS	Transvaal Supreme Court Reports [South Africa] (1902 – 1909)
TSAR	Tydskrif vir die Suid Afrikaanse Reg
ZASCA	Supreme Court of Appeal of South Africa

KEYWORDS

Mawetse

Property

Ownership

Registration

Enforceable

Mineral Rights

Table of Contents

CHAPTER 1: INTRODUCTION TO THE RESEARCH

1.1. Background and problem statement

In South Africa a transition occurred in the mineral regulatory regime when the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") was promulgated. The transition was from privately held mineral rights to custodianship of all minerals vesting in the State.[1] When referring to South Africa's mineral rights, the term custodianship is the correct term to use.[2] However, contrary to that the preamble of the MPRDA clearly states that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof.[3]

The objects of the MPRDA are essential in its interpretation, reasoning, formulating arguments and as background to the discussion of case law concerning mineral rights.[4]

The objectives of the MPRDA are manifold. Its objects include recognition of the State's sovereignty over mineral resources,[5] give effect to the State's custodianship over these resources[6] and promote equitable access thereto by all South Africans.[7] This also includes expanding meaningful opportunities to historically disadvantaged persons within the resource sector,[8] economic growth within it[9] and promote employment and social welfare of all South Africans.[10] It intends to promote security of tenure of prospecting and mining operations.[11] It also has in mind the development of such resources in an orderly and ecologically sustainable manner while promoting justifiable social and economic development[12] and ensuring that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[13]

It is imperative to read this with Section 4 of the MPRDA though, since interpreting a provision of the MPRDA, any reasonable interpretation which is consistent with the objects of the MPRDA must be

[1] Preamble Mineral and Petroleum Resources Development Act, 28 of 2002 (Hereinafter referred to as 'MPRDA').
[2] *Ibid*.
[3] Section 2(b) MPRDA.
[4] E Van Der Schyff, *Property in Minerals and Petroleum,* (Juta, 2016) at 140.
[5] Section 2(a) MPRDA.
[6] Section 2(b) MPRDA.
[7] Section 2(c) MPRDA.
[8] Section 2(d) MPRDA.
[9] Section 2(e) MPRDA.
[10] Section 2(f) MPRDA.
[11] Section 2(g) MPRDA.
[12] Section 2(h) MPRDA.
[13] Section 2(i) MPRDA.

preferred over any other interpretation which is inconsistent with such objects. [14] Also, insofar as the common law is inconsistent with the MPRDA, the MPRDA prevails.[15]

Thus, any interpretation and application of any provisions of the MPRDA should be consistent with the objects of the MPRDA.[16] To the contrary, the common law finds application to any interpretation of the MPRDA if it is not inconsistent with the MPRDA.

The Supreme Court of Appeal judgment in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) 419 (hereinafter "*Mawetse", "Mawetse* – case*" or "Mawetse* – judgement" as the context may require) impacts extensively upon the regulation of mineral law in South Africa.

*As aforementioned, section 4 of the MPRDA directs that when interpreting a provision of the MPRDA, any reasonable interpretation which is consistent with the objects of the MPRDA must be preferred over any other interpretation which is inconsistent with such objects. If common law is inconsistent with the MPRDA, the MPRDA prevails.

In terms of Section 5(1) of the MPRDA mineral rights are limited real rights in respect of minerals or petroleum over the land to which its relates, once granted in terms of the MPRDA and registered in terms of the Mining Titles and Registration Act, Act No. 16 of 1976.

The MPRDA defines the "effective date" of a mineral right to be the date on which it is executed.[17] However, this definition, contradicts the MPRDA which requires a mineral right to be registered first before becoming a limited real right.[18] Furthermore, the Mining Titles Registration Act 16 of 1967 ("*MTRA*") clearly states that registration of a mineral right constitutes a limited real right binding on third parties.[19]

Consequently, an inconsistency arises. How can a mining right become effective before becoming a limited real right by means of registration? It is trite that a limited real right only becomes enforceable upon registration in terms of common law.[20] This trite common law principle was introduced into the MPRDA and MTRA.[21] Yet, section 1 of the MPRDA provides that the date of execution is the date on which a mineral right becomes effective. How can a mineral right become effective, yet not be enforceable against third parties such as land owners of land subject to a mineral right? It is self-evident that an effective mineral right must be enforceable against a land owner in order to exercise the rights pursuant to a mineral right, but how can it if registration (which occurs after execution) and

---

[14] Section 4(1) of the MPRDA provides: *"(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects".*

[15] Section 4(2) of the MPRDA provides: *(2) In so far as the common law is inconsistent with this Act, this Act prevails."*

[16] Section 4(2) MPRDA.

[17] Section 1 MPRDA.

[18] Section 5(1) MPRDA.

[19] Section 2(4) MTRA.

[20] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* (2001) 3 All SA 321 (SAC) at 329a-b.

[21] Section 5(1) MPRDA and section 2(4) MTRA.

not execution itself causes a mineral right to become enforceable against third party land owners? As a result of these inconsistencies and the courts being confined thereto, the courts have had to find practical solutions in *inter alia* the case of *Meepo v Kotze* 2008 (1) SA 104 (NC) and the *Mawetse* case. The aforementioned inconsistencies resulted in the practical solutions proffered by these judgements not to have provided a permanent solution to the inconsistency.

In order to analyse this judgment, the characteristics and nature of mineral rights will be discussed next.

*The nature of prospecting rights, and by implication mining rights (jointly referred to as "*mineral rights*") came under the spotlight in this judgement when a comparison is drawn between the Mineral and Petroleum Resources Development Act 28 of 2002 ("*MPRDA*") and common law principles.

The MPRDA directs that when interpreting a provision of the MPRDA, any reasonable interpretation which is consistent with the objects of the MPRDA must be preferred over any other interpretation which is inconsistent with such objects. If common law is inconsistent with the MPRDA, the MPRDA prevails.[22] However, this must mean that if common law is consistent with the MPRDA, it is applicable.

A prospecting and mining right is a limited real right in respect of mineral or petroleum and the land to which its relates if granted in terms of the MPRDA and registered in terms of the Mining Titles and Registration Act, Act No. 16 of 1976.[23]

The MPRDA defines the effective date of a mineral right to be the date on which it is executed.[24] However, this definition of "effective date" contradicts section 5(1) of the MPRDA which requires a mineral right to be registered first before becoming a limited real right. This poses a contradiction

The primary question then arises how a mineral right can become effective before registration, as required in section 5(1) whilst it is not yet a limited real right before registration according to section 5(1)?

A secondary question arises. Is a mineral right a unilateral administrative action, contractual in nature or a hybrid of both? If contractual in nature, it can be enforceable upon registration in terms of the common law principles with regard to registerability and enforcement of real limited rights and if unilateral administrative action, it is enforceable from date of approval of its environmental management plan in terms of the judgement in *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd* 2015 (3) ALLSA 408 (SCA) or from date of execution in terms of section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (see definition of "effective date"). In practice the date of approval of an environmental management plan occurs simultaneously with execution, on which date the mineral right becomes effective in terms of section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (see definition of "effective date").

The courts having been confined to existing case law as a result of the precedent system, had to find practical solutions in *inter alia* the case of *Meepo v Kotze* 2008 (1) SA 104 (NC) and the *Mawetse* –

[22] Section 4 MPRDA.

[23] Section 5(1) MPRDA.

[24] Section 1 MPRDA.

case to answer these primary and secondary questions. However, the courts having been fundamentally confronted with these questions, failed to provide a solution to the riddle.

1.2. Research aims and objectives

1.2.1. Aim

This paper aims to offer a critique of the judgment of the Mawetse - case, in particular by illustrating how the judgement failed to provide a practical solution to answer the aforementioned primary and secondary questions.

1.2.2. Objectives

In order to achieve these aims, the objects of the dissertation will be the following:

- What is the nature of common law mineral rights;
- What is the nature of mineral rights in terms of the MPRDA;
- Critical analyses of the *Mawetse* – judgement with regard to the date of enforceability of mineral rights;
- Conclusion whether mineral rights are enforceable before registration and secondarily, whether they are contractual in nature, the consequence of unilateral administrative action or a hybrid of both.

1.3. Research questions

1.3.1. Primary research question

Accordingly, the primary research question answered by this dissertation is: “How can a mineral right become effective before registration, as required in section 5(1) of the MPRDA whilst it is not yet a limited real right before registration according to section 5(1)?

1.3.2. Secondary research questions

The primary research question is supported by the following secondary questions:

1.3.2.1. What is the nature of mineral rights in terms of the common law?
1.3.2.2. What is the nature of mineral rights in terms of the MPRDA?
1.3.2.3. How does the *Mawetse* - case deal with the date of enforcement of mineral rights in terms of the MPRDA and how did this court came to a conclusion which is inconsistent with the common law principle of enforcement of mineral rights on date of registration?

1.3.2.4 Are mineral rights contractual in nature, the consequence of unilateral administrative action or a hybrid of both?

1.4. Research methodology

1.4.1. Methodology

The Methodology entails a case study analysis and critique based on an interpretation of statutory and common law. The common law and applicable statutory law will be considered, case law analysed and the *Mawetse* –judgement criticised in light of statutory and common law.

1.5. Relevance of the study

This research findings suggest a misinterpretation by the courts, as well as the executive with regards to the application of the MPRDA in respect of the date on which mineral rights become enforceable. Accordingly, this dissertation provides legal surety, as well as an alternative interpretation to address the current oversight.

1.6. Chapter overview

Chapter 2 will deal with the nature of common law limited real rights whilst in Chapter 3 the nature of statutory limited real rights will be explored and determined. In Chapter 4 the *Mawetse* - judgment will be analysed and the flaws therein will be determined with regards to the primary and secondary research questions. Then, in Chapter 5 this judgment will be criticized in light of the identified flaws and a solution will be offered to address these flaws in conclusion.

CHAPTER 2: WHAT IS THE NATURE OF COMMON LAW LIMITED REAL RIGHTS?

2.1 Introduction

South African mining and mineral law has always been based on the Roman and Roman-Dutch law premise that the owner of land is the owner of the minerals embedded in and under the soil owned by the landowner.[25]

Apart from normal ownership Roman law also recognise other real rights. These are rights vested in the property of another.[26] In this section the various limited real rights that were recognised in Roman law will be discussed. In doing so, the classification of limited real rights will be explored and a conclusion reached on it.

The MPRDA describes mineral rights as limited real rights.[27] But what are limited real rights, are there different types and forms of limited real rights? This chapter explores the historical foundations, development and classification of limited real rights in terms of Roman, Roman Dutch and South African Common Law. This is of importance in order to understand the nature and characteristics of modern day mineral rights.

2.2 Roman law limited real rights

Roman law did recognise several limited real rights over the real rights of others.

2.2.1 Servitudes

A servitude is a burden placed upon the corporeal thing of another that could be enforced by means of a real action.[28] When the right was exercised for the benefit of the person himself, it was known as a personal servitude.[29]

When the right was exercised for the benefit of land of which he himself was the owner, it was known as a praedial or real servitude.[30]

---

[25] *Trojan Exploration Co (Pty) and another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A) 537C.

[26] T van der Merwe, and B Stoop, *Historical Foundations of South African Private Law*, 2nd Edition (Butterworths, 2000) at 191.

[27] Section 5(1) of the MPRDA.

[28] T van de Merwe, *Supra* note 25 at 191.

[29] *Ibid.*

[30] *Ibid*.

2.2.2 Praedial Servitudes

Praedial servitudes were real rights that were exercised by the owner of one piece of land over land belonging to another. The reasoning behind the creation of praedial servitudes is that one section of land should serve the other section of land.[31] When dealing with praedial servitudes we have to distinguish between the servient piece of land and the dominant piece of land. The relation between the two parcels of land was *servitus,*[32] a burden is placed on the servient parcel of land irrespective of who the owners are, and a benefit is derived for the dominant piece of land. If ownership is ever transferred where both pieces of land will be transferred, the servitude will continue in favour of the new owner of the dominant tenement and enforceable against the new owner of the servient tenement. The servitude has to benefit the dominant tenement.[33] It is impossible to hold a servitude over one's own property.[34] By implication when the owner of land (dominant land) acquires ownership of adjacent land (servient land), the servitude terminates and does not revive if at a later stage the ownership of one of the two properties are transferred.[35]

2.2.3 Personal Servitudes

A personal servitude is to be adhered to by a specific person. In this regard it is not necessary to be an owner of the land in order to be the holder of the personal servitude, and a personal servitude is also possible over moveable property.[36]

Both praedial and personal servitudes were real rights over the property of another. A distinction of a personal right from a praedial right is that a personal right cease to exist on the death of the holder of the personal right, whilst a praedial right survives transfer of ownership subsequent to sale thereof or death of the owner.

2.3 *Quasi* Servitudes

The reality that minerals were judicially severed from ownership of land, which will be dealt with below, made it very difficult to legally categorise these unique rights.[37] These rights having restricted the landowner's ownership, furthermore having subtracted from the landowners *dominium*[38]and the

---

[31] *Idem* at 192.

[32] *Ibid.*

[33] *Ibid.*

[34] *Idem* at 191.

[35] *Idem* at 194.

[36] *Idem* at 195

[37] Van der Schyff (2016) 48.

[38] The "subtraction from the *dominium* test" has been formulated by the courts to identify whether a particular right in property can be categorised as a limited real right and registered as such against the title of the property. This has been necessitated by the fact that no *numerus clausus* of limited real rights exists in South African Law. The test is based on the reasoning that a limited real right diminishes the owner's *dominium* over property to such an extent that it is not only the owner personally, but the construct of ownership that is bound. It either confers on the holder certain entitlements inherent in the right of ownership and/or prevents the owner of the thing to some extent from exercising his or her right of ownership. Van der Schyff (2016) 48.

intention to bind successors in title are characteristics of limited real rights.[39] Severed rights with regards to minerals were categorised as limited real rights.[40]

In respect of South African common law, in the *Van Vuren v Registrar of Deeds*[41]- case it was held that mineral rights was characterised as a personal *quasi*-servitude.[42] However in *Ex Parte Pierce*[43] the court noted that it was also correct to view mineral rights as constituting a class of real rights *sui generis*.[44]

The doctrine of judicial severance played an important role in South African mineral law. If we look at mineral rights in isolation, meaning severed from and held independently of the ownership of land, the following characteristics are evident:[45]

a) Mineral rights were recognised as real rights [46]
b) Mineral rights are in their very nature extremely complex which made up the abstract notion of *dominion,*[47] implying that they could be severed from the title to and ownership of land;
c) Mineral rights cannot be classified as praedial servitudes since they were constituted in favour of a beneficiary and not in favour of any land, and also a praedial servitude could not be alienated apart from the land to which they applied[48]
d) Mineral rights cannot be classified as personal rights either, since they are freely assignable or transferrable and passed to the heirs or successors in title of the holder, subsequently earning the label *quasi*-servitudes;[49]

---

[39] *Ex Parte* Geldenhuys 1926 OPD 155; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 (4) SA 490 (E) 499A; *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) 605D – E 610G; *Hotel De Aar v Jonordon Investments (Edms) Bpk* 1972 (2) SA 400 (A) 450D; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050E.

[40] PJ Badenhorst and H Mostert, *Mineral and Petroleum Law of South Africa: Commentary and Statutes* (Juta, 2005) 3-5.

[41] *Van Vuren v Registrar of Deeds* 1907 TS 289.

[42] *Idem* at 294.

[43] *Ex Parte* Pierce 1950 (3) SA 628 (O) 628.

[44] *Idem* at 634.

[45] CG Van der Merwe, *Sakereg* 2nd edition (Butterworths, 1989) at 561-562.

[46] Section 70(1) Deeds Registries Act 47 of 1937.

[47] *Natal Navigation Collieries & Estate Co Ltd v Minister of Mines* 1955 2 SA 698 (A) 705G.

[48] *Trojan Exploration Co* (*Pty*) *Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 509H.

[49] *Webb v Beaver Investments* (*Pty*) *Ltd* 1954 1 SA 13 (T) 25A. Ramsbottom J held that mineral right reservations constitutes praedial servitudes. However, the South African law on servitudes is based on the Roman law, which identified specific characteristics of praedial servitudes, namely: (a) they are generally limited to rights which do not interfere with or obstruct actual possession and enjoyment of the servient tenement by the owner (eg. usufruct, where the owner is effectively excluded from enjoyment of the land); (b) an advantage to the dominant tenement must exist; and (c) they are indivisible, whereas mineral rights could have been leased or subdivided.

e) They constituted real rights and real rights are registerable in the deeds office, after which it becomes binding on all third parties;[50]
f) Once severed from the land and held under a separate mineral right title, the separation was final, even in the event of a merger which would have terminated a praedial servitude, to the extent that the right to minerals once again became vested in the owner of the land;[51]
g) Mineral rights were divisible in the sense that the holder could acquire or dispose of an undivided share in them and the separation could have been in respect of a portion of a defined entity of land, or of a share in the whole or a portion of a defined entity of land, and could have been in respect of all minerals generally, or of a particular mineral or minerals;[52]
h) The rights necessary to exercise a mineral right is derived from the mineral right itself. Such ancillary or incidental rights can be amplified or restricted when created as may be necessary to exercise the mining right.[53]
i) Contrary to the rule applicable to personal servitudes that a servitude itself cannot be subject to a servitude, *quasi* servitudes can be subject to a personal servitude of ususfruct.[54]

It has frequently been held in case law that it is difficult to find the correct niche in which to place a reservation of mineral rights.[55] It is important to know that the reservation of mineral rights were commonly referred to as *quasi*-servitude, as in the case of *Lazarus and Jackson v Wessels and Others,*[56] where Innes, C. J said:

> "*Rights of that nature are peculiar to the circumstances of the country, and do not readily fall under any of the classes of real rights discussed by the commentators. They seem at first sight to be very much of the nature of personal servitudes, but then they are freely assignable*."

The Appeal Court concluded that mineral rights are in fact *quasi*-servitudes:

> "*what was acquired, then by this notice was the ownership in the land in question, including all minerals therein, the respondent at the same time being granted the rights of a quasi-servitude*".[57]

This meant that the property in this case was acquired by the appellant, subject to the respondent's right to mine.[58]

---

[50] *Du Preez v Beyers* 1989 1 SA 320 (T) 324H–I; *Trojan Exploration Co* (*Pty*) *Ltd v Rustenburg Platinum Mines Ltd* supra n 48 at 509H–I.

[51] *Beyers v Du Preez* 1989 1 SA 328 (T) 336D.

[52] Sections 20 and 21 Minerals Act 50 of 1991.

[53] Section 70(2) of the Deeds Registries Act 47 of 1937.

[54] *Ex parte Eloff* 1953 1 SA 617 (T); Badenhorst 1993 *Stell LR* 394, 1994 *TSAR* 107.

[55] *Ex parte* Pierce and others 1950 (3) ALL SA 397 (O) 403.

[56] *Lazarus and Jackson v Wessels and Others* 1903 TS 499, p 510.

[57] *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) ALL SA 576 (A) 587.

[58] *Ibid*.

However, considering the latter Appeal Court decision dating back almost sixty years, as will be mentioned below it is perhaps more appropriate to regard modern mineral rights as *sui generis* servitudes.

2.4 Sui Generis servitudes

Sui generis servitudes can best be described as servitudes unique in character, of a kind or class by itself. Although the Supreme Court of Appeal held in the *SA Railways and Harbour*[59]- case that mineral rights are *quasi* servitudes, the courts more recently held that they are *sui generis* servitudes.[60] But perhaps the precedent description of Chief Justice Innes with regard to *sui generis* servitudes in the *Neebe*[61] – case is most fitting:

> *"I am clearly of opinion that tenure under which claims like those in question are held is one sui generis specially created by statute, and the incidents of which must be gathered from the terms of the statute which established it."*

Modern mineral law regimes are derived from legislation and perhaps they can best be described as established by legislation and thus *sui generis* servitudes.

The classification of pre-2004 rights to minerals as *quasi*-servitudes or real rights *sui generis* might at first glance be deemed void of meaning under the MPRDA which in turn gave rise to a new debate regarding the exact juristic niche of the rights provided for in the Act.[62] However, the distinctive characteristics and nature of the rights embraced in the concept of mineral rights when severed and held independently of land ownership remain relevant for comparing the rights under the different mineral and petroleum law regimes when the juristic nature of rights to minerals in terms of the MPRDA is determined.[63] The origin and nature of independent mineral rights are also of importance in order to understand the manner in which the other common law principles, like the principles regulating conflict between landowners and holders of mineral rights are developed, in order to determine the continued application of these common-law principles in the new order mineral era.[64]

Before a mineral right could be established over property, the owner of the said property would also have been the holder with regards to the said minerals on his property.[65] These minerals, which have not yet been mined, did not form separate things in the legal sense of the word, but they did remain part of the property as a whole.[66] So, the owner of the property were not the owner of the severed minerals, rather the owner of the land property of which minerals were but an ingredient of such

---

[59] *Ibid.*

[60] *Rand Mines Ltd vs President of the Republic of South Africa* 1996 (3) SA 425 (B); *Minister of Land Affairs vs Rand Mines Ltd* 1998 (4) SA 303 (SCA).

[61] *Neebe v Registrar of Mining Rights* 1902 TS 83.

[62] Van der Schyff (2016) 50.

[63] *Ibid*.

[64] *Ibid*.

[65] L Van Schalkwyk, en P van der Spuy, *Algemene beginsels van die Sakereg* 5de Uitgawe (Juta 2002) 284.

[66] *Ibid*.

property.[67] When minerals were removed and mined from the property, only then did they form a legal thing on their own to which the landowner had separate ownership of.[68]

These minerals were properly regulated in terms of the Minerals Act 50 of 1991. Section 5 (1) of the Minerals Act reaffirmed the entitlement of mineral right holders, either as land owner or a holder who acquired the right after the severance of minerals, to prospect and mine for and also dispose of minerals.[69] However, the Minerals Act reduced the category of possible applicants qualifying to obtain mining authorisations to land owners or registered mineral right holders or those requiring their consent.[70]

However, mineral rights could only be exercised legally subject to the Minerals Act. Though the Minerals Act reaffirmed entitlement of mineral right holders, such entitlement were curtailed to the requirement to apply for and be granted an authorisation to mine or prospect.[71]

The term of mining authorisations were for a certain period of time and were capable of cancellation, lapsing or abandonment.[72] This was consequent to mining authorisations being solely applicable to the holders thereof, personally.[73] Such authorisations as a result appear to have had the character of a personal servitude, which is supported by section 13 of the Minerals Act[74] confirming that these authorisations were not capable of alienation, transfer, cession or mortgage.

The Minerals Act allowed an interpretation that as a measure it attempted to the fullest extent possible to ensure all common law rights are held by the holders thereof. However, the State played an assertive role. The State acquired the prerogative to legally allow third parties to mine on land owned by others. However, once severed minerals were not regarded as removed from a land owner's dominion.[75]

Essential to common law rights was the principle of *dominium* which in essence guaranteed that whoever owns the soil, also owns that which is above and below the surface. The Minerals Act abrogated this principle.[76] However, promulgation of the MPRDA completely extinguished common law rights in respect of minerals and made the State the custodian of all minerals.[77] In order to facilitate a full and proper transition from one system to the other, Schedule II of the MPRDA provided for transitional measures which includes the conversion of old order mineral rights to new order mineral rights.[78]

---

[67] *Ibid.*

[68] *Ibid.*

[69] Van der Schyff (2016) at 132-133.

[70] *Ibid.*

[71] Van der Schyff (2016) at 133.

[72] Section 16 of the Minerals Act 50 of 1991.

[73] Van der Schyff (2016) at 134.

[74] Minerals Act 50 of 1991.

[75] Van der Schyff (2016) 134.

[76] *Ibid*.

[77] Preamble and section 2 MPRDA.

[78] Van der Schyff (2016) 135.

The term old order right can be deceiving if compared to the old and the new mineral system. The rights referred to in Schedule II of the MPRDA refers to the actual authorisation to mine or prospect as personal rights provided for in the Minerals Act as well and not solely the common law mineral right held as a limited real right.[79] The concept of new order mineral rights differ from old order rights in that they not only consist of the common law mineral right but also legislative authority to exercise it. It is unique in comparison to mineral rights held under the Minerals Act.[80] This unique character of new order mineral rights are best described and discussed in two judgements which are fundamental to the concept of new order mineral rights as limited real rights. These judgements are the *Holcim*[81] – and *Sishen Iron Ore*[82] judgments.

In the *Holcim* – case the Supreme Court of Appeal held:

> *"As I have been at pains to emphasise, a common law mineral right is not preserved under the new statutory dispensation. It is not of itself an 'old order right' which can be converted under Item 7 of Schedule II. It survives only as a right underlying a mining authorisation. Nor can such a right properly be said to be a right 'in respect of which mining operations are being conducted'. Under the Minerals Act 1991 (and previous to that Act) it was the mining authorisation which conferred practical value on the mineral rights by authorising the exercise of those rights. In order to qualify under the definition of 'old order mining right' both the mineral right and the mining licence must have been in force immediately before the date on which the Act took effect, but it is the mining licence and not the mineral right 'in respect of which' operations are conducted".*[83]

The Constitutional Court held in the *Sishen Iron Ore* – case that common law mineral rights were altered in composition by putting it together with the authorisation required to exercise it:

> *"Table 2 in its unamended form applies to this case and defines old order mining rights in six categories and for present purposes it is category 1 only that is relevant. It provides that an old order mining right means:*
>
> *"The common law mineral right, together with a mining authorisation obtained in connection therewith in terms of section 9(1) of the Minerals Act.*

---

[79] *Minister of Mineral Resources and Others vs Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) paras 56 and 60.

[80] Minerals Act 50 of 1991.

[81] *Holcim South Africa* (*Pty*) *Ltd v Prudent Investors* (*Pty*) *Ltd and Others* 2011 (1) All SA 364 (SCA).

[82] *Minister of Mineral Resources and Others vs Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC).

[83] *Holcim South Africa* (*Pty*) *Ltd v Prudent Investors* (*Pty*) *Ltd and Others* 2011 (1) All SA 364 (SCA) par 26.

> *It is important to note that in terms of Table 2, the old order mining right is defined as comprising two components, namely, the mineral right and the mining authorisation. In this regard the old order mining right consists of a package of the mineral right and the mining authorisation. Thus Table 2 alters the composition of the underlying common-law right by putting it together with the mining authorisation that was issued to facilitate exploitation of the mineral right. The consequence is a new right created by statute".*[84]

Once converted in terms of the MPRDA transitional arrangements contained in Schedule II thereto, old order mineral rights become new statutorily defined concepts.[85] The MPRDA confirms that any such new order mineral rights, which includes converted old order rights and newly granted mineral rights under the MPRDA, are limited real rights.[86]

2.5 Conclusion

New order mineral rights as a limited real right in terms of the MPRDA fall within the category of *sui generis* servitudes. This is supported by the fact that they are classified as "*limited real rights*" in the MPRDA which by implication can only refer to the common law concept of limited real rights in the absence of a contrary definition in the MPRDA or MTRA. However, they are unique in having been derived from legislation and consisting of such common law mineral right as a real limited right and the authorisation to exercise it by mining or prospecting. [87] The nature of these new order mineral rights will be explored in the next chapter.

[84] *Minister of Mineral Resources and Others vs Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) paras 56-57.

[85] Van der Schyff (2016) 137; *Minister of Mineral Resources and Others vs Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) par 60.

[86] Section 5(1) of the MPRDA.

[87] *Minister of Mineral Resources and Others vs Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) par 57.

CHAPTER 3: WHAT IS THE NATURE OF MINERAL RIGHTS IN TERMS OF THE MPRDA?

3.1 Introduction

In the previous chapter the classification of mineral rights were explored and determined. In this chapter the nature of mineral rights in terms of the MPRDA will be evaluated and determined. The enforceability of mineral rights in terms of the MPRDA, specifically the moment it becomes enforceable will also be determined. The question arises whether mineral rights in terms of the MPRDA becomes enforceable before or after registration thereof.

3.2 The effective date of a mineral right

3.2.1 The definition of effective date

The effective date of a mineral right is defined as: *"'effective date' means the date on which the relevant permit is issued or the relevant right is executed".*[88]

The word "*effective*", as an adjective before a noun means: *"[existing] in fact, although not officially*".[89] The meaning of effective in this context means that on approval of an environmental management plan pertaining to a mineral right, the mineral right exists as a legal fact, but is not officially a limited real right enforceable against third parties. It remains unenforceable since registration has not yet occurred, which will make it a limited real right and enforceable against third parties.[90]

3.2.2 Application

The Supreme Court of Appeal held as follows with regard to the effective date of mineral rights:

> "*Section 17(5) stipulates that the effective date is the date on which the environmental management plan is approved in terms of section 39. That plan must be submitted to the Regional Manager within a period of 60 days of notification to do so. The Minister must within 120 days from the lodgement approve same, provided certain requirements have been met. It is plain from these provisions that a successful applicant for a prospecting right cannot sit back, with arms folded, and remain supine on the basis that the DDG has unlawfully imposed the BEE compliance condition and that the Regional Manager's refusal to execute the right by reason of that non-compliance was also unlawful. Those decisions remained valid until set aside by a court. The appropriate course of action was for Dilokong*

[88] Section 1 MPRDA.

[89] Cambridge English Dictionary Online, Cambridge University Press, November 2019, available at: https://dictionary.cambridge.org/us/dictionary/english/effective (last accessed 1 November 2019).

[90] Section 2(4) MTRA and section 5(1) MPRDA.

to obtain a mandamus compelling DMR to execute the right that is assuming that the right was lawfully granted".[91]

It is important that we should note that coming into effect and becoming a limited real right binding to the landowner and third parties are two very different and distinct situations, this much will become evident from the discussion following below.

However, the MPRDA and MTRA [92] provides that a mineral right becomes a real limited right once registered only.

The MPRDA provides the following:

> *"17(5) A prospecting right granted in terms of subsection (1) comes into effect on the effective date."*[93]

> *"23(5) A mining right granted in terms of subsection (1) comes into effect on the effective date."*[94]

The definition of "*effect*" in the dictionary[95] is to "*cause (something) to happen, bring about*". Synonymous to that is to realise something, bringing a prospect or mining right into existence as a legal fact.

Thus, considering the literal meaning of coming "*into effect on the effective date*" a literal interpretation holds that a mineral right comes into existence and exist as a legal fact on date of execution, as aforementioned. However, it remains unofficial until registration due to it being unenforceable, since it is registration that causes a mineral right to become a limited real right and enforceable against third parties.[96] A limited real right exists as a legal fact upon registration and it is registration that makes a limited real right enforceable against third parties and especially enforceable against the landowner.[97]

Such an interpretation also corresponds with the literal meaning of "*effective date*". Considering the definition and literal meaning of "*effective date*" and of coming "*into effect*", another interpretation that a mineral right becomes enforceable against third parties such as land owners on the effective date already, before registration, becomes indefensible.

---

[91] *Mawetse* par 20.

[92] Section 2(4) MTRA and section 5(1) MPRDA.

[93] Section 17(5) MPRDA.

[94] Section 23(5) MPRDA.

[95] Oxford English dictionary, OED online, Oxford University Press, November 2019, available at: https://www.dictionary.com/browse/oxford (last accessed 1 November 2019).

[96] Section 2(4) MTRA and section 5(1) MPRDA.

[97] Section 2(4) MTRA.

3.3 The legal nature of mineral rights

3.3.1 Section 5(1) MPRDA

The MPRDA provides as follows:

> *"Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof - (1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles and Registration Act, 1967, (Act No 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such rights relates".*

This section makes it clear that there are two requirements that exist for a mineral right to relate to land and minerals as a limited real right, namely granting and registration.[98] Registration requires execution as an inferred prerequisite, since it is the executed mineral right that is registered. It is submitted that a failure to register a mineral right causes it not to become enforceable, as argued above considering the definitions of "effective", "effective date" and the provisions of the MPRDA and MTRA.[99]

3.3.2 Limited real right in respect of land and minerals

In the *Mawetse* – case[100], the Supreme Court of Appeal stated in emphatic terms that the grant of a prospecting right as is the case with all other rights under the MPRDA, is not contractual, but that it is a unilateral administrative act done by the Minister or his delegate and performed in terms of the statutory powers conferred to them under the MPRDA.[101] The grant of the right occurs outside the ambit of and regardless of the existence of a contract between the Minister and a successful applicant.[102]

In summary, according to the Supreme Court of Appeal the terms and conditions of a prospecting right constitute the outcome of the exercise of statutory powers on the part of the Minister or his delegate. They are not contractual in nature and do not require consensus or consent. The Minister may only impose such terms and conditions as are contemplated by the MPRDA. Any term or provision sought to be included in the right in question which the Minister is not, by virtue of the MPRDA, entitled to impose will be an *ultra vires* term or condition, subject to judicial review and setting aside of the decision to impose the term in question.[103]

Accordingly, the granting requirement in the MPRDA arises as a unilateral administrative action.[104] The MPRDA determines that the new order mineral rights become limited real rights upon registration

---

[98] *Ibid*.

[99] Sections 1, 5(1), 17(5) and 23(5) MPRDA and section 2(4) MTRA.

[100] *Mawetse* case at 419.

[101] *Idem* at p17, par 24.

[102] *Ibid.*

[103] M O Dale, *et al*, *South African Mineral and Petroleum Law,* (Lexis Nexis, 2005) 141-142, par 96.4.

[104] Section 5(1) MPRDA.

only, as the second requirement in this section after granting. [105] This puts an end to the theoretical controversy with respect to the nature of rights granted in terms of section 3 and other provisions of the Act prior to their registration. [106] The MPRDA is now aligned with section 2(4) of the MTRA which provides that registration of the right in terms of the MTRA in the Mineral and Petroleum Titles Registration Office constitutes a limited real right binding on third parties.[107]

As with common law limited real rights, it is registration that makes it enforceable against third parties such as land owners.[108]

3.3.3 Registration

The MTRA provides that a mineral right becomes a limited real right on registration.[109] A limited real right becomes binding and enforceable against the whole world as third parties, upon registration.[110] These statutorily created mineral rights extends to the severed minerals, as opposed to the common law mineral rights to severed minerals. A limited real right now burdens the land as well as the minerals as a *sui generis* statutory public property and national asset. This means a mineral right limits a landowner's right pursuant to ownership in that the surface subject to the mining right or prospecting right can no longer be used by that landowner for purposes other than mining. However, it needs to be noted that it is not always the whole farm that is subject to mining, however all is not lost for the landowner since he is entitled to compensation for loss of surface use in terms of section 54.[111]

To determine the registerability of rights, the courts have developed a twofold test, namely the intention to bind successors in title and the subtraction from *dominion* test.[112] The latter was introduced into South African law in *Ex Parte Geldenhuys*.[113] Streicher JA held in Cape Explosive Works[114] that to:

> "..*determine whether a particular right or condition in respect of land is real, two requirements must be satisfied: (1) the intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and (2) the nature of the right or condition must be such that the registration of it results in a 'subtraction from dominium' of the land against which it is registered*".[115]

---

[105] *Ibid.*

[106] *Ibid.*

[107] Dale *Supra* n103 at par 96.5, p142.

[108] *Cape Explosives supra* n20 at par 16; Van der Schyff (2016) 345.

[109] Section 2(4) MTRA.

[110] *Ibid.*

[111] Section 54 MPRDA.

[112] Van der Schyff (2016) 345.

[113] *Ex Parte Geldenhuys* 1926 0PD 155, p162-164.

[114] *Cape Explosives supra* at n20.

[115] *Idem* at p328B-C.

If this is met, a right is a limited real right capable of registration. A mineral right bind successive owners of the land over which it is granted and also burdens the land by restricting the owner to use of the land's surface where a granted mineral right covers such surface.

However, an opposite view also exists with regards to the aforementioned. The view has been held that it is fallacious to automatically treat the registration of these rights according to common law principles.[116] This argument that enforceability from date of registration defeats optimal mining, is devoid of merit. Reliance is placed on the *Mawetse* - judgment in support of this argument. The court in the *Mawetse* - case relied on one of the MPRDA's key objectives that mineral rights must be exploited within stipulated time frames for the benefit of the public.[117] This was derived from the Agri SA - case[118] in which the court in that instance held that it was one of the objects of the MPRDA to abolish the entitlement to sterilise minerals.[119]

A failure to execute within a reasonable time and register a mining right within the time frames provided,[120] can be met with a directive suspending or cancelling the mineral right in question by the Minister of Mineral Resources.[121] Thus, considering that the MPRDA contains internal remedies that combats sub-optimal mining and inferably a delay to execute and / or register a mineral right, it is consistent with the common law as well as the MPRDA to apply the principles of common law with regards to registration and enforceability of mineral rights, as introduced into the MPRDA and MTRA.[122] This defeats the argument that applying common law principles with regards to registration of mineral rights is not in the best interest of optimal mining.The court in the *Coal of Africa vs Akkerland Boerdery* - matter[123] held that the respondent's argument that a prospecting right becomes effective but unenforceable until registration, as impractical in that it renders the strict terms within which prospecting must be conducted, ineffective.[124] The court comes to this conclusion on the basis that the Department takes months, even years to execute and or register mineral rights.[125] However, this reasoning does not equate with the provisions of the MPRDA[126] and applicable common law.[127] If the applicant delays execution or registration, the Minister of Mineral Resources can remedy the consequences of such delay with a cancellation of the mineral right concerned.[128] If the Department

[116] Van Niekerk (2019) 30 *Stell LR* 296.

[117] *Mawetse* Case par 20.

[118] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

[119] *Ibid* paras 1-3.

[120] Sections 19(2) (a) and 25(2) (a) MPRDA.

[121] Section 47 MPRDA.

[122] Section 5(1) MPRDA and section 2(4) MTRA.

[123] *Coal of Africa Ltd and Another vs Akkerland Boerdery (Pty) Ltd* (38528/2012) 2014 ZAGPHC 195 (5 March 2014).

[124] *Idem* at par 32.

[125] *Ibid*.

[126] Section 47 MPRDA.

[127] *Cape Explosives Supra* n20 at par 16.

[128] Section 47 MPRDA.

Mineral Resources delays execution or registration, a mineral right holder can enforce same by means of a *mandamus* application.[129]

3.4 Conclusion

Mineral rights in terms of the MPRDA becomes enforceable on date of registration. However, the court in the *Mawetse* - case failed to recognise this, to the contrary stating that it becomes enforceable on date of approval of the environmental management programme (which equates with date of execution in practice). The court certainly did not consider the dictionary meaning of "*effective*" and the coming into existence of a limited real right. It is evident that certain aspects of the *Mawetse* - judgment may be subject to criticism as aforementioned. A critical analysis of the *Mawetse* - judgment in respect of this will follow in the next chapter.

[129] *Mawetse* par 20.

Chapter 4: Analysis of the Mawetse SA Mining v Dilokong – Judgment

4.1 Introduction

In the previous chapter it was determined that mineral rights in terms of the MPRDA becomes enforceable on date of registration. However our courts have not confirmed this in judgments. The very recent *Mawetse* - case dealt, *inter alia*, with the date of enforcement of mineral rights in terms of the MPRDA. However, the court came to a conclusion which is inconsistent with the enforcement of mineral rights on date of registration. In this chapter the *Mawetse* - judgment will be critically discussed in light of the aforementioned inconsistency.

4.2 The facts of the *Mawetse* - case

The issues in the *Mawetse* - case were whether a prospecting right had been lawfully granted to Dilokong Chrome Mine (Pty) Ltd ("Dilokong") and if it was granted lawfully to Dilokong may Dilokong lawfully have exercised this right.[130] Another question relating to this right is was this right still valid or had it lapsed due to expiry and / or abandonment.[131] These questions were decided against Dilokong and in favour of Mawetse (SA) Mining Corporation (Pty) Ltd ("Mawetse") in the Gauteng Division of the High Court, Pretoria. Dilokong appealed the decision of the court *a quo*.[132]

On 24 November 2006 Dilokong applied for a prospecting right for chrome ore in respect of the farm Driekop. [133] A letter of acceptance was granted by the Department Mineral Resources dated 6 December 2006, requesting Dilokong to give effect to the objects of section 2(d) of the MPRDA by submitting a signed shareholder agreement to the Regional manager's office by 4 February 2007.[134] On 21 June 2007 the Deputy Director-General granted power of attorney to the Regional Manager to sign the prospecting right in favour of Dilokong in respect of Driekop.[135] On the same day the Deputy Director- General signed an approval of a recommendation to grant a prospecting right to Dilokong for four years subject to Dilokong, submitting before notarial execution of the right, all other outstanding information or documentation including a shareholder agreement with a BEE entity holding not less than 26% of the equity in the operation.[136]

*On 14 November 2007, the date on which the prospecting right was about to be notarial executed, this execution did not take place due to Dilokong's failure to give effect to section 2(d) of the MPRDA

[130] *Mawetse par 1*.
[131] *Ibid.*
[132] *Ibid*.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Idem* at p3.

in relation to the required BEE shareholding.[137] Dilokong's attempts to comply with the BEE requirement proved futile.[138]

In the meantime Mawetse applied for a prospecting right for various minerals (including chrome) in respect of various farms, including Driekop.[139] Its application for Driekop was rejected since that prospecting right had already been granted to Dilokong.[140] Upon investigation Mawetse discovered that Dilokong's right had not been executed, that its duration was for three years and that it would have lapsed on 13 November 2010.[141]

Mawetse challenged the award of the prospecting right to Dilokong in the North Gauteng High Court, Pretoria on 20 January 2012. This application was premature since Mawetse did not exhaust its internal remedy first, an appeal to the Minister in terms of section 96 of the MPRDA. The Minister upheld the award of the prospecting right to Dilokong and dismissed *Mawetse's* appeal. [142]

On 20 January 2012 Mawetse launched the review application culminating in the present appeal.[143] Counsel for Mawetse conceded that the prospecting right had lapsed at the time when Mawetse had launched its application to the court. Dilokong filed a counter application which sought to compel the DMR to cause the execution of the prospecting right. [144]

4.3 The judgment in the Mawetse case: Is a mineral right a unilateral administrative action or contractual in nature

It is important to ascertain whether a mineral right is contractual in nature[145] or a unilateral administrative action.[146] If contractual in nature it can be argued that it is enforceable from date of registration in terms of the common law principle of registerability and enforcement of real limited rights.[147] If an administrative action it can be argued that it is enforceable from date of approval of the environmental management plan thereto[148] or execution.[149]

In the *Mawetse* – case the Supreme Court of Appeal found that the grant of a prospecting right is not contractual in nature, but amounts to a unilateral administrative act by the Minister or his or her delegate performed in terms of the statutory powers conferred to them under the MPRDA.[150] The grant of the mineral right occurs outside the ambit of and regardless of the existence of a contract

---

[137] *Ibid.*

[138] *Ibid.*

[139] *Ibid.*

[140] *Ibid.*

[141] *Ibid.*

[142] *Idem* at par 5.

[143] *Ibid*.

[144] *Idem a*t par 6.

[145] *Meepo* par 46.3

[146] *Mawetse* par 26.

[147]*Cape Explosives supra* n20 at par 16.

[148] *Mawetse* case at par 19.

[149] Section 1 MPRDA.

[150] *Mawetse case* at p17, par 24.

between the Minister and a successful applicant.[151] However differences do exist between different rights, and this should also be mentioned. Prospecting rights are granted by the Deputy Director-General upon acceptance of the recommendation by the Regional Manager, whilst a mining right are granted by the Minister.[152] In this regard the nature of rights do differ.

In terms of basic property law principles, three juristic acts are involved upon the creation of a real right namely:

a) The conclusion of a contract or obligation-creating agreement;
b) The existence of a real agreement to transfer and receive the real right; and
c) The registration of the right in the Deeds Office.[153]

A unilateral administrative decision is followed by the conclusion of a prospecting deed (contract) and the acquisition of a real limited right upon registration. The failure to recognise the different juristic acts that are taking place can be attributed to the fact that the MPRDA does not distinguish between the prospecting right as an agreement or real right. [154]

The question arose in the *Mawetse* - case if Dilokong's prospecting right had lapsed. Any right issued in terms of the MPRDA lapses whenever it expires or is abandoned.[155] Expiry of the right would occur upon the effluxion of the time period for which the right has been granted. According to the court three legal processes should occur in order to establish a valid prospecting right: (1) the granting of, (2) execution and (3) coming into effect of the right.[156] In addition to this, the appeal court also stated that from the date of the grant Dilokong became the holder of a valid prospecting right as defined in the MPRDA.[157]

The court further looked at the decision in *Meepo v Kotze* 2008 (1) SA 104 (NC) (herein after referred to as "*Meepo*") where the court found that the granting of a prospecting right is contractual in nature and that consensus has to be reached, in addition that the applicant has to consent to the terms and conditions of the right. In *Mawetse* these arguments were rejected.[158] Furthermore, the court appeared to have misinterpreted the *Meepo* - decision by stating that the court in the latter case found that a prospecting right is granted only as on date of registration whilst the *Meepo* decision in fact found that it is granted upon execution of the notarial deed and not registration,[159] as the court judgment in *Mawetse* described it. [160]

The appeal court in *Mawetse* distinguished *Ondombo Beleggings (Edms) Bpk v Minister and Energy Affairs* 1993 TSAR 159 ("*Ondombo*") as not being applicable to the MPRDA but only to the Precious

[151] Dale *Supra* n103 at 141-142, par 96.4.

[152] PJ Badenhorst, "Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd 2016 (1) SA 306 (SCA)," 49 *De Jure* 168 (2016) at 177.

[153] *Idem* at 179.

[154] *Idem* at 180.

[155] Section 56(a) and section 56 (f) MPRDA.

[156] Mawetse par 13.

[157] *Ibid.*

[158] *Mawetse* par 22, 23 & 26.

[159] *Meepo* par 46.1.

[160] *Mawetse* par 28.

Stones Act 73 of 1964. The court in *Meepo* relied upon the *Ondombo* - case to reach the conclusion that a prospecting right is contractual in nature. Even if the appeal court in *Mawetse* was correct in this regard, the following still remains applicable:

> *"The fact that the [Precious Stones] Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease."* [161]
>
> *The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that this acceptance of those terms would lead to a binding contract being concluded*"[162]

The court in *Mawetse* states that the terminology used by the legislature is treated as the consequence of an administrative decision rather than a contract.[163]

The court in *Mawetse* held that the granting of a prospecting right is an authoritative unilateral administrative act by the Minister or his delegate in terms of their statutory powers under the MPRDA.[164] For this argument the court in *Mawetse* relied on the case of *Mustapha v Receiver of Revenue, Lichtenburg* 1958 3 SA 343 (A) 347 E-F:

> "*In exercising the power to grant or renew, or to refuse to grant or renew, the permit the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases."*[165]

In addition, the court in *Mawetse* furthermore relied on the judgment of *Norweb plc v Dixon* 1995 3 ALL ER 952 (QB) where in summary it was decided that the obligation to be a public supplier of electricity is predicated on legislation and therefore inconsistent with contract.[166] It seems as if the court by referring to this dictum in the *Mawetse* - judgment overt that the granting of a prospecting right is in the same nature as that of a statutory license or public law instrument.[167]

However, one should also take into account that the definition of "*mineral title*" and "*right*" contained in the MTRA requires the execution of a notarial deed to be registered to enable the coming into existence of a limited real right. The definition of "*mineral title*" in the MTRA reads as follows:

> *" 'mineral title' means any deed or document registered in the Mineral and Petroleum Titles Registration Office evidencing the right to prospect, mine, possess, trade or deal granted or acquired under*

---

[161] *Ondombo Beleggings (Edms) Bpk v Minister and Energy Affairs* 1993 TSAR 159 at 724 F-H.

[162] *Ibid*.

[163] See Badenhorst *supra* n152 at p173.

[164] *Mawetse* paras 24, 26 and 27.

[165] *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A) par 24.

[166] *Norweb plc v Dixon* 1995 (3) ALL ER 952 (QB) par 25.

[167] Badenhorst *supra* n152 at 175.

> *the Mineral and Petroleum Resources Development Act, 2002, or any other law".*[168]

The definition of "*right*" in the MTRA reads as follows:

> *"'right' means any right held by or under any deed and registered or capable of being registered in terms of the Mineral and Petroleum Resources Development Act, 2002;"*[169]

The mere definitions of a mineral tittle and mineral right expressly requires the existence of an executed deed (which is nothing else than a contract) which is registered, and which indicates that a contract undisputedly forms part of the process when a prospecting right application is processed, granted and then executed. Even if notarial execution of a contract is merely required for registration purposes, it will always bear legal weight and be enforceable as a deed and all contractual principles will apply. However the court here seems to want to ignore this for incomprehensible reasons not possible by any stretch of the imagination.

Badenhorst shares this view, albeit erroneously on section 15(2) of the MTRA.[170] Section 15(2) provides for deeds of cession or transfer of mineral titles or mineral rights.[171] This section refers to the transfer or cession of existing mineral titles or rights which is obviously contractual in nature, since it cannot occur without a contract of cession. But this cannot be used to support any contention that a mineral right is either contractual in nature or unilateral administrative action, since it deals solely with cession and transfer of existing rights.[172]

The same court than the court in the *Meepo* - matter came to a parallel decision in *Doe Run Exploration*[173] ("*Doe Run* - matter"), albeit that the waters concerning the nature of mineral rights being unilateral administrative acts in nature as opposed to contractual already became muddied in this matter. The judgement in the *Doe Run* - matter may explain why Majiedt, J whom rendered the *Mawetse* - judgment, came to the conclusion which he did that prospecting rights are not contractual in nature and to reject the *Meepo* - judgement, even though he also rendered the judgment in the *Doe Run* - matter to the opposite by finding that a prospecting right is indeed contractual in nature, relying upon *Meepo*.

In the *Doe Run* matter the State respondents raised a point *in limine* that Rockwood (Pty) Ltd should have been cited as a co-respondent in the case, since they alleged that Rockwood (Pty) Ltd had an interest in the application by means of a letter of grant in respect of properties relevant to the application of prospecting rights in its favour. [174] This point *in limine* was the only portion of the judgment that dealt with the nature of mineral rights and will be discussed as follows.

---

[168] Section 1 MTRA.

[169] *Ibid*.

[170] Badenhorst *Supra* n152 at 179.

[171] Section 15(2) MTRA.

[172] *Ibid*.

[173] *Doe Run Exploration SA (Pty) Ltd. and Others vs Minister of Minerals and Energy and Others* (Case Number: 499/07) 2008 ZANCHC (8 February 2018).

[174] *Doe Run* par 14.

On 8 February 2006 the State's Respondents communicated this letter of grant to Rockwood.[175] However of importance is that this letter of grant was conditional upon Rockwood providing BEE shareholding of not less than 51%, and a second condition that they should specify the mineral they applied for.[176]

Doe Run argued that in the absence of an executed notarial deed, no prospecting right was conferred to Rockwood (Pty) Ltd. It was common cause between all parties that no execution of a notarial deed has occurred.[177] In respect of the letter of grant the State Respondent's relied on a power of attorney authorizing the Northern Cape Regional Manager to sign a prospecting right in favour of Rockwood (Pty) Ltd and an unsigned prospecting right notarial deed.[178] The commencement date of the prospecting right and the duration thereof was not specified in the deed.[179]

Doe Run argued that since Rockwood (Pty) Ltd had no existing prospecting right it had no direct and substantial interest in the matter and therefore did not need to be joined as a co-party to the matter before court.[180]

Doe Run relied on the *Meepo* decision that the prospecting right was granted once the terms and conditions had been determined and communicated to an applicant for his acceptance.[181] The State Respondents argued that the right was conferred to Rockwood when the Deputy Director-General approved and signed the recommendation for the grant of the right.[182]

The State Respondents further argued that execution is an administrative formality whereby the grant of the prospecting right was confirmed and formalized and that the State did not contest the *Meepo* - decision.[183]

Paragraph 21 of the *Doe Run* matter states:

> *"From the aforegoing it will be observed that the facts of this case are similar to those in the Sechaba v Kotze matter with regard to this particular aspect under discussion. Here too, the recommendation (and the subsequent power of attorney) was to the effect that a prospecting right was to be granted for a period of two years subject to terms and conditions to be determined. In my view it cannot be said that this conferred a right to prospect on Rockwood (Pty) Ltd. Such right, as was correctly held in Sechaba v Kotze, supra, was to be conferred at the time when the conditions and terms as well as the period of validity were formally determined by way of a notarial executed deed between the Minister (or her representatives) and*

[175] *Idem* at par 15.

[176] *Ibid.*

[177] *Doe Run* par 16.

[178] *Doe Run* par 17.

[179] *Ibid.*

[180] *Idem* at par 18.

[181] *Idem* at par 19.

[182] *Ibid*.

[183] *Doe Run* par 19 and 20.

Rockwood (Pty) Ltd. Since this has never occurred, no right has in fact come into existence"[184]

The judgment contains a contradiction though. The court holds that a prospecting right is contractual in nature.[185] However if contractual in nature, the terms and conditions are only determined on execution, in line with this and the *Meepo* - case. If only determined on execution, the term of the contract can only commence to run on execution. However, to the contrary the court holds that it commence to run inferably from date of grant.[186] This appears to be the first occasion on which a court held this view, which underpins unilateral administrative action, yet the judgment is based on a prospecting right being contractual in nature and not a unilateral administrative action. The comparison with this and the *Mawetse* - judgment will be discussed below.

The court further held that the two year period for which the Rockwood prospecting right was granted may well have lapsed by then.[187] Ultimately the court in addition held that no prospecting right was conferred to Rockwood and accordingly its joinder was not required.[188]

In both the *Meepo* and *Doe Run* - decisions the court held a prospecting right is granted once the terms and conditions had been determined and communicated to the Applicant for his acceptance which is expressed by means of execution of the right. However the validity and term of a prospecting right was subject to the terms and conditions to be determined upon execution, by which it is determined and agreed.

However, the court in the *Doe Run*- matter contradicted itself as stated. It found that the prospecting right only becomes into existence on execution[189] but also holds that the two year period mentioned in the recommendation may have lapsed by then.[190] However it cannot lapse, since it does not exist yet. It exists only upon execution when the terms and conditions are determined and then commences to run its terms. It can never be held to lapse if it never existed.

The court in the *Mawetse* - matter held that a prospecting right is granted in terms of section 17(1) on the date that the Minister's delegate approves the recommendation.[191] The court held that the period for which the right endures has to be calculated from the time that an applicant is informed of the grant of the right and not from the effective date.[192] So to make it clear, according to the court's characterisation of the grant of the right in *Mawetse*, notwithstanding the fact that for purposes of the calculation of the duration of the right the right in this matter still had to be executed and had not yet become effective.[193]

---

[184] *Doe Run* par 21.

[185] *Ibid*.

[186] *Ibid*.

[187] *Doe Run* par 22.

[188] *Idem* par 23.

[189] *Idem* at par 21.

[190] *Ibid*.

[191] *Mawetse* par19.

[192] *Idem* par 21.

[193] *Mawetse* par 20-21.

The overall result and consequence of the *Mawetse* - judgment is that the period for which a right is granted will commence to run even before the right becomes effective.[194]

This outcome is problematic, since in practice the terms and conditions of the right in question communicated to the applicant in the letter of grant, will only be communicated upon the notarial execution of the right which causes the existence of a notarial contract at that time.[195] This should have been taken into account by the court although it clearly was not taken into account. In practice this judgment will create difficulties in that all rights now start to take effect on date of grant, and the effective date no longer is known as the date of notarial execution of the right.[196] Some right holder may not even be aware of the date of letter of grant and notaries should take note not to include the date of execution as the effective date upon which the right became effective.[197]

The court found the following in Mawetse:

> *"There are three distinct legal processes which must be distinguished from each other, namely the granting of, execution of, and coming into effect of the right. A prospecting right is granted in terms of section 17(1) on the date that the DDG approves the recommendation (a contrary finding was made in two Northern Cape High Court decisions to which I shall in due course refer). In the present instance that occurred on 21 June 2007. For practical purposes communication of that decision will enable challenges by the grantee to conditions which it might consider objectionable and furthermore will alert not only the grantee but also competitors who might have an interest. The period for which the right endures has to be computed from the time that an applicant is informed of the grant, in this instance 18 July 2007. From the date of the grant Dilokong became the holder of a valid prospecting right as defined in the MPRDA."*[198]

It appears that the court misinterprets the notification of grant with the notifying of express terms and conditions to the applicant. This in effect led to the court overruling the *Meepo* -, *Doe Run* - and *Ondombo Beleggings* judgments, which held mineral rights to be contractual in nature, the court being under the impression that the contractual terms and conditions are communicated through a notification of grant although doing away with the necessity of a contract being required in order to interpret the nature of mineral rights. However, the court did consider the definition of right as contained in the MTRA and the registration requirement, and accepts registration as a prerequisite for becoming a real right. But thinking away the contractual nature of mineral rights inadvertently let to a contradiction which the court acknowledged but failed to deal with, stating that it is not an aspect

[194] Dale *Supra* n103 at par 133.2.3, p212 (12).

[195] *Ibid*.

[196] *Ibid*.

[197] *Ibid*.

[198] *Mawetse* par 19.

which it needs to concern itself with.[199] Having found that a mineral right becomes effective on date of grant as opposed to effective but not enforceable from date of execution (when the notarial contract is concluded), gave rise to this contradiction.

The court should have considered the definition of effective and effective date in context and the common law principles pertaining to enforceability by means of registration.

4.4 The judgment in the Mawetse case: Mineral Rights become effective on execution date

The Supreme Court of Appeal held the following in this regard:

> "*The granting of a prospecting right becomes effective on the date on which the environmental management plan lodged by the applicant in terms of section 16(4) (a) is approved in terms of section 39. That is the date from which a successful applicant can actively start prospecting*".[200]

Here the court is incorrect, since the day from which a successfully applicant can start prospecting should be the day of registration of the mining or prospecting right. The question is how a mining right or prospecting right holder can enforce a prospecting or mining right on day of execution if it only becomes enforceable on date of registration against a landowner since it does not yet burden the land until registration.[201] The aforementioned definitions of "*effect*", "*effective*" and "*effective date*" supports such an interpretation.

In practice, environmental management programmes were approved by the signature of the Regional Manager, which occurred during execution. This practice has now indirectly been legislated by the inclusion of the definition of "*effective date*" that determines execution of a mineral right to be the effective date.[202]

However, this is contradictory to what the court held in the same judgement just before finding that a prospecting right becomes effective, and by implication enforceable on date of execution:

> *"These provisions appear at face value, to be contradictory with regard to the nature of the right and its legal consequences. But that is not an aspect which need concern us now - for present purposes I accept that the right becomes a_limited real right only upon registration. The purpose and effect of registration is not only that the right becomes binding on third parties, but also serves as notice to the general public, akin to registration of immovable property in the Deeds Office."* [203]

---

[199] *Ibid*.

[200] *Mawetse* par 19.

[201] Contrary to section 2(4) MTRA.

[202] Section 1 MPRDA.

[203] *Mawetse* par 19.

Here the court contradicts itself since it recognises the date of enforcement of a prospecting right to be the date of registration, when it becomes a limited real right in line with the common law and precedent. Shortly thereafter, the court states that the prospecting right is enforceable on date of execution, or date of approval of the environmental management plan ("….*That is the date from which a successful applicant can actively start prospecting"*).[204] Clearly, these two arguments are mutually destructive.

The question arises how a mineral right is enforceable against land owners by means of actively starting prospecting or mining as from date of execution when it only becomes enforceable against the whole world (which includes a landowner) upon registration after execution. This contention does not correspond with the aforementioned literal definitions of the words "*effective*" and "*effective date*"[205] which supports the submission that a mineral right comes into existence as a legal fact on date of execution, but is not yet official and enforceable against the world until its registration.[206] Becoming effective, as seen, does not cause a mineral right to be enforceable since it is registration that makes it a limited real right which causes it to become enforceable against the whole world, including land owners.[207]

The Supreme Court of Appeal dismissed the notion proffered in the *Meepo* - case[208] that a mineral right is granted on date of execution. In this regard, the Supreme Court of Appeal found the following:

> *"The decision in Meepo that the right is granted only at the stage of the registration of the right is wrong. It follows that the appeal must fail."*[209]

This should be read as that a right is granted only at the stage of execution and not registration, since nowhere in the *Meepo* - judgement did the court find that a prospecting right is granted on date of registration. Contrary, it held that it was granted on date of execution.[210] The court in *Mawetse*, to the opposite, found that a mineral right is granted on date of communication of a letter of grant, once the applicant becomes aware of the letter and its term commences to run from that moment.[211] The *ratio* of the *Mawetse* - judgement was cited with approval in the *Pan African* – case in this regard.[212]

4.5 Conclusion

The *Mawetse* - case clearly dispelled the argument that a mineral right is contractual in nature and found that it is a unilateral administrative action.[213] However, the MTRA to the contrary refers to a

---

[204] *Ibid*.

[205] Chapter 4, par 4.2.1.

[206] Section 2(4) MTRA.

[207] *Ibid*.

[208] *Sechaba v Kotze and others* [2007] 4 All SA 811 (NC).

[209] *Mawetse* par 28.

[210] *Sechaba v Kotze and others* [2007] 4 All SA 811 (NC) p829, par 46.3.

[211] *Mawetse* par 19.

[212] *Pan African Mineral Development Company (Pty) Limited and others v Aquila Steel (S Africa) (Pty) Limited* [2017] JOL 39325 (SCA) p17, par 28.

[213] *Mawetse* par 19.

"right" as a deed (a contract) quite clearly, which inferably dispels the possibility of it being a unilateral administrative action.[214]

What can further be inferred from the *Mawetse* - judgement is that a mineral right is granted on date of an applicant for a mineral right becomes aware of the letter of grant of the mineral right and commences to run its term on that date.[215] The mineral right becomes effective on date of approval of the environmental management plan.[216] The MPRDA now determines that a mineral right becomes effective from date of execution of the mineral right.[217] The MTRA determines that it becomes enforceable against third parties on date of registration of the mineral right. [218]

The court in *Mawetse* acknowledged the latter and identified the contradiction with regard to the nature of a mineral right and its legal consequences.[219] However, it classically avoided the contradiction by stating that it is an aspect which need not concern the court and that for purposes of the judgement accepted that a mineral right becomes a limited real right upon registration and only enforceable then.[220]

In the final chapter, a conclusion reached on the primary and secondary research questions, specifically on the date when a mineral right becomes enforceable and whether it is contractual in nature, a unilateral administrative action or a hybrid of both.

[214] Section 1 MTRA.

[215] *Mawetse* par 19.

[216] *Mawetse* par 20.

[217] Section 1 MPRDA.

[218] Section 2(4) MTRA.

[219] *Mawetse* par 19.

[220] *Ibid*.

Chapter 5: Conclusion

5.1 Introduction

It is evident from the previous chapters that the court in Mawetse not only incorrectly found that mineral rights can be enforced from date of approval of the environmental management programme, being the date of execution, but also avoided answering the inconsistency that arises with regards to mineral rights becoming limited real rights only upon registration. In this chapter a conclusion will be formed with regards to the date of enforceability of mineral real rights and incidental thereto whether they are contractual in nature, the consequence of unilateral administrative action or a hybrid of both.

5.2 Concluding remarks

5.2.1. Mineral rights become enforceable on date of registration

The court in *Mawetse* held the following in this regard:

> "*The granting of a prospecting right becomes effective on the date on which the environmental management plan lodged by the applicant in terms of section 16(4) (a) is approved in terms of section 39. That is the date from which a successful applicant can actively start prospecting*".[221]

The question arises how a mineral right is enforceable against land owners by means of actively starting prospecting or mining as from date of execution when it only becomes enforceable against the whole world (which includes a landowner) upon registration after execution. This contention does not correspond with the definitions of the words "*effective*" and "*effective date*" which supports the submission that a mineral right comes into existence as a legal fact on date of execution, but is not yet official and enforceable against the world until its registration.[222] Becoming effective, as seen, does not cause a mineral right to be enforceable since it is registration that makes it a limited real right which causes it to become enforceable against the whole world, including land owners:[223]

> *"But in terms of section 19(2)(a) of the MPRDA that right had to be registered in the Minerals and Petroleum Titles Office. That Office has been established in terms of section 2(1) of the Mining Titles Registration Act 16 of 1967 ("the MTR Act"). While section 5(1) of the MPRDA provides that a prospecting right is a limited real right in respect of the mineral to which it relates, section 2(4) of the MTR Act provides that "[t]he registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties". These provisions appear at face value to be contradictory with regard to the nature of the right and its legal consequences. But that is not an aspect which need*

[221] *Minister of Mineral Resources and others v Mawetse (SA) Mining Corporation (Pty) Limited* [2015] JOL 33303 (SCA) p13, par 19.

[222] Chapter 3, par 3.2.1.

[223] *Mawetse* par 19; Section 2(4) MTRA.

concern us now – for present purposes I accept that the right becomes a limited real right only upon registration."[224]

A contradiction arises in the *Mawetse* - case where the court states that it accepts that the right becomes a limited real right only upon registration. [225] The court notes the contradiction that in its view Dilokong became the holder of a valid prospecting right on date of grant, whilst it only becomes a limited real right upon registration.[226] The court then deals with the contradiction by stating that it is not an aspect the court needs to concern itself with.[227] In the same paragraph it states to the contrary that the date on which a successful applicant can actively start prospecting is the date on which the environmental management plan of the applicant is approved in terms of section 39 (now repealed). [228]

However, it is not possible to actively start prospecting on that date since the prospecting right only becomes enforceable against third parties such as the land owner of the property subject to the prospecting right as from becoming a limited real right, which is date of registration.[229] It is inconceivable how the court would argue that a prospecting right which has not been registered and is thus not a limited real right yet, can be enforced against a landowner as from grant.[230]

Unfortunately it has now set a precedent that a mineral right is enforceable against third parties even before registration, whilst the MTRA clearly legislates that it only becomes a mineral real right and thus enforceable against the landowner, on date of registration. [231] The court acknowledged this, yet contradicted itself by finding that a mineral right is enforceable against a land owner even before registration.[232]

However, it is clear from the literal definitions of "*effective*" and "*effective date*",[233] the MTRA,[234] the MPRDA[235] and the *Mawetse* - judgement[236] itself that a mineral right can only become enforceable from date of registration and not before. Such an interpretation is not contrary to neither the MPRDA nor the common law, in fact it introduces the common law principle of the enforceability of real limited rights upon registration into the MPRDA and is consistent with the MTRA. Any argument that such an interpretation is contrary to the objects of the MPRDA or the Constitution, [237]is devoid of merit since the MPRDA contains an internal remedy to combat delay in execution or registration and also

[224] *Mawetse* par 19.
[225] *Ibid.*
[226] *Ibid*.
[227] *Ibid*.
[228] Section 39 MPRDA; *Mawetse* par 19.
[229] *Mawetse* par 19*; S*ection 2(4) MTRA.
[230] *Mawetse* par 19.
[231]Section 2(4) MTRA.
[232] *Mawetse* par 19.
[233] Chapter 4, par 4.2.1.
[234] Section 2(4) MTRA.
[235] Section 5(1) MPRDA.
[236] *Mawetse* par 19.
[237] Constitution of the Republic of South Africa, 1996.

sterilisation of minerals[238] and so also the common law assists mineral right holders if the Department Mineral Resources delays execution or registration.[239]

5.2.2. Mineral rights are a hybrid of both unilateral administrative acts and being contractual in nature

The court in *Meepo* relied upon the *Ondombo* - case to reach the conclusion that a prospecting right is contractual in nature. Even if the appeal court in *Mawetse* was correct in this regard, the following still remains applicable:

> *"The fact that the [Precious Stones] Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease."* [240]
>
> *The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that this acceptance of those terms would lead to a binding contract being concluded*".[241]

For this argument, the court in *Mawetse* relied on the case of *Mustapha v Receiver of Revenue, Lichtenburg* 1958 3 SA 343 (A) 347 E-F:

> "*In exercising the power to grant or renew, or to refuse to grant or renew, the permit the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases."*[242]

In addition, the court in *Mawetse* furthermore relied on the judgment of *Norweb plc v Dixon* 1995 3 ALL ER 952 (QB) where in summary it was decided that the obligation to be a public supplier of electricity is predicated on legislation and therefore inconsistent with a contract,[243] thereby inferring that the granting of a prospecting right amounts to a statutory license or a public law instrument.[244]

This reasoning cannot be correct since English contract law requires valuable consideration as an *essentialia* for a contract. To illustrate the definition and application of consideration in English contract law, in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd* 1915 AC 847, it was confirmed that the doctrine of consideration is a fundamental requirement to be able to sue on a contract. The absence of consideration causes the existence of a contract to be absent. The doctrine requires a promisee to give consideration to the other contracting party for a contract to be completed. This did not occur in this case because Dunlop did not give anything to Selfridge, Selfridge merely promised to Dunlop to only sell at a certain price, but this was done gratuitously because Dunlop gave no

---

[238] Section 47 MPRDA.

[239] *Mawetse* par 20.

[240] *Ondombo Beleggings* 724 F-H.

[241] *Ibid*.

[242] *Mustapha* n165.

[243] *Norweb* n166.

[244] Badenhorst *Supra n152* at 174.

consideration in return.[245] This principle cannot even be considered in South African law since valuable consideration is not essential to a contract in South African law.

This being said, upon registration of the notarial contract a limited real right is created. The three property law principles are applicable when creating or transferring a real right:[246]

a) The conclusion of a contract or obligation-creating agreement;
b) The existence of a real agreement to transfer and receive the real right and;
c) The registration of the right in the Deeds Office.[247]

If the above principles are applied to the creating and registration of a mineral right, it also becomes clear that an obligation creating agreement and a real agreement are absent from the court's reasoning of the matter. The court simply recognises the legislature creating a limited real right and the policy of notice of registered rights and security of tenure, however the court denies the creation of an agreement by consensus.[248]

The solution here seems quite simple. Both legal principles are applicable, firstly the unilateral administrative act of the Minister of Mineral Resources or his delegates to grant the mineral right in terms of administrative powers they derive from the MPRDA.[249] Then the Minister or his delegates provides a standard non-negotiable offer to the holder in the form of a draft notarial contract (a deed as contained in the definition of "*mining title*" and "*right*" in the MTRA which can be nothing else but a contract)[250] as a requirement to obtain a limited real right. If the holder does not accept those terms in the notarial contract, he simply never obtains a limited real right enforceable against third parties. If he accepts those terms, the notarial contract is signed by both parties and executed after which it is registered, becoming a real limited right only then. The *Mawetse* - judgment rejects the notion of contractual terms as standard terms offered to a holder, citing that those terms are already encapsulated in the MPRDA.[251]

It is not strange for contracts to contain legislated terms, such as credit agreements before its substitution by the National Credit Act 34 of 2005. However, a proper glance of a prospecting or mining right will reveal that it does contain clauses, terms and conditions which are not derived from the MPRDA, such as a *domicillium* clause, contractual BEE arrangements included in terms of the doctrine of incorporation, severability and cost clauses. In support hereof, the court in *Mawetse* stipulated that Dilokong could challenge the BEE condition but in the same breath stated that a prospecting right is not contractual in nature and its terms and conditions not subject to negotiation or for that matter, being challenged.[252]

---

[245] *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd* 1915 AC 847.

[246] *Idem* at 179.

[247] Badenhorst *Supra n152* at 179.

[248] *Ibid*.

[249] *Mawetse* par 26.

[250] Section 1 MTRA.

[251] *Mawetse* par 28.

[252] *Mawetse* paras 19 and 26.

The court in the *Mawetse* matter rejects the *Meepo* - decision[253] In *Doe Run* the court makes the contradiction that the right lapsed before it existed, keeping in mind in that case that mineral rights are contractual in nature.[254] Yet the court finds that the rights lapsed before its existence from which the view that it is a unilateral administrative act in nature can be inferred.[255] These two views are mutually destructive in that the one requires consensus (the one being contractual in nature would require consensus) and the other excludes consensus since it is a unilateral administrative act.

Furthermore in *Doe Run* the court agrees with the *Meepo* decision and in *Doe Run* the court relied on and rejects the State's contradiction that it is a unilateral administrative action, then again the same judge find the exact opposite in the *Mawetse* judgment.

5.3. Finding

In the introduction mention was made of the inconsistency in South African Law as to the effective date of mineral rights and its enforceability date. In addition, legal precedent that arose from this inconsistency was analysed and the result of these judgments having failed to even recognise this inconsistency (except in *Mawetse),* [256]not even mentioning the failure to resolve it. It is apparent from the preceding chapters that the common law does provide for a solution by applying the common law principle of enforceability of limited real rights against third parties upon registration. This common law solution was introduced onto the MPRDA and MTRA, determining that a mineral right is a real limited right once executed and registered.[257] The normal common law principles in respect of registerability, registration and legal precedent should be applied and mineral rights should be viewed as effective upon execution[258] but only enforceable upon registration.[259]

Furthermore, the common law principles underpinning execution and registration of real limited rights being contractual in nature is not inconsistent with the MPRDA. The MPRDA refers to "limited real rights[260]" and registration[261] in terms of the MTRA, which in turn requires an executed deed.[262]In order to come to the aforementioned conclusion, mineral rights should be viewed as both unilateral administrative actions upon date of grant and then contractual in nature for purposes of execution and registration, considering that the MTRA requires a deed that is executed and registered to be considered a "right".[263] The initial application, processing and granting stage of a mineral right in terms of the MPRDA is in accordance with administrative prescripts contained in the MPRDA amounts to unilateral administrative action and the execution and registration of mineral rights embodied in deeds, as contractual in nature in terms of the MTRA.

---

[253] *Mawetse* par 28.

[254] *Doe Run.*

[255] Ibid.

[256] *Mawetse* par 19.

[257] Section 5(1) MPRDA and section 2(4) MTRA.

[258] Section 1 MPRDA definition of effective date.

[259] Section 5(1) MPRDA and section 2(4) MTRA.

[260] Section 5(1) MPRDA.

[261] Section 19(2) MPRDA and 25(2)(a) MPRDA

[262] Section 1 MTRA, definition of rights.

[263] Section 1 MTRA.

Thus, it is concluded that mineral rights are a hybrid of unilateral administrative action and being contractual in nature and accordingly, cannot be enforced against third parties from date of execution, but only once registered and not before.

BIBLIOGRAPHY

ACTS

Constitution of the Republic of South Africa, 1996

Deeds Registries Act 47 of 1937

Minerals Act 50 of 1991

Mineral and Petroleum Resources Development Act, 28 of 2002

Mining Titles Registration Act 16 of 1967

Precious Stones Act 73 of 1964

ARTICLES

Badenhorst, PJ "Beskerming van Mineraalregte: `n Satyagraha?" 2001 64 THRHR 643

Badenhorst, PJ "Ownership of minerals in situ in South Africa: Australia darning to the Rescue (2010) 127 4 SALJ

Badenhorst, PJ "The Make-up of Transitional Rights to Minerals: Something Old, Something New, Something Borrowed, Something Blue…?"2011 4 SALJ 763

Badenhorst, PJ "Trojan Trilogy: I Competing Mineral Rights Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines 1996 4 SA 499" 1998 2 Stell LR 143

Badenhorst, P J "Trojan Trilogy III Mineral Rights and Mineral Rights Law Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 4 SA 499 (A) 1999 1 Stell LR 96

Badenhorst 1993 *Stell LR* 394, 1994 *TSAR* 107

PJ Badenhorst, "Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd 2016 (1) SA 306 (SCA)," 49 *De Jure* 168 (2016)

Badenhorst, P J and van Heerden, C N "A Comparison between the Nature of Prospecting Leases in terms of the Precious Stones Act 73 of 1964 and Prospecting Permits in terms of the Minerals Act 50 of 1991 Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs 1993 1 TSAR 159

Badenhorst, PJ "Nature of New Order Rights to Minerals: a Rubikian exercise since passing the Mayday Rubicon with a Cubic Zirconium" 2005 26 Obiter 505

Badenhorst, PJ and Olivier, NJJ "Expropriation of unused old order rights" by the MPRDA: You have lost it! Agri SA v Minister of Minerals and Energy 2012 75 THRHR 329.

Badenhorst, PJ "Large scale Expropriation of Mineral Rights in South Africa: The Agri South Africa saga 2011 30 3 ARELJ 261

Badenhorst, PJ and Oliver NJJ "Conversion of old order mining rights" Sleeping at the MPRDA's wheel of misfortune 2013 76 THRHR 269

Badenhorst, PJ and Mostert, H "Duelling Prospecting Rights: A Non-Custodial Second? "2008 4 TSAR 819

Badenhorst, PJ "Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd 2016 (1) SA 306 (SCA) 49 De Jure 134

Badenhorst, PJ and Carnelly, M "Review of a refusal to Grant a Prospecting right – Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy"2008 29 Obiter 113

Van Niekerk (2019) 30 *Stell LR* 296.

BOOKS

CG Van der Merwe, *Sakereg,* 2nd edition (Butterworths, 1989)

E Van Der Schyff, *Property in Minerals and Petroleum,* (Juta, 2016)

L Van Schalkwyk, en P van der Spuy, *Algemene beginsels van die Sakereg* 5de Uitgawe (Juta 2002)

M O Dale, *et al*, *South African Mineral and Petroleum Law,* (Lexis Nexis, 2005)

PJ Badenhorst and H Mostert, *Mineral and Petroleum Law of South Africa: Commentary and Statutes* (Juta 2005)

T van der Merwe, and B Stoop, *Historical Foundations of South African Private Law*, 2nd Edition (Butterworths, 2000)

CASES

Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC)

Beyers v Du Preez 1989 1 SA 328 (T)

Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others (2001) 3 All SA 321 (SAC)

Coal of Africa Ltd and Another vs Akkerland Boerdery (Pty) Ltd (38528/2012) 2014 ZAGPHC 195 (5 March 2014)

Doe Run Exploration SA (Pty) Ltd and Others vs Minister of Minerals and Energy and Others (Case Number: 499/07) 2008 ZANCHC (8 February 2018)

Du Preez v Beyers 1989 1 SA 320 (T)

Ex parte Eloff 1953 1 SA 617 (T)

Ex Parte Geldenhuys 1926 OPD 155

Ex parte Pierce and others 1950 (3) ALL SA 397 (O) 403

Holcim South Africa (*Pty*) *Ltd v Prudent Investors* (*Pty*) *Ltd and Others* 2011 (1) All SA 364 (SCA)

Hotel De Aar v Jonordon Investments (Edms) Bpk 1972 (2) SA 400 (A)

Lazarus and Jackson v Wessels and Others 1903 TS 499

Lorentz v Melle and Others 1978 (3) SA 1044 (T)

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

Minister of Land Affairs vs Rand Mines Ltd 1998 (4) SA 303 (SCA)

Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd (20069/14) [2015] ZASCA 82 (28 May 2015)

Minister of Mineral Resources and Others vs Sishen Iron Ore Company (Pty) Ltd and Another 2014 (2) SA 603 (CC)

Mustapha v Receiver of Revenue, Lichtenburg 1958 (3) SA 343 (A)

Natal Navigation Collieries & Estate Co Ltd v Minister of Mines 1955 2 SA 698 (A)

Neebe v Registrar of Mining Rights 1902 TS 83

Norweb plc v Dixon 1995 (3) ALL ER 952 (QB) par 25

Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds 1953 (1) SA 600 (O)

Ondombo Beleggings (Edms) Bpk v Minister and Energy Affairs 1993 TSAR 159

Pan African Mineral Development Company (Pty) Limited and others v Aquila Steel (S Africa) (Pty) Limited [2017] JOL 39325 (SCA) p17, par 28

Rand Mines Ltd vs President of the Republic of South Africa 1996 (3) SA 425 (B)

South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd 1961 (2) ALL SA 576 (A)

Trojan Exploration Co (Pty) and another v Rustenburg Platinum Mines Ltd and Others 1996 (4) SA 499 (A)

Van Vuren v Registrar of Deeds 1907 TS 289

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

INTERNET

Cambridge English Dictionary Online, Cambridge University Press, November 2019, available at: https://dictionarycambridgeorg/us/dictionary/english/effective (last accessed 1 November 2019)

Oxford English dictionary, OED online, Oxford University Press, November 2019, available at: https://wwwdictionarycom/browse/oxford (last accessed 1 November 2019)