EXPROPRIATION OF "UNUSED OLD ORDER RIGHTS" BY THE MPRDA: YOU HAVE LOST IT!

***Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as* amicus curiae*)* [2011] 3 All SA 296 (GNP)**

1 Introduction

Within the context of South Africa's history of racially discriminatory property laws, a new mineral law regime was introduced on 1 May 2004 by the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"). The MPRDA abolished the previous mineral law system, introduced a new regime and provided for a transition from the old order to a new order (see Badenhorst "Mineral rights: 'Year zero' cometh?" 2001 *Obiter* 119; "Nature of new order rights to minerals: A Rubikian exercise since passing the Mayday Rubicon with a cubic circonium" 2005 *Obiter* 505; "Transitional arrangements in terms of the Mineral and Petroleum Resources Development Act 28 of 2002: Crossing a narrow bridge?" 2002 *Obiter* 250; and Badenhorst and Mostert "Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional property clause" 2003 *Stell LR* 377 and 2004 *Stell LR* 22).

The new regime brought about by the MPRDA impacted on existing rights to minerals and the question has, since its commencement, arisen as to the extent of its impact. The possible expropriation of the common law mineral rights of holders of "unused old order rights" by the enactment of the MPRDA recently received the attention of the court in *Agri SA v Minister of Minerals and Energy*

(Centre for Applied Legal Studies as amicus curiae*)* [2011] 3 All SA 296 (GNP) (*AgriSA II*). The expropriation of the underlying common law mineral rights (or statutory prospecting or mining rights) of holders of "old order rights" is governed by the section 25 of the South African Constitution, item 12 of Schedule II to the MPRDA ("containing transitional arrangements") and incorporated sections of the Expropriation Act 63 of 1975 (see *AgriSA II* paras 60 89–92).

The facts of *AgriSA II* are given first, followed by the court's unequivocal decision about the concepts of "deprivation" and "expropriation" and their respective requirements. The court's "before-and-after MPRDA" analysis, as well as its findings about deprivation and the expropriation of common law mineral rights of holders of "unused old order rights", are indicated. This is followed by a commentary and conclusion about the findings and correctness of the *AgriSA II* decision. In conclusion, it is argued that other expropriations (not addressed in *AgriSA II*) resulted through the enactment of the MPRDA. In line with *AgriSA II*, compensation would also be payable in these instances.

2 Facts

Agri South Africa ("AgriSA") is a voluntary association not for gain representing the interests of commercial farms in South Africa. "It promotes, on behalf of its members, the development, profitability, stability and sustainability of commercial agriculture in South Africa by means of its involvement and input on national and international policy level" (see http://www.agrisa.co.za/). It regularly engages with the government on matters that concern farmers and agriculture in general (see para 12). AgriSA was of the view that the MPRDA effected an expropriation of common law mineral rights of its members (see para 14). The Minister of Mineral Resources ("Minister") and the Department of Mineral Resources ("DMR") did not agree with this view (para 14). AgriSA instructed its attorneys to find a suitable instance to serve as a "test case" as to the issue whether the MPRDA in effect resulted in the expropriation of unused mineral rights. Sebenza Mining (Pty) Ltd ("Sebenza") was identified as a suitable cedent of an expropriation claim (para 15).

During November 2001 Sebenza acquired coal rights by notarial cession for R1 048 000. Prior to the commencement of the MPRDA (1 May 2004), Sebenza had not obtained a prospecting permit or mining authorisation under the Minerals Act 50 of 1991, and had never conducted prospecting or mining operations on the farm (para 16). Sebenza was, therefore, a holder of an "unused old order right" in terms of the MPRDA (item 1 read with Table 3 of the Schedule II MPRDA transitional arrangements (paras 54–55)). Sebenza was placed under liquidation and the liquidators advertised its coal rights for sale. By then the MPRDA had commenced (para 17). The liquidators accepted an offer from Metsu Trading (Pty) Ltd ("Metsu") to purchase the coal rights for R750 000 (paras 18-19). Upon legal advice, the sale of the mineral rights to Metsu was treated as void. Since the commencement of the MPRDA, the registration of cessions of mineral rights could no longer be effected in the Deeds Office (para 19; the non-registrability of a cession of mineral rights after the commencement of the MPRDA was confirmed by the Supreme Court of Appeal in *Southern Era Resources Ltd v Farndell* 664/2008) [2009] ZASCA 150 (27 November 2009) para 4; see also Badenhorst and Mostert "A bridge too ghostly to contemplate? Minerals and petroleum legislation and the Deeds Registries Act 47 of 1937" July 2004 *De Rebus* 24). During March 2006 the liquidators of Sebenza,

contending that Sebenza's coal rights had been expropriated, lodged a claim for compensation with the DMR. The claim for compensation for the said alleged expropriation was ceded to Agri SA for R250 000 (para 20; it should be noted that in principle there is no objection to the cession by an expropriatee of an expropriation claim to another (Gildenhuys *Onteieningsreg* (2001) 124)). The DMR rejected the claim for compensation (para 20).

In subsequent proceedings against the DMR, AgriSA as plaintiff (in its capacity as cessionary) contended that the very enactment of the MPRDA constituted an expropriation of its (unused) coal rights and accordingly it claimed compensation from the Minister (para 4). According to the plaintiff its mineral rights were expropriated in terms of section 5 (read with ss 2, 3 and 4) of the MPRDA, and that they were entitled to compensation as contemplated in item 12 of the Schedule II MPRDA transitional arrangements (para 7). Consequently, the plaintiff lodged an application in terms of section 14 of the Expropriation Act 63 of 1975 for the determination of compensation to which, it its view, it was entitled to as a result of the expropriation (see paras 14 90).

An earlier exception by the DMR to the plaintiff's claim as being vague or embarrassing did not succeed in *Agri South Africa v Minister of Minerals and Energy* 2010 1 SA 104 (GNP) 104 (hereafter "*AgriSA I*") (see further Badenhorst "Expropriations by virtue of the Mineral and Petroleum Resources Development Act: Are there some more trees in the forest? *Agri South Africa and Van Rooyen v Minister of Minerals and Energy*" 2009 *TSAR* 600; Van Niekerk and Mostert "Expropriation of unused old order mineral rights: The courts have its first say" 2010 *Stell LR* 158).

3 Issues

The following issues arose for decision in *AgriSA II*: (a) did the MPRDA deprive Sebenza of its coal rights; and, if so, (b) was Sebenza expropriated of its coal rights; and (c) is Agri SA, as cessionary of the expropriation claim, entitled to compensation? (para 8).

4 Decision

The court held that if it is contended that a person has been expropriated, the *first question* is whether the person has been deprived of property as envisaged in section 25(1) of the Constitution (para 61). The *second question* is whether the deprivation constituted an expropriation as envisaged in section 25(2) of the Constitution (para 78). (For an in-depth analysis of deprivation, expropriation and their relationship, see, amongst others, Cheadle, Davis and Haysom *South African constitutional law: The Bill of Rights* (2011) para 20.4; Currie and De Waal *The Bill of Rights handbook* (2005) 541; Rautenbach and Malherbe *Constitutional law* (2009) 384; and Roux "Property" in Woolman *et al Constitutional law of South Africa* (2010) para 46.4–46.9).

It was accepted by the parties that mineral rights constitute constitutional property (see 5 below). The court held that in order to decide whether a holder of common law mineral rights has been expropriated on account of the enactment of the MPRDA, it was necessary to determine the content of the rights before and after the MPRDA took effect (para 22). It was deemed important to determine how the MPRDA affected the (unused) coal rights and the content of such rights (para 22).

4 1 Deprivation in terms of section 25(1) of the Constitution

"Deprivation of property is perceived as a legal fact" (para 72) resulting from an administrative, judicial or legislative act (paras 63–76). Physical taking of the property is not required (para 65). According to the court, deprivation takes place "if one or more of the entitlements of ownership are interfered with" (para 65). Any interference with the use, enjoyment or exploitation of private property involves some kind of deprivation relating to the entitlements to the property concerned (see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) paras 57 61). In determining whether "there has been a deprivation of property, a court must consider the extent of interference with the use and enjoyment of the property" (paras 65 72). If there is sufficient or substantial interference it constitutes a deprivation (see paras 72 76; see also *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC), 2005 2 BCLR 150 (CC) para 32). The court distinguished deprivation from regulation of property. In respect of the regulation of property, the court took the view that it "presupposes that the person whose use is regulated, still has the property, albeit with a truncated content" (para 67). The court accepted that the object of the administrative, judicial or legislative act "may be of limited relevance to determine whether the interference was sufficiently substantial to qualify as a deprivation" (para 76). The purpose of the legislative act rather forms part of the inquiry into arbitrariness of the legislative act concerned (para 76). As regards deprivation, according to the court, "the purpose of an act of deprivation cannot change that which is a deprivation into not being a deprivation" (para 76). If deprivation took place by enactment of the MPRDA, it took place upon commencement of the MPRDA and not upon lapsing of an "unused old order right" under item 8 of the Schedule II MPRDA transitional arrangements (para 75).

4 2 Expropriation in terms of section 25(2) of the Constitution

The court was guided by the following definition of expropriation by Gildenhuys *Onteieningsreg* 8:

> "Onteiening is die eensydige uitwissing deur die owerheid van die vermoënsregte van 'n persoon ten aansien van goed, en daarmee saam die eensydige verkryging van vermoënsregte oor daardie goed deur die owerheid of deur iemand anders" (para 85).

For an expropriation to have occurred, the court required that – in addition to the deprivation of property – there must be "appropriation by the expropriator of the particular right and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right" (para 78, citing *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T)). This is because expropriation, as used in section 25(2) of the Constitution, constitutes "a subset of deprivations" (para 61). The court correctly held that expropriation is an original (and not a derivative) mode of acquisition or rights (para 80). The expropriator acquires title by reason of the consequences attached by law to expropriation and not by transfer of rights from a predecessor in title (see para 80).

In order to determine whether an expropriation has taken place, the court held that the "essential inquiry is whether the substance of the rights has been

acquired by the expropriator" (para 80). Because expropriation is an original mode of acquisition of rights, the "rights destroyed by the expropriation and those acquired by the expropriator need not be identical" (para 85). In terms of section 25(2) of the Constitution, "the content of the property rights expropriated need not always be acquired by the expropriator (the state)", but may be acquired by third parties (para 83). Property must be expropriated for a public purpose and in the public interest and must be used for a public purpose or in the public interest (para 84).

4 3 "Before-and-after MPRDA" analysis

In order to determine whether expropriation has taken place as a result of the enactment of the MPRDA, the court undertook a "before-and-after MPRDA" analysis of the content of the (unused) coal rights by comparing these common law mineral rights before and after commencement of the MPRDA (para 22). A comparison was drawn with the general provisions of the MPRDA and the Schedule II MPRDA transitional arrangements.

4 3 1 "Before"

As to the "before" part of the analysis, the court provided an overview of common law mineral rights and their statutory regulation by the Minerals Act (see paras 23–28 31–35). It summarised the law as follows: A holder of a mineral right had a real right entitling him/her *inter alia* to go upon the land to search for more minerals (para 29). "If additional minerals were found, the holder was entitled to sever them and to carry them away" (para 29). "Such holder held a contingent right to the ownership of the relevant minerals: Once they were severed from the land, the minerals became his or her property" (para 29). "These rights were transferable and could be sold, otherwise alienated, used as security and in general be dealt with to the benefit of the holder" (para 29). Mineral rights constituted a valuable asset that could be bequeathed and sold. A holder of mineral rights "could in general deal with it to his advantage and he could also retain it as an investment" (para 30). "The holder of mineral rights was, as a general proposition, under no obligation to exploit the minerals" (para 29). "The right not to exploit minerals was not necessarily negative or contrary to the public interest" (para 31). The exercising of the mineral rights by way of prospecting or mining was, however, subject to authorisation by the state through the issuing of prospecting permits and mining authorisations in terms of the Minerals Act 50 of 1991 (see paras 35–36).

4 3 2 "After"

As to the "after" part of the analysis, the court provided an overview of the general provisions of the MPRDA pertaining to prospecting rights and mining rights and transitional arrangements (see paras 37–48). Within this context, the following features of prospecting and mining rights are relevant: they are real rights (s 5(1) MPRDA; see paras 44–47) which are transferable, subject to ministerial consent, and capable of being encumbered by a mortgage (s 11(1) MPRDA; see para 48). These rights are registrable in the Mineral and Petroleum Titles Office (see ss 19(2)(a) and 25(2)(a) and s 5(1)(d) of the Mining Titles Registration Act 16 of 1967; paras 45–48). A prospecting right is granted by the Minister "for a limited period of time, but can be renewed" (see s 18 MPRDA; para 43). In respect of a prospecting right, the holder (a) must commence with

prospecting within a limited time period (s 19(2)(b) MPRDA; para 46), and (b) has the exclusive right to apply for a renewal of the prospecting right, permission to remove and dispose of limited quantities of minerals, a retention permit and a mining right (s 19(1) MPRDA; paras 45–46). "Linkage" of rights is thus provided for. Prospecting fees and royalties are payable to the state (ss 19(2)(f) and 25(2)(g) MPRDA; para 45). A mining right is granted upon an application, the requirements of which are more onerous and costly than that for a prospecting right (see para 47).

According to the court, an application for a prospecting right would cost approximately R50 000 and application for a mining right approximately R1,5 million (para 58). The holder of a mining right (a) has an exclusive right to apply for renewal thereof (s 25(1) MPRDA), and (b) must pay royalties to the state (s 5(2)(g) MPRDA; para 47).

4 3 3 1 Outcome of the before-and-after analysis with reference to transitional arrangements

According to the court, the above outcome is as follows:

(a) the "unused old order right" continues for one year (item 8(1) of the Schedule II MPRDA transitional arrangements; para 57);

(b) the "unused old order right" has as its content only an exclusive right for one year ("the interim period") to apply for a prospecting or mining right (item 8(2); paras 56–57);

(c) acquisition of a prospecting right or mining right, however, requires compliance with the provisions of the MPRDA (see ss 17(1) and 23(1) MPRDA; para 56);

(d) it is costly to apply for a prospecting right or a mining right (see 4 3 2 above); and

(e) the underlying common law right to coal with its prior content has been legislated out of existence (paras 57 67–68) and it has been lost (see para 70).

4.3.3.2 Outcome of the before-and-after analysis with reference to general provisions of the MPRDA

According to the court, the above outcome is as follows:

(a) common law mineral rights are no longer recognised and have disappeared (paras 2 50);

(b) the holder of such common law mineral right "no longer has an asset that can be sold, otherwise alienated, used as real security or kept as an investment" (para 50);

(c) the holder's "contingent ownership in the minerals, once severed, has disappeared" (see s 3(1) MPRDA; para 50);

(d) the right of the common law mineral rights holder to grant, subject to statutory regulation, prospecting rights or mining rights has disappeared (see s 3(2) MPRDA; para 50);

(e) the entitlements of a holder of a common law mineral right have been lost and subsumed into the power of the Minister to grant prospecting and mining rights (see s 3(2) MPRDA; para 51);

(f) only the right to apply for a prospecting right or mining right on a first-come-first-serve basis by any applicant is conferred (ss s 16(1) and 22(1) MPRDA; para 50); and

(g) upon the granting of prospecting or mining right, the combined content of such real right is similar to the content of the previous common law mineral right (see s 5(2) MPRDA; para 52).

The court found that Sebenza had been deprived of its common law coal rights (para 77). By implication, a sufficient interference with the use, enjoyment and exploitation of property has been found to constitute a deprivation (see para 72).

The court held that the enactment of the MPRDA resulted in expropriation. According to the court, the state acquired the substance of the property rights of the erstwhile holder of common law mineral rights (para 82). The court reasoned that from a reading of sections 3 and 5 MPRDA, the Minister was, upon commencement of the Act, "vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common law mineral rights" (para 82). The fact that the competencies of the state are collectively called "custodianship" was regarded as immaterial by the court (para 82). Other requirements for expropriation, namely, the expropriation must (a) be in terms of a law of general application, and (b) be for a public, or in the public, interest, were not at issue (para 87). The court concluded that Sebenza's common law coal rights had "been expropriated by the enactment of the MPRDA, specifically in terms of section 5 read with section 2 and 3 thereof" (para 88).

4 4 Compensation

Compensation has to be "just and equitable, reflecting an equitable balance between the public interest and the interest of those affected" (s 25(3) of the Constitution). According to the court "public interest" is partially defined in section 25(4)(a) as including the nation's commitment to land reform (para 92). In determining just and equitable compensation all the relevant circumstances mentioned in item 12(3) of the Schedule II MPRDA transitional arrangements and section 25(3) of the Constitution have to be taken into account (para 89). Section 25(3) requires that the following circumstances be taken into account: (a) current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purposes of expropriation.

In addition, item 12(3) of the Schedule II MPRDA transitional arrangements requires that the following factors be taken into account: (a) the state's obligation to redress the results of past racial discrimination in the allocation of and access to mineral and petroleum resources; (b) the state's obligation to bring about reforms to promote equitable access to all South Africa's natural resources; (c) the provisions of section 25(8) of the Constitution; and (d) whether the person concerned will continue to benefit from the use of the property in question. Furthermore, the court mentioned the market value of the property and the purpose of the expropriation as relevant circumstances (para 91).

The court accepted that the starting point in determining such compensation is the market value of the right (para 93). The court earlier accepted that it has to "work with monetary quantification when it determines just and equitable

compensation" (para 92). It, however, accepted that market value is just one of the factors to be taken into account (para 93). The court rejected the contention that having regard to factors such as the circumstances in section 25(2)(3) of the Constitution and the purpose of expropriation, no compensation should be awarded (para 94). It reasoned that such contention would lead to a result whereby Sebenza would have been expropriated without compensation which is contrary to section 25(2) of the Constitution insofar as it limits the fundamental right to compensation (para 94).

The court held that, "having regard to all the relevant circumstances, R750 000 will in this case be just and equitable reflecting an equitable balance between the public interest and the interest of Sebenza" (para 99). Even though the court accepted that R750 000 does not represent the market value of the (unused) coal rights (para 98), it reasoned that it would not be just and equitable to award a market value in excess of the R750 000 which the liquidators were prepared to accept in their intended sale to Metsu. The court held that it could not be regarded as "just and equitable that Sebenza should profit from expropriation" (para 99). The fact that the liquidators actually accepted R250 000 for the cession of the right to claim compensation was disregarded by the court. The court reasoned that if Sebenza had not accepted the figure and subsequently ceded the claim to AgriSA, it would have had to incur the cost of enforcing the claim (para 100).

5 Comment

The constitutionality of the MPRDA was not in issue in *AgriSA II* (para 39). The court did explain that MPRDA has to be understood in the context of the history of racially discriminatory South African property law (para 38). The MPRDA was enacted to *inter alia* give effect to the constitutional norms of equality to redress the results of pass racial discrimination (para 38, citing *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Bengwenyama-ye-Maswati Royal Council intervening)* 2011 3 BCLR 229 (CC) para 3). At this stage it seems unlikely that the constitutionality of the MPRDA would be challenged in court.

Section 25 of the Constitution can be said to consist of two subsets:

(a) the protection of property rights (s 25(1) – deprivation, and s 25(2)–(3) – expropriation and compensation), and the interpretation and definition of "public interest" and "property" (s 25(4)); and

(b) the transformation and reversal of discrimination and exclusion (by providing for (i) s 25(5)–(7): land restitution, redistribution and tenure reform; (ii) s 25(8): taking of legislative and other matters to achieve land, water and related reform; and (iii) s 25(9): the compulsory enactment of tenure reform legislation by Parliament).

(See, on the structure of section 25 of the Constitution, Badenhorst, Mostert and Dendy "Minerals and petroleum" 18 *LAWSA* para 18; Van der Walt *Constitutional property law* (2005) 11–18; Badenhorst, Pienaar and Mostert *Law of property* (2006) 522–523.)

It was accepted by both the parties in *AgriSA II* that the coal rights constituted property as envisaged in section 25 of the Constitution (paras 9 62). It is submitted that despite the erroneous view held in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* (2002 1 BCLR 23 (T) 28G–H

31D–E) that mineral rights are not constitutional property, it is accepted that mineral rights are worthy of constitutional protection. It is generally accepted that property includes, in addition to land, common law mineral rights, prospecting rights and mining rights (see in this regard Badenhorst, Mostert and Dendy para 19, who refer to *First National Bank of SA Ltd t/a Wesbank v The Commissioner, South African Revenue Service* 2002 7 BCLR 702 (CC); 2002 4 SA 768 (CC) and to the first certification judgment, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC); 1996 4 SA 744 (CC) paras 70–75; see also Badenhorst and Vrancken "Do mineral rights constitute 'constitutional property'?" 2001 *Obiter* 496; Van der Schyff "Ghost buster: Slaying a ghost by providing guidelines for determining whether 'old order' mineral rights constitute constitutional property" 2008 *THRHR* 387–388). This interpretation is strengthened by the wording of section 25(4)(b) which states that "property is not limited to land". (See also the discussion of the so-called "threshold test" in Badenhorst, Pienaar and Mostert 531–540.)

The debate as to "the legal nature of the custodianship created in section 3 of the MPRDA and as to the effect thereof on the landowner's ownership of minerals before they are severed from the land" (para 49), was left open by the court in *AgriSA II* as it was not necessary to consider it (para 49; as to the various views on the nature of "custodianship" see Badenhorst "Ownership of minerals *in situ* in South Africa: Australian darning to the rescue?" 2010 *SALJ* 646).

As regards new order mineral rights, a distinction is made between (a) real rights (prospecting rights and mining rights); and (b) personal rights (reconnaissance permissions, retention permits, permissions to remove and dispose of minerals and mining permits to minerals). Category (a) rights are registered in the Mineral and Petroleum Titles Office, whilst category (b) rights are recorded and filed in the same office (see Badenhorst, Mostert and Dendy para 19; Badenhorst 2005 *Obiter* 505).

The *AgriSA II* decision has shown that the expropriation of underlying common law mineral rights of holders of "unused old order rights" (who did not avail themselves of applying for new order prospecting or new order mining rights) did result from the enactment of the MPRDA. This is the weakest category of "unused old order rights" because such holders did not take any steps to apply for new rights in terms of the MPRDA. The court held that the MPRDA did not introduce the (popular) "use it or lose it" principle into South African mining law (para 70). According to Du Plessis J, item 8 of the Schedule II MPRDA transitional arrangements rather "introduced a principle of: 'You have lost it. Now apply within a year and if you qualify you may use it'" (para 70). Failure of a holder of an "unused old order right" to act is thus not an impediment to claiming compensation for expropriation. Both in *AgriSA I* and *AgriSA II* it was accepted that such failure merely constituted a failure to mitigate damages (para 72). Ironically, Sebenza, being a company under liquidation, was financially unable to apply for a prospecting right or mining right and did not have the financial resources as required by the MPRDA to do so (para 73; as to the cost of such application, see 4 3 2 above). Even if Sebenza had been successful with its application to the Minister, such rights would have lapsed immediately upon them having been granted, on account of the fact that rights under the MPRDA lapse if the holder is liquidated or sequestrated (s 56(d) MPRDA). Faced with "legal suicide" (as imposed by the MPRDA regime) Sebenza could, apart from

instituting an expropriation claim and/or selling its claim, do nothing more. The question also arose whether Sebenza could not rather have used the so-called "simultaneous cession" procedure (a procedure whereby an applicant is said to apply for a right and at the same time applies for ministerial permission to transfer the right, once granted, to a purchaser) (para 74). The court held that the question whether the "simultaneous cession" procedure should have been followed, did not inform the question whether there had been a deprivation or not, but rather whether reasonable steps to mitigate the loss of property had been taken (para 74). It is submitted that Sebenza did what was reasonably necessary.

The court made a clear distinction between deprivation and expropriation in terms of section 25 of the Constitution. Deprivation in the case of an "unused old order right" took place because there was a substantial interference with the underlying common law mineral right. Expropriation did take place as the state (by enactment of the MPRDA) acquired the power to confer rights the contents of which were substantially, and in some respects, identical to the contents of common law mineral rights.

It is generally accepted that the structure of any constitutional property expropriation enquiry consists of a number of phases (see Badenhorst, Pienaar and Mostert 529) in order to determine whether:

(a) the right of or interest in question satisfies the section 25 definition of property;

(b) a deprivation has taken place;

(c) the deprivation is in terms of a law of general application (the so-called non-arbitrariness criterion);

(d) the deprivation is in line with the section 36 general limitations provisions;

(e) the nature of the deprivation is such that it constitutes expropriation;

(f) the expropriation satisfies section 25(2)(a) and (b); and

(g) in cases of non-compliance, whether it is justifiable as being in accordance with section 36 (*First National Bank of SA Ltd t/a Wesbank v The Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) para 46; *Haffejee v Ethekwini Municipality* [2011] ZACC 28 para 26).

Although the court did not specifically deal with each of these phases, it is clear that all six elements have been complied with.

The state is empowered by section 3(2) of the MPRDA to grant prospecting and mining rights to applicants. In the normal course of events an applicant acquires such right upon grant by the Minister (the *nemo plus iuris* rule applies to this grant by the Minister as being a derivative form of acquisition of rights). Before the commencement of the MPRDA, the holder of mineral rights could grant such rights; and thereafter the Minister is empowered to do so. (See in respect of the derivative acquisition of ownership, Badenhorst, Pienaar and Mostert 175 201–240 and Van der Merwe "Things" 27 *LAWSA* paras 361–362. As regards the derivative acquisition of *iura in re aliena* (limited real rights), the same principles apply *mutatis mutandis* and subject to the existence of specific legislation – eg in the case of s 3(2) MPRDA, new order prospecting and mining rights are registered in the Mineral and Petroleum Titles Office.)

In a quantum leap of these entitlements between the holders of common law mineral rights and the state, expropriation as an original mode of acquisition of

rights as shown by the court in *AgriSA II*, took place. Within this context, Van der Merwe states as follows:

> "The acquisition of ownership is said to be original if it is acquired independently and not derived from the ownership of a predecessor. In some cases of original acquisition of ownership there may be a predecessor, as in the case of expropriation. However, in such a case there is no transfer of rights of a predecessor to a successor. The ownership is acquired by a fresh unilateral act and is free from the characteristics, obligations and benefits pertaining to the right of the predecessor. A totally new right is created with regard to the thing" (27 LAWSA para 322; see also Badenhorst, Pienaar and Mostert 71 173–174.)

This so-called quantum leap took place upon the enactment of the MPRDA. The court clearly saw through the legislative smokescreen of mere "custodianship" in section 3(1) of the MPRDA by recognising that the former rights themselves (and not competencies) are indeed vested in the state. The rights of alienation and encumbrance by virtue of a common law mineral right were terminated upon commencement of the MPRDA insofar as the MPRDA does not provide for the alienation, transfer or encumbrance of the "unused old order right" (or its underlying common law rights). The right to prospect and mine was, however, only exercisable during the so-called interim period of one year (see 4 3 3 1 above) if a valid prospecting permit or mining authorisation existed for a particular category. Only an 'exclusive right' was granted to the holder of an "unused old order right" to *de novo* apply during this interim period for a prospecting right or a mining right, as the case may be (item 8(2) of the Schedule II MPRDA transitional arrangements). The recognition of "old order rights" by the Schedule II MPRDA transitional arrangements should in terms of *AgriSA II* be construed as providing a framework for compensation on account of the expropriation that has taken place.

As regards the calculation of compensation payable for expropriation, section 25(2) of the Constitution determines that property may only be validly expropriated in terms of a law of general application "for a public purpose or in the public interest" and "subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court" (see for a discussion of public interest and public purpose, amongst others, Badenhorst, Mostert and Dendy para 23; Badenhorst, Pienaar and Mostert 566–568; Cheadle *et al South African Constitutional law: The Bill of Rights* (2011) para 20.5; Currie and De Waal 555; and Roux "Property" in Woolman *et al* para 46.8(a)). The determination of compensation may take place before or after expropriation in which case it "must be done as soon as reasonably possible" (*Haffejee v Ethekwini Municipality* [2011] ZACC 28 para 43). As indicated above (4 4), section 25(3) of the Constitution contains a number of factors to be taken into account when the amount of compensation payable is to be determined. Within this context, national legislation (whether pre- or post-1994) must be interpreted from the 1996 constitutional perspective, taking into account the supremacy of the Constitution and Schedule 6, item 2(1) of the Constitution, which states that:

> "(1) All law that was in force when the new Constitution took effect, continues in force, subject to–
>
> (a) any amendment of repeal; and
>
> (b) consistency with the new Constitution."

(See in this regard Van der Walt 269 who is of the opinion that the Expropriation Act 63 of 1975, although still valid, is subject the Constitution and should "be

interpreted and applied in view of the new conceptual and aspirational framework embodied in the Constitution".)

In general, compensation for expropriation must be determined in two stages: First, the court must consider what compensation is payable under the provisions of the expropriation or expropriating statute, and then, second, it has to consider if that amount is just and equitable under section 25(3) of the Constitution and make any necessary adjustment (see *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 35; *City of Cape Town v Helderberg Park Development (Pty) Ltd* [2007] 1 All SA 517 (SCA) para 20). The *modus operandi* is stated as follows by Gildenhuys J in *Ex parte Former Highlands Resident: In re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) para 35:

> "The equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require".

(See also *Khumalo v Potgieter* [2000] 2 All SA 456 (LCC) para 23; *Abrahams v Allie* 2004 4 SA 535 (SCA) para 15; *City of Cape Town v Helderberg Park Development (Pty) Ltd* para 19.)

The determination of the amount of compensation payable is further affected by the fact that, apart from state investment, the market value of the property is the only factor listed in section 25(3) that is capable of quantification (*City of Cape Town v Helderberg Park Development (Pty) Ltd* para 19). (See for a discussion of the role of the various section 25(3) factors, Badenhorst, Pienaar and Mostert 568–578; Cheadle *et al* para 46.8(b); Currie and De Waal 555; Roux in Woolman *et al* para 20.5; Van der Walt 272–283; and Badenhorst "Compensation for purposes of the property clause in the new South African Constitution" 1998 *De Jure* 251 260–266). In determining just and equitable compensation, the court in *AgriSA II* worked with market value as its point of departure. The court briefly dealt with the purpose of expropriation. It is unclear whether expropriation for certain "laudable" purposes in a transformation context, such as land or mineral reform, would entitle the expropriatee to less compensation than expropriation for mundane purposes, such as for a road or for a railway (Gildenhuys 177–178; Mostert and Badenhorst "Property and the Bill of Rights" in *Bill of Rights compendium* 3FB7.2.2(c)(iv)). If the weight attached to the circumstances and purposes of expropriation were to be of such a nature that it would result in nil compensation being payable, the court in *AgriSA II* correctly indicated that it would be contrary to the fundamental right to compensation. It should be noted that consideration of the purpose of expropriation may lead to a downward adjustment to (and not a total extinguishment of) the compensation amount (*Du Toit v Minister of Transport* 2003 1 SA 586 (C) para 51; the Cape court *a quo* in its decision, however, relied on the incorrect provisions of the Expropriation Act: *Du Toit v Minister of Transport* 2005 1 SA 16 (SCA) para 6–7). It may be argued that the consideration of the purpose of expropriation may trigger the provisions of section 25(8) of the Constitution (see Gildenhuys 178). As indicated earlier, item 12(3)(c) of the Schedule II MPRDA transitional arrangements requires that section 25(8) of the Constitution be taken into account. In *AgriSA II* it was, however, pointed out that if "the [s]tate wished to expropriate mineral rights without the attendant obligation to pay compensation, it had to invoke the provisions of section 25(8) and prove the requirements of the Constitution's limitation clause, section 36(1)" (para 94). Such route was in any event deemed

unwise (para 94). It is submitted that it remains unclear how, and to what extent, section 25(8) of the Constitution should be taken into account in co-determining the amount of compensation. (See in respect of s 25(8) of the Constitution the discussion in Cheadle *et al* para 20.6, Currie and De Waal 565 and Roux in Woolman *et al* para 46.6).

Market value is usually determined upon date of expropriation (see s 12(1)(a) of the Expropriation Act). According to the court in *AgriSA II*, expropriation took place upon the commencement date (1 May 2004) of the MPRDA (see para 75). During the determination of compensation this important principle of expropriation law was overlooked by the Court. Sebenza originally (in November 2001) acquired the coal rights for R1 048 000 (para 96). The purchase price for the mineral rights is a good indication of value, provided it did not take place long before the date of expropriation (Gildenhuys 220). Even though the fact that the liquidators in 2004 were prepared to accept a purchase price of R750 000 (para 96) constitutes an indication of market value (see Gildenhuys 226), it did not constitute the market value upon commencement of the MPRDA. The undisputed evidence before the court was that upon commencement of the MPRDA the market value of the (unused) mineral rights had risen to R2 000 000 (para 96). The market value of R2 000 000 should have been used as a point of departure, from which amounts, as the other relevant circumstances (see above) may require, should be deducted or added. As indicated, apart from the circumstances and purpose of expropriation, other relevant circumstances were not expressly dealt with by the court. It is submitted that the court should have embarked on the difficult task of giving some weight to these relevant circumstances, notwithstanding that the court did indicate that its determination of R750 000, as just and equitable compensation, was with "having regard to all the relevant circumstances" (para 99).

It was not necessary in *AgriSA II* to decide whether the MPRDA expropriated all minerals rights or to apply the *AgriSA II* principles in a wider context (para 95). Apart from the instance of expropriation (unused mineral rights) identified by the court in *AgriSA II*, it is submitted that expropriations in terms of the MPRDA could also have taken place in the following instances:

(a) if a holder of an "old order prospecting right" or an "old order mining right" failed to apply for conversion to a prospecting right or mining right, respectively, within the stipulated interim periods;

(b) upon conversion of the "old order prospecting right" or "old order mining right" and registration of a new order prospecting right or a new order mining right with a lesser content;

(c) upon granting of a new order prospecting right or a new order mining right with a lesser content compared to the "unused old order right";

(d) upon refusal of an application for:

  (i) the granting of a new order prospecting right or a new order mining right; or

  (ii) the conversion to a new order prospecting right or a new order mining right, by the Minister;

(e) when a prospector by virtue of a prospecting contract (holding an "older order prospecting permit"):

  (i) converted the "old order prospecting right";

(ii) failed to do so; or

(iii) the application for conversion of the "old order prospecting right" was refused, the underlying mineral right is expropriated;

(f) when a lessee by virtue of an "old order mineral lease" (holding a "mining authorisation"):

(i) converted the "old order mining right" into a new order mining right;

(ii) failed to do so; or

(iii) the application for conversion of the "old order mining right" was refused, the underlying mineral right is expropriated; and

(g) if holders of mineral rights or other rights were excluded on 1 May 2004 from the Schedule II MPRDA transitional provisions in the sense that they did not become holders of "old order rights" (see Badenhorst, Mostert and Dendy para 68).

Expropriation can be indicated in these other instances by applying a similar "before-and-after MPRDA" analysis (see in general Badenhorst and Mostert *Mineral and petroleum law of South Africa* (2004) (Revision Service 6) ch 25.3.5.2.2). Compensation would also be payable in those other instances. According to an estimate of the South African government given in evidence in *AgriSA II*, compensation for all mineral rights would amount to approximately R90 billion (para 95). It was foreseeable long before the reform of the mineral law system that expropriation of common law mineral rights would have to take place and that compensation would accordingly be payable (see Badenhorst, Van der Vyver and Van Heerden "Proposed nationalisations of mineral rights in South Africa" 1994 (12.3) *J of Energy and Natural Resources L* 287). It was held in *AgriSA II* that it is not a defence for the state or any expropriator to plead that it cannot afford to pay compensation (para 95). Such a plea would, in the words of the Du Plessis J, "amount to invoking a limitation of the fundamental right to compensation" (para 95). It should be remembered that the state has acquired the substance or part of the property rights of the holders of old order rights. In addition, upon granting of new order prospecting rights or new order mining rights to new applicants, prospecting fees and royalties will be payable to the state (s 3(2)(b) MPRDA) (see further Badenhorst and Mostert *Mineral and petroleum law* 13–8 note 1).

The objectives clause stated in section 2 MPRDA (provision of equitable access to mineral resources for all South Africans and expansion opportunities for historically disadvantaged persons) cannot be faulted within the constitutional transformation framework. The absence in item 2 of the Schedule II transitional arrangements of an object of providing compensation for expropriation of "old order rights" is, however, glaringly apparent. Whilst not expressly stated in the MPRDA, expropriation was found by the court in *AgriSA II* to be one of the purposes of the MPRDA (para 86). It is submitted that first two mentioned explicit objectives and the last mentioned implied objective are different sides to the same constitutional transformation coin. The impact of the MPRDA on "old order rights" must be recognised and addressed by the South African Government. By not doing so, or pleading as in *AgriSA II* that it is unable to pay compensation (which according to expert testimony does not seem to be the case (para 95)), it amounts to a negation of the state's constitutional duties and would probably impact on future investment in the mining industry.

The DMR expressed its disappointment with the decision, and considered applying directly to the Constitutional Court for leave to appeal (Anon "Department disappointed over expropriation ruling" *Independent Online* 29 April 2011 (http://bit.ly/pBGPmX, accessed on 9 May 2011; Anon "DMR set to appeal mining rights ruling" *Business Live* 29 April 2011 (http://bit.ly/rq6U37, accessed on 9 May 2011; Duvenhage "State allowed to appeal rights ruling" *Miningmx* 21 June 2011 (http://bit.ly/qFsMML, accessed on 25 June 2011). Du Plessis J granted DMR's application for leave to appeal, as well as AgriSA's application to lodge a counter-appeal. According to a recent (21 June 2011) newspaper report, it is expected that the Supreme Court of Appeal will only consider the appeal in the fourth quarter of 2012 (Duvenhage *supra*).

6 Conclusion

The *AgriSA II* decision so far has shown that the expropriation of underlying common law mineral rights of holders of "unused old order rights" (who did not avail themselves of the opportunity to apply for new order prospecting rights or new order mining rights) did result on the commencement date of the MPRDA. Deprivation in the case of an "unused old order right" took place on account of the fact that there was a substantial interference with the underlying common law mineral right. Expropriation came about because, in addition to deprivation, the state acquired the power to confer rights, on application, the contents of which were substantially, and in some respects identical to the contents of common law mineral rights. A "before-and-after MPRDA" analysis by the court clearly supported such a finding. Failure by such holders to have applied for new order prospecting rights or new order mining rights in terms of the MPRDA does in principle not constitute an impediment to instituting an expropriation claim. Based on *AgriSA II*, just and equitable compensation for expropriation of mineral rights brought about by the enactment of the MPRDA is payable. Compensation should be determined upon the date of expropriation, namely, the commencement date of the MPRDA (1 May 2004).

It is submitted that expropriations through the MPRDA also took place in the case of other forms of "old order rights" (see discussion above). As indicated above, the fact of expropriation is evidenced in these instances by applying a similar "before-and-after MPRDA" analysis. Compensation would, therefore, also be payable in these instances. The state has acquired the substance or part of the underlying common law (or statutory) rights of the holders of "old order rights" and accordingly just and equitable compensation is payable. The plea of inability to pay compensation is unavailable as a defence for the South African government as it would amount to an unconstitutional administrative suspension (if not extinction) of the constitutionally guaranteed right to compensation. The approach of *AgriSA II* that in principle compensation should be paid in cases where expropriation has been proved is welcomed.

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