VONNISSE

CONVERSION OF JOINTLY-HELD OLD ORDER MINING RIGHTS: YOU CAN'T ALWAYS GET WHAT YOU WANT

Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd
2014 2 SA 603 (CC)

OPSOMMING

Omskepping van ou-orde mynregte

Die beslissing van die Konstitusionele Hof in *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* bring helderheid oor die regsgevolge van die omskepping van voormalige mineraalregte ingevolge die oorgangsmaatreëls in Bylae II tot die Mineral and Petroleum Resources Development Act 28 of 2004 ("MPRDA"). Twee maatskappye, naamlik Sishen Iron Ore Maatskappy (Edms) Bpk ("Sishen") and Arcelormittal South Africa Beperk ("AMSA"), het mineraalregte gesamentlik in onverdeelde aandele van 87.6% en 21.4%, onderskeidelik, gehou. Anders as in die vorige bedeling, het die oorgangsmaatreëls nie uitdruklik voorsiening gemaak vir so 'n geval waar twee of meer persone gesamentlik regte gehou het nie. Sishen het gedurende die vyf jaar oorgangstydperk aansoek gedoen vir die omskepping van die maatskappy se mineraalregte, terwyl AMSA nagelaat het om sodanige aansoek te doen. Die Konstitusionele Hof het beslis dat by afkondiging van die MPRDA die twee maatskappy medehouers geword het van so-genaamde ou-orde mynregte met dieselfde aandeelhouding as voor die afkondiging van die MPRDA. Die hof beslis voorts dat by omskepping van Sishen se ou-orde mynregte en registrasie van 'n mynreg Sishen bloot 'n mynreg met 'n 87.6% aandeelhouding verkry het. Na afloop van die oorgangstydperk is AMSA se ou-orde mynreg beëindig en het die 21.4% aandeelhouding daarin nie by Sishen aangewas nie, maar teruggeval in die Staat wat dit weer op aansoek kon toeken. Die hof toon ook die redes aan waarom slegs Sishen daarvoor aansoek kon doen. Die outeurs wys daarop dat die onduidelikheid of, en in wie, die voormalige mineraalregte by afkondiging van die MPRDA en na afloop van die oorgangstydperke gevestig het, bly voortsleep. Die benadering van appèlregter Moseneke dat by afloop van die oorgangstydperk die voormalige mineraalregte in die staat hervestig word, word verwelkom as synde 'n voorwaartse stap in lyn met regswerklikheid. Die noodsaak om duidelikheid omtrent (a) die verhouding tussen die publiekreg en privaatreg gedurende grondwetlike gefundeerde transformasie en (b) die rol van die staat as bewaker van minerale kragtens artikel 3(1) van die MPRDA te verkry, word ten slotte geopper.

1 Introduction

The Mineral and Petroleum Resources Development Act 28 of 2004 (the "MPRDA") introduced a new mineral law regime on 1 May 2004 and also provided, in Schedule II to the MPRDA, ("transitional arrangements") for the transition from the old order to the new system. This appeal to the Constitutional Court (the "CC") dealt with the interpretation and application of item 7 of transitional arrangements (see [1]). Item 7 provides for the conversion of "old order

mining rights" into new mining rights. The main judgment was delivered by Jafta J, whilst Moseneke DCJ delivered a separate judgment. The other judges of the CC concurred with both decisions. It is submitted that a correct decision was given by the CC and important principles of law pertaining to the MPRDA were set out by the CC. Some of these principles are restated by way of introduction.

In an attempt to eradicate all forms of discriminatory practices in the mineral and petroleum industries, the MPRDA placed/vested all mineral and petroleum resources in either: (a) the nation, and made the State the custodian of all the resources on behalf of the nation (Jafta J [10] [16] [44]; but see [44]); or (b) in the State (Moseneke DCJ [108]). The differing views of the judges as to the person in whom the vesting of mineral resources takes place are discussed in more detail below. The MPRDA dispensed with the notion of mineral rights ([10]) and abolished private "ownership" of mineral rights ([16] [23]; see further [84]). The abolition of private "ownership" of mineral rights was an attempt to level the playing field for all applicants applying for (new) rights in terms of the MPRDA, because the holding of mineral rights is no longer required for the acquisition of prospecting or mining rights ([16]).

In order to avoid the disruption of mining operations which were being carried out at the commencement of the MPRDA, the transitional arrangements preserved some "old order rights" for periods of transition during which holders of old order rights had to choose to convert their rights (or apply for new rights) or allow the rights to lapse (see [49] [17]; see also [86]). *In casu* the "old order right" was an "old order mining right" (Category 1 of Table 2 of the transitional arrangements; [56]). An old order mining right is comprised of two components or elements, namely, the mineral right and the mining authorisation ([57] [60]). A new composite right was created by statute and such right could be converted into a (new) mining right ([57] [60]; see also [89]; see further Badenhorst "The make-up of transitional rights to minerals: Something old, something new, something borrowed, something blue …? 2011 *SALJ* 763). The statutorily created rights are not governed by the common law but by the MPRDA itself ([69]). Old order mining rights endured for a limited period of five years ([63]) after commencement of the MPRDA – that is, until 30 April 2009.

Upon application for conversion of old order mining rights in compliance with the requirements of both item 7(2) and (3) of the transitional arrangements, the Minister was obliged to convert an old order mining right ([53]). Within 90 days of notice of conversion, the converted right had to be lodged for registration in the Mineral and Petroleum Titles Registration Office ("MPTRO") and, simultaneously, the mineral right for deregistration in the Deeds Office (item 7(5)). Upon registration in the MPTRO, the old order mining right ceased to exist because the holder would enjoy all the entitlements flowing from the converted mining right ([53]). The terms and conditions of the old order mining right continued to apply if they were not inconsistent with the Constitution and the MPRDA ([53]). If, however, the requirements of item 7(2) and (3) of the transitional arrangements were not met, the Minister could decline to approve the conversion of an old order mining right ([53]).

An old order mining right (as a composite right) ceased to exist: (a) upon conversion of the old order mining right and registration of the converted right in the MPTRO; (b) upon refusal of an application for conversion; or (c) upon failure to convert the old order mining right as from midnight on 30 April 2009 (see [17] [52] [59] [60] [87]). It should be noted that, according to item 7(7), an old order

mining right is terminated upon conversion of the old order mining right and registration of the converted right in the MPTRO ([87]), and not upon lodgement for registration at the MPTRO, as was (erroneously) indicated by the court ([70)].

2 Facts

During the currency of the Minerals Act 50 of 1991 ("Minerals Act") Sishen Iron Ore Company (Pty) Ltd ("Sishen") and Arcelormittal South Africa Ltd ("AMSA") were joint holders of (registered) mineral rights in respect of iron ore and quartzite on eight properties in the Northern Cape Province ("Sishen properties"), and mining authorisations in terms of the Minerals Act ([18] [22]). The shareholding between the parties was divided into shares of 78.6% held by Sishen and 21.4% held by AMSA ([19]). Both companies held mining licences in terms of the Minerals Act in respect of their undivided shares to the mineral rights ([22]). The companies were entitled to mine for iron ore and quartzite on the Sishen properties ([22]). By agreement between the companies, the actual mining at the Sishen mine was conducted by Sishen, on its behalf and on behalf of AMSA, which was charged a fee for Sishen's service ([18]).

Upon enactment of the MPRDA, Sishen and AMSA were joint holders of "old order mining rights" ([62] [63] [88]) which had to be converted into mining rights before the expiry of the five years of transition on 30 April 2009 ([24]). During December 2005, Sishen applied for conversion of its old order mining rights, which conversion was approved by the Director-General on 5 May 2008 ([24]). AMSA did not apply for the conversion of its old order mining right within the mandatory five-year period ([25]). Upon expiry of the five-year mandatory period (on 30 April 2009), Sishen applied for mining rights in respect of the old order rights previously held by AMSA, namely, the 21.4% undivided share ([25]). Meanwhile, Imperial Crown Trading 289 (Pty) Ltd ("Imperial"), a "newcomer" ([119]), and "obscure third party" ([121]), applied for a prospecting right in respect of iron ore and manganese on the Sishen properties. On 30 November 2009, a prospecting right was granted to Imperial whilst Sishen's objection to the granting of a prospecting right was unsuccessful ([25]). Sishen's appeal against the grant of the prospecting right to Imperial was dismissed by the Minister of Mineral Resources ([26]).

In *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* [2011] ZAGPPHC 220 [56] [109] Zondo J held that when Sishen, as co-holder of the old order mining right, converted its right, it became the sole holder of the converted mining right, including AMSA's share. The correctness of the decision has been questioned, especially in light of the fact that prior to the expiry of AMSA's old order mining right on 30 April 2009, it would have been *ultra vires* during 2008 for the Minister to have considered and granted a mining right to Sishen in respect of the 21.4% undivided share of the old order mining right, which was still at that time held by AMSA (see Badenhorst and Olivier "Conversion of 'old order mining rights': Sleeping at the MPRDA's wheel of (mis)fortune? *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources* unreported case no 28980/10 (GNP)" 2013 *THRHR* 269). The Supreme Court of Appeal (the "SCA") in *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* 2013 4 SA 461 (SCA) [61]) also decided that upon conversion of Sishen's old order mining right and failure of AMSA to convert its right, Sishen became the exclusive holder of the mining right in respect of the Sishen

properties. The order issued by the Supreme Court was that Sishen became the sole holder of the mining right on 30 April 2009. The correctness of the decision of the SCA, but not its outcome, was again questioned (see Badenhorst and Olivier "Conversion of jointly-held old order mining rights: An all and nothing ruling? *Minister of Mineral Resources of the RSA v Sishen Iron Ore* (394/12) [2013] ZASCA 50 (28 March 2013)" 2014 *THRHR* 145). The Minister and other applicants sought leave to appeal against the order of the SCA ([37]). The CC decided that the decisions of both the High Court and the SCA were incorrect ([64] [108]).

3 Issues

Jafta J accepted that the case raised (as required for consideration by the CC) important constitutional issues:

> "It involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources. Furthermore, this legislation regulates the mining industry which is a vital component of this country's economy, not only in terms of its contribution to the national GDP, but also in respect of creating jobs for thousands of people who otherwise would be unemployed" ([37]).

The following specific issues were identified by Jafta J:

(a) Whether Sishen applied for and was granted conversion of its own and AMSA's old order mining rights.

(b) If so, what was the legal basis for the granting of AMSA's rights to Sishen?

(c) If, at the level of fact, Sishen was granted AMSA's old order rights, did that decision have legal consequences in the light of the *Oudekraal* principle?

(d) If Sishen's conversion did not extend to AMSA's rights, what happened to AMSA's old order mining rights upon the expiry of five years on 30 April 2009? ([38])

The following additional issues where raised by Moseneke DCJ, namely, whether:

(a) an unconverted old order mining right lives beyond the transition ([107]);

(b) an unconverted old order mining right ceases to exist only in relation to its holder (107]);

(c) an unconverted old order mining right continues to exist in relation to the State, to which it reverts for further allocation ([107]); and whether

(d) the Minister was empowered to grant the old order right of AMSA to a third party, where a mining right had already been issued to Sishen in respect of the properties ([102] [111]).

4 Decision

The first set of legal issues raised in this appeal was decided as follows:

As to issue (a), Jafta J decided that Sishen: (i) only converted its old order mining right which comprised of its 78.6% undivided share of the mineral right and its mining licence (see [71]); and (ii) did not and could not have applied for conversion of something more that its own old order mining right ([67]). It was thus found that Sishen did not convert its old order mining right together with that of AMSA ([64]). Jafta J accordingly decided that both the High Court and

the SCA erred in holding that Sishen converted its old order mining right together with that of AMSA ([64]). It was found that upon conversion of Sishen's old order mining right, it ceased to exist when it was lodged for registration during August 2008 ([65] [66]). It should be noted that termination of the converted old order mining right only took place upon registration of the mining right in the MPTRO. Moseneke DCJ also held that the conversion of the old order mining right of Sishen did not include the old order mining right of AMSA ([77] [102]). He reasoned that the unconverted right of AMSA did not accrue to Sishen because it lapsed ([102]).

As to issue (b), Jafta J reasoned that there was no legal basis for concluding that AMSA's loss could become Sishen's gain ([70]). The court was unfortunately, under the impression that the common law provided a basis for the erroneous view that, upon conversion, Sishen acquired "100% mineral rights (*sic*)" ([68]). Such view would be inconsistent with the MPRDA ([68]). The view that upon conversion and registration you could not acquire more of the shareholding than you had before (as now decided by the CC), is in line with the common law principles of co-ownership or joint holding and the exercise of entitlements of mineral rights (see Badenhorst and Olivier 2013 *THRHR* 269 275–277 281). The common law is not necessarily inconsistent with the MPRDA, and should be properly examined before it is declared to be inconsistent or inimical to the objects of the MPRDA. Be that as it may, the court correctly indicated that in terms of section 4 of the MPRDA, if there is conflict between the MPRDA and the common law, the MPRDA prevails ([68]). The court reasoned that item 7 is not capable of an interpretation that Sishen acquired the sole and exclusive mining right, and such construction would be inconsistent with the objects of the MPRDA, including equitable access to natural resources ([70]; see also [102]). The court correctly rejected the decision of the High Court that the inclusion of the words "sole and exclusive right" in the converted right meant that Sishen was the "sole holder of the 100% mineral right" ([67]). This would be the case despite the intention of Sishen to acquire a sole and exclusive mining right or wording used to that effect in an application for conversion. In other words, one cannot acquire a larger share of a (converted) mining right if one was not previously entitled to it by virtue of one's shareholding of the mineral right even though one has intended to acquire 100% of the old order right or used words to that effect in one's conversion application (see further, Badenhorst and Olivier 2013 *THRHR* 282). Upon conversion, you can't also get what was intended or wanted. One acquires a mining right with a shareholding in accordance with one's previous shareholding within the parameters of the MPRDA. Even though private law notions are not favoured in the new mineral law regime, there are certain analogies with the application of the *nemo plus iuris* rule (see further, Badenhorst and Olivier 2013 *THRHR* 280) and a derivative mode of acquisition of rights (by the former right holder).

As the assumption was rejected that Sishen converted the sole and exclusive old order mining right and that the State was precluded from allocating the mining right lost by AMSA, it was decided in respect of issue (c) that reliance on the *Oudekraal* principle was without merit and misplaced ([71] [72]). The *Oudekraal* principle entails that "an administrative decision, whether it be right or wrong, stands until set aside" (*Minister of Mineral Resources v Sishen Iron Ore* 2013 4 SA 461 (SCA) [51]). As the CC found that no conversion of AMSA's shareholding in respect of the old order mining right took place; there

consequently was no decision to grant a sole and exclusive mining right in place which could (or had to) be reviewed.

As to issue (d), it was decided that upon failure to timeously apply for the conversion of AMSA's old order mining right ([64]), it ceased to exist at midnight on 30 April 2009 ([64] [70]; see also per Moseneke DCJ [90]). Moseneke DCJ was of the view (albeit *obiter*) that if AMSA had renewed its undivided share of 21.4% in the old order right timeously, it would have been entitled to be a co-holder of the mining right to the properties, to the extent of its undivided share ([106]). As indicated below, this would not have been possible because of section 22(2)(b) of the MPRDA.

Jafta J and Moseneke DCJ decided that the appeal against the order of the SCA, that Sishen's conversion resulted in it acquiring AMSA's old order mining right, must succeed ([73] [77]).

Moseneke DCJ indicated that the main judgment was not the end of the matter ([78]; see also Jafta J [73]) insofar as the MPRDA is silent on the fate of the undivided share in an unconverted old order mining right which has lapsed ([81] [107]). As to the second set of issues raised, Moseneke DCJ decided as follows:

(a) An unconverted old order mining right ends upon expiry of the prescribed time limit ([107]).

(b) An unconverted old order mining right ceases to exist in relation to its former holder ([108]).

(c) An unconverted old order mining right continues to exist in relation to the State, to which it reverts for further allocation. According to Moseneke DCJ, the "mineral and the land which was the subject of the unconverted and expired old order right" revert to the State for further allocation (see [108]). Subject to the requirements of a new prospecting right or mining right, the "State is, and would be, entitled to grant a 'new' prospecting or mining right in respect of the mineral and land in terms of sections 17 and 23 of the MPRDA" ([108]).

(d) The Minister was not empowered to grant AMSA's undivided share of an old order mining right to a third party, where the old order mining right was formerly held by Sishen and AMSA in undivided shares, and Sishen had converted its old order right, but AMSA had failed to do so (see [81] [114]).

As to (b) above, Moseneke DCJ reasoned that the transitional arrangements only regulated conversion of rights during the period of transition and not beyond transition (see [108]).

As to (c) above, Moseneke DCJ reasoned that old order mining rights reverted to the State because the State is the custodian of all mineral and petroleum resources ([108]). He was of the view that the same was true for the termination of unused old order rights in *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) ("*Agri SA*") which could, after termination, have been allocated by the State as custodian (see [109]). He reasoned further that only new rights can be granted because prospecting or mining without the necessary right is prohibited by the MPRDA ([110]). The distribution by the State of unconverted old order rights as new rights was also seen as advancing the primary objects of the MPRDA (see [111]).

As to (d) above, Moseneke DCJ mentioned that the Minister and other applicants were not happy with an outcome to the effect that the Minister is not entitled

to grant the unconverted old order mining right of AMSA to a third party ([105]). This perhaps explains the continuation of the most expensive litigation in South Africa to date at the expense of the taxpayer – despite the fact that Imperial did not intend to prospect on the Sishen properties and waived its preference to apply for a mining right, and the fact that the prospecting right itself had lapsed ([103]). Moseneke DCJ, however, decided that once (i) the old order mining rights of Sishen had been converted; (ii) the old order rights of AMSA had lapsed; and (iii) the Minister had granted a mining right to Sishen under the MPRDA in respect of the minerals on the land, it was not open for the Minister to grant a prospecting right or mining right in respect of the same mineral and the same land to a third party ([81]). Moseneke DCJ distinguished the instance in (d) above from the general principle in (c) above (and the *Agri SA* decision of the CC) as follows:

> "Here, the difficulty is, first, that Sishen and AMSA held their old order rights in undivided shares. Second, Sishen has been, and still is, conducting vast mining operations. And, third, it has been granted a mining right in terms of the MPRDA. None of these three factors arose in *Agri SA*" ([113]).

Moseneke DCJ reasoned further that:

> "This conclusion [in (d) above] is fortified by sections 16 and 22 dealing with the grant of prospecting and mining rights, as well as other provisions of the MPRDA that are aimed at the optimal mining of the mineral resources of the country and which impose obligations on the holder of a mining right to comply with the environmental, social and labour requirements of the MPRDA" ([114]).

It can be assumed that the grant of rights to two holders (for instance, Sishen and Imperial) would run contrary to optimal mining of resources. It is also shown that the MPRDA does not really contemplate two right holders in respect of the same mineral and land (see [116]–[117]). The absurdity of allowing a newcomer, like Imperial, to acquire prospecting rights in respect of the Sishen properties is clearly illustrated by the court's exposition of the vast operations at the Sishen mine (see [119]–[121]).

Moseneke DCJ concluded that "Sishen is entitled to formally apply again for, and be granted, the residual 21.4% undivided share of AMSA's unconverted old order mining right in the Sishen [properties], subject to whatever conditions the Minister deems appropriate, provided they are permissible under the MPRDA" ([122]). An order to that effect was granted by Moseneke DCJ (see 4(d) and (e) of the order at [125]).

Sections 16(2)(b) and 22(2)(b) preclude a Regional Manager, to whom an application for a prospecting right or mining right, respectively, has been submitted, from accepting an application if it relates to a mineral and land in respect of which another person already holds a prospecting right, mining right or a mining permit. In other words, where a right already exists in relation to minerals and land, the State may not grant a right to anyone other than the existing right holder ([115]). Moseneke DCJ found that Sishen would not be prohibited by section 22(2)(b) because it was the existing right holder ([115]). Jafta J also indicated that the prohibition in section 22(2)(b) of the MPRDA would not apply to Sishen's application for AMSA's residual 21.4% undivided share of the unconverted old order mining right because the mining right was held by Sishen itself ([73]; see further Badenhorst and Olivier 282–283 284). Ironically, this provision would have prevented AMSA from acquiring a mining right if it had applied for its lost 21.4% undivided share of the unconverted old order mining right, which, of course, did not happen and was not at issue in this case.

5 Commentary

The (so-called) main judgment of Jafta J (supported by eight judges, including Moseneke DCJ) and the supplementary judgment of Moseneke J (supported by ten judges, including Jafta J) cannot be faulted regarding their exposition of the law relating to the rights of the respective parties (Sishen and AMSA), and the finding that Imperial's application should not have been received by the Regional Manager. The failure of AMSA to apply for conversion of its 21.4% undivided share of the old order mining right did not result in its accrual to Sishen, but in its vesting in the nation (as per Jafta J) upon expiry of the period of transition, with the Minister being empowered to allocate the relevant new order mining right. The applicant's appeal against the decision of the SCA was successful in this regard. The final outcome was that only Sishen is entitled to apply for AMSA's 21.4% undivided share of the old order mining right. The Minister's unhappiness about the fact that she was not entitled to grant unconverted old order mining rights to a third party was, therefore, not alleviated by Moseneke DCJ. Even the Minister cannot always get what she wants! Upon the eventual granting of the (new order) mining right (in respect of AMSA's 21.4% undivided share) to Sishen, the result originally envisaged by the State during the unbundling of Iscor Ltd ("Iscor") into a mining business (conducted by Sishen) and a steel manufacturing business (conducted by AMSA) will have been fully achieved. This particular end result was also achieved by the (incorrect) decisions of the High Court and the SCA.

A number of points of criticism may be raised. The common law distinction between a mineral right and a mining right is, at times, not fully appreciated. AMSA was not the holder of a mining right, but a mineral right (see [19]). Mineral rights are defined as rights in the mineral itself, whereas it is stated that the mining right referred to the mining authorisation, licences and permits in terms of which the activity of mining could be carried out ([53]). A mineral right was a limited real right which was severed from the ownership of land entitling its holder to prospect, mine and remove minerals, whilst a mining right was granted by a mineral right holder to a miner in terms of a mineral lease. The mining authorisation only permitted the exercise of entitlements by virtue of a mineral right or a mining right and did not constitute a mining right. The holders of old order mining rights and not licences or permits, were entitled to apply for conversion of their rights ([23]).

The recognition by Moseneke DCJ in the *Sishen* decision that minerals "revert" to the State for allocation is significant because it amounts to an implicit recognition by the CC that *minerals* are actually vested in the State for the allocation of *rights to minerals*. It is submitted that only the mineral resources and not the ownership of the land revert to the State (Moseneke DCJ) or nation (Jafta J). Strictly speaking, the content of the old order mining right (entitlements) is merely vested and not revested in the State (because, in the present case, the State was not the holder of the content of the mineral rights to iron ore and quartzite (entitlements) before the commencement of the MPRDA). Upon termination of the statutory old order mining right by operation of law (the MPRDA), the entitlements thereof are vested in the State. An acquisition of former entitlements took place. In other words, an original mode of acquisition of rights takes place. If, as is submitted, Moseneke DCJ is correct about the vesting of the entitlements in the State, then, by operation of law, expropriation did take place in *Agri SA*. It follows that the view of Mogoeng CJ in *Agri SA*, that acquisition by

the State did not take place, is incorrect, and cannot be supported. These former entitlements may probably now be said to be encompassed by either a public law right or a public law power. Such acquisition is no different from acquisition by the State during an expropriation in terms of the Expropriation Act 63 of 1975, both in the past and at present – which can be explained in terms of private law principles despite the fact that an act of expropriation was (and still is) an administrative act in terms of public law (see, eg, the explanation by Gildenhuys *Onteieningsreg* (2001) 8–9 61–63). In the case of an expropriation of ownership of land in terms of the Expropriation Act, the type of ownership acquired by the State remains ownership in the private law sense of the word (as before), and a public law transformation process was never required to explain (and to provide a legal basis for) the acquisition of such ownership by the State. However, the court in *Agri SA* seems to accept that only a public law transformation process is now required in order to give effect to the objectives of the MPRDA. It is submitted that important aspects of the MPRDA could, like the Expropriation Act, be explained with reference to existing private law principles – without any need to replace such principles with a public law construction.

The recognition by Moseneke DCJ that minerals revert to the State is, however, in contradiction of the statements by Jafta J that (a) ownership of mineral resources is now vested in the nation ([16]); (b) all mineral resources were placed "in the hands of the nation as a whole" ([10]; see also [44]); and (c) mineral resources "belong to the nation" ([11]). Jafta J, however, contradicts himself in one and the same paragraph by referring to (a) "vesting the resources in the nation as a whole"; and (b) "by placing the mineral wealth of the country in the hands of the State, Parliament acted in accordance with international accepted practice" ([44]). It should be noted again that "the nation" is not a legal subject in law (unless this common law principle is also inconsistent with the MPRDA in which case the statute prevails – however, the MPRDA does not explicitly afford juridical personality to the South African nation, nor can it be said to do so in an indirect manner).

In *Agri SA* [71] Mogoeng CJ also did not recognise the vesting of *mineral rights or unused old order rights* in the State upon the failure of the holder of unused old order rights (Sebenza Mining (Pty) Ltd ("Sebenza")) to apply for new rights. Mogoeng CJ found that "(n)either the State nor other entities or people acquired the rights to sterilise, monopolise the exploitation of minerals or sell, lease or cede Sebenza's old order rights on 1 May 2004" ([71]). According to *Agri SA*, vesting (of rights) does not take place at all. Former mineral rights/unused old order rights somehow disappear into thin air because of the absence of a holder. The State as custodian is merely empowered to grant rights to minerals. The contradiction in the decisions can perhaps be explained by saying that the *Agri SA* decision dealt with *unused old order rights*, whereas *Sishen* dealt with *old order mining rights* for which different procedures were created by the transitional arrangements. In terms of the transitional arrangements, unused old order rights involved a *de novo* application process (item 8), whilst old order prospecting and mining rights (items 6 and 7) involved a conversion process. It is, however, submitted that the consequences of the failure to submit the required applications in respect of both these categories of old order rights during the two processes, are the same. In *Agri SA* it was necessary for the CC to find that upon termination of unused old order rights (due to failure to apply for new rights) no vesting in the State took place because it would have amounted to an

expropriation (which, according to the authors of this article, it did). Therefore, compensation (as provided for in section 25(3) of the Constitution) would have been payable, whereas in *Sishen*, a finding of vesting in the State was only necessary as a step in the process resulting in the eventual allocation of AMSA's former old order mining right (with a 21.4% shareholding) to Sishen. Moseneke DCJ stated, with reference to the *Agri SA* decision, that there was "no provision of the MPRDA that precluded the State from assuming its custodial role and allocating a new mining right" ([109]). Although this may suggest that vesting in the custodial sense took place (which may contradict the view of vesting in the State), Moseneke DCJ did acknowledge that the State would be empowered to grant the former entitlements of the mineral rights of Sebenza (the claimant in *Agri SA*) to new applicants ([109]). Again, as indicated before (Badenhorst "Ont-eiening van onbenutte ou-orde regte: Het iets niets geword? *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (KH)" 2014 *THRHR* 313 329), someone has lost entitlements, and someone acquired entitlements (for allocation) which can eventually be granted to a new (meritorious) applicant by the Minister in accordance with the provisions of the MPRDA. This truth is, however, not recognised if one were to discard a well-functioning private law paradigm and exchange it for a pair of public law glasses, the lenses of which bring into sight uncharted territory and new constructs, and, by so doing, conveniently narrow (and so impair) legal sight, resulting in an approach which spells the demise of the tried and tested (and adaptable) notion of ownership and limited real rights. After all, section 5(1) of the MPRDA Act states that a prospecting right or mining right, granted in terms of the provisions of the MPRDA, is a limited real right in respect of the mineral and the land to which the right relates. In other words, the legislature used the well-known common law notion of a limited real right (*ius in re aliena*) even though matters relating to *ius in re sua* and its holder are not dealt with in the MPRDA.

The problem remains that the judges (except for Moseneke DCJ) are not prepared to decide that former minerals, mineral rights or entitlements relating to mineral rights are now vested in the State. With reference to section 3(1) of the MPRDA, with its statement that "minerals and petroleum resources are the common heritage of the people of South Africa" (even though not a legal subject), *Agri SA* stated that the State acquired nothing, but controls everything. Upon commencement of the MPRDA all former mineral rights, prospecting rights and mining rights were terminated and replaced with new statutory rights, namely, new order rights with a prescribed content. Upon termination of these statutory old order rights at different moments in time (as determined by the MPRDA), the remaining content thereof or "minerals" was, as indicated by Moseneke DCJ in *Sishen*, vested in the State for allocation of new rights to such minerals. Vesting of minerals or rights/entitlements to minerals in the State should no longer be denied. This brave approach of Moseneke DCJ is to be preferred as being in line with legal reality despite the CC's aversion to common law property principles. Section 3(1) of the MPRDA should be explained in this manner, namely, mineral resources, former rights or their entitlements are now vested in the State. If not, contradictions in one judgment or judgments of the same court will continue to plague judicial decisions.

At the outset, Jafta J provided an overview of mining and land legislation that was racist and discriminatory (see [3]–[8] [15]), which placed the decision within context. It is interesting to add that despite the racist restriction of land ownership

according to race by the Group Areas Act 36 of 1966, the definition of "immovable property" in the Group Areas Act did not include (separated) mineral rights, prospecting rights, mining rights or mineral leases (Dale in Lowe *et al Elliot The South African notary* (1987) 245). Theoretically, these rights could have been acquired and held by the owners of land in the respective group areas. Admittedly, this excluded Black (African) South Africans, who could not legally occupy or acquire land in any group area.

With the establishment of the Union of South Africa on 31 May 1910, the then South African Government decided to perpetuate the British trusteeship approach to land which was inhabited by indigenous communities. All such land in the erstwhile colonies and protectorates was registered in the name of the Crown as trustee. In South Africa, from 31 May 1910, this was changed to (a) the (South African) Governor-General (who, incidentally, was also declared to be the "Supreme Chief of all native people", as provided for in the Native Administration Act 38 of 1927 (subsequently renamed the Black Administration Act 38 of 1927 – and which has, 20 years after the advent of democratic South Africa, still not been fully repealed); (b) from 1961, the State President; or, sometimes (c) the Government of South Africa; or (d) the national government department responsible for the administration of such communities.

Mineral rights pertaining to land parcels (the so-called released areas) acquired by the South African Native Trust (later renamed the South African Development Trust (SADT)) were reserved for the State (in its capacity as trustee). With the consolidation of reserved areas (as defined in the Black Land Act 27 of 1913) and the released areas (as defined in the Development and Trust Land Act 18 of 1936) into "homelands" and the subsequent granting of (limited) legislative and executive powers to them in terms of, firstly, the Bantu Authorities Act 68 of 1951, secondly, the Promotion of Bantu Self-Government Act 46 of 1959, and, thirdly, the National States Constitution Act 21 of 1971 (subsequently renamed the Self-governing Territories Constitution Act 21 of 1971), subterranean resources (and their exploitation) remained with the South African State.

When four of the 10 self-governing territories (Transkei, Bophuthatswana, Venda and Ciskei) opted for so-called independence, both the land and the related mineral rights were transferred to the respective governments in terms of the four Status Acts passed by the South African Parliament (the Status of Transkei Act 100 of 1976; the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1979; and the Status of Ciskei Act 110 of 1981), as well as the four Constitutions enacted by the respective TBVC Parliaments (the Republic of Transkei Constitution Act 15 of 1976; the Republic of Bophuthatswana Constitution Act 18 of 1977; the Republic of Ciskei Constitution Act 20 of 1981; and the Republic of Venda Constitution Act 9 of 1979).

Regarding the six remaining self-governing territories (Gazankulu, KanGwane, KwaNdebele, KwaZulu, Lebowa and QuaQua), the rights pertaining to land and minerals remained, in principle, with the South African government, subject to the transfer of a number of functions and functional domains in accordance with the provisions of the Self-governing Territories Constitution Act 21 of 1971. Section 36(1) provided for the power of the State President (by proclamation) to vest or transfer any land or other public property to the government of the self-governing territory concerned. In 1990 (by means of section 36(1) of the National States Constitution Amendment Act 111 of 1990) and, again, in 1992 (by means of Proclamation R27 of 31 March 1992) (*GG* 13906)), this was further amended

to provide that the State President could (by proclamation in the *Government Gazette*) determine that the ownership or control of any land or other public property situated in a self-governing territory, which was vested in (or had been acquired by) the Government of the Republic of South Africa, should vest in (or be transferred to) the government of the self-governing territory concerned.

According to section 30 of the 1971 Act, the legislative assemblies of the self-governing territories had the power to enact new legislation and amend or repeal existing legislation in respect of functional domains listed in Schedule 1. In terms of section 5 of the 1971 Act, the executive government of the territories concerned had the power to administer such legislation. In 1986 (by means of GN 1038 of 23 May 1986), Schedule 1, Item 6, was amended to include mining.

On 1 April 1992, the State President (by means of regulation 1(d)(i) of Proclamation R28 of 31 March 1992 (*GG* 13906)) transferred land in the jurisdictional areas of the self-governing territories to their respective governments. Proclamation R29 of 31 March 1992 (*GG* 13906) represented the culmination of the transfer of all powers and functions relating to land and minerals in the jurisdictional areas of the self-governing territories to their respective governments by means of amendments to the functional domains contained in Schedule 1 of the Self-governing Territories Constitution Act 21 of 1971, by the substitution of item 31Z in respect of land matters ("31Z. Land matters, including the acquisition, alienation, grant, occupation and possession of land, or any right to land"), and by the insertion of the functional domain of "mineral matters" as the new item 32E. GN 959 of 31 March 1992 (*GG* 13905), issued in terms of section 37A(2) of the 1971 Act, determined 1 April 1992 as the commencement date of the substituted item 31Z ("land matters") and the new item 32ZE ("mineral matters") in respect of the six self-governing territories.

The Minerals Act 50 of 1991 (which commenced on 1 January 1992) was thus not applicable to the four TBVC states and the six self-governing territories, as the legislative and administrative powers relating to minerals and mines had, in fact, already been transferred to their respective governments. In respect of the six self-governing territories, section 69 of the Minerals Act 50 of 1991 provided for agreements between the South African government and the government of a self-governing territory relating to mineral matters.

Another typical example of trusteeship was the holding of minerals in trust for the inhabitants of Lebowa (a self-governing territory) by the Lebowa Mineral Trust established by the Lebowa Mineral Trust Act 9 of 1987 (L) (see Badenhorst and Mostert *Mineral and petroleum law of South Africa* (2004) Revision service 9 ch 11.4). The Lebowa Mineral Trust had to be administered "for the material benefit, and moral welfare of Lebowa and its inhabitants" (*Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* [2001] 2 All SA 388 (T) 392i–j; see further, s 3 of Lebowa Mineral Trust Act 9 of 1987 (L)).

As Schedule 6 of the (interim) Constitution of the Republic of South Africa 200 of 1993 (which commenced on 27 April 1994) did not list land and/or mineral matters as being functional areas of provincial competence, section 235(6)(a)(i) applied, which meant that all matters pertaining to land and minerals in the erstwhile TBVC states and the six self-governing territories vested in the national government, both as regards legislation and administration. In terms of section 229, all old order (pre-1994) legislation remained in place and continued to apply to the areas where it used to apply immediately prior to 27 April 1994.

On 7 December 1994 the Mineral and Energy Laws Rationalisation Act 47 of 1994, which rationalised the mining and energy laws by repealing laws that were in force in the erstwhile TBVC states and the self-governing territories, and provided a framework for the application of the South African mineral and energy laws to those areas, commenced (see further, Badenhorst and Mostert 1–23). However, the Minerals Act (and a number of other RSA Acts) were only made applicable to these areas on 1 May 1995 (Proclamation R46 of 28 April 1995 (*GG* 16396)). It should be noted that not all the pre-1994 homeland legislation pertaining to mineral matters was repealed by the 1994 Act (which, in turn, was repealed by section 110 of the MPRDA).

In terms of the (final) Constitution of the Republic of South Africa, 1996 (which commenced on 4 February 1997), old order (pre-27 April 1994) legislation remained in force in its original area of applicability, subject to amendment, repeal and consistency with the 1996 Constitution (Schedule 6, Item 2(1)–(2)). The Lebowa Mineral Trust Act 9 of 1987 (L) was only repealed on 30 September 2000, by means of the Abolition of Lebowa Mineral Trust Act 67 of 2000 (which transferred all assets, liabilities, obligations and staff of the Lebowa Mineral Trust to the State).

The (1996) Constitution did not include land and/or mineral matters as functional areas of concurrent national and provincial legislative competence (Schedule 4 (Part A)) or of exclusive provincial legislative competence (Schedule 5 (Part B)), resulting in those areas remaining exclusively in the national sphere of government. It is ironic that the same paternalistic structure of the pre-1994 colonial and apartheid trust in respect of minerals can, in a certain sense, be said to have been reintroduced by the MPRDA from 1 May 2004 onwards in the form of a custodianship over minerals. Thus, in terms of section 3(1) of the MPRDA, the State is the custodian of minerals and petroleum resources for the benefit of all South Africans, and, as the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may grant the rights to minerals and petroleum.

The question can legitimately be asked whether there has really been a change that ensures that the benefits of South Africa's mineral wealth will be spread amongst all South Africans, or whether, in reality, "business as usual" will be perpetuated (as in the past when Black people did not benefit in any real material manner from the apartheid era trust structures and arrangements). For benefit-sharing amongst all South Africans, it is a *conditio sine qua non* that (a) the contents (including the various inherent roles, powers, functions and duties) of custodianship of minerals, and (b) the benefits accruing to South Africans must be defined and enacted by means of appropriate legislation.

It is a pity that the CC did not see fit in *Agri SA* and/or *Sishen* to engage with, and investigate from a historical and comparative perspective, the phenomenon of custodianship – especially as it forms the basis of, amongst others, the allocative, regulatory, management, control and supervisory functions of the State in the person of the Minister. In addition, a growing tendency in post-1996 national legislation (dealing with aspects of natural resources) has been to refer to the custodianship/trusteeship role of the State, acting through the relevant Minister. A non-exhaustive list of examples of such terms in national legislation is (a) "trusteeship" (s 3 of the National Water Act 36 of 1998; s 3 of the National Environmental Management: Biodiversity Act 10 of 2004); and (b) "custodianship" (s 9(3)(h) of the Water Services Act 108 of 1997; s 3 of the MPRDA).

The absence of a proper and appropriate understanding of what custodianship entails, and to what extent it also requires the Minister to be accountable to South Africans regarding the manner in which he/she exercises his/her custodianship obligations, are matters that require serious and urgent attention.

6 Conclusion

The decision of the CC provides clarity about the conversion of old order mining rights which were jointly held by Sishen and AMSA. It was decided that upon commencement of the MPRDA in 2004, Sishen and AMSA became joint holders of a statutory right, namely, an old order mining right, comprised of mineral rights and mining authorisations with the same respective shareholdings as before the enactment of the MPRDA. Prior to the MPRDA, the shareholding between the parties was divided into shares of 78.6% held by Sishen and 21.4% held by AMSA. Upon conversion of its old order mining right and registration of a new mining right, Sishen only acquired a new mining right with a 78.6% shareholding. This amounts to a derivate mode of acquisition of rights. Upon failure by AMSA to convert its old order mining right with a 21.4% shareholding prior to the cut-off date for applying for conversion, its old order mining right was terminated upon the prescribed time limit. No accrual of this shareholding took place in favour of Sishen. Generally speaking, an unconverted old order mining right (or rather its entitlements) continues to exist in relation to the State in whom it is vested for further allocation of new prospecting and mining rights. This amounts to an original mode of acquisition of rights. However, in the present case, further allocation to a third party by the State was not permissible, because Sishen was a joint holder of an old order mining right, already acquired a new mining right and was already conducting vast mining operations. Further allocations of prospecting rights or mining rights to a newcomer, like Imperial, would have been in conflict with section 16(2)(b) or 22(2)(b) of the MPRDA, respectively. It was decided that only Sishen is entitled to formally apply again for, and be granted, the residual 21.4% undivided share of AMSA's unconverted old order mining right in the Sishen properties, subject to whatever conditions the Minister deems appropriate, provided they are permissible under the MPRDA. Upon the grant of such application and registration, the end result which was originally envisaged by the State with the unbundling of Iscor into a mining business (conducted by Sishen) and a steel manufacturing business (conducted by AMSA) would be achieved. Acquisition or the exercising of prospecting rights (or mining rights) by third parties, which could have disrupted mining operations at the Sishen mine, is effectively thwarted by the CC.

The Minister and applicants won the battle against the accrual of the 21.4% undivided share of AMSA to Sishen, but lost the war about the ability of the Minister to grant prospecting rights or mining rights in respect of unconverted undivided shares of old order mining rights to "meritorious" applicants. The objectives of the MPRDA and the national interest of running one of the largest open cast iron ore mines in the world were totally disregarded by the Department.

Uncertainty and contradictions remain about the vesting of former entitlements of old order mineral rights and the identity of the right holders before new rights are granted in terms of the MPRDA. The decision of Moseneke DCJ in *Sishen*, that an old order mining right, upon termination (due to failure to apply for conversion of the old order mining right), (a) continues to exist in relation to

the State, and (b) reverts to the State for further allocation of rights, is in conflict with the view of Mogoeng CJ in the *Agri SA* decision which stated that an unused old order right, terminated by operation of the MPRDA on account of failure to apply for new rights, does not vest in the State or the people. The Moseneke DCJ approach to vesting is also in conflict with the view of Jafta J, that vesting takes place in the people, who are, however, not a legal subject in law. These contradictions are caused by the unwillingness of the courts to uncover the legal basis underlying section 3(1) of the MPRDA. In uncovering the legal foundation, basic private law principles relating to the acquisition, loss and alienation of ownership and limited real rights may – and should – be relied on. The view of Moseneke DCJ about "revesting" of minerals or rights in the State is to be welcomed as a step forward and is in line with legal reality. It is hoped that this positive development will be taken further by the provision of clarity by the courts regarding, amongst others, first, the relationship between private law and public law in the context of the transformational role of the 1996 Constitution, and second, the vesting of private law rights subsequent to the taking thereof in the national (public) interest by means of legislation of general application that complies fully with the requirements of section 36 of the 1996 Constitution. Finally, there is an urgent need to obtain clarity regarding the content of the role, powers, functions and duties inherent in custodianship as well as the related accountability obligations – including the benefits that should accrue to the citizens of South Africa. If the resolution of this pivotal matter is not expedited, the result might just be that the apartheid past is (at least in part) reinvented in the present, as aptly put in the words attributed to Jorge Santayana: "Those who cannot remember the past are condemned to repeat it" (Santayana *The life of reason* (1905) 284).

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