

The historical development of the right to mine diamonds in South Africa

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Soli Deo Gloria

ABSTRACT

This thesis is an analyses of the historical development of diamond mining legislation in South Africa. Diamond mining legislation in South Africa developed as a result of and following the discovery of diamonds. There were at least four factors that influenced the development of diamond mining legislation in South Africa. In the first instance, there was the governing authority, secondly the habitat played a role or the source of the diamonds, thirdly the developments in diamond mining technology had an influence on legislation, and fourthly the form of land tenure played an important part. The primary focus of this study was to determine what the influence of the form of land tenure was on the historical development of the right to mine diamonds in South Africa. The right to mine diamonds was in a number of diamond mining legislation, which was in force during different periods of time in various parts of South Africa in the past, stated to be reserved to the British Crown or the relevant Government or State. In these historical diamond mining legislation, distinction was made between different types of land tenure and certain entitlements were granted to the owners or occupiers thereof, depending on the form of land tenure.

In parts 1 and 2 of this thesis, the different diamond mining legislation that was enacted in the former British colonies and the Boer Republics are analysed. The purpose of the analysis is to determine who was entitled to prospect for or to mine diamonds and the influence of the form of land tenure thereon. After the end of the second Anglo Boer War, diamond mining legislation was enacted in the former Boer Republics, which became British colonies in which provision was made for the Crown to share in the profits derived from the working of the diamond mines. The particular shares and the persons who were entitled to mine the diamond mines, depended on the form of land tenure. The different diamond mining legislation continued to apply when South Africa became a Union in 1910 and was only consolidated with the commencement of the *Precious Stones Act* 44 of 1927 which is discussed in part 3 of this thesis. The development of the right to mine diamonds in terms of the *Precious*

Stones Act 73 of 1964 and after its repeal in terms of the *Minerals Act 50 of 1991* (hereafter the 1991 Minerals Act), which was enacted in the Republic of South Africa is discussed in part 4 of this thesis.

The prospecting for and mining of diamonds (and all other minerals) are with effect from 1 May 2004, regulated by the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter MPRDA). The MPRDA fundamentally changed the legal basis upon which rights to prospect for and to mine minerals are acquired and exercised. This was achieved mainly, by disconnecting the form of land tenure and the concept of mineral rights from the right to prospect for or to mine diamonds. There are numerous diamond mines in South Africa proclaimed before the enactment of the MPRDA. Transitional provisions were included in schedule II of the MPRDA in which three categories of rights were created, namely old order prospecting rights, old order mining rights and unused old order rights to provide for security of tenure. In these transitional provisions, reference is made to rights, permits, permissions and documents which were granted or entered into in terms of legislation repealed by the MPRDA. The terms and conditions that applied to diamond mines proclaimed prior to the commencement of the MPRDA may still be relevant for purposes of interpreting item 9(7) of schedule II of the MPRDA. Item 9(7) of schedule II of the MPRDA deals specifically with precious stones and provides that any lease of the State's interest in a mine in terms of section 74 of the 1964 Precious Stones Act which was in force immediately before the commencement of the MPRDA in terms of section 47(1)(a)(iii) of the 1991 Minerals Act continues in force subject to the terms and conditions contained in the documents under which it was granted or entered into. Section 74 of the 1964 Precious Stones Act empowered the relevant Minister to lease the State's interest in any precious stones mine to the person entitled to work the mine. The person who was entitled to work a diamond mine in terms of the 1964 Precious Stones Act depended on the form of land tenure. The lease of the State's interest formed part of the terms and conditions under which a mineholder was entitled to work a diamond mine in terms of the 1964 Precious Stones Act and such terms and conditions were,

with certain exceptions preserved in section 47 of the 1991 Minerals Act. It is submitted that in the case of a lease of the State's interest in respect of land where the rights to diamonds were previously held by the State, the lessee was for the duration of the agreement obliged to continue paying the lease consideration in terms of the 1991 Minerals Act and that this lease of the State's interest continues in force in terms of item 9(7) of schedule II of the MPRDA subject to the terms and conditions under which it was granted or entered into.

There is finally the issue of historical tailings, which the Department of Mineral Resources will be including within the ambit of the MPRDA if the *Mineral and Petroleum Resources Amendment Bill* [B15D-2013] is enacted and comes into effect. These historical tailings are not currently regulated by the MPRDA. It is inevitable that this inclusion of historical tailings, which is mostly regarded as movable assets belonging to the person or entity who lawfully mined and created the historical tailings, will be confronted by arguments of expropriation and it will be necessary for litigants and courts to consider the terms and conditions that applied to these historical tailings.

It is recommended that when the courts are confronted with the terms and conditions which applied to diamond mines proclaimed before the commencement of the MPRDA, the courts and in particular the relevant legal representatives have a proper regard to the historical development of the relevant diamond mining legislation and refrain from any unsubstantiated submissions and assertions.

Key words: Legal history, historical development of diamond mining legislation, diamonds, precious stones, minerals, mineral rights, prospecting, mining, land tenure, alluvial diamonds, *quitrent*, *cuius est solum*, tailings, residue stockpiles, residue deposits, deposit sites.

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LIST OF ABBREVIATIONS AND ACRONYMS

A

Agri CC case	Agri SA v Minister of Minerals and Energy 2013 4 SA 1 (CC)
Agri SCA case	Minister of Minerals and Energy v Agri South Africa 2012 5 SA 1 (SCA)
1919 Alluvial Amendment Act	Precious Stones (Alluvial) Amendment Act 15 of 1919
Anglo Operations High Court case	Anglo Operations Limited v Sandhurst Estates (Pty) Limited 2006 1 SA 350 (T)
Anglo Operations SCA case	Anglo Operations Limited v Sandhurst Estates (Pty) Limited 2007 2 SA 363 (SCA)
Ataqua case	De Beers Consolidated Mines Limited v Ataqua Mining (Pty) Limited (O) (unreported) case number 3125/06 of 13 December 2007

B

Bank of Africa case	Bank of Africa v Kimberley Mining Board 1884 3 HCG 371
Bengwenyama 2011 CC case	Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited 2011 4 SA 113 (CC)

Buitendach case	Buitendach v West Rand Proprietary Mines 1925 TPD 745
Bultfontein Mining Board case	London and SA Exploration Company v Bultfontein Mining Board 1888-1889 6 SC 201

C

1883 Cape Precious Stones Act	Precious Stones and Minerals Mining Act 19 of 1883
1886 Cape Precious Stones Amendment Act	Precious Stones and Minerals Act Further Amendment Act 18 of 1886
1887 Cape Precious Stones Amendment Act	Precious Stones and Minerals Mining Law Amendment Act 44 of 1887
1899 Cape Precious Stones Act	Precious Stones Act 11 of 1899
1907 Cape Precious Stones Amendment Act	Precious Stones Amendment Act 27 of 1907
Carter case	Carter v Van Niekerk and Union Government (Minister of Lands) 1910-1917 GWLD 445
Carter Appeal case	Van Niekerk and Union Government (Minister of Lands) v Carter 1917 AD 359
Colonial Government case SC	De Beers Consolidated Mines Limited v The Colonial Government 1891-1892 9 SC 101

Constitution	Constitution of the Republic of South Africa, 1996
1961 Constitution	Republic of South Africa Constitution Act 32 of 1961
Cradock Proclamation	Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure 6 of 1813
cuius est solum principle	cuius est solum eius est usque ad caelum et ad inferos

D

De Beers prospecting case	De Beers Consolidated Mines Limited v The Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy (O) (unreported) case number 1590/2005 of 15 May 2008
De Villiers case	De Villiers v The Cape Divisional Council 1875 5 Buch 50
Diggers Republic's Rules	Rules and Regulations for the Vaal river diamond fields alluvial claims
Dinkel case	Dinkel v Union Government 1929 AD 150
Dutoitspan Diggings Regulations	Rules and Regulations of the Dorstfontein Diggings

E

Elandskloof case	Elandskloof Trust v EMJEFF (Pty) Limited 1988 4 All SA 84 (T)

Ekapa case	Ekapa Minerals (Pty) Limited v Lucky Seekoei (NC) (unreported) case number 2057/2016 of 13 January 2017

F

First MPRDA Amendment Act	Mineral and Petroleum Resources Development Amendment Act 49 of 2008

fn	footnote

Fryer case	Colonial Government v Fryer and Huysamen 1885-1886 4 SC 313

G

Gelletich Mining case	Inyaku Game Farm (Pty) Limited v Gelletich Mining Industries (Pty) Limited (GNP) (unreported) case number 51602/2014 of 6 September 2016

Giddy case	Webb v Giddy 1878 3 App Cas 908

Goldschmidt case	Goldschmidt & Co v Du Toit's Pan Mining Board 1883 2 HCG 195

Greathead case	Greathead v Transvaal Government and Randfontein Estate and Gold Mining Co Limited 1910 TS 276
1871 GW Diggings Proclamation	Griqualand West Proclamation 71 of 27 October 1871
1871 GW Proclamation	Griqualand West Proclamation 67 of 27 October 1871
1871 GW Quieting Proclamation	Griqualand West Proclamation 72 of 1871
1872 GW Prospecting Proclamation	Griqualand West Proclamation 59 of 7 November 1872
1874 GW Crown Land Ordinance	Griqualand West Ordinance 3 of 1874
1874 GW Mining Ordinance	Griqualand West Ordinance 10 of 1874
1875 GW Land Court Ordinance	Griqualand West Ordinance 3 of 1875
1880 GW Fixity of Tenure in Mines Ordinance	Griqualand West Ordinance 6 of 1880 Fixity of Tenure in Mines Ordinance
1880 GW Mining Proclamation	Griqualand West Proclamation 8 of 1880
1880 GW Registration of Leases Ordinance	Griqualand West Registration of Leases (Mines and Diggings) Ordinance 16 of 1880

H

Holcim case	Holcim SA (Pty) Limited v Prudent Investors (Pty) Limited 2011 1 All SA 364 (SCA)

I

Idada case	Idada Trading (Pty) Limited v Top Coat Property Investment 23 (Pty) Limited (NC) (unreported) case number 646/2006 of 13 March 2009

K

Kimberley Divisional Council case	London and South African Exploration Company Limited v Kimberley Divisional Council 1884 3 HCG 125

Kimberley Divisional Appeal case	Kimberley Divisional Council v London and South African Exploration Council Limited 1885-1906 2 Buch 84

Klipdrift Rules	Rules for the miners and occupiers of the Klip Drift Diggings

L

LAWSA	The Law of South Africa

Littlejohn case	SA Loan Mortgage and Mercantile Agency v Cape of Good Hope Bank and Littlejohn 1888-1889 6 SC 163

M

1991 Minerals Act	Minerals Act 50 of 1991
MHSA	Mine Health and Safety Act 29 of 1996
1994 Mineral Rationalisation Act	Mineral and Energy Laws Rationalisation Act 47 of 1994
1956 Mines and Works Act	Mines and Works Act 27 of 1956
Mining Rights Act	Mining Rights Act 20 of 1967
Monastery case	Monastery Diamond Mining Corporation (Pty) Limited v Schimper 1983 3 SA 538 (O)
Mondira Pula case	De Beers Consolidated Mines Limited v Mondira Pula CC (NC) (unreported) case number 496/2004 of 13 May 2005
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
2008 MPRDA Amendment Act	Mineral and Petroleum Resources Development Amendment Act 49 of 2008
2013 MPRDA Bill	Mineral and Petroleum Resources Amendment Bill [B15D-2013]
Murphy case	London and SA Exploration Co v Murphy 1886-1887 4 HCG 322

N

Natal Cambrian case	Natal Cambrian Collieries v Durban Navigation Collieries Limited 1925 46 NPD 27
1841 Natal Fixed Property Law	Burghership Law and the Possession of Fixed Property 108 of 1841
1887 Natal Mines Law	Natal Mines Law 17 of 1887
1888 Natal Mines Law	Natal Mines Law 34 of 1888
1899 Natal Mines Act	Natal Mines Act 43 of 1899
1845 Natal Ordinance	Ordinance 12 of 27 August 1845
Neebe case	Neebe v Registrar of Mining Rights 1902 TS 65
New Jagersfontein Company	The New Jagersfontein Mining and Exploration Company Limited
1865 NM Mining Leases Act	Mining Leases Act 12 of 1865
Northumberland case	Case of Mines (R v Earl of Northumberland) (1568) 1 Plowd 310

O

1854 OFS Constitution	Constitutie van den Oranjevrijstaat of 1854
1871 OFS Diamond Fields Ordinance	Free State Ordinance for Administering Affairs Upon the Diamond Fields Ordinance 3 of 1871

1891 OFS Statute	Wetboek van den Oranjevrijstaat
1904 OFS Precious Stones Ordinance	Mining of Precious Stones Ordinance 4 of 1904
1907 OFS Amendment Ordinance	Mining of Precious Stones Amendment Ordinance 30 of 1907
1908 OFS Discoverer's Act	Discoverer's Claims (Licence) Act 9 of 1908
Ondombo Beleggings case	Ondombo Beleggings (Pty) Limited v Minister of Mineral and Energy Affairs 1991 4 SA 718 (A)

P

Palala Resources	Palala Resources (Pty) Limited v Minister of Mineral Resources and Energy 2014 6 SA 403 (GP)
para	paragraph
paras	paragraphs
PELJ	Potchefstroom Electronic Law Journal
1927 Precious Stones Act	Precious Stones Act 44 of 1927
1964 Precious Stones Act	Precious Stones Act 73 of 1964
1986 Precious Stones Amendment Act	Precious Stones Amendment Act 62 of 1986

1976 Pre-Union Revision Act Pre-Union Statute Law Revision Act 36 of 1976

Q

Queen case Queen v Town 1884 3 HCG 143

R

Raath case Rex v Raath 1951 1 SA 600 (T)

Richtersveld CC case Alexkor Limited v The Richtersveld Community 2004
5 SA 460 (CC)

Rocher case Rocher v Registrar of Deeds 1911 TPD 311

Rouliot case London and SA Exploration Company v Rouliot 8 1891
Juta (SC) 74

reg regulation

regs regulations

S

s section

ss sections

SAPL Southern African Public Law

Sephaku case	Sephaku Tin (Pty) Limited v Kranskoppie Boerdery (NGP) (unreported) case number 47561/2010 of 7 May 2012
SALR	South African Law Review
Sishen SCA case	Minister of Mineral Resources of the Republic of South Africa v Sishen Iron Ore Company (Pty) Limited 2013 4 SA 461 (SCA)
Sishen CC case	Minister of Mineral Resources of the Republic of South Africa v Sishen Iron Ore Company (Pty) Limited 2014 2 SA 603 (CC)
South Africa Act	South Africa Act [9 EDW 7 CH 9]
Stockenström judgment	Judgment of Judge Stockenström of the Griqualand West Land Court delivered on 16 March 1876 in respect of a number of land claims
Swiegers case	Union Government v Pringle and Swiegers 1923 CPD 337
T	
Thirty-Three Articles	Thirty-Three Articles Being General Regulations and Laws for Law Sessions
Thompson case	Union Government (Minister of Mines) v Thompson 1919 AD 404

THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
Trojan case	Trojan Exploration Co (Pty) Limited v Rustenburg Platinum Mines Limited 1996 4 SA 499 (AD)
TSAR	Tydskrif vir Suid-Afrikaanse Reg
1866 Tvl Ordinance	Ordonnantie 5 of 1866, Bepalende de Wet op het Mijnwezen
1903 Tvl Precious Stones Ordinance	Precious Stones Ordinance 66 of 1903
1908 Tvl Precious Stones Amendment Act	Precious Stones Amendment Act 21 of 1908

V

Van den Heever case	Van den Heever v The Minister of Minerals and Energy (NC) (unreported) case number 1252/2010 of 4 May 2012

W

Wessels case	Wessels v Wilson and Hall 1890-1892 6 HCG 88
Williams case	Williams v The Premier (Transvaal) Diamond Mining Co Limited and the Union Government 1910 TS 811

X

Xstrata case	Xstrata SA (Pty) Limited v SFF Association 2012 5 SA 60 (SCA)

Z

ZAR	Zuid-Afrikaansche Republiek

1858 ZAR Constitution	Grondwet van de Zuid-Afrikaansche Republiek of 1858

1889 Zululand Proclamation	Zululand Proclamation II of 1889

1894 Zululand Proclamation	Zululand Proclamation VII of 1894

Chapter 1 Introduction

1.1 Problem statement and research question

The discovery of diamonds in South Africa played an important part in the development of South Africa's economy.¹ Diamonds are being mined across South Africa in a number of provinces and are also mined offshore in the Atlantic Ocean.² The Eureka diamond, which is acknowledged to be the first diamond discovered in South Africa, was found in 1866 during a time that South Africa was caught in the grip of its first economic depression.³ The historical development of diamond mining legislation in South Africa is inextricably linked to the history of the discovery of diamonds. The history of the

¹ Diamonds form part of the category of gem stones known as precious stones. Before the commencement of the *Minerals Act* 50 of 1991 (hereafter the 1991 Minerals Act) on 1 January 1992, the prospecting for and mining of diamonds have been regulated under legislation dealing with precious stones. The word "diamond" is defined in the *Oxford South African Dictionary* 324 to mean: "a precious stone consisting of a clear and often colourless crystalline form of pure carbon, the hardest naturally occurring substance." For a discussion of the mineralogy of diamonds see Tillman *Minerals and Rocks* 32-33; See also Wilson, McKenna and Lynn *Occurrence of Diamonds* 1-5; Draper and Frames *The Diamond* 9-15; Crookes *Diamonds from the Smithsonian Report* 219-235; Simons *Cullinan Diamonds* 4-5, 11; Sawyer *Diamonds in South Africa* 10-11; Lewis *Genesis and Matrix of the Diamond*. De Beers *Annual Report 31 March 1890* 20; Wagner *The Diamond Fields of Southern Africa* 1-2.

² Examples of some of the well-known mines are the Kimberley Mine, the De Beers Mine, Dutoitspan Mine, Bultfontein Mine and the Wesseltown Mine in the Northern Cape Province; the Finsch Mine, Koffiefontein Mine and the Voorspoed Mine in the Free State Province; the Cullinan Mine in the Gauteng Province and the Venetia Mine in the Limpopo Province.

³ This was primarily caused by the American Civil War which commenced in 1861 and which impacted negatively on the global economy. The Cape Colony derived its income mainly from agriculture and the export of wool. The international wool market was negatively impacted by the American Civil War and the opening of the Suez Canal a few years later, also contributed to the loss of income in the Cape Colony. The Cape lost its strategic importance with the opening of the new sea route between Europe and India. See Taylor *African Treasures* 31-32; Davenport *Colonial Mining Policy* 44-45; Davenport *Digging Deep* 37-38,40; Robertson *Diamond Fever* 15-16; Simons *Cullinan Diamonds* 6-7,10-11; Reunert *Diamond Mines of South Africa* 1; Murray *The Diamond-Field Keepsake* 7; Walker *A History of South Africa* 333; Scholtz "The Cape Colony 1845-1902" 204-205; Beet and Terpend *Vaal Diamond Diggings* 15-18; Williams *Diamond Mines* Vol 1 115; McNish *El Derado* 15-17; Visser "Die Minerale Revolusie" 183; Worger *City of Diamonds* 9; Marquard *South Africa* 178; Rotberg *The Founder* 57; Roberts *The Diamond Magnates* 4; Doughty *Early Diamond Days* 202; Machens *Platinum, Gold and Diamonds* 139-142; Hornsby *The South African Diamond Fields* 5; Millin *Rhodes* 10; Steyn *Afrikaner-Joernaal* 136; Kiewiet *A History of South Africa* 57-58, 88-89.

discovery of diamonds in South Africa has been recorded in numerous publications,⁴ but the historical development of diamond mining legislation and in particular the right to mine diamonds has as far as could be ascertained, not been researched in similar detail.⁵

This thesis deals with the historical development of the right to mine diamonds in South Africa. Unless the contrary is stated or appears from the context, the term "right to mine" is used in this study to refer to the entitlement to enter upon land to prospect for or to mine diamonds and to dispose thereof. These entitlements formed part of the entitlements of the holder of a common law mineral right before the commencement of the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the MPRDA) on 1 May 2004.⁶ In South African law, minerals have been dealt with as part

⁴ See Roberts *Kimberley* 5-6; Williams *Diamond Mines* Vol 1; Robertson *Diamond Fever* 69-82; Boyle *To the Cape for Diamonds* 85; Beet *Diamond Fields* 4-22; McNish *El Dorado* 17; Herbert *Diamond Diggers* 9-11; Kanfer *The Last Empire* 27-27; Simons *Cullinan Diamonds* 10; Murray *The Diamond-Field Keepsake* 7; Reunert *Diamond Mines of South Africa* 17; Streeter *The Great Diamonds of the World* 237-241; Dunn *Notes on the Diamond-Fields*; Muller *Op de Kaapsche Diamantvelden*; Lacour-Gayet *A History of South Africa* 133.

⁵ For a brief discussion of the early diamond laws with reference to the trading of diamonds in the South African economy, see Ndlovu *Diamond Law* 1-12.

⁶ Dale *et al Mineral and Petroleum Law* MPRDA1, MPRDA124-MPRDA125; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 219-222; Badenhorst "Development of Mineral and Petroleum Law" 1-1; Franklin and Kaplan *Mining and Minerals* 7; Badenhorst 1999 *Stellenbosch Law Review* 101-102 describes the entitlements of the holder of mineral rights to include the following: "... the entitlement to use the land for purposes of the exploitation of minerals to which the mineral rights relate. The entitlement includes the following: (i) the entitlement to enter upon the land for purposes of prospecting for and mining of minerals; (ii) the entitlement to prospect for minerals; (iii) the entitlement to mine the minerals ... the entitlement to determine what may and what may not be done on the land for purpose of the exploitation of minerals." See Badenhorst and Mostert 2003 *Stellenbosch Law Review* 384-385; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 221-222; See also Badenhorst and Mostert 2007 *TSAR* 418. Viljoen *The Holder of Mineral Rights* 41-48; Mostert *et al Law of Property* 268; Mostert *Mineral Law* 12; See Badenhorst 2011 *SALJ* 773-774. Badenhorst 1991 *TSAR* 114-115; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 221; Badenhorst, Van der Vyver and Van Heerden 1994 *Journal of Energy and Natural Resources Law* 291; Van der Walt and Pienaar *Introduction to the Law of Property* 332; *Van Vuuren v Registrar of Deeds* 1907 TS 289 at 294; *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) para 12 (hereafter the *Agri CC* case); *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 25 (hereafter the *Agri SCA* case); *Trojan Exploration Co (Pty) Limited v Rustenburg Platinum Mines Limited* 1996 4 SA 499 (AD) 509G-H (hereafter the *Trojan* case); *Minister of Mineral Resources of the Republic of South Africa v Sishen Iron Ore Company (Pty) Limited* 2013 4 SA 461 (SCA) para 21 (hereafter the *Sishen SCA* case). For a discussion of the *Sishen SCA* case see Badenhorst and Olivier 2014 *THRHR* 145-155.

of the law of property.⁷ In order to analyse the historical development of the right to mine diamonds, it is necessary to distinguish between the common law meaning of the term "right to mine" and the meaning thereof in the plethora of diamond mining legislation in which the term was used. It is often stated that prior to the commencement of the 1991 Minerals Act, the right to mine diamonds vested in the Crown or the State.⁸ Some scholars state that the reservation of the right to prospect and mine certain minerals in favour of the State goes as far back as 1871.⁹ In the *Agri SCA* case, the Supreme Court of Appeal even went so far as to hold that the right to mine is matter of "substantive powers" of the State and falls under its "suzerainty" the exercise of which is then allocated by the State as it deemed appropriate.¹⁰

One of the fundamental principles of the law of property in South Africa, is the principle of *cuius est solum eius est usque ad caelum et ad inferos* (hereafter the *cuius est*

⁷ Mostert *Mineral Law* 1; Badenhorst *The Law of Mineral Rights* 1-1; Van der Schyff *Property in Minerals and Petroleum* 5.

⁸ The *Agri SCA* case para 53; Mostert *et al Law of Property* 268; Mostert *Mineral Law* 2, 23, 49; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 5th ed 667; Van der Merwe *Sakereg* 408-409; Kleyn and Borain *Silberberg and Schoeman's The Law of Property* 405; Schoeman *Silberberg and Schoeman's The Law of Property* 419-420; Badenhorst "Development of Mineral and Petroleum Law" 1-21-1-22; Franklin and Kaplan *Mining and Minerals* 469, however, acknowledge that under the *Precious Stones Act* 73 of 1964 (hereafter 1964 Precious Stones Act) the rights to prospect on private land remained vested in the holder of the right to precious stones; See Viljoen and Bosman *Mining Rights* 28-40 with reference to the position under the *Mining Rights Act* 20 of 1967 (hereafter the Mining Rights Act). Badenhorst 1999 *Stellenbosch Law Review* 102-104 states that some of the entitlements to mine for a particular class of minerals, have been vested in the State and he describes the State as the holder of "statutory mineral rights". See also Badenhorst *Juridiese Bevoegdheid* 90, 622-623; Badenhorst and Mostert 2007 (2) *TSAR* 469-470.

⁹ See Badenhorst 2004 *Journal of Energy and Natural Resources Law* 223; Badenhorst and Malherbe 2001 *TSAR* 465; Badenhorst *The Law of Mineral Rights* 1-22; Van den Berg 2009 *Stellenbosch Law Review* 141-142 states that: "After the discovery of diamonds and gold in South Africa in the nineteenth century, the colonial legislatures started controlling mineral rights through various enactments. As early as 1871, the right to mine for precious metals and precious stones was reserved for the state. At the end of the nineteenth century, the owner's common law dominium with regard to the minerals under his soil had been 'reduced to a very shadowy right'. This is, however, a reference to the first so-called "Gold law" that was enacted in the *Zuid-Afrikaansche Republiek* and did not apply in the other British colonies or in the Orange Free State. See chapters 5-8 below. See Martinson 1989 *Annual Survey of South African Law* 207.

¹⁰ *Agri SCA* case para 69. This view was correctly criticised by the Constitutional Court in the *Agri CC* case paras 34-37. See Badenhorst "Development of Mineral and Petroleum Law" 1-24-1-26. For a discussion of the *Agri SCA* case see Badenhorst 2013 *THRHR* 472-490.

solum principle). According to the *cuius est solum* principle, the owner of land is not only the owner of the surface of the land but also the owner of the air space above and below the surface of the land, including the minerals situated below the surface.¹¹ It is uncertain what the influence of common law mineral rights and landownership (where the rights to diamonds had not been severed from the title of the relevant land) were on the historical development of the right to mine diamonds in South Africa.

The research question of this study is to determine what the influence of the form of land tenure was on the historical development of the right to mine diamonds in South Africa. The main objective of the study is therefore to provide a legal historical study of the development of the right to mine diamonds in South Africa to determine the context and content of the right to mine diamonds in the previous diamond mining legislation and the influence of the form of land tenure thereon. In order to achieve this objective, the following secondary objectives were set, namely to review and

¹¹ According to Franklin and Kaplan *Mining and Minerals* 4-5, the origin of the *cuius est solum* principle is credited to Accursius, a thirteenth century Italian commentator. De Groot *Inleidinge* 2 1 23; Badenhorst *Juridiese Bevoegdheid* 12. See the *Agri SCA* case para 32. The *cuius est solum* principle is, as Dale *Mineral Rights* 13-78, points out, the starting point of the right to mine in South Africa. Although Dale accepts that the *cuius est solum* principle forms part of South African law, he questions whether this principle should have been adopted into South African law as readily and without criticism as it was. The *cuius est solum* principle formed part of the common law in South Africa. See *London and SA Exploration Company v Rouliot* 8 1891 Juta (SC) 74 (hereafter the *Rouliot* case); *Rocher v Registrar of Deeds* 1911 TPD 311 at 315 (hereafter the *Rocher* case); *Union Government (Minister of Railways and Harbours) v Marais* 1920 (AD) 240 at 246; *Erasmus and Lategan v Union Government* 1954 3 SA 415 (O) 417; *Anglo Operations SCA* case para 16; *Agri CC* case paras 7 and 8; *Trojan* case 509G-H, 537C-D; Hahlo and Kahn *The Union of South Africa* 760-761; Badenhorst 1994 *TSAR* 501-501; Mostert *et al Law of Property* 269; Silberberg *The Law of Property* 235, 313; Schoeman *Silberberg and Schoeman's The Law of Property* 419; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 4th ed 667; Badenhorst and Mostert "Development of Mineral and Petroleum Law" 1-9; Van der Merwe *Sakereg* 395; Van der Merwe *Sakereg* 2nd ed 190; Van der Walt and Pienaar *Introduction to the Law of Property* 68-69, 106, 331-332; Mostert *Mineral Law* 5; Badenhorst 1991 *TSAR* 115; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 220-221; Badenhorst 1995 *TSAR* 172-173; Van der Schyff *Property in Minerals and Petroleum* 5, 19-20. There are scholars who are of the view that the *cuius est solum* principle no longer applies in the Republic of South Africa in terms of the current mineral legislation. Badenhorst and Malherbe 2001 *TSAR* 465; Badenhorst "Development of Mineral and Petroleum Law" 1-10-1-11; For a different view, see Dale *et al Mineral and Petroleum Law* MPRDA124-MPRDA125; See para 12.2 below. For a detailed discussion of the development of the common law principles governing the nature of mineral rights see Badenhorst "Development of Mineral and Petroleum Law" 1-3-1-7.

analyse the historical development of diamond mining legislation in South Africa to determine:

- (a) Firstly, who was entitled to access the relevant land to prospect for or to mine diamonds; and
- (b) Secondly, the rights and/or obligations of the holder of the right to prospect for or to mine diamonds, in particular to determine whether any authorisations were required to prospect for or to mine diamonds.

1.2 Relevance of this study

Currently, the MPRDA regulates the prospecting for and the mining of diamonds and all other minerals in South Africa.¹² A person or entity who intends to prospect for or to mine diamonds in South Africa on or after 1 May 2004 will have to comply with the requirements of the MPRDA.

A study of the historical development of the right to mine diamonds and the influence of the form of land tenure thereon, is not merely a theoretical question. The reason for this is threefold. There are in the first place, numerous diamond mines in South Africa which were proclaimed under previous diamond mining legislation in force prior to the commencement of the MPRDA.¹³ Schedule II of the MPRDA contains the transitional arrangements that apply to these diamond mines that have been operating prior to the commencement of the MPRDA. Item 9(7) of schedule II of the MPRDA deals specifically with precious stones and provides that any lease of the State's interest in a mine in terms of section 74 of the 1964 Precious Stones Act,¹⁴ which was

¹² The MPRDA was assented to on 3 October 2002, by virtue of Gen Not 1273 in GG 23922 of 10 October 2002. The MPRDA commenced on 1 May 2004. Dale *et al Mineral and Petroleum Law* MPRDA1; See chapter 12 below.

¹³ These mines include, the Kimberley Mine, the De Beers Mine, the Dutoitspan Mine, the Wesselton Mine, the Namaqualand Mines, Finsch Mine, Cullinan Mine and Venetia Mine. Although the Koffiefontein Mine and the Voorspoed Mine are currently mined under mining rights granted in terms of s 23 of the MPRDA they were discovered and mined more than a century ago.

¹⁴ See chapter 10 below.

in force immediately before the commencement of the MPRDA in terms of section 47(1)(a)(iii) of the 1991 Minerals Act¹⁵ continues in force subject to the terms and conditions contained in the documents under which it was granted or entered into. Section 74 of the 1964 Precious Stones Act empowered the relevant Minister to lease the State's interest in any precious stones mine to the person entitled to work the mine.¹⁶ The person who was entitled to work a diamond mine in terms of the 1964 Precious Stones Act depended on the form of land tenure. In order to interpret item 9(7) of schedule II of the MPRDA, it is necessary to consider the historical development of diamond mining legislation insofar as it regulated or impacted on the right to mine diamonds in South Africa.

The relevance of this thesis is, however, not limited to the interpretation of item 9(7) of schedule II of the MPRDA. The objects of the transitional arrangements as described in item 2 of schedule II of the MPRDA are to:

- (a) Protect security of tenure in respect of prospecting and mining;
- (b) Give the holder of old order rights an opportunity to comply with the MPRDA; and
- (c) Promote equitable access to the nation's mineral resources.

In order to ensure compliance with the object of security of tenure, items 6(1) and 7(1) of schedule II of the MPRDA provide for the continued existence of old order prospecting rights and old order mining rights for specific periods of time, subject to the requirement that the holders of such rights lodged the rights for conversion within certain stipulated periods.¹⁷ As part of a conversion lodgement submission, the holder

¹⁵ See chapter 11 below.

¹⁶ Section 74 of the 1964 Precious Stones Act is discussed in para 10.6.2 below and s 47(1)(a)(iii) of the 1991 Minerals Act is discussed in para 11.3.2.7 below.

¹⁷ Item 6(1) of schedule II of the MPRDA provided that an old order prospecting right continued in force for a period of two years from the date of commencement of the MPRDA. *De Beers Consolidated Mines Limited v The Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy* (O) (unreported) case number 1590/2005 of 15 May 2008 (hereafter *the De Beers prospecting right case*). Item 7(1) of schedule II of the MPRDA provided that an old order mining right continued in force for a period not exceeding five years from the commencement of the MPRDA, but limited to the duration of the relevant mining authorisation. *Dale et al Mineral and Petroleum Law* SchII121-SchII122, SchII137-SchII138; Badenhorst and

of an old order prospecting right or an old order mining right was required to lodge a statement setting out the terms and conditions that apply to the old order prospecting right¹⁸ or the older mining right.¹⁹ Item 7(4) of schedule II of the MPRDA provides as follows:²⁰

No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act.

The old order mining right ceases to exist upon the conversion of the old order mining right and the registration of the mining right into which it is converted.²¹ The provisions of items 6 and 7 of schedule II of the MPRDA could secondly, be interpreted to mean that the terms and conditions of old order mining rights and old order prospecting rights continue to apply to the converted mining rights and converted prospecting rights, subject to the provision that such terms and conditions are not contrary to the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) and the MPRDA.²² According to Dale *et al*²³ these terms and conditions that continue to apply in terms of items 6(1) and 7(1) of schedule II of the MPRDA to old order mining rights and old order prospecting rights also encompass the statutory terms and conditions applicable to such old order mining rights and old order prospecting rights. In *Xstrata SA (Pty) Limited v SFF Association*²⁴ the Supreme Court of Appeal refrained from

Mostert "Transitional Arrangements" 25-13-25-14, 25-21; See *Idada Trading (Pty) Limited v Top Coat Property Investment 23 (Pty) Limited* (NC) (unreported) case number 646/2006 of 13 March 2009 (hereafter the *Idada* case); *Inyaku Game Farm (Pty) Limited v Gelletich Mining Industries (Pty) Limited* (GNP) (unreported) case number 51602/2014 of 6 September 2016 (hereafter the *Gelletich Mining* case); *Topcoat Property Investments 23 (Pty) Limited v Idada Trading 5 (Pty) Limited* (NC) (unreported) case number 646/2006 of 8 June 2007; Dale 2007 *Annual Survey of South African Law* 1137.

¹⁸ Item 6(2)(g) of schedule II of the MPRDA. See para 12.5.1 below.

¹⁹ Item 7(2)(g) of schedule II of the MPRDA. See para 12.5.2 below.

²⁰ Item 6(4) of schedule II of the MPRDA contains a similar provision regarding old order prospecting rights.

²¹ Item 7(7) of schedule II of the MPRDA. Item 6(7) of schedule II of the MPRDA contains a similar provision in regard to the cessation of old order prospecting rights.

²² Dale *et al Mineral and Petroleum Law* Sch86-Sch87; Badenhorst and Mostert "Transitional Arrangements" 25-4-25-5.

²³ Dale *et al Mineral and Petroleum Law* Sch11-Sch53.

²⁴ 2012 5 SA 60 (SCA) para 14 (hereafter the *Xstrata* case). For a discussion of the *Xstrata* case see Badenhorst 2013 *Obiter* 436.

expressing a view on the proper meaning to be attached to item 7(4) of schedule II of the MPRDA and held that:

It is apparent from the complexity of these contentions that the correct interpretation of item 7(4) is a difficult issue with potentially far-reaching ramifications in relation to factual situations that are not before us in this appeal.

If the correct interpretation of items 7(4) and 6(4) of schedule II of the MPRDA is that the terms and conditions of old order mining rights and old order prospecting rights continues to apply to the converted mining rights and converted prospecting rights, the question arises what the content of such terms and conditions is that continue to apply to the converted mining rights and prospecting rights. It is stated at the outset, that it is not the purpose of this thesis to determine what the correct interpretation of items 7(4) and 6(4) of schedule II of the MPRDA is. Even if items 7(4) and 6(4) of schedule II of the MPRDA do not have the effect of preserving the statutory terms and conditions of old order mining rights and old order prospecting rights, certain specific provisions of repealed diamond mining legislation may still continue to impact on or be of relevance to historic diamond mines in South Africa.

Thirdly, the historical development of diamond mining legislation may also continue to be relevant where the ownership of tailings created under mining rights or mining titles in force prior to the commencement of the MPRDA has to be determined.²⁵ In at least two court cases it was necessary for a diamond mining company to prove its ownership of tailings containing diamondiferous material created under mining rights or titles in force prior to the commencement of the MPRDA.²⁶ It was necessary in both cases for the relevant diamond mining company to prove with reference to repealed diamond

²⁵ See para 12.6 below.

²⁶ *De Beers Consolidated Mines Limited v Mondira Pula* (NC) (unreported) case number 496/2004 of 13 May 2005 (hereafter the *Mondira Pula* case); *De Beers Consolidated Mines Limited v Ataquia Mining (Pty) Limited* (O) (unreported) case number 3125/2006 of 13 December 2007 (hereafter the *Ataquia* case). For a discussion of the *Ataquia* case see Badenhorst and Van Heerden 2010 *Stellenbosch Law Review* 116-131; Dale *et al Mineral and Petroleum Law* MPRDA98-MPRDA99; Dale 2007 *Annual Survey of South African Law* 1134-1136; Dale 2013 *Annual Survey of South African Law* 1007-1036; See also *Realeboga Bosaletse NO v The Minister of Mineral Resources* (O) unreported) case number 1891/2013 of 26 September 2016.

mining legislation, that the tailings were movable assets and emanated from its mining operations conducted under legally valid mining rights or titles granted under previous diamond mining legislation. Put differently, the mining company had to prove that it was entitled to mine diamonds under the repealed diamond mining legislation and that the tailings emanated from such mining operations.

There is therefore a need to research the historical development of the right to mine diamonds in South Africa.

1.3 Research methodology and format of this study

This study includes an analytical literature review of the impact of the form of land tenure on the historical development of the right to mine diamonds in South Africa. A legal historical study requires an analysis of both the external legal history and the internal legal history in order to reach a conclusion.²⁷ The political, economic, social and religious context influenced the development of diamond mining legislation in South Africa during the time in which it developed.²⁸

A number of libraries and archives were visited in an attempt to obtain original documents, manuscripts and newspapers articles.²⁹ Challenges with a research of this

²⁷ External legal history refers to the different factors that may have influenced the development of law in a particular period and includes social, political, economic and cultural circumstances. Internal legal history refers to the development of the material or substantive law. Du Plessis "The Historical Functions of the Law" 47; Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 2-4; Van Zyl 1972 *THRHR* 19-37; Hosten *et al Introduction to South African Law and Legal Theory* 271-272; Venter *et al Regsnavorsing* 161-162; Van Zyl *Beginnels van Regsvergelyking* 37; Edwards *The History of South African Law - An Outline* 1-3 states that: "If we go further and examine a legal system as a dynamically developing system and ask ourselves where the rules come from and how they have developed (and will probably develop further) then we are engaged in the application of the historical method to the study of law. Such study is necessary for a sound grasp of the law because it brings with it a sharper realisation of the social function of the law and the continuing struggle to find the best way to fulfil this function."

²⁸ Erasmus *The History of South African Law – An Outline* 1.

²⁹ These are the library of the University of North-West, the library of the University of South Africa, the library of the Pretoria Bar, the National Library of South Africa in Pretoria, the Brenthurst library in Johannesburg, the Africana Research Library in Kimberley, the De Beers archives in Kimberley and the Cape Town Diamond Museum. In addition and during my employment with De Beers Consolidated Mines Limited I had the benefit of conducting research at the Western Cape Archives

nature were that not all the original documents had been preserved and in some instances, the diggers had different versions of the same event.³⁰ Primary sources of this study are the legislation, proclamations and reported case law.³¹ The secondary sources of this study are the legal textbooks, the historic books, which also included books written by diggers who visited the diamond fields during the early years and during the so-called "diamond-rush".

The research for this study was concluded on 31 January 2017 and includes, with certain exceptions, relevant material to this date. This thesis comprises of 13 chapters and is divided into five parts. The development of the right to mine diamonds is as far as practical, discussed chronologically to follow the discovery of diamonds.

1.3.1 Part 1: Early diamond mining legislation

In Part 1 the early diamond mining legislation which was enacted in the former Cape Colony and in Griqualand West is discussed. Part 1 commences in chapter 2 with a brief discussion of the early land tenure conditions in the Cape, which led to the proclamation of *Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure* (hereafter the Cradock Proclamation).³² The Cradock Proclamation, which was the first statutory provision in South Africa in which specific reference was made to precious stones, is thereafter discussed. The purpose of the Cradock Proclamation was to provide for security of tenure by providing for holders of loan places to convert their titles to perpetual *quitrent*, subject to the reservation of the rights "on mines of precious stones, gold and silver" to the Government.³³

Land tenure conditions continued to influence the development of the right to mine diamonds, not only in the Cape, but also in the remaining parts of South Africa and in

in Cape Town, the Free State Archives in Bloemfontein and the National Archives of South Africa in Pretoria.

³⁰ See fn 91 below.

³¹ Some of the very early rules adopted by the diggers at the alluvial diggings are preserved at the Brenthurst Library. See para 3.2.2 below.

³² See para 2.2 below.

³³ Section 4 of the Cradock Proclamation; See para 2.3 below.

particular at the diamond fields. The first known diamond was discovered in 1866 in an area which was initially regarded as "no-man's land", but after the discovery of diamonds became known as the diamond fields. The rules that regulated the winning of diamonds at the diamond fields during the first five years following the discovery of diamonds are discussed in chapter 3. The diamond fields were in 1871 proclaimed as a British territory, known as Griqualand West and within a few years thereafter it was annexed as part of the Cape Colony in 1880. In chapter 4, the development of diamond mining legislation in Griqualand West during the period 1871 until the annexation thereof as part of the Cape Colony is discussed. During this period, Griqualand West was under the control of three different administrations and different diamond mining legislation was adopted under each administration.³⁴

1.3.2 Part 2: The British colonies, Boer Republics and the Union of South Africa before 1927

In Part 2 of this thesis, the historical development of the right to mine diamonds in the former British colonies and the two Boer Republics, including the Union of South Africa before 1927 is discussed to determine the influence of the form of land tenure on the development of the right to mine diamonds. In the 1860s, South Africa comprised of the two British colonies, namely the Cape and Natal and the two Boer Republics, being the Republic of the Orange Free State and the *Zuid-Afrikaansche Republiek*. Following the second Anglo-Boer War, which endured from 1899 until 1902, South Africa comprised of the following colonies, the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony, which were with effect from 31 May 1910 united in a legislative Union under one Government under the name of the Union of South Africa.³⁵

³⁴ See paras 4.2-4.4 below.

³⁵ The former four colonies, decided during a national convention in 1908 to relinquish their sovereign rights and to form a Union. Erasmus *The History of South African Law-An Outline* 87. The *South Africa Act* of 1909 [9 EDW 7 CH 9] (hereafter the South Africa Act) was passed by the British Parliament and assented to by King Edward VII on 20 September VII. A *Royal Proclamation* of 2 December 1909 declared that from 31 May 1910 the Government and Parliament of the Union of South Africa had full power and authority within the boundaries of the four colonies. Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45; Rautenbach *Rautenbach-Malherbe Staatsreg* 14; Zimmermann and Visser "Introduction-South African Law as a

The four colonies became provinces of the Union of South Africa under the names of the Cape of Good Hope, Natal, Transvaal and the Orange Free State.³⁶ All laws that were in force in the former four colonies continued in force in the respective provinces until they were repealed or amended.³⁷ The diamond mining legislation that existed in the former colonies therefore continued to apply when the Union of South Africa was established and was only repealed with the commencement of the *Precious Stones Act* 44 of 1927 (hereafter the 1927 Precious Stones Act).

In chapter 5, the consolidation of the diamond mining legislation in the former Cape Colony during the period 1883 to 1927, which included Griqualand West, is discussed. Chapter 6 deals with the development of the right to mine diamonds in the Orange Free State before the commencement of the 1927 Precious Stones Act. In chapter 7, the development of the right to mine diamonds in the *Zuid-Afrikaansche Republiek* is discussed and in chapter 8 the development of the right to mine diamonds in Natal before the commencement of the 1927 Precious Stones Act is reflected.

1.3.3 Part 3: The Union of South Africa after 1927

Part 3 comprises of chapter 9 and deals with the development of the right to mine diamonds under the 1927 Precious Stones Act. The Government of the Union of South Africa enacted the 1927 Precious Stones Act mainly to consolidate the different diamond mining legislation that existed in the different provinces. The 1927 Precious Stones Act regulated the prospecting for and mining of diamonds in South Africa for almost four decades until South Africa became a Republic. During this period, the form

mixed legal system" 18-19; Girvin "The architects of the mixed legal system" 119; Wiechers *Verloren Van Themaat Staatsreg* 196-201, 202-205; Basson and Viljoen *South African Constitutional Law* 36-37; Carpenter "Public Law: Constitutional Law" 952-953; Viljoen *Die Diamantnywerheid van Suid-Afrika* 207-208; Hocking *Oppenheimer and Son* 39.

³⁶ Section 6 of the South Africa Act. Eybers *Constitutional Documents* 522.

³⁷ Section 135 of the South Africa Act. Eybers *Constitutional Documents* 551-552; Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45. Du Plessis *Inleiding tot die Reg* 52.

of land tenure continued to influence the right to mine diamonds in the Republic of South Africa.

1.3.4 Part 4: The Republic of South Africa prior to the MPRDA

In Part 4 the diamond mining legislation that was enacted by the Government of the Republic of South Africa before the commencement of the MPRDA is discussed. Chapter 10 deals with the development of the right to mine diamonds under the 1964 Precious Stones Act and chapter 11 with the development of the right to mine diamonds under the 1991 Minerals Act. During this period, the Government of the Republic of South Africa's policy of racial discrimination, known as "apartheid" was at its peak. The influence of the form of land tenure on the diamond mining legislation is also relevant as it impacted on the large number of the South African population who were prohibited from landownership and as a consequence also barred from ownership of common law mineral rights.

1.3.5 Part 5: The Republic of South Africa under the MPRDA

In Part 5, chapter 12 discusses the right to mine diamonds under the MPRDA, which was enacted by the Government of the Republic of South Africa after the abolishment of the apartheid policy. Chapter 13 provides a summary of the conclusions of this research and an analysis of the impact of the form of land tenure on the historical development of the right to mine diamonds in South Africa. It concludes with a few remarks on the impact of the historical development of the right to mine diamonds on diamond mines in terms of the MPRDA.

Part 1 follows next with a short outline of its structure.

Part 1 : Early diamond mining legislation

Chapter 2 Early land tenure and the Cradock Proclamation

Chapter 3 Diamond fields during the period 1866 to 1871

Chapter 4 Griqualand West during the period 1871 to 1880

Chapter 2 Early land tenure and the Cradock Proclamation

2.1 Introduction

The Cradock Proclamation was proclaimed during British rule in the Cape Colony on 6 August 1813. This was as a direct consequence of the land tenure conditions that applied in the Cape under the rule of the Dutch East India Company and the Batavian Republic.³⁸ This chapter commences with a brief discussion of the land tenure conditions that applied in the Cape under the rule of the Dutch East India Company.³⁹ The Cradock Proclamation is thereafter discussed, insofar as it provided for perpetual *quitrent* and the reservation of rights to precious stones.⁴⁰

The Dutch East India Company, also referred to as the *Vereenigde Oost-Indische Company*, which administered the Cape on behalf of the Republic of Seven Provinces brought the Roman Dutch law to the Cape.⁴¹ A number of statutes were passed by the Dutch East India Company during the 143 years that it governed the Cape, but none

³⁸ The Dutch East India Company ruled the Cape from 1652 until 1795, thereafter the British Government occupied the Cape in 1795 to procure the Cape which it regarded to be an important and strategic sea route to India. In 1803, Britain restored the Cape to the Batavian Republic of the Netherlands. Hahlo and Kahn *The Union of South Africa* 4-5; Edwards *The History of South African Law - An outline* 74-75; Du Plessis "The Historical Functions of the Law" 103; Du Plessis *Inleiding tot die Reg* 48-49; Van Zyl *Beginnels van Regsvergelyking* 286-288; Binckes and Kotzé *Die Groot Trek* 47, 138-139; Davenport *South Africa A Modern History* 3rd ed 22-23, 41-42; Davenport *South Africa A Modern History* 4th ed 19-20, 37; Davenport and Saunders *South Africa A Modern History* 40-41; Walker *A History of South Africa* 31-33, 130-134, 139-145; Pienaar *Land Reform* 58-59; Van Zyl "Transition, 1795-1806" 101-116; Giliomee *Die Kaap Tydens Die Eerste Britse Bewind 1795-1803*; Badenhorst "Development of Mineral and Petroleum Law" 1-3-1-7; Steyn *Afrikaner-Joernaal* 20-22, 73; Katzen "White settlers and the origin of a new society" 213-227; Kiewiet *A History of South Africa* 4-29, 30-35.

³⁹ See para 2.2 below.

⁴⁰ See para 2.3 below.

⁴¹ The law of Holland was adopted in the Cape because the province of Holland was at that time the wealthiest and most powerful of the provinces. Hahlo and Kahn *The South African Legal System* 571- 572; Hahlo and Kahn *The Union of South Africa* 10-11; Miller and Pope *Land Title* 3; Edwards *The History of South African Law - An Outline* 65-74; Du Plessis "The Historical functions of the Law" 101-103; Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 420-423; Venter *et al Regsnavorsing* 197-198; Du Plessis *Inleiding tot die Reg* 46-47; Van Zyl *Beginnels van Regsvergelyking* 284; Viljoen "History, Conventions and Prerogatives" 35; Devenish "Die Kaap die Goeie Hoop 1652-1909" 33-38; Rautenbach *Rautenbach-Malherbe Staatsreg* 13-14.

of these statutes dealt with the mining of diamonds.⁴² This is not surprising as there was very little mining activity, if any, in Holland.⁴³ One of the fundamental principles of the law of property in the Roman Dutch law, is the *cuius est solum* principle.⁴⁴

2.2 Early land tenure conditions at the Cape

Four forms of land tenure developed at the Cape under the rule of the Dutch East India Company, namely (a) loan farms, (b) loan freehold, (c) *erfpacht* and (d) full ownership.

During the first few years following the arrival of Jan van Riebeeck at the Cape on 6 April 1652, the soil of the land was mainly used for the purpose of providing ships with fresh meat and vegetables. Within a few years, the half-way outpost developed into a permanent settlement. The need arose for more agricultural land mainly as a result of the increase of inhabitants at the Cape.⁴⁵ This led to the first form of tenure in the

⁴² Hahlo and Kahn *The Union of South Africa* 16-17. In a *Placaat* of 25 March 1735 the removal of clay from the castle was forbidden. Dale *Mineral Rights* 218.

⁴³ The concept of minerals was treated in Roman Dutch law either in the context of a *usufruct* or criminal law. See the *Trojan* case 509D-G; Viljoen *The Holder of Mineral Rights* 11-12; Dale *Mineral Rights* 3-42; Van der Schyff *Constitutionality* 10-22; Badenhorst, Mostert and Dendy "Minerals and Petroleum" 2; Mostert *Mineral Law* 4-5; Van der Merwe *Sakereg* 396; Van der Merwe *Sakereg* 2nd ed 552-553; Badenhorst *The Law of Mineral Rights* 1-3-1-8; Van der Walt *The Law of Servitudes* 468. This does not mean that there was no interest in minerals during the rule of the Dutch East India Company at the Cape. On the contrary, the Dutch East India Company sent miners to prospect for gold near the Fort and in particular at Devil's Peak, Table Mountain and Lion's Head. In 1660, Jan van Riebeeck sent a mineral prospecting expedition under the command of Pieter van Meerhof to the interior of the Cape. This expedition came in contact with people from Namaqualand who wore copper ornaments. During the period between 1659 and 1664, six expeditions to search for minerals were sent to the interior. A few years later the new Commander at the Cape, Simon van der Stel, invited Namaqua chiefs to visit him at the Fort in order to obtain information about the existence of copper in their land. In 1865 Simon van der Stel led an expedition to Namaqualand to investigate the copper potential at Namaqualand. Van der Stel's expedition included a mineralogist, who was employed by the Dutch East India Company and who was instructed by his employer to report on the minerals on route to Namaqualand. Smalberger *Copper Mining* 12-16; Smalberger *Aspects of the history of copper mining* 1-8; Davenport *Colonial Mining Policy* 2- 3; Davenport *Digging Deep* 7-20. According to Houghton "Economic Development" 11, a copper mine was opened at Springbokfontein in the north-western part of the Cape in 1852 and coal was discovered in the north-eastern part of the Cape in the 1850s, but its exploitation was prevented by the lack of transport and it was the discovery of diamonds that resulted in the mineral revolution.

⁴⁴ See fn 11 above.

⁴⁵ Jan van Riebeeck was instructed by his employer, the Dutch East India Company, to set up a half-way house on route from the Netherlands to India for the ships of his employer. According to

Cape known as "loan farms" or *leeningsplaats*.⁴⁶ The occupier of land was given a licence to occupy the land, initially for free. However, after 1714, the occupier was obliged to pay rent to the Dutch East India Company. The Dutch East India Company was entitled to terminate the loan unilaterally and the farmer or occupier could not subdivide, sell or alienate the land.⁴⁷ There was no formal procedure for the acquisition of this form of land tenure. There was no survey of the land and no title deed was awarded.⁴⁸ Duly⁴⁹ describes this form of land tenure as a form of "legalised squatting" which simply involved an administrative step with no legal title granted to the occupant.⁵⁰

Loan tenure was during 1743 developed or converted into a second form of tenure known as *leenings eigendom* or "loan freehold". According to Milton,⁵¹ this was done in an attempt to regulate the loan tenure and to confer more security of tenure to the

Marquard *South Africa* 34-35, Van Riebeeck kept strict control over the farmers. They were only allowed to produce what the Dutch East India Company required and they could only sell their produce to the Dutch East India Company; Bōeseken "Jan van Riebeeck en sy Stigtingswerk 1652-1662" 34-58; Van der Merwe "Van Verversingspos tot Landbou-Kolonie 1662-1707" 59-84; De Villiers "Die Nederlandse era aan die Kaap 1652-1806" 39-42; Welsh *A History of South Africa* 21-39; Giliomee *Die Afrikaners 'n Biografie* 5-8; Botha 1919 *SALJ* 150; Van der Merwe 1989 *TSAR* 666; Pearse *The Cape of Good Hope* 17-18; Du Plessis *Inleiding tot die Reg* 47-48; Bōeseken "The arrival of Van Riebeeck at the Cape" 18-28; Lacour-Gayet *A History of South Africa* 14-15; Davenport and Saunders *South Africa A Modern History* 36-40; Binckes and Kotzé *Die Groot Trek* 47-48; Hahlo and Kahn *The Union of South Africa* 2-3; Van der Schyff *Property in Minerals and Petroleum* 100-101.

⁴⁶ As early as 1655, small garden plots in the Table Valley were made available for the grazing of cattle and to plant crops. Botha 1919 *SALJ* 150-151; Pienaar *Land Reform* 57-58; Du Plessis and Olivier 1994 *TSAR* 131-132; Davenport 1985 *Acta Juridica* 54; Davenport *South Africa A Modern History* 2nd ed 22; Van der Merwe *Sakereg* 2nd ed 584; Van der Schyff *Property in Minerals and Petroleum* 100.

⁴⁷ Botha 1919 *SALJ* 150-152; Stone *British Empire* 2; Van der Schyff *Constitutionality* 23-24; Van der Merwe *Sakereg* 421; Van der Merwe *Sakereg* 2nd ed 584-585; Nel *Jones Conveyancing* 4. According to Milton "Ownership" 662-663, this became the most common form of land tenure at the Cape during the rule of the Dutch East India Company, as approximately 80 per cent of all available land in the Cape was held on loan. See also Van der Merwe 1989 *TSAR* 667; Hall *Maasdorp's Institutes* 139.

⁴⁸ The occupier merely requested permission to occupy an area of land, usually approximately 3000 morgen in extent and in return he agreed to pay an annual rent. Milton "Ownership" 662; Pienaar *Land Reform* 57.

⁴⁹ Duly *British Land Policy* 16-20.

⁵⁰ Erasmus 2010 *Fundamina* 32-33.

⁵¹ Milton "Ownership" 663; See also Hall *Maasdorp's Institutes* 139; Van der Schyff *Property in Minerals and Petroleum* 100-101.

occupier of the land. The rental property had to be surveyed and a formal deed of grant had to be prepared.⁵²

A third form of tenure was introduced to promote agriculture at the Cape, which was described as *erfpacht*. The granting of an *erfpacht* was a grant of land for a period of 15 years, subject to the payment of an annual rent.⁵³ The ownership of land held under *erfpacht* remained with the Dutch East India Company, which at the expiry of the 15 years, could take the land back and was only obliged to compensate the tenants for the improvements on the land at a proper valuation. The area of land granted under *erfpacht*, was usually annexed to land already held under loan. The additional land was then granted under *erfpacht*, usually to prevent overgrazing.⁵⁴ According to Milton,⁵⁵ very few of these grants were made and this form of tenure fell into disuse.

The fourth form of land tenure was described as "full ownership" and entailed the granting of land to certain "freemen" who were released from their employment contracts with the Dutch East India Company.⁵⁶ This form of land tenure was subject to certain conditions, which according to Milton,⁵⁷ were included to enable the Dutch

⁵² The procedure to obtain a loan freehold was relatively simple. The applicant applied to the *Landdrost* of the relevant district with evidence from the neighbouring farms that they had no objection to the granting of the loan freehold. The formalities that were adopted, are described by Botha 1919 *SALJ* 156-157 as follows: " ... the Field Cornet was directed to go to the selected spot and walk half an hour in every direction provided it did not encroach on any land reserved by Government or already occupied. A central spot called the *ordonnantie* was chosen and half an hour's walk on every side from here were the points of the boundaries. As 'walking off' the distance was somewhat uncertain to determine the extent, it was decided that 750 roods were to be equal to half an hour. This have an area of 3,000 *morgen*." If no objection was raised to the granting of the loan freehold, a permit was issued to the occupier and details thereof registered at the office of the Secretary to the Council of Policy and later at the Revenue Office. Van der Merwe *Sakereg* 2nd ed 585.

⁵³ See Du Plessis and Olivier 1994 *TSAR* 132-133; Miller and Pope *Land Title* 4-5; Pienaar *Land Reform* 57-58; Van der Schyff *Property in Minerals and Petroleum* 100-101.

⁵⁴ Botha 1919 *SALJ* 152-226; See Van der Merwe *Sakereg* 422-424 and Miller and Pope *Land Title* 3-6; Van der Merwe *Sakereg* 2nd ed 583-584.

⁵⁵ Milton "Ownership" 663; See also Miller and Pope *Land Title* 4-5.

⁵⁶ The first grant is recorded to have taken place on 21 February 1657. The title deeds were thereafter issued to the grantees on 14 April 1657. This date has been described as "the birthday of [South Africa's] ... present day system of private ownership of land." Milton "Ownership" 657-661; Davenport 1985 *Acta Juridica* 54-55; Steyn *Afrikaner-Joernaal* 26; Van der Schyff *Property in Minerals and Petroleum* 100-101.

⁵⁷ Milton "Ownership" 661.

East India Company to derive an income from the grant. It was recorded in the title deeds that the owners of the land could not sell, let or alienate the land for a period of 12 years and thereafter only with the permission of the Dutch East India Company.⁵⁸ In 1717, the Dutch East India Company ordered that no further grants of ownership be awarded.⁵⁹ The Dutch East India Company held the view that it was entitled to dispose of the rights of ownership in the land comprising the Cape. According to Van der Merwe,⁶⁰ this was based on its view that the Cape was uninhabited and therefore *res nullius*, which could be acquired by mere *occupatio*.⁶¹

The conditions of land tenure that existed in the Cape during the period 1652 until 1813 did not provide for security of tenure and as a result, occupants very seldom made any improvements to the land. The boundaries of land were not surveyed or demarcated.⁶² According to Kiewiet,⁶³ the land tenure conditions that existed in the Cape provided the farmers with maximum freedom and the Government a minimum of authority. These land tenure conditions led to the proclamation of the Cradock Proclamation on 6 August 1813.

⁵⁸ See Van Wyk 1992 *TSAR* 281-282. The owners were further usually obliged to cultivate the land and to pay the Dutch East India Company a tenth of the harvest.

⁵⁹ Milton "Ownership" 660-661; See also Botha 1919 *SALJ* 155 and De Villiers "Die Nederlandse era aan die Kaap 1652-1806" 43.

⁶⁰ Van der Merwe 1989 *TSAR* 666.

⁶¹ They soon encountered the San and Khoi groups as well as indigenous communities. See Pienaar *Land Reform* 54; Van der Merwe 1989 *TSAR* 666, states that in instances where employees of the Dutch East India Company recognised the rights to land of these inhabitants, they held the view that their employer acquired these rights from the inhabitants. According to Van der Merwe, the legal validity of these informal agreements could be questioned as it was arguably the intention of these groups merely to grant rights to reserved access and not private rights to possess, use, burden and alienate the land; Bennett "African Land" 66, states that in some instances, the Dutch East India Company bought land from the Khoi and thereby implied that they were the sovereign nation and in other instances, it simply appropriated the land.

⁶² Botha 1919 *SALJ* 227; Van der Merwe *Sakereg* 422; Nel *Jones Conveyancing* 3; Changuion and Steenkamp *Omstrede land* 21; Van der Merwe *Sakereg* 2nd ed 585; Kiewiet *A History of South Africa* 40.

⁶³ Kiewiet *A History of South Africa* 40.

2.3 The Cradock Proclamation

The Roman Dutch law continued to apply in the Cape when it was annexed by the British Government in 1806.⁶⁴ The land tenure conditions that applied at the Cape under the rule of the Dutch East India Company and the titles granted pursuant thereto continued to apply.⁶⁵ The Cradock Proclamation was proclaimed to change the form of land tenure in the Cape Colony.⁶⁶

⁶⁴ The British Government occupied the Cape in 1795, mainly due to France declaring war on Holland. England feared that the French Republic would annex the Cape. The *Articles of Capitulation of Rustenburg* which was signed on 16 September 1795 provided that the colonists at the Cape would retain all their privileges without change. On 27 March 1802, Britain made peace with France and the *Treaty of Amiens* was signed and in 1803 Britain restored the Cape to the Batavian Republic of the Netherlands. The rule of the Batavian Republic at the Cape did not last long and when the war resumed between Britain and France, the British Government occupied the Cape for the second time in January 1806. When Napoleon Bonaparte of France was finally defeated, Britain undertook in terms of the *Convention of London* of 13 August 1814, to restore to the Netherlands the Dutch colonies which had come under British rule since 1803, but the Cape was excluded. Hahlo and Kahn *The Union of South Africa* 4-5; Edwards *The History of South African Law - An Outline* 74-75; Du Plessis "The Historical functions of the Law" 103; Du Plessis *Inleiding tot die Reg* 48-49; Van Zyl *Beginnels van Regsvergelyking* 286-288; Davenport *South Africa A Modern History* 3rd ed 22-23, 41-42; Davenport *South Africa A Modern History* 4th ed 19-20, 37.

⁶⁵ Pienaar *Land Reform* 55; Bennett "African Land" 68. Article 8 of the *Cape Articles of Capitulation* of 10 and 18 January 1806 provided that the inhabitants of the Cape Colony preserved all their rights and privileges which they had enjoyed before. This was also in accordance with international public law that in a conquered country with a civilised legal system, the existing laws remain in force unless they are altered by the new ruler. Hahlo and Kahn *The Union of South Africa* 17; De Wet 1958 *THRHR* 172. See also *Alexkor Limited v The Richtersveld Community* 2004 5 SA 460 (CC) para 69 (hereafter the *Richtersveld CC case*), where the Constitutional Court quoted with approval the approach of the Privy Council in *Oyekan v Adele* [1957] 2 All ER 785 at 788G-H in which it was held that "in inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law." In *Campbell v Hall* (1774) 1 Cowp 204 at 209, 98 ER 1045 at 1047 Lord Mansfield held that "the laws of a conquered country continue, until they are altered by the conqueror." According to Wiechers *Verloren Van Themaat Staatsreg* 65-66, the reference to "rights and privileges" in the *Cape Articles of Capitulation* should not be interpreted to mean that the British Government guaranteed the continued application of the Roman Dutch law, but merely the recognition of the rights and privileges already acquired under the Roman Dutch law.

⁶⁶ In 1809 the Cape Governor, Lord Caledon, sent a written submission to the British Government in which he requested that certain changes be made to the land tenure conditions at the Cape Colony to provide for security of tenure. His submission was referred to the Lords of the Committee of the Privy Council for Trade and Plantations, but their response was that no permanent changes could

2.3.1 Perpetual quitrent

The purpose of the Cradock Proclamation was to provide for security of tenure by providing that the holders of loan places could apply to convert their titles to perpetual *quitrent*, subject to certain rights and privileges expressly reserved in the Cradock Proclamation.⁶⁷

The holder of the perpetual *quitrent* could do with the land as he deemed fit and could sell or alienate it. The holder of the perpetual *quitrent* had to pay an annual rent based on the location of the land, the fertility thereof and other circumstances of the land.⁶⁸ In order to obtain a title deed to the land, the relevant piece of land had to be surveyed and a diagram framed which had to be submitted to the Government by the *Landdrost*.⁶⁹

be made to the land tenure conditions at the Cape Colony, as it was uncertain whether the Cape Colony would remain under Britain's control. Sir John Francis Cradock, who succeeded Lord Caledon as the Cape Governor in 1811, again requested the British Government to consent to the change of the land tenure provisions that applied in the Cape Colony. The matter was again referred to the Committee of the Privy Council and despite the Committee's concerns about the future proprietary status of the Cape Colony and the capital expenditure, it agreed to the adoption of the principles previously suggested by Lord Caledon. The implementation of the changes to the land tenure conditions was, however, left to the discretion of Sir Cradock. He gave instructions in June 1813 for the drafting of a proclamation that would serve two principles – "Benefit to the individual and advantage to the State." Botha 1919 *SALJ* 226-228; Milton "Ownership" 665; Kiewiet *A History of South Africa* 40.

⁶⁷ The preamble of the Cradock Proclamation stated that agriculture constituted the chief source of prosperity in the Cape Colony and that the successful development thereof depended on certainty of tenure. It stated further that all improvements of the soil and increase of fertility should belong to the holder of the perpetual *quitrent*. See Hall *Maasdorp's Institutes* 140; Botha 1919 *SALJ* 229; Grundling "Vyftig jaar" 160; Welsh *A History of South Africa* 117, states that Sir Cradock was determined that the Cape should remain under British control and that its British control should be reinforced by bringing the land under the control of the British Government; *Wallace v Randall* (1883-1884) 3 EDC 87; Van der Merwe *Sakereg* 2nd ed 585-586; Changuion and Steenkamp *Omstrede land* 21-22.

⁶⁸ Section 3 of the Cradock Proclamation. Section 1 of the *Payment of Quitrent (Cape) Act* 14 of 1927 provided that the owner of an undivided share in or subdivided portion of any land situated in the Cape and subject to *quitrent*, was only liable for such part of the *quitrent* as was proportionate to the extent of his share or portion. See also Van der Merwe *Sakereg* 422-423; Van der Merwe *Sakereg* 2nd ed 586; Pienaar *Land Reform* 59.

⁶⁹ Section 13 of the Cradock Proclamation provided that the *Landdrost* had to submit a certificate in which he confirmed that the measurement of the land was accurate, that no person would be prejudiced and that the area of land did not exceed the extent of the ground that the holder legally possessed under loan. Botha 1919 *SALJ* 230; Theal *History of South Africa* Vol 1 265; Welsh *A*

Until 1886, the general view was that *quitrent* was similar to the form of land tenure known as *emphyteusis* or *erfpacht* that existed in the Roman Dutch law. Consequently, it was interpreted to mean that the Colonial Government had not transferred the *dominium* of the land to the transferee.⁷⁰ Denoon⁷¹ explains that the reason for this misconception was the incorrect translation of the word *quitrent* to mean *erfpacht*. According to Denoon,⁷² the English word *quitrent* refers to a land tax and the Dutch word *erfpacht* refers to a form of land tenure. He states that the translators should

History of South Africa 118. According to Van der Merwe 1989 *TSAR* 668-669, the change in land tenure brought about by the Cradock Proclamation, was not successful, firstly as a result of the incompetent administration of the Cape Colony, secondly because the farmers were in many instances unable to pay the surveying costs and thirdly because they preferred the previous informal land tenure conditions where there was little control over their use of the land. See Pienaar *Land Reform* 60.

⁷⁰ Denoon 1948 *SALJ* 545; Milton "Ownership" 667. In *De Villiers v The Cape Divisional Council* 1875 5 Buch 50 at 58 (hereafter the *De Villiers* case), De Villiers CJ described the nature of perpetual *quitrent* in the Cape Colony as follows: "The perpetual quit-rent of this Colony is in all respects identical with the *emphyteusis* of the Roman Dutch Law. Voet (*Comm.ad.Pand.*, vi., 3, 3), defines *emphyteusis* as *contractus quo proeium alicui, fruendum conceditur in perpetuum, aut ad tempus non modicum sub lege meliorationis et proestimationis annui canonis*; and he adds that in the Dutch language it is termed *erfpacht*. This is the term by which quit-rent has always been known in this Colony. It was used as the equivalent for quit-rents in all grants issued until the year 1822 (in which year grants ceased to be made out in both Dutch and English), including the grant now in question. It is also the term invariably used by the Dutch-speaking inhabitants of this Colony to designate the quit-rent tenure. *Burge*, in his *Commentaries* (iii, p. 449), defines the *jus emphyteuticum* as a contract by which houses or lands are given to be possessed forever, or at least for a long term, upon condition that they shall be improved, and a small annual rent or pension, *canon emphyteuticus*, either in money, grain, or any other thing, is reserved and made payable to the grantor as a recognition of his paramount title. He adds that this right originated in the desire of the proprietor to secure the improvement and cultivation of those barren or uncultivated lands for which it was not easy to procure tenants, in consequence of the expense they must incur in settling and improving them, and that it was afterwards constituted in respect of lands the most fertile and cultivated. This description of the origin and progress of the tenure is peculiarly applicable to the quit-rent lands of this Colony. According to Voet (vi., 3, 11), the *emphyteuta* or holder of quit-rent is entitled to nearly all the rights of enjoyment which belong to an usufructuary (*ad eum omnia fere pertineant quo ad fructuarium pertinere trademus*). *Burge* (iii, 452), says that the *emphyteuta* is entitled 'to derive all those profits and benefits which belong to an usufructuary'; and he quotes as his authority the passage just cited from Voet, but he seems to have overlooked the force of the word *fere*, which considerably modifies the general statement. There are some important benefits belonging to the usufructuary to which the *emphyteuta* is not entitled; for example the right to dig out potter's earth or materials for fuel (including, I, apprehend, coals as well as peat), or to dig mines for metals of quarries for stones" (own underlining). See also Milton "Ownership" 667.

⁷¹ Denoon 1948 *SALJ* 553.

⁷² Denoon 1948 *SALJ* 553.

have translated the English word *quitrent* to mean *recognitie*. According to Milton,⁷³ the Cradock Proclamation should have provided for the conversion of loan tenure into "freehold" tenure and not *quitrent*, as the concept of "freehold" was known in the Cape in 1813. He confirms that until 1886 the general view was that the nature of perpetual *quitrent* was similar to that of *erfpacht* or *emphyteutic*, which meant that the Government did not transfer the *dominium* of the land to the grantee.⁷⁴

In 1886 in *Colonial Government v Fryer and Huysamen*,⁷⁵ the Supreme Court of the Cape of Good Hope held in respect of *quitrent*, that the grantee became the owner of the *dominium* in the land and that the nature of *quitrent* title was as follows:

the grantee really became the owner of the land, subject only to such reservations in favour of the Crown as had been provided for by the Proclamation; in other words, the Crown ceased to have any proprietary rights, but retained only those general rights which belonged to it, not as dominus of the land, but as princeps and those special rights which were secured to it by the Proclamation.

According to Denoon,⁷⁶ the nature of the land tenure created in terms of the Cradock Proclamation was that Legislature granted to the grantee freehold.

⁷³ Milton "Ownership" 665-666 fn 65, states that the explanation for this omission is that Sir Cradock was advised by his supervisors in London, that the use of the term "freehold" would be invalid. The Cape was at that stage a territory held under military conquest and not as a British Colony. Sir Cradock was advised that in terms of international law, the implementation of any policies which could curtail the income or prerogatives of the future Government of the Colony, was prohibited. Sir Cradock could therefore not implement a land policy which could deprive the Government of its title in the land. The granting of a *quitrent* which entailed the continued obligation to pay rent to the Government, did not curtail the income of the State; See also Van der Merwe 1989 *TSAR* 668. This argument again assumed that the Colonial Government and its predecessors, the Dutch East India Company, indeed owned the land, which appeared to be the view adopted by some scholars. See Nathan, Holmes and Craighead *Land and Mining Title* 1; Hall *Maasdorp's Institutes* 138.

⁷⁴ Milton "Ownership" 667; In *Webb v Giddy* 1878 3 App Cas 908 at 930 (hereafter the *Giddy* case) the Privy Council confirmed the judgment of the High Court of Griqualand West with reference to a grant under an Orange Free State *quitrent* that a perpetual *quitrent* was not a form of land tenure known in the Roman Dutch law as *emphyteusis*. The *Giddy* case is discussed in paras 4.3.2 and 6.2 below.

⁷⁵ 1885-1886 4 SC 313 (hereafter the *Fryer* case).

⁷⁶ Denoon 1948 *SALJ* 546, emphasised that this interpretation was supported by ss 3, 6 and 13 of the Cradock Proclamation. Section 3 of the Cradock Proclamation provided that the grantee would be entitled to deal with the land granted under *quitrent* as he deemed proper and to alienate it. Section 6 of the Cradock Proclamation provided that in all judicial decisions *quitrent* land had to be placed on the same footing as freehold land and s 13 of the Cradock Proclamation provided that

A further question which arises is whether the Cradock Proclamation only applied to land which was originally a loan converted to freehold or whether it applied to all land in the Cape Colony. In the *De Villiers* case, the Supreme Court of the Cape of Good Hope had to decide whether the Cape Divisional Council was entitled to enter De Villiers' (the landowner's) property and to remove gravel for the repair of public roads. The land in question was granted on perpetual *quitrent* to its previous owner in 1815 and it was thereafter transferred to De Villiers on 17 February 1866. The following condition is recorded in the initial deed of grant, namely that the land was granted subject to:

all such duties and regulations as either are already, or shall in future, be established, respecting lands granted under similar nature.

The landowner instituted action against the Cape Divisional Council to recover damages as a result of the removal of the gravel by the Cape Divisional Council. The Supreme Court of the Cape of Good Hope as the court of first instance, held that the Cradock Proclamation only applied in respect of occupiers of loan land that was converted to perpetual *quitrent*. The claim was upheld and the Cape Divisional Council was ordered to pay the landowner a sum of money as damages for the removal of the perpetual *quitrent* land which belonged to the landowner. Although the Supreme Court held that the nature of the perpetual *quitrent* created by the Cradock Proclamation, was in all respects identical to the *emphyteusis* concept in the Roman Dutch Law, it acknowledged that the *quitrent* tenure under the Cradock Proclamation, went beyond the tenure afforded in terms of the common law concept of *emphyteusis*. On appeal, the Privy Council in *The Cape Divisional Council v De Villiers* 1876 6 Buch 105, upheld the appeal and confirmed that the Cradock Proclamation applied irrespective of whether the land was originally a loan converted to *quitrent* or whether the land was

the grant had to be referred to as an *erfgrondbrief* which translates to a title deed, which was the term used for a freehold grant. It is submitted that this interpretation is correct and is further supported by the provisions of s 4 of the Cradock Proclamation, which is discussed in para 2.3.2 below. Section 4 of the Cradock Proclamation reserved rights on mines of precious stones, gold and silver in respect of *quitrent* land to the Government, but then specifically states that other mines belong to the "proprietor".

originally granted as *quitrent*. The Privy Council held that the Cape Divisional Council was in terms of section 4 of the Cradock Proclamation entitled to remove gravel, stones, earth or other matter or things from the land in question, but that the Cape Divisional Council was not entitled to take material from such portions of the landowner's land as had been improved by cultivation, irrigation or otherwise, without compensation. In this instance, it was held that the landowner was not entitled to such compensation, as he did not allege that the gravel was indeed taken from land which had been improved.

It is submitted that section 13 of the Cradock Proclamation supports the decision of the court *a quo* as it provided that one of the requirements to obtain a *quitrent* title, was that a certificate be submitted in which it is confirmed that the extent of the land claimed under *quitrent*, did not exceed the extent of the ground that the holder legally possessed under loan, thus referring to land previously held under loan. Furthermore, it was recorded in the preamble of the Cradock Proclamation that the purpose of the Cradock Proclamation was to grant to (own underlining): " ... the holders of all lands on loan, who may regularly apply for the same, their places on *perpetual quitrent* ... "

2.3.2 Reservation relating to precious stones

Section 4 of the Cradock Proclamation reserved the rights on mines of precious stones, gold and silver to the Government and provided as follows:⁷⁷

⁷⁷ In *Union Government v Pringle and Swiegers* 1923 CPD 337 (hereafter the *Swiegers* case) the Government of the Union of South Africa applied for an interim interdict to restrain the respondents who were the registered owners of a farm Zand Duin, a portion of the farm Klipfontein, situated in the Hopetown district, from removing diamonds from certain alluvial diggings situated thereon. The landowner argued that the Cradock Proclamation did not apply to the relevant land. The land in question was first occupied by a certain Jacobs prior to December 1847. In December 1847, Sir Harry Smith as the High Commissioner issued a proclamation to annex Namaqualand as part of the Cape Colony. This included the farm Klipfontein. Jacobs then ceded his rights to a certain Erasmus. In 1857, The Government of the Cape Colony issued a notice calling upon all persons having claims from *bona fide* and beneficial occupation to land annexed under the proclamation, to lodge their claims for investigation and report. Erasmus lodged a claim and requested a title for the farm Klipspruit. A deed of grant was issued to Erasmus on 9 August 1861 and the relevant portion provided that the farm Klipspruit was granted under perpetual *quitrent*. Ownership of the relevant land passed through various owners and eventually when the matter became before the court, the

Government reserves no other rights but those on mines of precious stones, gold, or silver; as also the right of making and repairing public roads, and raising material for that purpose on the premises: Other mines of iron, lead, copper, tin, coal, slate of limestone are to belong to the proprietor.

According to Dale⁷⁸ and Badenhorst,⁷⁹ the Cradock Proclamation preserved the English Law concept of the Crown prerogative in regard to mines of gold and silver. The Crown's prerogative provided that the Crown was entitled to enter land held in freehold by her subjects, to search for gold and silver.⁸⁰ The reservation in the Cradock

registered owner argued that the initial owner acquired ownership of the land by *occupatio* and that there was no evidence in the relevant Proclamation of 17 December 1847 of any intention from the Government to interfere with existing rights in private property. The landowner argued that the issue of a *quitrent* title was an error and occurred during a time when the rights of *quitrent* holders were uncertain. The Cape of Good Hope Provincial Division held that the title condition was *verbatim* the same as in the *De Villiers* case and that it did not matter whether the registered owner's defence was founded on an alleged grant or on *occupatio* as they held their title to the land under what purported to be a grant obtained from the Crown after its annexation of the territory to the Cape and that this grant was in the form of an ordinary *quitrent* title. The Court held that s 4 of the Cradock Proclamation applied to the land in question. The registered owners contended that if the court found that the land was indeed subject to the Cradock Proclamation, s 4 of the Cradock Proclamation only related to "mines" of precious stones. The diamonds which formed the subject of the dispute occurred in alluvial formation and not in mines. The Court, however, held at 345 as follows: "I do not think that the word 'mine' in clause 4 of Sir John Cradock's Proclamation was intended to be used in the narrow sense which it bears when contrasted with the words 'alluvial diggings.' The section seems to have been framed for the purpose of allocating *all* mineral occurrence in the soil quite irrespective of the geological formation in which they may be found and the consequent mode by which they may be worked, precious stones and minerals being reserved to the Crown and base stones and minerals passing to the grantee of the soil." See Milton "Ownership" 667; Franklin and Kaplan *Mining and Minerals* 467; *Ferguson v Faviell* 1880-1881 1 EDC 211; *Stellenbosch Divisional Council v Myburgh* 1887-1888 5 SC 8; *Colonial Government v Logan* 1903 20 SC 343; *Divisional Council of Stellenbosch v Estate Marais* 1929 CPD 1; *Marais v Cradock Divisional Council* 1931 CPD 211; *Cape Provincial Administration v Honniball* 1942 AD 1; In *Bower v Colonial Government* 1896 13 SC 158 it was held that the Government was not in terms of the Cradock Proclamation entitled to the water in a well sunk by the railway department in *quitrent* land for the supply of their engines as being a material for making and repairing public roads. See Van der Merwe *Sakereg* 2nd ed 586-587.

⁷⁸ Dale *Mineral Rights* 217.

⁷⁹ Badenhorst 1991 *TSAR* 120; Badenhorst "Development of Mineral and Petroleum Law" para 1-17-1-19.

⁸⁰ The Crown's prerogative is defined by Dicey *Law of the Constitution* 424, as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." The Crown's prerogative relates to very diverse subjects, for example foreign affairs, the Crown's authority as head of the national church, mines, treasure trove, infants, ports and havens. Chitty *Prerogatives of the Crown* 144-145, provides a comprehensive discussion on the Crown's prerogative. He describes the Crown's prerogative relating to mines as follows: "It is quite clear, that by his prerogative the King is entitled to all mines of gold and silver which may be discovered, not only in his own but even in a subject's land, within his dominions. The danger of rendering a subject too formidable, by vesting in him so immense a treasure as a mine of gold or silver might

Proclamation was, however, wider than the Crown's prerogative in that it also reserved to the Government the rights to precious stones. According to Grobler and Gildenhuys,⁸¹ the Crown's prerogative was not received into South African law and the English practice of reserving mineral rights to the Crown upon the grant of a *quitrent* title was imported during the period of English rule in the Cape in terms of statute and not in terms of the Crown prerogative. This appears to be the correct interpretation. The Crown's prerogative was limited to gold and silver.⁸² Section 4 of the Cradock Proclamation was thus a statutory reservation to the Government of the right in respect of mines on precious stones, gold and silver, in land that had been granted under

afford, is the reason assigned for this royal prerogative." See also Viljoen "History, Conventions and Prerogatives" 41-42. In English law, the Crown's prerogative to gold and silver was recognised in the *Case of Mines (R v Earl of Northumberland)* (1568) 1 Plowd 310 (hereafter the *Northumberland* case). For a discussion of this case see Badenhorst 2012 *De Jure* 605-623; Badenhorst "Development of Mineral and Petroleum Law" 1-17-1-19. The Crown's prerogative was also received into Australian law. See *Woolley v Attorney-General of Victoria* 1877 LR 2 APP Cas 163 at 166. The Supreme Court of Victoria held in *Millar v Wildish* 1863 2 W & W VIC (E) 37 at 43 that: "By the law of England, which is also the law of this country, all gold mines belong to the Crown; and that though the Crown may have granted the lands containing them to a subject without reservation. This was so decided in *Reg. v Northumberland*; and so far, that case has never been questioned. The same case decided that the Crown may enter upon such land to mine for gold, though no right of entry was reserved." See also Basson and Viljoen *South African Constitutional Law* 41-44.

⁸¹ Grobler and Gildenhuys *Heads of Argument* 35-36.

⁸² In *Boccardo SA v Star Energy UK Onshore Limited* 2010 1 ALL ER 26 at 35, the English Court of Appeal confirmed that the Crown's prerogative relating to the mines, did not extend to other valuable minerals such as coal. In a number of cases in which the English courts had to decide whether the Crown's prerogative which related to treasure trove, also extended to other metals, the courts held that the Crown's prerogative was limited to gold and silver and that it did not extend to coins made of other metals. See *Attorney General of the Duchy of Lancaster v GE Overton (Farms) Limited* 1980 3 All ER 503; *R v Hancock* 1990 3 All ER 183.

quitrent.⁸³ Viljoen⁸⁴ draws a distinction between a prerogative and a statutory discretion, he states that:

... when the State President exercises a power, one has to distinguish clearly between a prerogative and a statutory discretion. To infer that it is a prerogative, one would have to refer to the royal prerogatives of England, but keep in mind that many prerogatives have been superseded by statutes in which case it may not be regarded as a prerogative any more.

It is not the focus of this study to determine the initial ownership of land forming part of the former Cape Colony. Yet, on the premise that all land in the Cape Colony, which had not already been alienated, belonged to the Government, it is submitted that the Government was in any event as landowner in terms of the *cuius est solum* principle, entitled to reserve to itself the rights to precious stones.

2.4 Summary and conclusion

In this chapter, the first section discussed the land tenure conditions that existed in the Cape under the rule of the Dutch East India Company, before the discovery of diamonds. These land tenure conditions were one of the most important reasons for the proclamation of the Cradock Proclamation, which was the first statutory provision in South Africa in which specific reference was made to precious stones.

The purpose of the Cradock Proclamation was to provide for security of tenure by affording the holders of loan places an opportunity to convert their titles to perpetual *quitrent* subject to the obligation that the holder of the perpetual *quitrent*, had to pay

⁸³ In the *Agri SCA* case para 69, the Supreme Court of Appeal held that the law relating to mineral rights in South Africa was based on the basic philosophy that the right to mine is under the "suzerainty" of the State and the State allocated this right from time to time as it deemed appropriate. The Constitutional Court in the *Agri CC* case paras 35- 37 rejected this view and held that: "There was thus an inextricable link between ownership of mineral rights and the right to exploit the minerals concerned." This was also emphasised by Grobler and Gildenhuys *Heads of Argument* para 8.2.4-8.2.7, who argued that the concept that the right to mine fell under the "suzerainty" of the State was foreign to the South African law and that the Supreme Court of Appeal's employment of the right to mine in the sense of a substantive public law is reminiscent of the Crown's prerogative to mine gold and silver which existed in English law. See also Badenhorst 1991 *TSAR* 120.

⁸⁴ Viljoen "History, Conventions and Prerogatives" 43-44.

an annual *quitrent* to the Government.⁸⁵ Until 1886, the general view was that the holder of the perpetual *quitrent* was not entitled to the *dominium* of the land, but this was incorrect and the Supreme Court of the Cape of Good Hope in the *Fryer* case, confirmed that the nature of *quitrent* title was that the grantee became the owner of the *dominium* in the land.⁸⁶

The Cradock Proclamation contained a statutory reservation of rights on mines of precious stones, gold and silver and it applied in respect of land that was granted under *quitrent*.⁸⁷ Although the main purpose of the Cradock Proclamation was not to regulate the mining of diamonds, it influenced the development of diamond mining legislation in respect of the diamond fields, which later became known as Griqualand West. The form of land tenure continued to influence the development of diamond mining legislation and in particular the right to mine diamonds in South Africa. As will be discussed in more detail in chapter 4, disputes regarding the rights to diamonds *in situ* arose and it became necessary to determine whether the Cradock Proclamation applied to the relevant land, in particular after Griqualand West was annexed as part of the Cape Colony.⁸⁸

More than 50 years after the proclamation of the Cradock Proclamation,⁸⁹ the Eureka diamond was discovered in South Africa. The events that occurred and the very early rules that were adopted during the first five years at the so-called "diamond fields" are discussed in the next chapter.

⁸⁵ See para 2.3.1 above.

⁸⁶ See para 2.3.1 above.

⁸⁷ See para 2.3.2 above.

⁸⁸ See para 4.2.2 below.

⁸⁹ The Cradock Proclamation was repealed by the *Pre-Union Statute Law Revision Act* 44 of 1968 with effect from 24 April 1968.

Chapter 3 Diamond fields during the period 1866 to 1871

3.1 Introduction

In this chapter the rules that regulated the searching for diamonds at the diamond fields during the first five years following the discovery of the Eureka diamond are discussed. This is the period before the diamond fields were proclaimed as a British territory in 1871. The Eureka diamond was discovered in 1866 in the district of Hopetown, in an area of land which was then regarded as "no-man's land". This area was, following the discovery of diamonds, simply referred to as the diamond fields.⁹⁰ Many authors have written about the discovery of the first known diamond in South Africa, but very few of them provide a similar account.⁹¹

⁹⁰ There were rumours of the existence of an ancient missionary map of the Orange River region, with the words "here be diamonds" written across it, even before the discovery of the first known diamond. The missionary map was prepared by Rev John Campbell who visited South Africa in 1820. He camped at the Orange River and recorded in his diary that: "One of our people on first coming to this river collected many kinds of bright stones." He later compiled a map of his journey, which was published in 1852. Campbell wrote the words "here be diamonds" on the map across a particular area of the Orange River. Herbert *Diamond Diggers* 11; Boyle *To the Cape for Diamonds* 84; Roberts *Kimberley* 5, records that a surveyor who was instructed to survey the land between Hopetown and the junction of the Orange and Vaal Rivers and who was also an amateur mineralogist, had already formed the view in 1859 that the area where diamonds were later discovered was diamondiferous. The surveyor gave Schalk van Niekerk, the co-owner of the farm De Kalk (where the Eureka diamond was discovered) a book on diamonds and told him to keep his eyes open. Beet and Terpend *Vaal Diamond Diggings* 15-18; Williams *Diamond Mines* Vol 1 115; McNish *El Derado* 15-17; According to Visser "Die Minerale Revolusie" 183, there is evidence that members of the Batlhaping branch of the Batswana tribe traded in diamonds in South Africa many years before the discovery of diamonds in 1866. Davenport *Digging Deep* 40; Worger *City of Diamonds* 9; Marquard *South Africa* 178; See the *Sishen SCA* case para 3; Simons *Cullinan Diamonds* 10-11; Rotberg *The Founder* 57; Roberts *The Diamond Magnates* 4; Doughty *Early Diamond Days* 202; Machens *Platinum, Gold and Diamonds* 139-142; Hornsby *The South African Diamond Fields* 5; Millin *Rhodes* 10.

⁹¹ According to Reunert *Diamonds and Gold* 5-6, John O'Reilly discovered the first diamond in March 1867, when he was returning from a hunting trip across the Vaal River. He spent the night at Schalk van Niekerk's farm, "De Kalk" in the Hopetown district and noticed "a beautiful lot of river pebbles on the table, out of which he picked the 'first diamond' ". According to Roberts *Kimberley* 5-6, the correct version of the discovery of the first diamond was that Schalk van Niekerk decided to sell his portion of the farm De Kalk. He agreed to sell his portion to Daniel Jacobs who lived with his wife and children in a cottage on the farm De Kalk. Van Niekerk visited Jacobs in December 1866 and noticed the Jacobs children playing a game with a few stones. Van Niekerk was a keen collector of beautiful stones and he noticed that one of the stones was unusual. He offered to buy it but Mrs Jacobs gave him the stone. Van Niekerk kept the stone until March 1867 when he showed it to a

Soon after the discovery of diamonds, the diamond fields were proclaimed as British territory in 1871, known as Griqualand West. This territory was, within ten years, annexed as part of the Cape Colony.⁹² The first few years after the discovery of diamonds at the diamond fields, were characterised by uncertainty. It was uncertain whether the area where the first diamond was discovered was indeed diamondiferous. It was furthermore uncertain what the proprietary status of the diamond fields was. Before the discovery of the Eureka diamond, there was simply no interest in this part of the country. According to McNish,⁹³ the diamond fields were within a few years, following the discovery of diamonds, converted from the most desolate pieces of land to one of the most disputed and richest portions of the surface of the earth and there were suddenly different competing claims for the sovereignty of this area.⁹⁴

In the early years following the discovery of the Eureka diamond, very little was known of the geology of diamonds. It was widely accepted that rivers or streams were the only habitat of diamonds and that they could only be sourced in or near rivers or streams.⁹⁵ The area of land where the first number of diamonds was discovered, lay on either side of the Vaal River, near its conjunction with the Orange River, in the

passing trader, John O'Reilly who agreed to take the stone to Hopetown to determine whether it was indeed a diamond. See also Simons *Cullinan Diamonds* 10. For a detailed discussion of the different versions of the discovery of the Eureka diamond see Robertson *Diamond Fever* 69-82 and Boyle *To the Cape for Diamonds* 85. A copy of a letter from Erasmus Jacobs, who as a child found the Eureka diamond, is published in Beet *Diamond Fields* 4-22. In the letter, Jacobs confirms that he found the Eureka diamond in 1866 and he describes the circumstances under which he found the diamond. McNish *El Dorado* 17; Herbert *Diamond Diggers* 9-11; Kanfer *The Last Empire* 26-27; Murray *The Diamond-Field Keepsake* 7; Dunn *Notes on the Diamond-Fields* 5; Streeter *The Great Diamonds of the World* 237-241; Beet *et al Knights of the shovel* 9-12; Cattelle *The Diamond* 227-228; Rotberg *The Founder* 42; Roberts *The Diamond Magnates* 1-3; Hahn *Diamond* 15-17; Cohen *Reminiscences of Kimberley*; Doughty *Early Diamond Days* 1; Millin *Rhodes* 10; De Villiers *The Mineral Resources of the Union of South Africa* 43; Van Zyl *Discovery of Wealth* 15; Chilvers *Story of De Beers* 4-5; Lacour-Gayet *A History of South Africa* 133; Steyn *Afrikaner-Joernaal* 135.

⁹² The development of diamond mining legislation in Griqualand West between 1871 and the annexation thereof as part of the Cape Colony is discussed in chapter 4 below.

⁹³ McNish *El Dorado* 1; *Sishen SCA* case para 3; Mostert *Mineral Law* 31.

⁹⁴ The battle for the legal control of the diamond fields is briefly discussed in para 3.4 below.

⁹⁵ Marquard *South Africa* 178-179; Davenport *Digging Deep* 39 and 52; Wheatcroft *Randlords* 29; Beet *Diamond Fields* XV; Chilvers *The Story of De Beers* 14, 24-25. A diamond mine refers to diamonds discovered in its primary source, namely a diamond pipe and alluvial diamonds refer to diamonds which have been removed from their primary source, normally by erosion and are found in a new habitat or environment, such as a riverbed.

Hopetown district. This area was referred to as the "alluvial diggings" or "river diggings". The diamonds could be found in the gravel and sand, using primitive equipment such as a pick and shovel.⁹⁶

This chapter commences with a discussion of the Vaal River diggings and the rules that regulated the searching for diamond at the river diggings.⁹⁷ This is followed by a brief discussion of the discovery of diamonds at the so-called "dry diggings" which later became known as the Dutoitspan Mine, the Bultfontein Mine, the De Beers Mine and the Kimberley Mine.⁹⁸ The competing claims to the diamond fields are finally discussed.⁹⁹

3.2 The Vaal River diggings

The discovery of the Eureka diamond and other diamonds shortly thereafter, did not initially result in an influx of diggers to the area. There was great uncertainty and doubt as to whether the particular part of the country was indeed diamondiferous.¹⁰⁰

⁹⁶ Marquard *South Africa* 178-179; Davenport *Digging Deep* 47; Babe *Diamond Fields* 11. Dunn *Notes on the Diamond-Fields* 6-7 describes the early method of alluvial diamond mining as follows: " ... water is indispensable, and the operation consists in excavating the boulders and pebbles. The boulders are piled up, but the pebbles are put through a coarse sieve for grating. Everything over two-thirds of an inch in diameter being thrown aside as refuse (any diamond of this size would readily catch the eye); the finer portion is either taken by cart, barrow, or bucket to the edge of the river and washed in a cradle – a machine, the simplest form of which is a box with rockers underneath; on the top, and fitting one into the other, are two or sometimes three sieves or hoppers, with different meshes, the finest having about eight holes to the inch placed at the bottom ... the gravel to be washed is put into the top sieve, water poured on, and the cradle worked backward and forward by a long handle standing up vertically from the back of it. The water passes through the different sieves, taking with it all the particles smaller than the mesh; the very fine material passes away at the bottom. When sufficiently washed the remaining gravel in the different sieves is placed on a table at which the sorter is seated."

⁹⁷ See para 3.2 below.

⁹⁸ See para 3.3 below.

⁹⁹ See para 3.4 below.

¹⁰⁰ Some people held the view that the diamonds were accidentally lost in the specific area or that they had been brought to the Hopetown district from distant regions by ostriches. Davenport *Digging Deep* 41-42; Theal *History of South Africa* Vol IV 345. Beet and Terpend *Vaal Diamond Diggings* 15, describe the following legend regarding the origin of diamonds at the diamond fields: "After the passing of many moons, and when there was great sorrow in the land, a spirit, pitying the wants and difficulties of mankind, descended from Heaven with a huge basket filled with diamonds. The spirit flew over the Vaal River, starting beyond Delport's Hope, and dropping diamonds as it sped on, past Barkley West and Klipdam it flew along towards a place now called Kimberley." According to Simons *Cullinan Diamonds* 2, some people held the view that the diamonds were

Geologists from the Cape dismissed any views that the country's interior was diamondiferous.¹⁰¹ Another reason for the lack of interest in the diamond potential of the Hopetown district, was that not all prospectors disclosed details of their discoveries. It was accepted that a number of diamonds had been picked up in the Hopetown district, which were disposed of privately. According to Roberts,¹⁰² the reason for the secrecy was that the Cape Government had a clause in land titles which reserved mineral rights to the Crown. The Cape Government apparently shared this view because it publicly announced that no action would be taken against prospectors for the "time being".¹⁰³ This appears to be a reference to the Cradock Proclamation that applied in respect of *quitrent* land in the Cape.¹⁰⁴

The proprietary status of the land comprising the river diggings was uncertain.¹⁰⁵ Although the Eureka diamond was discovered in the district of Hopetown, the first river camp was set up at Klipdrift on the banks of the Vaal River, the second across the river

mined in Brazil and smuggled into South Africa to "rig" the property market. Murray *The Diamond-Field Keepsake* 8-9; Kapp *Nalatenskappe sonder einde* 37; Roberts *The Diamond Magnates* 3-4.

¹⁰¹ In 1868 James Gregory, a leading geologist from Britain, visited the area where the Eureka diamond was picked up. Gregory stated that the geological character of the area was such that it was impossible that diamonds could be found there. Gregory also expressed the view that the diamonds must have been brought there by ostriches. Gregory's statement cost him much embarrassment. For a period of time thereafter, the diggers and miners continued to describe any inaccurate statement or lie with regard to the discovery of diamonds as a "Gregory". Davenport *Digging Deep* 41-42; Theal *History of South Africa* Vol IV 345; Wheatcroft *Randlords* 26; According to Beet and Terpend *Vaal Diamond Diggings* 15, the news of the first discoveries of diamonds in South Africa, was received with disbelief. They state that "Did not the oldest inhabitant remember and reiterate the saying: 'South Africa! The last place God ever made! How could any good come out of it? Impossible!' This remark is by no means inaccurate or far-fetched, for I have often heard it with my own ears." Simons *Cullinan Diamonds* 12. An extract from Gregory's report is published in Beet *et al Knights of the shovel* 13-15. For a detailed discussion of the nature of the river diggings see Williams *Diamond Mines* Vol 1 140-163 and Babe *Diamond Fields* 36-56; Murray *The Diamond-Field Keepsake* 9; Roberts *The Diamond Magnates* 4; Millin *Rhodes* 11; Chilvers *Story of De Beers* 5-6.

¹⁰² Roberts *Kimberley* 10.

¹⁰³ Davenport *Digging Deep* 42, states that one of the reasons that the few prospectors who did have faith in the diamondiferous potential of the area did not proceed to search for diamonds, was that "it was a well-known fact that minerals discovered on public land belonged to the Crown."

¹⁰⁴ See para 2.3 above.

¹⁰⁵ Lenzen *The History of Diamond Production and Diamond Trade* 145.

at Pniel on land owned by the Lutheran mission station¹⁰⁶ and a third at Hebron.¹⁰⁷ These three villages later became the centres of the river diggings.¹⁰⁸ According to Payton,¹⁰⁹ the village of Klipdrift had always been under the rule of the British Government, but the village of Pniel fell under the authority of the Orange Free State. The reason for the uncertainty of the proprietary status of the river diggings was simply that it had not been questioned before the discovery of diamonds. The area was regarded as "no man's land" occupied by a few Griquas.¹¹⁰ This all changed with the discovery of diamonds. The catalyst for the first diamond rush was in 1869, when a second large diamond of approximately 83^{1/2} carats was discovered on the banks of the Vaal River.¹¹¹

¹⁰⁶ The river diggings at Pniel were situated approximately three miles from the mission station on the east bank of the Vaal River. Babe *Diamond Fields* 44; Newbury *Diamond Ring* 11-12.

¹⁰⁷ The Hebron camp was situated approximately 20 miles above Pniel on the west side of the Vaal River. Babe *Diamond Fields* 50. Beet and Terpend *Vaal Diamond Diggings* 15 state that: "To my mind, the most remarkable thing connected with the discovery is the fact that, whilst the first diamonds were found in the district of Hopetown, the rush of diggers did not proceed in that direction at all, but to Klipdrift, Hebron and Pniel. I have endeavoured to ascertain some adequate explanation of this, and the most plausible is given in the remarks of three of my correspondents – Mr. George Alexander, 'An Old Diamond Digger,' and Mr. H.R. Giddy. The first-named states that Gregory's unfavourable report on the Hopetown district made would-be prospectors and diggers fight shy of that part, but, hearing independently of fabulous finds at Pniel, Klipdrift, and Hebron, they lost no time in rushing there instead. The 'Old Diamond Digger,' in a letter to the 'Diamond Fields Advertiser,' says: 'I have a dim recollection that the Pniel missionaries knew of diamonds having been found on their estate years before any other discovery. Perhaps this became known in Natal and elsewhere, and when the large stones were found in the neighbourhood of the Orange River, the pioneers, or some of them, remembering these rumours, decided to go straight to Pniel instead of Hopetown.'" For a detailed discussion of the discoveries at Hebron, Pniel and Klipdrift, see Murray *The Diamond-Field Keepsake* 9-11, 24-25; Beet *et al Knights of the shovel* 17-23, 25-28; Doughty *Early Diamond Days* 10-12; Van Zyl *Discovery of Wealth* 15.

¹⁰⁸ Herbert *Diamond Diggers* 25; Cattelle *The Diamond* 229, 231. There were also a number of other camps. According to Bruton *Diamonds* 32, the camps and claims had their own names which sometimes referred to the digger's name or fortune such as: "Fortune Hope, Waldeck's Plant, Poorman's Kopje, Webster's Pool and the rich Gong Gong ...".

¹⁰⁹ Payton *Diamond Diggings* 10.

¹¹⁰ The *Sishen SCA* case para 3; Mostert *Mineral Law* 31; Walker *A History of South Africa* 339; Hahn *Diamond* 21-22; Hocking *Kaia's & Cocopans* 20; Houghton "Economic Development" 11.

¹¹¹ This diamond was later called the "Star of South Africa". By the end of 1869, a large number of diamonds was found along the northern banks of the Vaal River. As a result of poor economic conditions, professional men, merchants, farmers and labourers rushed to the banks of the Vaal River, searching for diamonds and a number of canvas tent camps arose. By the end of 1870, approximately 5 000 diggers were spread out along a 100 kilometre stretch on the banks of the Vaal River. There are also conflicting reports about the facts of the discovery of the "Star of South Africa". According to Davenport *Digging Deep* 42-47, this diamond was picked up by a Griqua

3.2.1 Competing claims to the river diggings

The discovery of diamonds led to competing claims being made by the Governments of the *Zuid-Afrikaansche Republiek* and the Orange Free State, and the Barolong, Batlhaping and Korana tribes.¹¹² In June 1870, the Government of the *Zuid-Afrikaansche Republiek* attempted to assert control over the northern bank of the Vaal River, in particular the rich camp of Klipdrift. The Government of the *Zuid-Afrikaansche Republiek* represented by President Pretorius, granted to a firm comprising of Messrs J Munnich, JM Posno and HB Webb, the exclusive right to search for diamonds in the territory along the Vaal River above the junction of the Hart River for a period of 21 years from 22 June 1870. In return, the firm agreed and bound itself to pay a royalty of six per cent to the Government of the *Zuid-Afrikaansche Republiek*, for all diamonds discovered. It, however, transpired that the procedure that was prescribed in the Constitution of the *Zuid-Afrikaansche Republiek* had not been followed and the general view in the *Zuid-Afrikaansche Republiek* was that the granting of the concession to the

shepherd named Swartboy who attended to his livestock in this area. The shepherd approached Schalk van Niekerk and sold him the diamond for 500 sheep, ten oxen and a horse, the equivalent of £400. Herbert *Diamond Diggers* 14. According to Theal *History of South Africa* Vol IV 344-346, the diamond was obtained from a witch doctor who had it in her possession for a long time, without realising the value thereof. Norton, Bristow and Van Wyk 2007 *Diamonds source to use*, state that the discovery of this large diamond led to the creation of the "digger fraternity" which they define as follows: "eternally optimistic individuals or groups, and most recently small private companies, who utilize simple and often primitive mining methods to seek out elusive big diamonds." Simons *Cullinan Diamonds* 12; Murray *The Diamond-Field Keepsake* 8; Reunert *Diamond Mines of South Africa* 17. A detailed list of the "first" 20 diamonds that were discovered at the diamond fields is published in Beet *et al Knights of the shovel* 16; Beet *Diamond Fields* 115-116; Roberts *The Diamond Magnates* 4-5; Walker *A History of South Africa* 339; Hahn *Diamond* 21; Rall *Petticoat Pioneers* 13; Millin *Rhodes* 11; Anonymous *The Diamond Fields of South Africa* 63; Newbury *Diamond Ring* 11; Van Zyl *Discovery of Wealth* 15-16; Chilvers *Story of De Beers* 4-5; Steyn *Afrikaner-Joernaal* 135; Kiewiet *A History of South Africa* 88-89.

¹¹² The Barolong, the Batlhaping and Korana tribes claimed the area as their lawful inheritance. David Arnot claimed the territory on behalf of Nicholas Waterboer for the Griqua community. Beet *Diamond Fields* 34-48, states that at the early stage of the river diggings, Jan Bloem, who was at that stage the chief of the Koranas, visited the river diggings at the Klipdrift camp. Later his field-cornet, Piet Kwaaiman arrived at the camp with approximately 60 men from the Korana tribe. They ordered the diggers to stop working, but the diggers ignored them. The diggers armed themselves and a state of siege was proclaimed. Jan Bloem did not proceed to attack the diggers and retired, leaving the diggers in possession of the river diggings. Theal *History of South Africa* Vol IV 346-348; Davenport *Colonial Mining Policy* 46-48; Davenport *Digging Deep* 49; Wheatcroft *Randlords* 32; Meredith *Diamonds, Gold and War* 24; Davenport *South Africa A Modern History* 2nd ed 127.

firm was unlawful.¹¹³ The diggers also refused to acknowledge the granting of the concession and announced that they would resist any attempt to enforce it.¹¹⁴

3.2.2 Rules at the river diggings

In response to the attempts from the *Zuid-Afrikaansche Republiek* not only to control the area, but also to give a concession to mine diamonds in the area, the diggers proceeded to declare the village of Klipdrift and its immediate vicinity an independent Diggers Republic.¹¹⁵ The diggers insisted that a set of rules be drawn up to govern the alluvial diggings.¹¹⁶ A "Diamond-Diggers' Mutual Protection Association" was formed

¹¹³ See para 7.3 below.

¹¹⁴ Theal *History of South Africa* Vol IV 346-348; Davenport *Colonial Mining Policy* 46-48; Davenport *Digging Deep* 49; Babe *Diamond Fields* 15, states that: "At the decision of the council, the Transvaal Republic appointed a Mr. Owen as magistrate, and sent him to the great camp, Klip Drift, where he issued a proclamation and raised the Transvaal flag. The miners, not liking this arrangement, tore down the flag, and putting Mr. Owen into a boat, sent him across the river, and his tent after him, and refused to allow him to return." Bruton *Diamonds* 32; Roberts *The Diamond Magnates* 8; Hocking *Kaia's & Cocopans* 22; Rosenthal *Here are Diamonds* 26-27; Millin *Rhodes* 12-13.

¹¹⁵ Stafford Parker, a former British sailor and soldier was elected as the president of the new Diggers Republic and the village of Klipdrift was renamed Parkerton. Theal *History of South Africa* Vol IV 346-348; Davenport *Colonial Mining Policy* 46-48; Davenport *Digging Deep* 49; Bruton *Diamonds* 32, describes Parker as "a claim owner, ex-policeman, ex-seaman, one-time gold miner, father of eighteen children, and owner of the local dance-hall." See also Walker *A History of South Africa* 339.

¹¹⁶ These rules emanated mainly from the alluvial gold fields of California and Australia. Foreign diggers who joined the search for diamonds, shared their experiences and recollections of the law that applied at the gold fields, with the diggers at the river diggings. Davenport *Digging Deep* 49; Davenport *Colonial Mining Policy* 47-48. See Stoodley 1966 *University of Queensland Law Journal* 179 -190 in relation to the rules that applied in Australia and Shinn *Mining Camps* in relation to the rules that applied in California. According to the *Cape of Good Hope Report of the Commissioners on the working and management of the diamond mines of Griqualand West of 1882* para 5, the first systematic search for diamonds was carried on in the beginning of 1870 by a group of diggers from Natal, comprising of several Australian and California diggers and one Brazilian, who influenced the group to begin regular search, washing and sifting. It is further reported in para 7 that: "The presence of the old diggers from the alluvial gold fields of California and Australia in the first party, and of others who soon drifted up to join them, was of considerable importance in the history of the Diamond Fields. These men brought with them certain ideas and recollections of diggers' law prevailing in the earlier days of gold-seeking in America and Australia, and many of these practices and traditions were readily adopted by the community on the Vaal, and have become firmly fixed in the prejudices of all who have had anything to do with diamond seeking; and still continue at a time, indeed, when many of them have become obsolete in Australia, to influence the legislation on a subject which has little in common with alluvial gold diggings on lands the property of the Crown."

and a chairman was appointed, who also acted as judge and jury to enforce the rules and penalties were carried out forthwith.¹¹⁷

The rules that were drawn up with regard to the river diggings were called the "Rules and Regulations for the Vaal river diamond fields alluvial claims" (hereafter the Diggers Republic's Rules) and contained a set of 13 rules. The Diggers Republic's Rules were the first rules regulating the search for or digging for diamonds at the diamond fields. The question of who held the right to search or to dig for diamonds was not addressed in the Diggers Republic's Rules. The Diggers Republic's Rules simply provided that every man would be entitled to work only one claim of 20 square feet. The claims were awarded to the diggers by the governing committee.¹¹⁸ If a digger was absent from his claim for a period of more than three successive days, a notice would be posted up on his claim stating the time of his absence and that his claim was thereafter considered to be abandoned.¹¹⁹ This provision was described as the "jumping" system. The "jumping" of claims was regarded as one of the essential requirements for the diggers' democracy.¹²⁰

Any person who discovered "any new run, or patch of diamonds" and who reported such finding to the appointed governing committee, was entitled to be awarded four claims. The discovery had to be reported by posting a notice in a conspicuous place at the diggings and the locality of the finding had to be stated.¹²¹ Any person proved to

¹¹⁷ McNish *El Dorado* 47; Mostert *Mineral Law* 31. Bruton *Diamonds* 32; Hocking *Kaia's & Cocopans* 21.

¹¹⁸ Rules 1 and 11 Diggers Republic's Rules; See McNish *El Dorado* 46-47 and Davenport *Digging Deep* 49; Davenport *Colonial Mining Policy* 47-48.

¹¹⁹ Rule 9 of the Diggers Republic's Rules.

¹²⁰ Turrell *Capital and Labour* 34, states that the "jumping" system emanated from the gold fields of California and Australia and its purpose was threefold. Firstly, it assisted poor diggers who could not afford to pay exorbitant prices to purchase claims from existing claimholders. It secondly, prevented speculation in claims, in that speculators could not acquire claims and then hold them for sale at a later stage. Thirdly, it contributed to the methodical working of claims. Rule 9 of the Diggers Republic's Rules provided that the "jumping" system did not apply if the claimholder was ill or if he performed work incidental to his digging activities, such as washing as part of the process to search for diamonds. The methodical working of claims was important in the context of the dry diggings. Davenport *Digging Deep* 49; Davenport *Colonial Mining Policy* 47-48; See *Cape of Good Hope Report of the Commissioners on the working and management of the diamond mines of Griqualand West of 1882* para 11.

¹²¹ Rule 9 of the Diggers Republic's Rules.

have picked up a diamond on a claim which belonged to another person and who failed to return the diamond to the owner immediately, was considered to be a thief and expelled from the diggings.¹²² At Pniel, the Diggers' Committee acknowledged the right of the landowner to charge a fee of ten shillings per claim for the working of each claim.¹²³

President Pretorius of the *Zuid-Afrikaansche Republiek* again travelled to the river diggings with a small armed force in an attempt to assert control over the river diggings on behalf of the *Zuid-Afrikaansche Republiek*. President Pretorius offered various concessions to the diggers in the form of regulations in a proclamation dated at Klipdrift on 10 September 1870.¹²⁴ These regulations provided that the Government of the *Zuid-Afrikaansche Republiek* would assert its right to the territory east of the Hart river and in return the Government of *Zuid-Afrikaansche Republiek* agreed that no preferential right would be given to anyone. Also, the English currency would be the lawful currency in the specific territory and the English language would be the official language to be used in all courts. President Pretorius' attempts were unsuccessful.¹²⁵ At the same time, Theodor Doms claimed the territory on behalf of the Barolong and

¹²² Rule 11 of the Diggers Republic's Rules; McNish *El Dorado* 47, states that: "Thieves were made to parade through a camp with sandwich boards upon which was printed the word *Thief* in large letters. He had to ring a bell while he wandered among the claims, to attract attention to himself. Having completed the round he was kicked out and told never to show his face in that camp again." Hornsby *The South African Diamond Fields* 6. According to Bruton *Diamonds* 32, Stafford Parker took his duties as President of the Diggers' Republic very seriously. He states that Parker: "wore a tip-top hat and frock-coat he had purchased on impulse while in London. He appointed an ex-butcher as State Punisher and introduced flogging for theft of stock and diamonds. Card cheats were ducked in the river ... Another punishment was to be hauled across the river by a rope tied round the wrists and attached to the stern of a boat, similarly to keep-hauling." See also Hornsby *The South African Diamond Fields* 6-7.

¹²³ Newbury *Diamond Ring* 11-12; According to Babe *Diamond Fields* 46-47, the diggers at the Klipdrift camp were required to sign a set of rules called "Rules for the miners and occupiers of the Klip Drift Diggings" (hereafter the Klipdrift Rules). Every digger who wanted to work a claim, was in terms of Rule 4 of the Klipdrift Rules obliged to pay to the Committee two shillings and sixpence, which entitled him to a "digger's right." Rule 18 of the Klipdrift Rules provided that the money had to be used for sanitary and other necessary purposes at the Klipdrift diggings. Rule 5 of the Klipdrift Rules provided that the extent of each claim was 20 feet square.

¹²⁴ According to Chilvers *Story of De Beers* 11, President Pretorius was a keen diamond digger and also held a claim. He frequently visited the river diggings to search for diamonds.

¹²⁵ Theal *History of South Africa* Vol IV 346-348; Beet *et al Knights of the shovel* 35-40; Lenzen *The History of Diamond Production and Diamond Trade* 146; Bruton *Diamonds* 132.

the Batlhaping tribes. Doms indicated that he was also prepared to make concessions if their authority was recognised. The potential conflict was defused when richer diamond deposits were discovered elsewhere, which caused an exodus from the river diggings as nearly all the diggers left the northern bank of the Vaal River for the dry diggings.¹²⁶

3.3 Rules at the dry diggings

The first diamond known to be discovered on "dry" land was on the farm Koffiefontein in the Orange Free State in July 1870. This farm was situated approximately 90 kilometres south east of Klipdrift at the river diggings.¹²⁷ The next important discovery was also in the Orange Free State, on the farm Jagersfontein, situated approximately 60 kilometres south east of the farm Koffiefontein.¹²⁸ Towards the end of 1870, most of the river diggings were exhausted and rumours spread that the owner of the farm Dutoitspan, situated approximately 40 kilometres south of Klipdrift, had found diamonds embedded in the walls of his farm house.¹²⁹

By 1871, more diamonds were discovered on the farms Dutoitspan, Bultfontein, Vooruitzicht and at a *koppie*, named Colesberg *Kopje*. These areas were referred to as the "dry diggings" and the diamonds could, in some instances, be found on the surface

¹²⁶ Theal *History of South Africa* Vol IV 346-348; Roberts *The Diamond Magnates* 8-9; Allen *Early Kimberley* 3.

¹²⁷ Bruton *Diamonds* 34; Davenport *Digging Deep* 52; *Cape of Good Hope Report of the Commissioners on the working and management of the diamond mines of Griqualand West of 1882* para 13.

¹²⁸ Davenport *Digging Deep* 52. Some writers record that the first discovery of diamonds on "dry" land was on the farm Jagersfontein. See Wilson, McKenna and Lynn *Occurrence of Diamonds* 78; Chilvers *Story of De Beers* 15; De Villiers *The Mineral Resources of the Union of South Africa* 43. The development of the right to mine diamonds in the Orange Free State is discussed in chapter 6 below.

¹²⁹ According to Theal *History of South Africa* Vol IV 350, the diamonds were discovered when the landowner's children picked small diamonds from the mud with which their house was plastered. They then searched the place on the farm from which the mud had been taken and found more diamonds. According to Wheatcroft *Randlords* 28, diamonds may even have been found and sold at the farm Dutoitspan as early as 1868; Beet *Diamond Fields* 51; Davenport *Digging Deep* 53-54. See also Williams *Diamond Mines* Vol 1 167, however, states that this rumour related to the farm Bultfontein. Simons *Cullinan Diamonds* 13; According to Van Zyl *Discovery of Wealth* 16-17, a certain Anderson discovered the first diamonds at the farm Dutoitspan in 1870, when the owner, showed him an interesting pebble embedded in one of the clay walls of the farm house.

of the land.¹³⁰ At this early stage, the method of diamond mining was very primitive. Initially no water was used at the dry diggings and the ground was sorted by hand.¹³¹ The circumstances under which diamonds were discovered on the farms Dutoitspan, Bultfontein and Vooruitzicht are briefly discussed in the following section. The discovery of diamonds on these farms led to the establishment of diggings, which were later converted to mines and became four of the most important diamond mines in South Africa.¹³²

3.3.1 Diggings on the farm Dutoitspan

On 4 April 1860, the Government of the Orange Free State granted the farm Dutoitspan, previously known as Dorstfontein, to its first owner Abraham du Toit.¹³³ In 1871, when a group of diggers arrived at the farm Dutoitspan, they found friends

¹³⁰ Marquard *South Africa* 178-179; Anonymous *The Diamond Fields of South Africa* 84.

¹³¹ The nature of the early method of winning diamonds at the dry diggings, was described by Beet *Diamond Fields* 56-57 as follows: "if the claim was a shallow one, the diamondiferous stuff was first loosened by the pick and then thrown to the surface by the shovel, or hauled up in buckets if it was deep. The ground was afterwards roughly pulverised and then shaken vigorously in a sieve of large mesh with the object of removing any rough stones which might possibly injure the second, or 'fine' sieve, which was constructed of close but strong wire meshing. Occasionally the rough sieve was made of sheets of perforated zinc or iron, and fixed in strong oblong wooden frames, some three feet by two feet, with rounded handles at one end, and two deep notches at the other, by which latter the sieve was made to rest firmly on a strong *riem*, or rawhide rope, supported by two upright posts called 'sieve props.' The operator swung the loaded sieve steadily backward and forwards till all the sand and dust had fallen through, leaving a gravel residuum consisting mainly of fragment of limestone, chalk, green trap, etc ... with a slight admixture of garnets, peridotite, ilmenite and talc, which was carefully deposited on the adjoining sorting-table and eagerly combed over by the claim-holder with the aid of a small triangular iron scraper." See also Hornsby *The South African Diamond Fields* 39-41. Dunn *Notes on the Diamond-Fields* 6-8; Bruton *Diamonds* 77-78; Sawyer *Diamonds in South Africa* 18-19; Allen *Early Kimberley* 7-17.

¹³² The De Beers Mine, Kimberley Mine, Dutoitspan Mine and Bultfontein Mine, were not the only diamond mines which were discovered in Griqualand West. There were several other diamond mines, most of them were also "rushed" by diggers and some mines were abandoned and later reopened. The Saint Augustine's Mine is situated within the township of Kimberley to the west of the Kimberley Mine and was in 1892 hidden between the houses and gardens on the west side of the town. It was named after the Saint Augustine's church which was situated on the property where the mine was discovered. The Ottos' *Kopje* Mine was discovered in 1880 and was mined from 1891 to 1905 and again from 1911 to 1913. The Kamfersdam Mine is situated on the farm Roodepan approximately seven kilometres north of Kimberley. It was discovered in 1880 and was mined until its closure in 1914. For a discussion of these and other mines in the Kimberley area, see Reunert *Diamonds and Gold* 64-65; "Eleventh Annual Report" 147-151; Wilson, McKenna and Lynn *Occurrence of Diamonds* 43; Hocking *Old Kimberley* 2.

¹³³ Wheatcroft *Randlords* 28; See the *Giddy* case; Murray *The Diamond-Field Keepsake* 11.

of the landowner already searching for diamonds.¹³⁴ The landowner refused the group of diggers permission to search on his land but they refused to leave. The landowner was left with no option but to allow them onto his land. This was the opening of the diamond diggings on the farm Dutoitspan.¹³⁵

At first, the landowner demanded a royalty of a quarter of the value of all diamonds found on his farm, but the diggers refused to pay.¹³⁶ Hundreds of diggers rushed to the farm Dutoitspan. The reaction from the landowner to the "rush" onto his property, is described by Beet¹³⁷ as follows:

He simply sat there on his stoep, pipe in hand, gazing in solemn amazement at the seemingly endless procession of horse, foot, and wagon traffic that was now invading the hitherto peaceful precincts of his homestead. The question of owner's right gave the diggers no concern; that was a matter for the Committee to deal with.

There were no legislative measures in place at the dry diggings. There was also no reservation of the right to diamonds in the title deed of the farm Dutoitspan in favour of the Government or anyone else.¹³⁸ The landowner of the farm Dutoitspan attempted to restore order by granting licences to the diggers, known as *briefjes*.¹³⁹

The landowner eventually sold his farm Dutoitspan in April 1871 without much protest to a property syndicate, the London and South African Exploration Company for £2600.¹⁴⁰ The London and South African Exploration Company gave notice to the diggers that no new licences would be issued but that the holders of the old "*briefjes*"

¹³⁴ Wheatcroft *Randlords* 28; According to Davenport *Colonial Mining Policy* 48, diamonds had already been discovered on this farm by prospectors in 1869. The farm Dutoitspan was on 6 January 1868 transferred to Adriaan van Wyk for £870. According to Murray *The Diamond-Field Keepsake* 12, Van Wyk's friends paid him one-fourth of their finds in return. Cattelle *The Diamond* 281.

¹³⁵ Theal *History of South Africa* Vol IV 350; Murray *The Diamond-Field Keepsake* 12.

¹³⁶ Williams *Diamond Mines* Vol 1 165; Newbury *Diamond Ring* 12.

¹³⁷ Beet *Diamond Fields* 52.

¹³⁸ This was later confirmed in a number of decisions by courts in respect of the diamond fields, later known as Griqualand West and after its annexation as part of the Cape, also by courts in the Cape Colony.

¹³⁹ See *the Giddy case*. See also Newbury *Diamond Ring* 12; Cleveland *Stones of Contention* 45-45; Angove *In the Early Days* 26-27; *Cape of Good Hope Report of the Commissioner on the working and management of the diamond mines of Griqualand West of 1882* paras 14-15.

¹⁴⁰ The syndicate took transfer of the farm Dutoitspan on 24 April 1871. Williams *Diamond Mines* Vol 1 166-167; *The Giddy case*.

could remain on the farm Dutoitspan until 15 May 1871. The diggers, however, persisted that they were entitled to search for diamonds on the farm and they formed a Diggers' Committee to negotiate with the landowner. The landowner and the Diggers' Committee reached an agreement in terms of which the diggers would be entitled to continue searching for diamonds on the farm. The terms and conditions of these arrangements were embodied in a document that was dated 15 May 1871 and titled "Rules and Regulations of the Dorstfontein Diggings" (hereafter the Dutoitspan Diggings Regulations).¹⁴¹

The Dutoitspan Diggings Regulations provided that each digger was entitled to work a maximum of two claims.¹⁴² In return the digger had to pay the landowner a royalty of ten shillings and sixpence per claim per month, except those diggers who held briefs or "*old briefjes*" prior to 15 April 1871.¹⁴³ Each claim was limited to 30 square feet and this became the standard size of claims at the dry diggings.¹⁴⁴ Provision was also made for the establishment of a committee who was entitled to impose fines for any breach of the Dutoitspan Diggings Regulations.¹⁴⁵ The landowner surveyed and measured each claim of Dutoitspan.¹⁴⁶ Every digger was obliged to first sign and submit to the Dutoitspan Diggings Regulations, before being permitted to search for diamonds on the farm Dutoitspan.¹⁴⁷ Claims or portions thereof were transferable on condition that the transfer was registered in the landowner's book and subject to the payment of a fee of sixpence sterling.¹⁴⁸

¹⁴¹ See the *Giddy* case; Murray *The Diamond-Field Keepsake* 29 states that the search for diamonds at the farm Dutoitspan was the most remarkable and that: "No other camp sprang so instantaneously from a barren waste into a city as this place did, and a city it was, busy as an European city, fifteen months ago ... "

¹⁴² See *Giddy* case.

¹⁴³ Regulation 2 read with reg 13 of the Dutoitspan Diggings Regulations; See also Davenport *Digging Deep* 54; Davenport *Colonial Mining Policy* 49.

¹⁴⁴ The diggers described the size of a claim as "the area ten times the size or your grave." Davenport *Digging Deep* 54; Boyle *To the Cape for Diamonds* 94.

¹⁴⁵ Regulation 1 of the Dutoitspan Diggings Regulations.

¹⁴⁶ Regulation 3 of the Dutoitspan Diggings Regulations.

¹⁴⁷ Regulation 8 of the Dutoitspan Diggings Regulations.

¹⁴⁸ Regulation 24 of the Dutoitspan Diggings Regulations.

It is clear from the agreement that was reached between the landowner of the farm Dutoitspan and the Diggers' Committee, that they acknowledged the rights of the landowner to the diamonds *in situ*. The diamonds *in situ* belonged to the landowners of the farm Dutoitspan, as there was no reservation of rights to the diamonds in favour of any Government. The landowner held the rights to the diamonds under the farm Dutoitspan and although the diggers initially refused to pay any royalties, they derived their right to go onto the farm Dutoitspan and to search for diamonds, from the landowner's consent.

3.3.2 *Diggings on the farm Bultfontein*

In the meantime, diamonds had also been discovered on the adjacent farm Bultfontein. The farm Bultfontein was initially a stock-breeding farm and the British Government (who at that stage occupied the Orange Free State under the name of the "Orange River Sovereignty") originally granted it to JF Otto on 16 December 1848.¹⁴⁹ The landowner was quite keen to sell his farm to a financial syndicate soon after the news broke of the discovery of diamonds on the farm Bultfontein.¹⁵⁰ The new owners attempted to close the farm Bultfontein to diggers but as stated by Davenport:¹⁵¹

the lack of a constituted authority rendered the rights of the company as landowner a legal fiction.

¹⁴⁹ See fn 555 below. Davenport *Digging Deep* 54; Williams *Diamond Mines* Vol 1 168.

¹⁵⁰ Williams *Diamond Mines* Vol 1 167-168 states that when the landowner, a certain Du Plooy, was approached by an eager speculator from the Orange Free State, Thomas Lynch, on a Sunday, he accepted the offer to purchase his property immediately. Soon thereafter, a syndicate represented by Leopard Lilienfeld approached Du Plooy and advised him that the sale was illegal because it was concluded on a Sunday. They offered to buy the farm Bultfontein from him for the same amount and provided Du Plooy with an indemnity against a possible claim for damages from Lynch. The sale was concluded two days after the first sale and the purchaser was the newly formed Hopetown Company. Lynch subsequently brought an action against Du Plooy for £10 000 but on 19 August 1872, he obtained judgment for only £500 and costs. Du Plooy in turn sued Lilienfeld and his associates and on 12 February 1892, he obtained judgment for £760 and costs. The Hopetown Company's successor in title was the London and South African Exploration Company. Beet *Diamond Fields* 65; Roberts *Kimberley* 16-24; Murray *The Diamond-Field Keepsake* 26-27; Cattelle *The Diamond* 285-291; Van Zyl *Discovery of Wealth* 17.

¹⁵¹ Davenport *Digging Deep* 54.

In May 1871, approximately 2000 diggers stormed onto the farm Bultfontein and demanded the right to work claims. They marked out their claims to the door of the farmhouse.¹⁵² The owner of the farm Bultfontein managed to remove the diggers from the farm with the assistance of the Government of the Orange Free State. They were, however, soon left with no option but to allow the diggers to work on their property and in return claimed payment of a monthly royalty, on a similar basis as on the farm Dutoitspan.¹⁵³ The landowner permitted the diggers to search for diamonds on the farm Bultfontein in return for the payment to the landowner of ten shillings per month for each claim.¹⁵⁴ There was similarly no reservation in the title deed of the farm Bultfontein of diamonds in favour of any Government or person.

3.3.3 Diggings on a portion of the farm Vooruitzigt

The Government of the Orange Free State first granted the farm Vooruitzigt to two brothers Johannes Nicolaas de Beer and Diederick Arnoldus de Beer in 1863.¹⁵⁵ In May

¹⁵² Theal *History of South Africa* Vol IV 351; Davenport *Colonial Mining Policy* 49; Murray *The Diamond-Field Keepsake* 12.

¹⁵³ Davenport *Colonial Mining Policy* 49.

¹⁵⁴ Beet *Diamond Fields* 66. According to Murray *The Diamond-Field Keepsake* 27, the whole character of Bultfontein had changed in 1871. Murray states that: "The uninhabited farm had changed as if by magic into a crowded and busy camp. There were streets and shops, hotels, canteens and ready-made clothing establishments, bakers and butchers. Three thousand sieves were at work, rattling out gravel like hail, the picks and axes of five thousand men were going from sunrise to sunset ... "

¹⁵⁵ After the discovery of diamonds on the farm Vooruitzigt, the two De Beer brothers sold their farm for £6300 to a syndicate from Port Elizabeth, Dunell Ebdon and Company, represented by Alfred Ebdon, who became the owner thereof in 1871. Joel *Ace of Diamonds* 13. Angove *In the Early Days* 29-31 describes the circumstances under which he met one of the De Beer brothers after the two brothers had sold the farm Vooruitzigt. Angove was on a journey through the Orange Free State in 1872 and was about to *outspan* his cart when he met the De Beer brother who bought another farm in the Boshof district with his share of the proceeds of the sale of the farm Vooruitzigt. Angove states as follows: "I answered the usual interrogations, as from whence I came, whither I was going, etc., but I was somewhat surprised when, after enquiring my name, that he should ask whether I was a '*verd-de Englishman!*' When in turn asked why he enquired about my nationality in that manner, he replied: 'Because it was an Englishman who overreached me when buying my farm, Vooruitzigt, on which the diamonds were found, and I have been since informed that the farm is worth more millions than thousands of pounds I have received for it.' 'But suppose you had received six million pounds for your farm; what would you ever have done with such a tremendous sum of money?' said I. 'Oh!' quoth Mynheer De Beer, 'in that case I would have been able to buy a brand-new buck-wagon, new yokes, and a wire-trek touw.' But that would not have taken very much from your pile of money,' I said. 'Ja!, But I should have been able to buy a new Cape cart and a spring wagon to go to nachtmaal in when our new church is built in Boshof.' And what about

1871 diamonds were discovered on a portion of the farm Vooruitzigt, situated approximately two miles north of the farm Dutoitspan.¹⁵⁶ The two De Beer brothers initially gave a digger permission to search for diamonds on the farm Vooruitzigt, on condition that the digger hand over a quarter of all diamonds found to the landowners. Other diggers soon followed and they were also allowed to mark out claims of 30 square feet each.¹⁵⁷

Diggers started digging below the surface and discovered diamonds in a layer of yellow clay, approximately 50 feet deep, which was referred to as "yellow ground". When the diggers reached the bottom layer of the yellow ground, they discovered hard rock, described as "blue ground". Some diggers became despondent, they thought that all the diamonds had been exhausted and they returned to the river diggings.¹⁵⁸ The diggers that remained at the dry diggings were soon rewarded when they discovered that the blue ground was diamond bearing pipes, which were later described as kimberlite pipes.¹⁵⁹ The yellow ground was in fact decomposed or pulverised blue

your dwelling house?' I asked. 'Well, you see,' said he, 'there are only me and my old vrouw, so that the present house is quite big enough for two people' ... Such was the man who at one time owned one of the richest spots on earth." This conversation is also recorded in Millin *Rhodes* 11-12. According to Roberts *Kimberley* 122, it was determined in 1890 that the value of the farm Vooruitzigt, had risen to £14 500 000. Turrell *Capital and Labour* 68-69; Hahn *Diamond* 25-26; Hocking *Old Kimberley* 6.

¹⁵⁶ Beet *Diamond Fields* 67. The farm Vooruitzigt was later proclaimed as the De Beers mine, named after the initial owners of the farm Vooruitzigt. Davenport *Digging Deep* 56; See Chilvers *Story of De Beers* 17-18; Meredith *Diamonds, Gold and War* 33-34; Doughty *Early Diamond Days* 47-48.

¹⁵⁷ Davenport *Digging Deep* 57; Herbert *Diamond Diggers* 29.

¹⁵⁸ Davenport *Digging Deep* 57; Simons *Cullinan Diamonds* 11.

¹⁵⁹ According to Simons *Cullinan Diamonds* 11, the host rock in which diamonds are found is composed mainly of kimberlite which is commonly referred to as blue ground. See also Sawyer *Diamonds in South Africa* 7-8. Wheatcroft *Randlords* 12-13 describes the process of the formation of diamonds as follows: "These stones lay far too deep to be brought to the face of the earth by folding or cracking of the surface. Several million years ago, at some time after the diamonds had been created, igneous activity weakened the earth's mantle and the molten interior forced its way from the depths to the surface. As the fierce mixture of liquid rock and gases pushed upwards it carried with it the stones, whose formation was completed by this violent journey. These eruptions were not volcanoes: the liquid rock did not flow over the surface like lava but spurted into the air, fell back, and set hard. The resulting 'pipes' running up to ground level are irregularly cone-shaped like ice-cream cornets, widening as they approach the surface though often closed at the top. Sometimes the exploding mixture did not form a neat cone but broke out in fissures. When they were first formed these pipes stood like small hillocks. Millions of years have weathered them away, carrying diamonds far and wide. Like gold, the stones were often water-borne and would settle as alluvial deposits in river beds. At the surface the diamond-bearing rock softened with time into a

ground.¹⁶⁰ The diggings on this portion of the farm Vooruitzicht later became known as the De Beers Mine.

3.3.4 Diggings at Colesberg Kopje

In July 1871, diamonds were discovered on a *koppie*, on another portion of the farm Vooruitzicht, less than half a mile from the earlier discoveries on the same farm and less than three miles from the farm Duitoitspan. Prospectors previously searched this *koppie* for diamonds without success. Fleetwood Rawstorne sent his servant to prospect at a certain area and the servant returned with a diamond of approximately two carats in weight. Rawstorne and his group of diggers immediately went to the spot to mark and peg off their claims. Rawstorne was acknowledged to be the discoverer and was rewarded with three claims, two as the discoverer and one as a digger. After the claims had been pegged, Rawstorne went to the authorities to report the discovery.¹⁶¹

friable, yellowish ground, but below it kept its original condition, hard and blue. The new town was officially named after the Colonial Secretary of the day, Lord Kimberley. Then the name of the mining town was adapted as the formal name of the diamond rock: blue ground became 'kimberlite' named indirectly after a Norfolk village far from any diamond fields."

¹⁶⁰ Herbert *Diamond Diggers* 26. According to Hart *Diamond* 41-42, Barney Barnato heard that a local mineralogist was advancing the theory that diamonds had come to the surface of the earth in volcanoes. Barnato realised that if the theory was correct, the yellow ground was only the top layer of the deposit and more diamonds lay underneath. See Murray *The Diamond-Field Keepsake* 33-34 for a detailed discussion of the digging at the De Beer's camp.

¹⁶¹ Williams *Diamond Mines* Vol 1 172-175 states that diamonds were discovered on this *koppie* by a group of diggers headed by Fleetwood Rawstorne. Rawstorne's group comprised of eight diggers, who were also referred to as "the Red Cape Party" because of their distinctive red headgear. A more detailed account of the discovery of diamonds at Colesberg *Kopje*, is provided by Davenport *Digging Deep* 58-61 - Rawstorne's servant who discovered the diamonds, was his cook, Damon who travelled with him and who grew up with the Rawstorne family. The circumstances under which diamonds were discovered at Colesberg *Kopje*, was that Damon drank too much alcohol. Rawstorne then as punishment ordered him to leave the camp and to search for diamonds at a nearby *koppie*. The servant returned in the middle of July 1871, with diamonds. One of the members of Rawstorne's group, recalled the events as follows: "On a Saturday night in July 1871 we were all in Rawstorne's tent playing cards. Damon turned up. He came to the door of the tent and said, 'Fleet, I want you'. Rawstorne replied, 'All right, come inside'. Damon walked in and held out his hand showing two or three small diamonds. The effect on us was electrical, and there was an immediate rush out of the tent. Having quickly secured stakes and hatches, the whole party led by Damon, made haste to the spot where the diamonds had been found. It was a clear moonlit night with just a touch of frost in the air. When we reached the place indicated by Damon, we found that he had dug a shaft ten or twelve feet deep in the shade of a fine old camelthorn-tree,

This *koppie* was named "Colesberg *Kopje*" in honour of Rawstorne's hometown Colesberg. The discovery of diamonds on the farm Vooruitzigt caused diggers to rush to these areas and as a result, the diggings at Colesberg *Kopje* were also referred to as the "New Rush" and later became known as the Kimberley Mine.¹⁶²

The kimberlite pipe that was discovered at Colesberg *Kopje* became known as the richest diamond yielding pipe. Diggers had to pay a fee of ten shillings to obtain permission to dig for diamonds and were soon trading their claims.¹⁶³ Claims were divided into halves, quarters, eighths and even into sixteenths. Within a few months, as much as £4000 was paid for a claim with particularly rich ground.¹⁶⁴

3.4 Legal control of the diamond fields

The discovery of diamonds in this area brought the question of legal control of the diamond fields to the fore. The diamond fields were initially regarded as "no-man's" land and it was unclear which law applied to the area. The first title deeds to the farms Dutoitspan, Bultfontein and Vooruitzigt were in the form of deeds of grant that were granted by the Government of the Orange Free State to the farmers. In these title deeds no reservations of minerals were made. The land was believed to be good for

Rawstorne naturally marked off his claim round this hole ... It afterwards turned out that Rawstorne had got two of his claims inside the pipe wall and if my memory serves me well, the others got about one each." See Herbert *Diamond Diggers* 34-36; Bruton *Diamonds* 41-42; Doughty *Early Diamond Days* 48; Chilvers *The story of De Beers* 22-25; Van Zyl *Discovery of Wealth* 17. Rall *Petticoat Pioneers* 16-17 provides a different version of the discovery of Colesberg *Kopje*. Rall states that a Mr Rae told the Star newspaper that the diamonds at Colesberg *Kopje* was discovered by a Mrs Ortlepp, the wife of a land surveyor who went for a day to a *kopje*. Mrs Ortlepp sat in the shade of a camelthorn tree and turned over the sand when she discovered a number of diamonds. Mrs Ortlepp was not keen about the publicity and asked her brother in law, Fleetwood Rawstorne, to claim the discovery.

¹⁶² The diggings at Colesberg *Kopje* became known as the "New Rush" and later the Kimberley Mine. This mine is presently known as the "Big Hole". Davenport *Digging Deep* 59; Williams *Diamond Mines* Vol 1 175; Murray *The Diamond-Field Keepsake* 12. For a detailed discussion of the discovery and working of the "New Rush" see Beet *et al Knights of the shovel* 47-58; Angove *In the Early Days* 28-29; Cattelle *The Diamond* 291-292; Hocking *Old Kimberley* 4.

¹⁶³ Davenport *Digging Deep* 59; Payton *Diamond Diggings* 22.

¹⁶⁴ Davenport *Digging Deep* 61; According to Joel *Ace of Diamonds* 14, the diggings on the farm Vooruitzigt produced diamonds to the value of £50 000 in November 1871 alone and claims which had initially sold for £20, were selling for £4000.

nothing but pasture.¹⁶⁵ The diggers desired that the government take over the land from the landowners at a reasonable valuation. They argued that the land had in any event been granted to the farmers for grazing purposes and that the landowners would not suffer any injustice. The farmers, who were the initial owners of the farms, sold their farms to syndicates or companies. These companies contested that their title deeds granted them absolute ownership of the land and everything below the surface.¹⁶⁶

Four authorities claimed sovereignty over the diamond fields, the *Zuid-Afrikaansche Republiek*, the Orange Free State, the southernmost Tswana chiefdom and the Griqua chiefdom of Nicholas Waterboer, the son of Andries Waterboer.¹⁶⁷ The Government of the Cape Colony could also no longer ignore this question and although they made no claim to the area, they urged the Government of Britain to annexe the territory, in the interest of law and order and Cape revenue.¹⁶⁸

The Government of the Orange Free State took the first initiative to assert control over the diamond fields by implementing certain digging regulations as a provisional arrangement, to take immediate effect until the *Volksraad* of the Orange Free State could take a decision. In May 1871 the Government of the Orange Free State passed the *Free State Ordinance for Administering Affairs upon the Diamond Fields Ordinance* 3 of 1871 (hereafter the 1871 OFS Diamond Fields Ordinance)¹⁶⁹ to record and consolidate the arrangements between landowners and the diggers. The application of the 1871 OFS Diamond Fields Ordinance to the diamond fields only lasted a few months.¹⁷⁰

¹⁶⁵ Theal *History of South Africa* Vol IV 351.

¹⁶⁶ Theal *History of South Africa* Vol IV 351-352; Steyn *Afrikaner-Joernaal* 135.

¹⁶⁷ Thompson *History of South Africa* 117; Murray *The Diamond-Field Keepsake* 13; Davenport *South Africa A Modern History* 2nd ed 127; Millin *Rhodes* 12-13; Chilvers *Story of De Beers* 12; Steyn *Afrikaner-Joernaal* 136.

¹⁶⁸ Marquard *South Africa* 180; Beet *et al Knights of the shovel* 29-31.

¹⁶⁹ See para 6.3 below.

¹⁷⁰ The 1871 OFS Diamond Fields Ordinance is discussed in para 6.3 below. Davenport *Colonial Mining Policy* 51; Cape of Good Hope *Report of the Commissioner on the working and management of the*

In December 1870, the Governor of the Cape Colony, Sir Henry Barkly,¹⁷¹ received instructions from the British Government to arrange for the matter to be resolved through arbitration. Barkly persuaded the Government of *Zuid-Afrikaansche Republiek*,¹⁷² the Griqua chief Waterboer¹⁷³ and the two African chiefs to agree to the arbitration proceedings. The Government of the Orange Free State, however, refused to participate in the arbitration proceedings.¹⁷⁴ The three participating parties agreed that their dispute be referred to commissioners, sitting as judges for investigation and arbitration. They agreed further that should the decision of the Commissioners not be unanimous, the matter would be referred to Robert Keate, the Lieutenant-Governor of Natal for final determination and arbitration. The judges sitting as commissioners disagreed on the outcome of the dispute and the question of legal control of the disputed diamond fields was referred to Keate of Natal.¹⁷⁵ On 17 October 1871, the arbitrator awarded the dispute in favour of Waterboer and the African chiefs.¹⁷⁶

The claim of the Orange Free State was, however, not resolved. The Government of the Orange Free State was not only deprived of its rights to what became the richest diamond mines in the world, approximately 143 farms were also "removed" from its

diamond mines of Griqualand West of 1882 para 16; Lacour-Gayet *A History of South Africa* 136-137.

¹⁷¹ Sir Henry Barkly succeeded Lieutenant-General Hay early in 1871 as Queen Victoria's High Commissioner and Governor of the Cape Colony. Williams *Diamond Mines* Vol 1 180.

¹⁷² The *Zuid-Afrikaansche Republiek's* claim was based on certain treaties and agreements with the African chiefs. Marquard *South Africa* 180. See Boyle *To the Cape for Diamonds* 29-43 for a detailed discussion of the grounds on which the claims were based.

¹⁷³ Waterboer's claim was based on an earlier occupation of the area. Marquard *South Africa* 180.

¹⁷⁴ Marquard *South Africa* 180-181; See also Theal *History of South Africa* Vol IV 376-384; Walker *A History of South Africa* 339-345.

¹⁷⁵ Williams *Diamond Mines* Vol 1 180; See also Theal *The Story of the Nations* 326-327; Herbert *Diamond Diggers* 32-34; Bruton *Diamonds* 32-33; Walker *A History of South Africa* 344.

¹⁷⁶ Williams *Diamond Mines* Vol 1 180-181; This is contrary to the finding of the Constitutional Court in the *Agri CC* case fn 107 and in the *Sishen SCA* case para 3. The boundaries of the territory awarded to the Griquas were recorded in article 11 of Proc 69 of 1971. See also Lardner-Burke "Griqualand West Land Titles" 31-34 wherein he confirms that Waterboer requested the British Government to annex the diamond fields. Simons *Cullinan Diamonds* 13. According to Davenport *South Africa A Modern History* 2nd ed 127, Keate recognised Waterboer as the territorial sovereign of Griqualand West and upheld the claim of the Batlhaping by pushing the border of the *Zuid-Afrikaansche Republiek* to the Makwassie *Spruit*; Rotberg *The Founder* 58; Newbury *Diamond Ring* 12-13; Chilvers *Story of De Beers* 12; Steyn *Afrikaner-Joernaal* 136.

territory and included in what became known as Griqualand West.¹⁷⁷ Later in 1876, the Cape Land Court held that the Government of the Orange Free State had a legitimate claim to the diamond fields.¹⁷⁸ President Brand claimed that the diamond fields be returned to the Orange Free State, but the British Government was only prepared to compensate the Government of the Orange Free State in the sum of £90 000 to relinquish their claim.¹⁷⁹

¹⁷⁷ According to Lindley *Adamantia The Truth about the South African Diamond Fields* 422-423, Sir Barkly forcibly dispossessed the Orange Free State of its 143 farms on the basis that the farms had been illegally purchased from Cornelius Kok and his successor Adam Kok, who according to Barkly did not own the land. Barkly held the view that Waterboer owned the land. Lindley questions the fact that Waterboer never objected to the sale of the land to the Government of the Orange Free State in the early 1860s and he states that the diamond fields were in the *de facto* and *de jure* possession of the Orange Free State at the time of the arbitration. For a discussion of the difficulties in determining the correct title deed conditions in respect of the diamond fields, see Lardner-Burke "Griqualand West Land Titles" 31-34. Lardner-Burke distinguishes between three forms of land held, firstly land under "Cape Colony Title", secondly land held under "Orange Free State Title" and "Qualified Title". He describes "Cape Colony Title" as farms that are held subject to an express reservation of mineral rights. This is a reference to a reservation in terms of the Cradock Proclamation. He defines "Orange Free State Title" as land where there is no reservation of minerals and precious stones to the Crown and such land would in terms of the *Giddy* case belong to the landowner. The term "Qualified Title" is used by Lardner-Burke to describe land where the following clauses appear in the title deeds: "That the issue of the title without an express reservation by Government of its rights to all precious stones, gold or silver found on or under the surface of the land, shall in no degree prejudice the position of such Government in regard to the same." See also the *Report of the Select Committee on Griqualand West Lands Titles of July 1895*.

¹⁷⁸ Van Schoor *Marthinus Steyn* 21-22; Walker *A History of South Africa* 367-368; Welsh *A History of South Africa* 239; See para 4.2.2 below.

¹⁷⁹ Theal *History of South Africa* Vol IV 386; Marquard *South Africa* 180-181; Van Schoor *Marthinus Steyn* 21. According to Angove *In the Early Days* 29-30, the diamond fields were considered to be part of the Orange Free State and that it belonged to the district of Boshof. Lindley wrote an entire book to substantiate his argument that the British Government had robbed the Orange Free State of the diamond fields. See Lindley *Adamantia The Truth about the South African Diamond Fields*. It falls outside the scope of this study to determine which authority was lawfully entitled to the diamond fields. In a judgment of Judge Stockenström of the Griqualand West Land Court delivered on 16 March 1876 in respect of a number of land claims (hereafter the *Stockenström* judgment), it was held that the Government of the Orange Free State was the lawful claimants to the diamond fields. See the *Stockenström judgment in the matter of certain land claims*. This question is still relevant with reference to the *obiter* finding of the Constitutional Court in *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Limited* 2014 2 SA 603 (CC) (hereafter the *Sishen CC* case) para 3, that the relevant authorities refused to recognise the Griqua's claim in respect of the diamond fields. See also Steyn *Afrikaner-Joernaal* 136-136.

3.5 Summary and conclusion

In this chapter the rules that regulated the searching for diamonds at the diamond fields during the first five years, after the discovery of the Eureka diamond, were discussed.

In the early years following the discovery of the Eureka diamond in 1866, the habitat or natural environment in which the diamonds were discovered influenced the rules that were adopted for the searching or digging for diamonds. At the river diggings, with the exception of the diggings situated at Pniel, no consideration was given to questions such as the proprietary status of the land where the diamonds were found or to who was entitled to search for or dig diamonds. This statement should be qualified in that it appears that some members of the public held the view that all diamonds belonged to the Government of the Cape Colony, by virtue of a reservation in the title deeds of the land in terms of the Cradock Proclamation. The diggers at the river diggings realised that they had to maintain law and order and each of the river camps elected a governing committee. The Diggers Republic's Rules were the first regulations that were drawn up to regulate the digging of diamonds at the river diggings. Its purpose was to address the major concerns of the diggers at that time, like the number of claims that each digger could hold, the size of each claim and the requirement that claims had to be worked continuously for *bona fide* mining purposes, which resulted in the adoption of a principle which became known as the "jumping" system. The "jumping" system which provided that other diggers could acquire a claim which was not worked under certain circumstances, continued to feature in various forms in the mining legislation that was later adopted in respect of the diamond fields.¹⁸⁰

At the dry diggings, it appears that the *cuius est* solum principle was recognised in the sense that the first form of regulation of the searching or digging for diamonds, was

¹⁸⁰ See paras 4.2.1.1 and 4.3.1 below.

the *briefjes*, which the landowners of the farm Dutoitspan granted. This system was shortly replaced by the Dutoitspan Diggings Regulations which were drafted following an agreement between the new landowners of the farm Dutoitspan and an elected Diggers' Committee. These regulations also mainly addressed the concerns of the diggers at that time. The number of claims that could be worked by each digger was specified and provision was made for the payment of a monthly royalty to the landowner. Similar regulations were also adopted in respect of the other dry diggings. Although the landowners later consented to the searching for diamonds on their land, they did not have much choice but to allow the diggers on their land.

There was, with the exception of the 1871 OFS Diamond Fields Ordinance passed by the Government of the Orange Free State, no statutory intervention from the other Governments mainly as a result of the competing interests in the diamond fields. This all changed, following the proclamation of the diamond fields as a British territory, known as Griqualand West. As will be discussed in the next chapter, changes in the form of Government that exercised control in respect of the diamond fields, also resulted in changes to the diamond mining legislation. Furthermore, the form of land tenure, and in effect the common law mineral rights to diamonds, influenced the development of the right to mine diamonds. The proclamation of Griqualand West as a British territory was the beginning of a new chapter in the development of diamond mining legislation in South Africa.

Chapter 4 Griqualand West during the period 1871 to 1880

4.1 Introduction

In this chapter the diamond mining legislation that was enacted in Griqualand West from 1871 until the annexation thereof as part of the Cape Colony in 1880 is discussed. Sir Henry Barkly proclaimed the diamond fields as a British territory on 27 October 1871.¹⁸¹ The land comprising the diamond fields became known as Griqualand West and it included the dry diggings situated on the farms Dutoitspan, Bultfontein, Vooruitzicht and the river diggings along the Vaal River.¹⁸² Sir Henry Barkly was mandated, pending the annexation of Griqualand West as part of the British Colony, to adopt measures necessary for the administration of justice in Griqualand West, to maintain order among the diggers and inhabitants of Griqualand West and to collect revenue in respect of the diamond fields.¹⁸³ A number of proclamations and ordinances were passed in respect of Griqualand West during the period from 1871 until the annexation of Griqualand West in 1880.

The period after the proclamation of Griqualand West as a British territory in 1871 can from a diamond mining perspective be divided into three periods. Firstly, the period between 1871 and 1872 during which Griqualand West was under the control of Sir Barkly as Governor, and administered by three Commissioners.¹⁸⁴ Secondly, the period from 1873 until 1879 when Griqualand West was designated a Province and became

¹⁸¹ It is recorded in Griqualand West Proc 67 of 27 October 1871 (hereafter the 1871 GW Proclamation) that "at the request of Chief Waterboer", Sir Barkly proclaimed Nicholas Waterboer and the Griqua tribe to be British subjects and the area which is described therein as Griqualand West, as British territory. See Theal *History of South Africa* Vol IV 386-387; Beet *et al Knights of the shovel* 29-123. Griqualand West was annexed as part of the Cape Colony almost a decade later with the enactment of the *Griqualand West Annexation Act* 39 of 1877 on 15 October 1880. See para 4.4 below. According to Beet, Nicholas Waterboer was represented by a lawyer David Arnot, who he described as being "pro-British". Beet states that after Waterboer's claims to the diamond fields had been upheld by Lieutenant Keate, the British Government awarded Arnot with a life-long pension of £500 a year. Buchanan "Memorandum on the early legislation in diamond matters" para 5.

¹⁸² The boundaries of Griqualand West were defined in s 11 of the 1871 GW Proclamation. See Williams *Diamond Mines* Vol 1 180-181.

¹⁸³ Theal *History of South Africa* Vol IV 386-387.

¹⁸⁴ See para 4.2 below.

a British Crown Colony¹⁸⁵ and thirdly, the period after the annexation of Griqualand West as part of the Cape Colony in 1880.¹⁸⁶ During each of these periods, different legislative measures were adopted to regulate the searching for diamonds and the working of claims in Griqualand West, which are discussed below. In each of these diamond mining legislation, the form of land tenure formed an integral part of the development of the right to mine diamonds.

4.2 First period: The three Commissioners during 1871 and 1872

After the proclamation of Griqualand West as a British territory, Sir Barkly governed Griqualand West from Cape Town, the capital of the Cape Colony.¹⁸⁷ Griqualand West was in 1871 divided into three magisterial districts, Klipdrift, Pniel and Griqua Town.¹⁸⁸ Sir Barkly appointed three Commissioners to administer Griqualand West on his behalf, one for each of the three districts.¹⁸⁹

During the two years that Sir Barkly governed Griqualand West through the three Commissioners, approximately 74 proclamations were passed. Three of these proclamations were important from a diamond mining perspective. In the first, Griqualand West Proclamation 71 of 27 October 1871 (hereafter the 1871 GW Diggings Proclamation) provision was made for rules and regulations under which the search for diamonds or digging of claims within Griqualand West had to be carried out.¹⁹⁰ In

¹⁸⁵ During this period, Griqualand West was under the control of Lieutenant-General Southey, who was dismissed in 1875 and replaced by Major William Owen in 1875 as Administrator. Buchanan "Memorandum on the early legislation in diamond matters" para 6. See para 4.3 below.

¹⁸⁶ See para 4.4 below.

¹⁸⁷ Sir Barkly issued seven proclamations in respect of Griqualand West on 27 October 1871. In Griqualand West Proc 68 of 27 October 1871, he proclaimed that the laws and "usages" of the Cape Colony were deemed to be the laws of Griqualand West insofar as the laws were not inapplicable. In Griqualand West Proc 70 of 1871, provision was made for a High Court of Griqualand West pending the passing of a law to provide for the annexation of Griqualand West as part of the Cape Colony.

¹⁸⁸ Griqualand West Proc 69 of 27 October 1871.

¹⁸⁹ Griqualand West Proc 73 of 27 October 1871; Buchanan "Memorandum on the early legislation in diamond matters" para 5.

¹⁹⁰ See para 4.2.1 below. Buchanan "Memorandum on the early legislation in diamond matters" paras 5-6, states that initially no Government *Gazette* existed in Griqualand West. The early proclamations seemed to have been promulgated by the Commissioners themselves reading them out in the presence of the diggers at the different diamond fields.

the second, Griqualand West Proclamation 72 of 1871, which was also passed on 27 October 1871, provision was made for the acknowledgement of existing private rights or titles to possess movable or immovable property which had been *bona fide* acquired by the inhabitants of Griqualand West. This proclamation became known as the "Quieting Proclamation" (hereafter the 1871 GW Quieting Proclamation).¹⁹¹ In the third, Griqualand West Proclamation 59 of 7 November 1872 (hereafter the 1872 GW Prospecting Proclamation) provision was made for regulations for the payment of licences for prospecting on private property.¹⁹²

Each of these three proclamations impacted on the development of the right to mine diamonds in Griqualand West and they are discussed in the following subsections.

4.2.1 The 1871 GW Diggings Proclamation

The 1871 GW Diggings Proclamation was adopted to regulate the working of claims to extract diamonds once a diamond field had been proclaimed. Its purpose was thus to regulate the working of claims after the diamonds had already been discovered and a diamond field proclaimed. The prospecting or searching for diamonds was not regulated under the 1871 GW Diggings Proclamation. The 1871 GW Diggings Proclamation referred to the "searching" for diamonds in the context of the working or digging of claims in proclaimed diamond fields.

4.2.1.1 The working of claims

Each diamond field proclaimed under the 1871 GW Diggings Proclamation was divided into different claims.¹⁹³ Every person who wanted to work a claim had to obtain a digging licence.

¹⁹¹ See para 4.2.2 below.

¹⁹² See para 4.2.3 below.

¹⁹³ Section 19 of the 1871 GW Diggings Proclamation provided that the size of each claim was 30 feet by 30 feet or 900 square feet. An Inspector was in terms of s 5 of the 1871 GW Diggings Proclamation appointed for each diamond field with duties and powers as set out in the 1871 GW Diggings Proclamation. The Inspector of each proclaimed diamond field had to mark out, with pegs,

There was no statutory reservation of the rights to diamonds in favour of the British Crown or the Government of the Cape Colony during the period that Griqualand West was administered by the three Commissioners between 1871 and 1872 under the control of Sir Barkly. The question as to who was entitled to work claims (where diamonds had already been discovered) depended on the specific form of land tenure.

Three types of land tenure were acknowledged in the 1871 GW Diggings Proclamation. These three forms are firstly, Crown land, secondly, private land, the title of which was subject to the reservation of rights to diamonds, presumably in favour of the British Crown (hereafter in this chapter referred to as reserved private land)¹⁹⁴ and thirdly, private land without any such reservation in the title deed of the land (hereafter in this chapter referred to as unreserved private land). The 1871 GW Diggings Proclamation did not provide definitions for these different types of land tenure.

In the case of the discovery of diamonds on Crown land or reserved private land, the High Commissioner was entitled to proclaim, by public advertisement, a diamond field on the Crown land or reserved private land. In the case of the proclamation of a diamond field on reserved private land, the consent of the relevant landowner was not required for the proclamation of a diamond field, although certain measures were adopted in an attempt to accommodate the landowner.¹⁹⁵ In the case of Crown land and reserved private land, the Crown could, by granting digging licences to members of the public determine and regulate who was entitled to dig for diamonds.

In the case of the discovery of diamonds on unreserved private land, the consent of the landowner was required before a diamond field could be proclaimed on the

the boundaries of the different claims in the diamond fields. The Inspector was in terms of ss 2-5 of the 1871 GW Diggings Proclamation obliged to keep a register of claims within the relevant diamond field and to receive licence money or royalty or rent payable for the right to search for or to dig diamonds within the relevant diamond field.

¹⁹⁴ Section 23 of the 1871 GW Diggings Proclamation referred to: "The private property of any person, the title to which lands (sic) is or shall be subject in the original grant thereof to a reservation of the right to precious stones or minerals."

¹⁹⁵ See para 4.2.1.2 below. Sections 1 and 23 of the 1871 GW Diggings Proclamation provided that a diamond field could be proclaimed in respect of existing diggings and new diggings.

unreserved private land.¹⁹⁶ Section 29 of the 1871 GW Diggings Proclamation provided that a digging situated on unreserved private land was deemed to be a public diamond field, which could be proclaimed as such, provided firstly, that the landowner consented to the establishment of diamond diggings on his property and secondly, that the landowner granted at least 24 claim licences to work claims on his land, or he must have granted licences to search diamonds on his land over a total surface of at least 20 000 square feet.¹⁹⁷ In the case of unreserved private land, the right to search for diamonds or to mine diamonds vested with the landowner, who was in terms of the *cuius est solum* principle also the holder of the rights to diamonds.¹⁹⁸

Every claimholder had to pay a royalty or rent. In the case of Crown land and reserved private land, the sum of licence monies, royalties or rent that the holder of a digging licence had to pay was prescribed.¹⁹⁹ In the case of unreserved private land, the landowner had to determine the licence money, rent or royalty payable for each claim. The Civil Commissioner had to collect the monthly payments to be made by the diggers in respect of diamond fields proclaimed on unreserved private land and account to the relevant landholder, withholding one-tenth of the money recovered and any costs incurred for the establishment and maintenance of the land on which the diamond field was situated.²⁰⁰ The diggers at each digging could establish a Diggers' Committee who could adapt rules or by-laws which had to be adopted at a public meeting called by the Inspector. The rules or by-laws, including those rules and by-laws that had previously been adopted in respect of existing diggings, had to be sent to the Civil

¹⁹⁶ Section 29 of the 1871 GW Diggings Proclamation.

¹⁹⁷ Section 29 of the 1871 GW Diggings Proclamation.

¹⁹⁸ See fn 11 above.

¹⁹⁹ Section 20 of the 1871 GW Diggings Proclamation provided that with regard to claims that were worked by no more than three people, an amount of five shillings per month was payable. Where a claim was worked by not more than six persons, an amount of ten shillings per month was payable. Thereafter, for every additional person employed by the claimholder, an amount of two shillings per month was payable.

²⁰⁰ Section 29 of the 1871 GW Diggings Proclamation. The maximum amount which a landowner could charge was later in terms of the 1872 GW Prospecting Proclamation fixed at one pound per month. See para 4.2.3.1 below.

Commissioner for approval.²⁰¹ There was no provision in the 1871 GW Diggings Proclamation that prescribed the number of claims that each claimholder could hold.²⁰²

Claimholders could transfer their claims provided that the Inspector had registered the transfer of the claims and that all licence money, royalty, or rent and registration fees due and payable had been paid in respect of the relevant claim.²⁰³ The so-called "jumping" system that previously applied at the river diggings was continued.²⁰⁴ The "jumping" system provided that diggers had to work their claims continuously, which

²⁰¹ Section 14 of the 1871 GW Diggings Proclamation. Rules or by-laws that were in conflict with substantial justice and reason or with any of the provisions in the 1871 GW Diggings Proclamation could in terms of s 15 of the 1871 GW Diggings Proclamation not be approved. The interests of landowners of reserved private land were in terms of s 23 of the 1871 GW Diggings Proclamation protected in that no rules or by-laws passed at any public meeting, which limited the amount of compensation payable to the landowner, were valid unless the relevant landowner consented thereto. Landowners of unreserved land were similarly protected in that s 29 of the 1871 GW Diggings Proclamation provided that no rules or by-laws that were passed at a public meeting, affecting or interfering with the landowner's property rights or defining the compensation to be paid were binding on any landowner without his consent. According to Newbury *Diamond Ring* 15, the previous regulations that applied at the river diggings and the dry diggings, such as the Diggers Republic's Rules and the Dutoitspan Diggings Regulations, were disallowed by the officials.

²⁰² According to Worger *City of Diamonds* 16-17, the diggers could only hold two claims pursuant to the 1871 GW Mining Proclamation. See also Davenport *Colonial Mining Policy* 52. No support for these statements could be found in the 1871 GW Diggings Proclamation. The reference to a prohibition on the number of claims appears to be a reference to the rules and regulations adopted by the Diggers' Committee in respect of the farm Vooruitzicht in 1871 (hereafter the 1871 Vooruitzicht Rules). Rule 13 of the 1871 Vooruitzicht Rules provided that no person was entitled to hold more than two claims at one time. Rule 14 of the 1871 Vooruitzicht Rules provided that no licence to dig for diamonds on the farm Vooruitzicht could be granted to a so-called "native". The rules and regulations adopted by the Diggers' Committees in respect of the farms Bultfontein and Dutoitspan in 1873 (hereafter the 1873 Dutoitspan and Bultfontein Rules) provided in rule 19 that no person was entitled to hold more than five claims. There was no prohibition in these rules on the holding of claims based on a person's race. Rule 21 of the 1873 Dutoitspan and Bultfontein Rules provided that each person was entitled to a right of footway for all persons passing to and from any one claim to another. Rule 10 of the 1873 Dutoitspan and Bultfontein Rules, however, provided that the owner of any *briefje* claim in respect of the farm Dutoitspan (which was in the 1873 Dutoitspan and Bultfontein Rules still referred to as Dorstfontein) was entitled to hold and work his claim without having to pay any licence money, provided that such claim was registered in the Office of the Inspector of Claims and the boundaries thereof had to be marked out and defined by proper beacons within a period of one month from the promulgation of the 1873 Dutoitspan and Bultfontein Rules.

²⁰³ Sections 7 and 8 of the 1871 GW Diggings Proclamation. The Inspector was required to register every purchase or transfer of every claim in respect of the relevant diamond field. Every vendor or purchaser had to pay a registration fee of five shillings upon the registration of each purchase.

²⁰⁴ See para 3.2.2 above.

assisted in the uniform working of a pit.²⁰⁵ If a person failed *bona fide* to work a claim for eight days, his claim was forfeited.²⁰⁶

4.2.1.2 The interests of the landowner

Although a diamond field could be proclaimed on reserved private land without the consent of the landowner, certain measures were included in the 1871 GW Diggings Proclamation to protect the interests of the landowner. The High Commissioner first had to attempt to reach an agreement with the landowner of the reserved private land on the terms and conditions on which diamond diggings on the reserved private land could be worked or the terms on which diggers could search for diamonds on the reserved private land. If they could not reach an agreement, the High Commissioner could simply enter the reserved private land or cause such land to be entered, in order to take possession of the mines and the diamonds therein on behalf of the British Crown, provided that notice of the entry was given to the landowner.²⁰⁷ The landowner was entitled to reasonable compensation for all damage caused to the surface and soil of the land as a result of the diamond digging, mining and the searching for diamonds on his land. The amount that was payable for any damage to the surface and soil of the reserved private land had to be agreed to between the landowner and the High Commissioner within a period of three months.²⁰⁸ The landowner could also, instead of accepting compensation for damages, agree to sell his property to the High Commissioner.²⁰⁹

²⁰⁵ Turrell *Capital and Labour* 34-35.

²⁰⁶ Section 16 of the 1871 GW Diggings Proclamation. Section 16 of the 1871 GW Diggings Proclamation was later suspended. See para 4.3.1 below. According to Davenport *Colonial Mining Policy* 52, the 1871 GW Diggings Proclamation prevented the monopolisation of the diamond industry through the continued application of the "jumping system".

²⁰⁷ See *Union Government (Minister of Mines) v Thompson* 1919 AD 404 at 421 (hereafter the *Thompson case*).

²⁰⁸ Section 26 of the 1871 GW Diggings Proclamation provided that if they could not reach an agreement within three months, the dispute had to be referred to arbitration to determine the amount payable.

²⁰⁹ If the parties could not agree on the purchase price within three months, the dispute was in terms of s 28 of the 1871 GW Diggings Proclamation also referred to arbitration. The value of the diamonds existing on or under the land could in terms of ss 27 and 28 of the 1871 GW Diggings

4.2.2 The 1871 GW Quieting Proclamation

Although the 1871 GW Quieting Proclamation did not specifically refer to diamonds, it impacted on the searching for diamonds and on the working of diamond diggings in Griqualand West.²¹⁰ Sir Barkly declared in the 1871 GW Quieting Proclamation that existing private rights or titles to possess any movable or immovable property which had been *bona fide* acquired by inhabitants of Griqualand West under the laws of the State and Government under which they were previously living *de facto*, would not be invalidated or prejudicially affected.²¹¹

All persons that claimed any title or right of possession or any other right in land within Griqualand West, were requested to submit a written statement to the Civil Commissioner of the district in which such land was situated, setting out details of the claim and the nature of the rights claimed. The details of the rights and titles had to be recorded publicly.²¹² The 1871 GW Quieting Proclamation further provided that the existing titles of private persons would be duly respected and considered to be valid, if they would have been valid under the laws of the *de facto* Government under which the private persons holding them, were previously living.²¹³

Proclamation not be taken into account in determining the compensation payable for the purchase price of the land.

²¹⁰ See the *Giddy* case discussed in paras 4.3.2 and 6.2 below.

²¹¹ Dale *Mineral Rights* 353. It was recorded in the preamble of the 1871 GW Quieting Proclamation that the inhabitants of the Griqualand territory may have had doubts in particular regarding the status of land that they occupied, the sovereignty over which there had previously been a dispute between the Griqua Chief, Waterboer and the Governments of the Orange Free State and the *Zuid-Afrikaansche Republiek*. The Appellate Division held in *Botha v Minister of Lands* 1965 1 SA 728 (A) that the object of the 1871 GW Quieting Proclamation, was: "to quiet the apprehension of inhabitants of the new British Territory with regard to the existing titles to their land, 'especially those occupying lands' which had been affected by the Keate Award."

²¹² Section 1 of the 1871 GW Quieting Proclamation.

²¹³ Section 2 of the 1871 GW Quieting Proclamation. The confirmation or the cancellation of titles claimed by grant or other document from the Government of the Orange Free State or the Government of the *Zuid-Afrikaansche Republiek* in Griqualand West after 1 January 1870, was specifically reserved. Section 3 of the 1871 GW Quieting Proclamation provided that each case would be investigated by Sir Barkly and that the relevant title deed would either be cancelled or confirmed or confirmed subject to certain conditions.

The real impact of the 1871 GW Quieting Proclamation became clear a few years later. A special Land Court was established in Griqualand West through the *Griqualand West Ordinance* 3 of 1875 dated 9 September 1875²¹⁴ to adjudicate on land claims in Griqualand West, which then had the status of a province. Judgments or decrees of the Land Court were provisional for a period of three months to provide aggrieved parties with an opportunity to appeal to the High Court of Griqualand West. After the lapsing of the period of three months, application could be made to the Land Court to obtain a final judgment, if an appeal had not been noted.²¹⁵ Any person who obtained a final order would be entitled to demand and receive a title from the Governor with regard to the land that formed the subject of the judgment in accordance with the terms of the judgment.²¹⁶

²¹⁴ The title of which was *Ordinance to establish a court to adjudicate on claims to land in the Province of Griqualand West* (hereafter the 1875 GW Land Court Ordinance). Buchanan "Memorandum on the early legislation in diamond matters" para 25.

²¹⁵ This requirement was dispensed with in 1876 with the adoption of the *Amendment of Land Court Ordinance* 13 of 1876 of 13 October 1876, which provided that a provisional judgment granted by the Land Court became final upon the expiration of three months in every case where an appeal was not noted within the three month period.

²¹⁶ Section 10 of the 1875 GW Land Court Ordinance. In *London and South African Exploration Company Limited v Kimberley Divisional Council* 1884 3 HCG 125 (hereafter the *Kimberley Divisional Council* case) the landowners of the farm Alexanderfontein, situated in the Kimberley district, instituted an action against the Kimberley Divisional Council for trespassing on their farm. The plaintiffs argued that they owned the farm Alexanderfontein by virtue of a grant from the Government of the Orange Free State. The Kimberley Divisional Council erected a toll-house and other buildings on the farm and pleaded that with effect from the date of proclamation of the 1871 GW Proclamation on 27 October 1871 (providing for the proclamation of Griqualand West as a British Territory) the farm Alexanderfontein vested in the British Crown. The farm Alexanderfontein had originally been granted to its first owners by the Government of the Orange Free State in 1862 on perpetual *quitrent*, subject to certain conditions which were registered against the title of the land, including the following: "That all roads passing over this land, or which may hereafter be made upon lawful authority, shall remain free and unencumbered ... that the said land shall be further subject to all such duties and regulations as already are or may in future be established concerning lands granted upon the like condition." The farm Alexanderfontein was included in the area that was in 1871 proclaimed as a British territory known as Griqualand West. In 1876, the London and South African Exploration Company Limited's title was confirmed by the Land Court of Griqualand West. No new title was issued to the owners of the farm. The High Court of Griqualand West held that it was clear from the 1871 GW Quieting Proclamation, that the effect of 1871 GW Proclamation was not to transfer the *dominium* in the farm Alexanderfontein to the British Crown, but to acknowledge and confirm the rights of persons that claimed any title or right of possession in movable or immovable property. The Court held further that the farm was held under a title from the Government of the Orange Free State, without the conditions in favour of the British Crown reserved in Colonial *quitrent* titles which existed under the Cradock Proclamation. The

In *Carter v Van Niekerk and Union Government (Minister of Lands)*²¹⁷ the landowner of a farm riparian to the Vaal River instituted an action against Van Niekerk, a digger (operating under a digger licence) who had dug for and extracted diamonds from the half of the river bed adjoining the owner's farm, which the owner argued formed part of his land. In 1863 the then President of the Orange Free State granted the farm in question to Carter's predecessors in title. The predecessors in title applied to the Land Court in terms of the 1875 GW Land Court Ordinance and obtained judgment on 19 June 1876 in which it was confirmed that the law of the Orange Free State applied to the land.²¹⁸ The previous owners who obtained judgment in the Land Court did nothing further with regard to the judgment. Approximately four years later on 15 July 1880 the Governor, without waiting for a demand or request from the landowners, proceeded to issue and register a title in respect of the land. The following condition was included in the title deed of 15 July 1880:

That the issue of this title without any express reservation to the Government of its rights to all precious stones, gold or silver found on or under the surface of the land shall in no degree prejudice the position of the said Government in regard to the same.

Chief Justice Maasdorp remarked that the title was issued in the form of a new and original grant in perpetual *quitrent* without the reservation to the landowners of their rights under their "Free State title" or under the judgment of the Land Court and with

Kimberley Divisional Council therefore had no right to enter the plaintiff's land and to erect the toll-house and buildings thereon. The Court concluded that the plaintiff was protected by the Orange Free State title against the invasions of their proprietary rights which rights had to be protected as provided for in the 1871 GW Quieting Proclamation. On appeal, the Kimberley Divisional Council argued that the Cradock Proclamation became applicable to the farm Alexanderfontein by operation of law when Griqualand West was annexed to the Cape Colony in 1880. In *Kimberley Divisional Council v London and South African Exploration Council Limited* 1885-1906 2 Buch 84 (hereafter the *Kimberley Divisional Appeal* case), Chief Justice De Villiers dismissed the appeal and held that s 4 of the Cradock Proclamation did not apply to *quitrent* land in the Cape Colony, unless the grant of the land contained such a reservation. See also the *De Villiers* case 57.

²¹⁷ 1910-1917 GWLD 445 (hereafter the *Carter* case).

²¹⁸ Chief Justice Maasdorp recorded at 459 that: "The reasons which influenced the Judge of the Land Court in giving his judgment in favour of the claimants of farms under Free State titles were put in the course of the evidence of the witness... and are to the following effect... 'I must hold, under Ordinance 72, 1871, that the rights of the Free State claimants to the farms Scholtzfontein, Waterbak, and other farms must be judged of as if those farms lay in the Free State and were subject to Free State law.'"

the addition of the clause regarding the reservation of precious stones, which did not form part of their original title or the judgment.²¹⁹ The landowner argued that as the owner of the land he was also the owner of all diamonds, gold and silver on and under the surface of the land in question.²²⁰ The defendants' defence was that the clause that was inserted into the title deed constituted an express reservation of the rights to all diamonds found on the relevant farm in favour of the Government.²²¹ Chief Justice Maasdorp, however, held that the Government could not reserve to itself what it had not already possessed. He held that in the case of an original *quitrent* grant of unalienated Crown land, the Government was entitled to reserve to itself as much of the ownership of such Crown land and of the rights attaching to the land as it wanted to, but it could not reserve to itself what belonged to the owner of the land that had already been alienated.²²² Prior to the issue of the grant of 15 July 1880, the owner's predecessors in title were entitled to receive a grant confirming the perpetual *quitrent* from the Orange Free State with all the rights attaching thereto – the Government of the Orange Free State would not have been entitled to claim the ownership in such precious stones and the Government of Griqualand West similarly had no such right.²²³

Van Niekerk and the Union Government appealed to the Appellate Division,²²⁴ but Innes CJ dismissed the appeal and stated that the farm never belonged to the Government of Griqualand West. The land in question was private property at the date of annexation of Griqualand West as part of the Cape Colony and it remained private property thereafter.²²⁵ The Appellate Division referred to the decision in the *Giddy* case²²⁶ in which it was decided that a precisely similar grant made by the Government of the Orange Free State, conveyed not mere *emphyteutic* rights, but the ownership

²¹⁹ At 460.

²²⁰ At 460. This is in accordance with the *cuius est solum* principle. See para 2.1 above.

²²¹ At 466.

²²² At 466.

²²³ At 467.

²²⁴ *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359 (hereafter the *Carter Appeal* case).

²²⁵ At 372.

²²⁶ See paras 4.3.2 and 6.2 below.

of the soil, including the diamonds and minerals which it contained. The Appellate Division held that the grant initiated by the Governor in 1880 had to be interpreted as conferring the same mineral rights as the Orange Free State title for which it was substituted. Innes CJ stated in regard to the term "perpetual *quitrent*":²²⁷

That was a term in general use in South Africa to describe a tenure, the incidents of which might greatly vary. Upon the common law meaning it is not necessary to dilate; but that meaning had been fundamentally modified in different localities. In the Cape it had become a form of ownership governed first by Sir John Cradock's Proclamation (1813), and thereafter by the provisions of Act 14 of 1878. In the Free State it had evolved into a tenure which, as decided by the Privy Council, gave the minerals to the owner. By Griqualand West Ordinance 3 of 1874 certain statutory incidents were assigned to it, which included a reservation of precious stones, gold and silver to the Crown. But that measure regulated the disposal of unalienated or waste lands; it was not intended to apply and could not apply to grants issued in terms of the quieting proclamation in substitution for Free State titles.²²⁸

The Appellate Division also referred to the position with regard to other farms along the Vaal River which had been originally held under Free State title and stated that the Cape Government was for a long time willing to rectify titles which purported to reserve mineral rights to the Crown. After the annexation of the Griqualand West as part of the Cape Colony, the Cape Government in an attempt to rectify the position, began to issue "clean titles", which clearly gave the minerals in the land to the landowner in exchange for titles that either reserved them to the Crown or purported to be without prejudice to any rights the Crown possessed. This practice was, however, discontinued after the Government had issued 75 "clean titles."²²⁹

²²⁷ At 379.

²²⁸ See fn 268 below for a discussion of *Griqualand West Ordinance* 3 of 1874.

²²⁹ A Bill was introduced into the Cape Parliament by the Government to delete from the title deeds of all properties originally held under Free State title any conditions referring to the mineral rights of the Crown. The Bill was never enacted and in the *Carter Appeal* case 382, Innes CJ remarked as follows in regard to the failure to remove the conditions from the title deeds: "There are, it would seem, certain titles of the Free State farms still in existence which contain an express reservation of minerals in favour of the Crown. It is clear now that those minerals did not belong to the Crown, and that clean titles should have been issued in such cases. I venture to think that the fitting course for the Union Government to take is to divest itself of rights which it could only have reserved under a mistaken view of the law; and by legislation or otherwise to take steps to restore such rights to those entitled to them."

4.2.3 The 1872 GW Prospecting Proclamation

There was prior to the issue of the 1872 GW Prospecting Proclamation no statutory provision in Griqualand West, which regulated the prospecting or searching for diamonds in respect of land that had not already been proclaimed as a diamond field. Before the commencement of the 1872 GW Prospecting Proclamation, a person who wanted to prospect on land that belonged to another person where no diamond field had been proclaimed, had to require the consent of the landowner.

The position was amended with the proclamation of the 1872 GW Prospecting Proclamation, but only in respect of private property.²³⁰ The purpose of the 1872 GW Prospecting Proclamation was twofold. It firstly provided regulations for the payment of licences for prospecting on private property for precious stones, gold or silver. Secondly, it determined the rate of digging licences on such parts of the private property that had not previously been proclaimed as a public diamond field.²³¹ The term "private property" was not defined in the 1872 GW Prospecting Proclamation. There was no qualification that the term "private property" referred only to reserved private land.²³² The consequence was that unreserved private land²³³ was included and regulated under the 1872 GW Prospecting Proclamation.²³⁴

With reference to its first objective, section 1 of the 1872 GW Prospecting Proclamation provided that the Civil Commissioner of any district within which private property was situated, would be entitled to issue a prospecting licence, authorising the holder

²³⁰ On 7 November 1872, two of the three Commissioners issued the 1872 GW Prospecting Proclamation.

²³¹ See para 4.2.3.2 below for a discussion of the royalties that the landowner of unreserved private land could charge.

²³² Referred to in this chapter as private land, the title deed of which was subject to the reservation of the rights to diamonds in favour of the Crown.

²³³ Referred to in this chapter as privately owned land, the title of which did not contain a reservation of the right to diamonds in favour of the Crown or anyone else.

²³⁴ Section 8 of the 1872 GW Prospecting Proclamation.

thereof to prospect for the period of one month on any part of the relevant private property that was not a proclaimed diamond field.²³⁵

There was no reference in the 1872 GW Prospecting Proclamation to the fact that any of the provisions of the 1871 GW Diggings Proclamation was repealed. It is submitted that a person who wanted to prospect for diamonds on unreserved private land, would only have been entitled to obtain a prospecting licence regarding such land, if it is with the consent of the landowner. It is not clear why a landowner of unreserved private land would have been obliged to allow the holder of a prospecting licence to prospect for diamonds on his land, if the landowner could not be forced to consent to the establishment of diggings on his land.²³⁶

In the case of reserved private land, the consent of the landowner was not required to obtain a prospecting licence and the landowner could not exclude prospectors from his land.²³⁷

4.2.3.1 Rights and obligations of the prospector

Any person who found any diamonds, gold or silver, while prospecting under a prospecting licence was obliged to report the finding to the Civil Commissioner of the district.²³⁸ The discoverer who found diamonds while working under a prospecting licence was entitled to the free grant of two claims of 30 square feet each, at the place

²³⁵ The licence fees payable in respect of each prospecting licence, were prescribed in s 2 of the 1872 GW Prospecting Proclamation. In the case of a party of not more than three persons, an amount of one pound sterling was payable for a monthly licence. In the case of a party of more than three and not more than ten persons, an amount of two pounds sterling was payable. In the case of a party of more than ten persons, an amount of four shillings was payable for every person above ten, in addition to the two pounds sterling.

²³⁶ This appears to be the correct interpretation, years later with the issue of Griqualand West Proc 8 of 1880 dated 30 September 1880, it was noted in the prescribed form for a prospecting licence, that the consent of the landowner of unreserved private land was required in order to prospect on unreserved private land. See para 4.4.2.1 below.

²³⁷ *Thompson* case 421.

²³⁸ Section 3 of the 1872 GW Prospecting Proclamation. Failure to report a finding would upon conviction before a magistrate result in the forfeiture of the prospecting licence and to the payment of a fine not exceeding 20 pounds sterling and in the event of default of payment, to imprisonment with or without hard labour for any period not exceeding three months.

where the diamonds had been discovered.²³⁹ The 1872 GW Prospecting Proclamation did not apply in respect of Crown land. Thus, a person who found diamonds on Crown land was not entitled to the rights of a discoverer as provided in section 6 of the 1872 GW Prospecting Proclamation. It is submitted that in the case of unreserved private land, the discoverer would only be entitled to be granted the two claims, if the landowner consented to the establishment of diamond diggings on his land under the 1871 GW Diggings Proclamation. The previous position that applied under the 1871 GW Diggings Proclamation in terms of which the landowner was entitled to determine the rate at which digging licences would be issued,²⁴⁰ was amended with the proclamation of the 1872 GW Prospecting Proclamation. The maximum amount payable for digging licences as the landowner of unreserved private land determined, was fixed at one pound per month.²⁴¹ No provision was made for the renewal of prospecting licences granted in terms of the 1872 GW Prospecting Proclamation.

4.2.3.2 Interests of the landowner

Certain measures were adopted to protect the interests of landowners. An applicant for a prospecting licence was obliged to provide security for payment of 20 pounds sterling in the form agreed to by the Civil Commissioner, to indemnify the landowner against any surface damage resulting from the prospecting operations.²⁴² The holder of the prospecting licence was also not entitled to search for diamonds within a distance of 100 yards of any house or building that the landowner or occupier of the land used, without the consent of such landowner or occupier.²⁴³ Prospecting on any land under cultivation was also prohibited unless the landowner or occupier consented

²³⁹ Section 6 of the 1872 GW Prospecting Proclamation. Previously at the river diggings, the Diggers Republic's Rules provided that the discoverer was entitled to be awarded four claims. See para 3.2.2 above.

²⁴⁰ Section 29 of the 1871 GW Diggings Proclamation.

²⁴¹ Section 8 of the 1872 GW Prospecting Proclamation. The amounts payable to the landowner were also subject to the withholding of charges for the Government's expenses.

²⁴² Section 5 of the 1872 GW Prospecting Proclamation.

²⁴³ Section 7 of the 1872 GW Prospecting Proclamation.

thereto.²⁴⁴ These measures did not apply in the case of prospecting for diamonds on Crown land. There were also no similar restrictions in respect of the working of claims on proclaimed diamond fields.

4.2.4 Diamond fields on Vooruitzigt, Dutoitspan and Bultfontein

By the end of 1871, the diggings known as De Beers, Kimberley, Bultfontein and Dutoitspan were divided into approximately 3200 full claims and many of them were further subdivided.²⁴⁵ They were situated on private land and there was no reservation of the rights to diamonds in favour of any Government or the Crown in the title deeds of the land on which the mines were situated.²⁴⁶ On 17 November 1871, two of the local Commissioners issued three proclamations establishing diamond fields on the farms Vooruitzigt,²⁴⁷ Dutoitspan²⁴⁸ and Bultfontein.²⁴⁹ It was recorded in the preambles of all three proclamations that the titles of all three farms were not subject to the reservation of minerals and precious stones in favour of the Crown. Thus, for the purposes of this chapter, they were unreserved private land.²⁵⁰

²⁴⁴ Section 7 of the 1872 GW Prospecting Proclamation. Prospecting without a prospecting licence was in terms of s 4 of the 1872 GW Prospecting Proclamation punishable by a fine not exceeding 20 pounds sterling and in the event of default of payment, to imprisonment with or without hard labour, for any period not exceeding one month.

²⁴⁵ Davenport *Colonial Mining Policy* 52.

²⁴⁶ *Beaconsfield Municipality v London and South African Exploration Company Limited* 1884 3 HCG 183; *London and SA Exploration Company v Bultfontein Mining Board* 1888-1889 6 SC 201 at 212 (hereafter the *Bultfontein Mining Board* case).

²⁴⁷ Griqualand West Proc 30 of 17 November 1871. This proclamation was later repealed in terms of *Griqualand West Ordinance* 5 of 1874. See para 4.3.2 below.

²⁴⁸ Griqualand West Proc 31 of 17 November 1871. This proclamation was later repealed in terms of *Griqualand West Ordinance* 5 of 1874. See para 4.3.2 below.

²⁴⁹ Griqualand West Proc 32 of 17 November 1871. This proclamation was later repealed in terms of *Griqualand West Ordinance* 5 of 1874. See para 4.3.2 below.

²⁵⁰ The appointed local Commissioners further issued proclamations under the 1871 GW Diggings Proclamation, in which they made provision for the establishment of diamond fields on a number of portions of Crown land. In Griqualand West Proc 33 of 1871 dated 28 November 1871, diamond fields were established on Crown lands at Pniel, Webster's *Kopje*, Cawoods' Hope and Blue Jacket in the District of Kimberley. On the same day, Griqualand West Proc 34 of 1871 was issued, establishing diamond fields on Crown lands at Hebron, Good Hope, Bad Hope, Gong Gong, Union *Kopje*, Keiskamma, Forlorn Hope, Esterhuizen's Rush, Winter's Rush and Delport's Hope in the Barkly District. Griqualand West Proc 35 of 8 December 1871 established diamond fields on Crown lands at Longland's Rush, in respect of the area between Winter's Rush and Delport's Hope in the Barkly District. Griqualand West Proc 39 of 1872 dated 10 January 1872 was issued to establish

4.3 Second period: Griqualand West designated as a Province (1873 to 1879)

The three Commissioners were not successful in governing Griqualand West. They were situated in the different districts of Klipdrift, Pniel and Griqua Town which made uniform government difficult. They often held different and conflicting views on matters and were faced with numerous challenges, at the centre of which were the technological and operational problems that the diggers faced and with which legislation did not keep up.²⁵¹

Circumstances at the diggings in Griqualand West deteriorated. Allowing diggers to own individual claims, permitted the diggers to remove the soil within each claim at their own time, which often resulted in ground slides between adjoining claims, as not all diggers worked their claims at the same rate.²⁵² It became evident that amalgamation of the claims was the solution, not only to prevent ground slides, but

diamond fields on Crown land between Upper Klipdrift and Good Hope. Griqualand West Proc 53 of 4 September 1872 established a diamond field at Waldek's Plant.

²⁵¹ Davenport *Colonial Mining Policy* 52; The Commissioners sometimes made irrational decisions, in Griqualand West Proc 47 of 23 July 1872, the Commissioners proclaimed that all digging licences held by so-called natives and coloured people were ordered to be suspended and they imposed restrictions on the renewal of such licences. The proclamation was issued, following complaints of theft and serious riots. This proclamation was cancelled by Sir Barkly on 10 August 1872.

²⁵² Turrell *Capital and Labour* 11-12 describes the method of diamond digging in Griqualand West during those early years as follows: "... digging was conducted on a damaging, haphazard basis. Soil taken out of a claim was sorted on an adjacent one; water was struck after 40 feet and so each hole was filled in and another one begun. Dutoitspan was so badly worked, wrote one official, 'that there are not 10 full claims worked to a depth of 40 feet, although it has been worked for 18 months longer than Colesberg Kopje [Kimberley Mine] and there is not an average depth of 10 feet.' Sorting inside the mine obstructed digging as debris mounds were left upon productive soil. In an attempt to encourage diggers to take soil out of the mines, a central road, running across the pits, was left intact in Bultfontein and Dutoitspan, while in Kimberley Mine a road system was adopted on a grand scale. Across the pit from north to south 14 roads were laid. Each claim surrendered seven and a half feet along one side and backed with its adjacent claim made roads 15 feet in width. The soil was hauled out of the claims in buckets, loaded on to waiting carts or wheel barrows on the roadways and then taken out of the pit to diggers' encampments for sorting. But the roadway system could not last. Diggers undermined the roadways in their search for diamonds and by April 1872 the system had developed into a death trap." See also Davenport *Colonial Mining Policy* 53. In regard to the duty of a claimholder to work his claim with reasonable diligence, see *Murtha v Von Beek* 1880-1884 1 Buch AC 121; *Reed v De Beers Consolidated Mines Limited* 9 1892 Juta (SC) 33; The *Rouliot* case 74 and Dale *Mineral Rights* 301, 334.

also to reduce the rising costs of diamond digging.²⁵³ The "jumping" system which provided that claims of diggers who failed to work their claims continuously and *bona fide* for purposes of extracting diamonds could be "jumped" by other diggers, was regarded as the main opposition to the consolidation of the claims.²⁵⁴

The diggers at Griqualand West were furthermore concerned that the main focus of the Government of the Cape Colony was on the farming industry and that laws adapted for agriculture such as those of Cape Town and the rest of the Cape Colony, were not suitable for the mining community of Griqualand West. They desired a representative government situated in Griqualand West.²⁵⁵

On 30 November 1872, Sir Barkly cancelled the appointment of the three local Commissioners²⁵⁶ and he appointed Richard Southey as administrator with full authority to govern Griqualand West on his behalf.²⁵⁷ Six months later, Sir Barkly declared that the territory of Griqualand West would be designated the Province of

²⁵³ The price of diamonds also reduced as a result of the large number of diamonds found, which in turn, flooded the European market. See Worger *City of Diamonds* 21; Davenport *Colonial Mining Policy* 52-54. The amalgamation of the diamond claims is discussed in para 5.2 below.

²⁵⁴ William Hall, who was regarded as a monopolist and who was the owner of the first steam engine on the diamond fields stated the following in his written submission to the 1873 Diamond Fields Commission: "the benefits to the community is the same whether the claims are owned by one man or a hundred. To restrain the investment of capital in the mine would be injurious to the present holders of ground, opposed to advancement and be adopting principles that are far behind the age and have always failed. It would also drive all our most intelligent and enterprising men from our midst and would be a permanent injury to a new state like this. By restricting what a man may acquire an end is put to all progress which is the very soul of a new country. If a man is only to hold two claims why not prevent him from holding more than two farms or two houses or two stores or two carts, in fact, if 'individual levelling' is going to be adopted we had better at once call ourselves 'Chartists' or 'Fenians' or 'Communists' or the latest improvement 'Internationalists' and redivide the claims in Colesberg Kopje' [Kimberley Mine] every month." Turrell *Capital and Labour* 35.

²⁵⁵ It was still not an appropriate time for the Government of the Cape Colony to annex Griqualand West as part of the Cape Colony. A bill for the annexation of Griqualand West was passed on 18 April 1872 by the Government of the Cape Colony. The bill was withdrawn without putting it to the vote. This was because there was a dispute between the members of Parliament as to whether Griqualand West should be annexed as part of the Cape Colony. Some members of Parliament supported the Government of the Orange Free State's claim to Griqualand West and they were in favour of a united South Africa. They feared that the annexation of Griqualand West would result in hostility from the Government of the Orange Free State. Theal *History of South Africa* Vol IV 389-401.

²⁵⁶ By Griqualand West Proc 75 of 30 November 1872.

²⁵⁷ By Griqualand West Proc 76 of 30 November 1872.

Griqualand West. He also proclaimed Richard Southey as the Lieutenant-General of Griqualand West.²⁵⁸ In the first few months, following the appointment of Richard Southey first as administrator and thereafter as Lieutenant-General, he had to rule by proclamation as no constitution for Griqualand West had been drawn up.²⁵⁹

4.3.1 *Suspension of the "jumping" system*

Southey issued two of the very first proclamations just after his appointment as Administrator of Griqualand West, which dealt with the mining of diamonds. In the first, Griqualand West Proclamation 2 of 31 January 1873, he suspended the operation of sections 11 and 16 of the 1871 GW Diggings Proclamation until 15 March 1873.²⁶⁰ Roberts²⁶¹ states that, although the majority of the diggers supported the suspension of the "jumping" system, it was one of the very first indications of the direction in which Southey wanted the diamond diggings to move, namely to destroy the authority of the Diamond Diggers' Committees. Southey viewed the "jumping" system as part of the rules emanating from the Diggers' Committees, which prevented capitalist enterprise.²⁶²

²⁵⁸ By Griqualand West Proc 21 of 5 July 1873.

²⁵⁹ This was contrary to previous promises made by Sir Barkly to the diggers, that Griqualand West would have a representative Government. Meredith *Diamonds, Gold and War* 33, 41-42; Roberts *Kimberley* 115 -119.

²⁶⁰ Section 11 of the 1871 GW Diggings Proclamation provided that where a person became disentitled to a claim, the Inspector could grant the claim to any other person who applied for such claim, provided that the licence fee was paid. Section 16 of the 1871 GW Diggings Proclamation provided for the "jumping" system and stated that if the holder of a claim failed to *bona fide* work a claim for eight days, it was deemed that the holder was disentitled to the claim. Southey hereafter continued to issue proclamations providing for the suspension of ss 11 and 16 of the 1871 GW Diggings Proclamation until January 1874. Southey suspended the provisions of ss 11 and 16 of the 1871 GW Diggings Proclamation by means of Griqualand West Proc 6 of 12 March 1873 until 15 May 1873. Griqualand West Proc 15 of 12 May 1873 suspended ss 11 and 16 until 15 June 1873. Griqualand West Proc 18 of 12 June 1873 suspended ss 11 and 16 until 15 July 1873 and thereafter the sections were by Griqualand West Proc of 11 July 1873 suspended until 15 August 1873. Griqualand West Proc 27 of 13 August 1873 suspended ss 11 and 16 until 15 September 1873. Griqualand West Proc 30 of 13 September 1873 suspended ss 11 and 16 until 31 December 1873. Griqualand West Proc 37 of 12 December 1873 suspended ss 11 and 16 until 31 January 1874.

²⁶¹ Roberts *Kimberley* 113.

²⁶² Roberts *Kimberley* 112-113 describes Southey's views as follows: "In his view the Diggers' Committees were both dangerous and subversive. He openly admitted to his 'object of curbing or getting rid of the Diggers Committees' and establishing the blow, Southey then announced his

In the second, Griqualand West Proclamation 5 of 26 February 1873, Southey appointed a Commission to report to him on the status of the diamond fields at Colesberg *Kopje*, De Beers, Dutoitspan and Bultfontein, together with the regulations under which the diamond fields were being worked. The Commission was also instructed to recommend future measures for their management.²⁶³ In 1873, the Commission concluded that the "jumping" system did not ensure or contribute to the uniform working of a pit. They, however, realised that the "jumping" system should be retained in one form or another to avoid that a small number of diggers dominate the diggings. The Commission recommended that the "jumping" system be amended to provide that the forfeited claims could only be auctioned after a notice of demand had been given.²⁶⁴

The diggers insisted that an election be held and that a representative government for Griqualand West be elected.²⁶⁵ Contrary to the previous promises of Sir Barkly, that

intention to set up a commission to 'determine more definitely what officers or bodies should be entrusted with the control of matters' on the diamond fields. Five prominent diggers, including leading members of the Diggers' Committees, were appointed to the commission. This was to be the first step towards establishing Mining Boards. Significantly the commission was headed by J.B. Currey." According to Roberts, Currey also disliked the Diggers Committees, he regarded them as a mob rule with their main purpose to destroy the privileges of the affluent miners. Currey was shortly thereafter appointed as Government Secretary to assist Lieutenant-General Southey.

²⁶³ Roberts *Kimberley* 112-113.

²⁶⁴ Turrell *Capital and Labour* 34-35; "Diamond Fields Commission Report of June 1873."

²⁶⁵ The diggers insisted that an election be held and that a representative government for Griqualand West be elected. The British Secretary for the British Colonies, Lord Kimberley, insisted that before electoral divisions could be defined, the areas should receive decent and intelligible names. According to Roberts *Kimberley* 115 -119, Lord Kimberley – "declined to be in any way connected with such a vulgarism as New Rush and for Vooruitzicht ... he could neither spell or pronounce it. Klipdrift and Griquatown were not much better and he requested that English speaking names might be given to the Districts round the Mining Camps." Lord Kimberley's request was passed on to Southey, who handed it to Currey. Sir Barkly issued Griqualand West Proc 22 of 1873 dated 5 July 1873 to make provisions for the change of names and towns within Griqualand West. The proclamation was divided into three electoral divisions, Kimberley, Barkly and Hay. The name of the previous district of Pniel was changed to the district of Kimberley, in honour of Lord Kimberley. The encampment previously known as Colesberg Kopje or the New Rush, was called the town of Kimberley. The name of the previous district of Klipdrift was changed to the district of Barkly, in honour of the Governor Sir Barkly and it included the diggings along the Harts River and the Vaal River. The name of the town of Klipdrift was changed to Barkly. The name of the district of Griquatown was changed to the district of Hay, partly in memory of a Scottish town that Currey had known in his youth and partly in honour of the previous acting Governor of the Cape Colony-Doughty *Early Diamond Days* 97; Theal *History of South Africa* Vol IV 409.

Griqualand West would have a representative government, the Legislative Council of the Province of Griqualand West comprised of eight members, of which only four members would be elected, two from the district of Kimberley and one each from the districts of Barkly and Hay. The Government of Griqualand West would nominate the remaining four members. Southey was left with a casting vote and had the power to veto legislation. The Legislative Council of Griqualand West met for the first time on 30 December 1873.²⁶⁶

The Province of Griqualand West passed its first ordinance, *Griqualand West Ordinance* 1 of 1874 on 30 January 1874, in which the recommendations of the Commission were adopted.²⁶⁷ *Griqualand West Ordinance* 1 of 1874 provided for the suspension of section 11 of the 1871 GW Diggings Proclamation insofar as it provided that the Inspector of Claims was obliged to grant licences for forfeited claims or to put up such claims to public auction. It was stated in the preamble that *Griqualand West Ordinance* 1 of 1874 was passed, pending the passing of an ordinance for the better management of mines and diggings in Griqualand West. Section 16 of the 1871 GW Diggings Proclamation which provided for the "jumping" system, was not suspended with the result that claims would have lapsed if the holder thereof ceased *bona fide* to work the claims for a period of eight days.²⁶⁸

²⁶⁶ Meredith *Diamonds, Gold and War* 33, 41-42. According to Roberts, Southey was imposing his own authority on the diamond mining community, which impacted negatively on the independence of the diggers.

²⁶⁷ *Griqualand West Ordinance* 1 of 1874 took effect on 9 May 1874.

²⁶⁸ The Legislative Council of the Province of Griqualand West adopted *Griqualand West Ordinance* 3 of 1874 on 26 February 1874, to provide for the leasing of Crown land and for the purchase thereof (hereafter the 1874 GW Crown Land Ordinance). Sections 1-4 of the 1874 GW Crown Land Ordinance provided that the Governor of the Province of Griqualand West could by public auction, let certain "waste" Crown Lands for a period not exceeding 21 years, subject to conditions imposed by the Governor and agreed to by the lessee and subject to the payment of an annual rental. Section 5 of the 1874 GW Crown Land Ordinance specifically reserved the rights to all minerals and precious stones found in the leased areas to the Crown. A lessee could furthermore in terms of s 6 of the 1874 GW Crown Land Ordinance, at any time during the duration of the lease, convert the leasehold to perpetual *quitrent* tenure, at such price as may be agreed to between the lessee and the Governor. The conversion of the leasehold to perpetual *quitrent*, was *inter alia* subject to the following conditions - Firstly, the purchaser, in addition to the payment of a purchase price, had to pay in perpetuity, an annual *quitrent* of two pounds sterling for every 100 pounds or fraction of 100 pounds, on the purchase price. Secondly, the purchaser was on payment of the purchase price,

4.3.2 Public diamond fields on Vooruitzigt, Dutoitspan and Bultfontein

Almost three years after the proclamation of diamond fields on the farms Vooruitzigt, Dutoitspan and Bultfontein, the Legislative Council of the Province of Griqualand West passed *Griqualand West Ordinance* 5 of 1874 on 11 March 1874 to make provision for the repeal of the three earlier Proclamations establishing diamond fields on the privately owned farms Vooruitzigt, Dutoitspan and Bultfontein.²⁶⁹ It was recorded in the preamble of *Ordinance* 5 of 1874 that doubts had arisen as to whether the three earlier Proclamations²⁷⁰ had been duly and lawfully promulgated and further that the Government of the Griqualand West Province had been advised that the titles to the farms Vooruitzigt, Bultfontein and Dutoitspan were indeed subject to reservations of minerals and precious stones in favour of the Crown.²⁷¹ Two months later, seven areas situated within the District of Kimberley, were proclaimed as public diamond fields by virtue of Griqualand West Proclamation 6 of 4 May 1874. These areas included the farms Vooruitzigt, Dutoitspan and Bultfontein.²⁷² The effect of the latter proclamations was that the landowners of these farms were no longer entitled to receive any rental or royalties in terms of section 29 of the 1871 GW Diggings Proclamation.²⁷³

entitled to require a grant of perpetual *quitrent* title to the land previously held by him under lease. The land held under perpetual *quitrent* title was also subject to the reservation of precious stones and of gold and silver found therein, in favour of the Crown.

²⁶⁹ See para 4.2.4 above.

²⁷⁰ Griqualand West Proc 30 of 17 November 1871, Griqualand West Proc 31 of 17 November 1871 and Griqualand West Proc 32 of 17 November 1871. See *Cape of Good Hope Report of the Commissioners on the working and management of the diamond mines of Griqualand West of 1882* para 32; See para 4.2.4 above.

²⁷¹ Section 2 of *Griqualand West Ordinance* 5 of 1874 provided that the Governor of the Griqualand West Province could with the advice of the Executive Council proclaim such areas throughout the province as may be necessary, to be public diamond fields in accordance with the 1871 GW Diggings Proclamation.

²⁷² The first three areas were situated on the farm Vooruitzigt, the fourth and sixth on the farm Bultfontein, the fifth on the farm Dutoitspan. A seventh area was proclaimed on the farm Alexanderfontein.

²⁷³ See para 4.2.1.2 above. *Griqualand West Ordinance* 5 of 1874 was later disallowed by Queen Victoria of England in terms of Cape Government Notice 35 of 5 April 1875. The legality of the mining areas that were constituted pursuant to *Griqualand West Ordinance* 5 of 1874 were later doubted as a result of the disallowance of *Griqualand West Ordinance* 5 of 1874. *Griqualand West Ordinance* 21 of 1880 dated 24 September 1880 was later passed to confirm the legality of the first

The proprietary status of the farms Vooruitzicht, Dutoitspan and Bultfontein, later came under scrutiny in a number of cases before the High Court of Griqualand West.²⁷⁴ In the *Giddy* case, the agent (Webb) of the landowner of the farm Dutoitspan instituted action against the Government on 5 November 1875 for the payment of all licence monies, royalties or rents collected by the Government from 17 November 1871 in respect of the diggings situated on the farm Dutoitspan and for an account of the amount, which the Government retained to defray the public expenditure for the maintenance of order and good government at the farm Dutoitspan. The Government (represented by Giddy, one of the Commissioners appointed in respect of Griqualand West) pleaded that the farm Dutoitspan was held under perpetual *quitrent* and that it was therefore subject to a reservation of precious stones and minerals to the State as *dominus directus* of the soil and that all rights that formerly vested in the Government of the Orange Free State were vested in the British Crown. The Government further contended that all payments which had been made to the landowners in terms of section 29 of the 1871 GW Diggings Proclamation, had been made in error. It was common cause that the Government of the Orange Free State had previously granted the farm Dutoitspan to its first owner and that the following condition was contained in the initial grant:

That the said land will further be subject to all conditions and regulations as are already, or may in future, be fixed, referring to lands granted on the same conditions; and, lastly that the owner shall be bound to the prompt payment of a yearly quitrent of the sum of £1.10s sterling.

The Privy Council agreed with the judgment of the High Court of Griqualand West in which it was held that the landowner of the farm Dutoitspan was entitled to receive a portion of the licence fees as provided for in section 29 of the 1871 GW Diggings

three mining areas situated on the farm Vooruitzicht. *Griqualand West Ordinance* 21 of 1880 was confirmed by Queen Victoria in terms of Cape Government Notice 33 of 10 January 1881.

²⁷⁴ In *London and South African Exploration Co Limited v Trustees of Isaacs Co* 1884 3 HCG 174, the High Court of Griqualand West accepted that the farm Dutoitspan was a privately owned farm and that the title deed of the land contained no reservation of the rights to diamonds in favour of the Crown. See also *Bultfontein Mining Board v Armstrong* 1890-1892 6 HCG 57, in relation to the farm Bultfontein.

Proclamation. On 13 May 1874, the Legislative Council of the Province of Griqualand West adopted *Griqualand West Ordinance* 10 of 1874 (hereafter the *1874 GW Mining Ordinance*)²⁷⁵ empowering the Governor of the Province of Griqualand West, to make rules and regulations for the management of diggings and mines within the Province of Griqualand West²⁷⁶ and to demand the payment of a prescribed sum of money from persons digging or mining for precious stones or minerals within the province.²⁷⁷

4.3.3 1874 GW Mining Ordinance

General rules and regulations for the management of diggings and mines were included in a schedule to the 1874 GW Mining Ordinance and applied until the cancellation or amendment thereof.²⁷⁸ The schedule included rules regulating the prospecting for diamonds and the working of established and new diggings and further provided for the conversion of a digging to a mine. The 1874 GW Mining Ordinance was the first legislation in which the working of alluvial diggings and the mining of diamonds were separately regulated.

The 1874 GW Mining Ordinance repealed the 1871 GW Diggings Proclamation and all other legal enactments which may be repugnant or inconsistent with any of the provisions of the Ordinance.²⁷⁹ Section 4 of the 1874 GW Mining Ordinance provided as follows:

All and singular the provisions of the Proclamation of His Excellency Sir Henry Barkly, K.C.B., No 71 (No. 5) of the 27th of October, 1871, and of any other Proclamations, Government Notices, or other legal enactments, which may be repugnant to or inconsistent with any of the provisions of this Ordinance or of any Rules and Regulations now or hereafter to be enacted by the Legislature of this Province for the management of Diggings and Mines, or for regulating the searching for precious stones and metals, shall and the same hereby are cancelled and repealed.

²⁷⁵ The 1874 GW Mining Ordinance was published in the Griqualand West Government *Gazette* of 4 June 1874 and was confirmed by Queen Victoria in terms of Cape Government Notice 35 of 1875.

²⁷⁶ Section 1 of the 1874 GW Mining Ordinance; *Bank of Africa v Kimberley Mining Board* 1884 3 HCG 371 at 395 (hereafter the *Bank of Africa* case).

²⁷⁷ Section 3 of the 1874 GW Mining Ordinance.

²⁷⁸ Section 5 of the 1874 GW Mining Ordinance.

²⁷⁹ Section 4 of the 1874 GW Mining Ordinance.

There are two possible interpretations of section 4 of the 1874 GW Mining Ordinance. The first is that the whole of the 1871 GW Diggings Proclamation was repealed. The second, which appears to be the correct interpretation, is that only those provisions that were inconsistent with the 1874 GW Mining Ordinance and its rules and regulations were repealed. The whole of the 1874 GW Mining Ordinance was only repealed on 27 September 1883, with the commencement of the *Precious Stones and Minerals Mining Act* 19 of 1883.²⁸⁰

There was no statutory reservation of the rights to diamonds in favour of the British Crown or the Government of the Cape Colony in the 1874 GW Mining Ordinance. The question as to who was entitled to prospect for diamonds or to work claims in diggings or to mine for diamonds continued to depend on the specific form of land tenure. The rules and regulations contained in a schedule to the 1874 GW Mining Ordinance only applied in respect of Crown land and reserved private land and not in respect of unreserved private land.²⁸¹

4.3.3.1 Rights and obligations of a prospector

Any person that wanted to prospect for diamonds²⁸² on Crown land or reserved private land²⁸³ first had to register as a miner and had to take out a prospecting licence at the

²⁸⁰ Section 1 read with the first schedule of the *Precious Stones and Minerals Mining Act* 19 of 1883. See para 5.3 below. Furthermore, s 9 of Griqualand West Proc 8 of 1880 dated 30 September 1880, specifically referred to ss 23-28 of the 1871 GW Diggings Proclamation insofar as it was still applicable. See also *London and South African Exploration Company Limited v Dutoitspan Mining Board* 1883 2 HCG 154; *London and SA Exploration Co v Murphy* 1886-1887 4 HCG 322 at 330 (hereafter the *Murphy* case); *Bultfontein Mining Board* case 217.

²⁸¹ The preamble of the schedule to the 1874 GW Mining Ordinance provided that it contained: "General Rules and Regulations for the management of Diggings and Mines of Precious Stones and Minerals on Crown Lands, or on Private Properties in which the Precious Stones and Minerals belong to the Crown, in the Province of Griqualand West."

²⁸² Item 1 of s 7 of the schedule to the 1874 GW Mining Ordinance referred to "precious stones or minerals."

²⁸³ Referred to in this chapter as privately owned land, the title of which contained a reservation of the right to diamonds in favour of the Government.

office of the Civil Commissioner.²⁸⁴ The 1874 GW Mining Ordinance did not apply to prospecting for diamonds on unreserved private land and it is submitted that the 1871 GW Diggings Proclamation read with the 1872 GW Prospecting Proclamation continued to apply in respect of the prospecting for diamonds on unreserved private land.²⁸⁵

The discoverer, who discovered the diamonds under a prospecting licence, was entitled first to select and to mark off the ground for his two claims.²⁸⁶ The claims had to be measured and numbered, boundary lines determined and a plan prepared. Notice was then given of a specific day, on which claims would be allocated to certificated miners.²⁸⁷ Once at least two-thirds of the claims applied for, had been allocated and registered, the Inspector or Overseer had to define the reserved areas outside the claims which the miners could use in addition for mining purposes.²⁸⁸

4.3.3.2 Rights and obligations of a claimholder and miner

In the case of the discovery of a new digging,²⁸⁹ on Crown land or on reserved private land, the Inspector or Overseer²⁹⁰ had to attend at the specific area for the purpose of registering the claim. After the expiration of six months from the date of proclamation of a new digging, all new diggings were deemed to be established diggings.²⁹¹ There was no definition of "established diggings" in the 1874 GW Mining Ordinance or in the

²⁸⁴ Item 1 of s 7 of the schedule to the 1874 GW Mining Ordinance referred to a "certificated miner." The certificated miner had to pay a monthly licence fee of one pound for a party of not more than one miner and two servants. Item 2 of s 7 of the schedule to the 1874 GW Mining Ordinance provided that a fee of ten shillings a month was payable for every additional miner and five shillings for every additional servant.

²⁸⁵ See paras 4.2.1 and 4.2.3 above.

²⁸⁶ Item 4 of s 3 read with item 5 of s 7 of the schedule to the 1874 GW Mining Ordinance. Every claim had to be 30 square feet. The size of the claims could be amended by proclamation or by-laws, adopted in respect of the digging. See Item 19 of s 1 of the schedule to the 1874 GW Mining Ordinance.

²⁸⁷ Item 5 of s 3 of the schedule to the 1874 GW Mining Ordinance.

²⁸⁸ Item 6 of s 3 of the schedule to the 1874 GW Mining Ordinance.

²⁸⁹ The term "new diggings" was described in item 1 of s 3 of the schedule to the 1874 GW Mining Ordinance, as diggings that were proclaimed as such after the promulgation of the 1874 GW Mining Ordinance.

²⁹⁰ Item 1 of s 2 of the schedule to the 1874 GW Mining Ordinance provided that the Governor could appoint such Inspectors or Overseers of claims as he deemed necessary for all diggings.

²⁹¹ Item 1 of s 4 of the schedule to the 1874 GW Mining Ordinance.

schedule thereto. There were also no transitional provisions to confirm that diggings, which were proclaimed in Griqualand West under the 1871 GW Diggings Proclamation on Crown land and on reserved private land, would be established diggings as contemplated in section 4 of the schedule to the 1874 GW Mining Ordinance.²⁹²

The 1874 GW Mining Ordinance further provided for the conversion of a digging into a mine.²⁹³ Once a digging is declared to be a mine, the Governor had to appoint a Registrar and Engineer or Surveyor for such mine.²⁹⁴ In the case of the conversion of a digging to a mine, the Governor had to request all claimholders in the mine, by notice in the *Gazette* to elect a Mining Board.²⁹⁵ Each Mining Board was entitled to determine the rate which miners had to pay yearly, quarterly or monthly in respect of each claim.²⁹⁶

²⁹² Item 7 of s 3 of the schedule to the 1874 GW Mining Ordinance provided that at every digging where there were more than 50 registered claimholders, the claimholders were entitled, after submitting an application signed by at least two-thirds of the total number of claimholders to the Government, to elect a Diggers' Committee consisting of not less than five and not more than nine members. The Diggers' Committee had to make by-laws for such digging, which had to be approved by the Governor and had to be published in the *Gazette*. In the event that the diggers failed to elect a Diggers' Committee or where the elected Diggers' Committee failed to make by-laws, item 8 of s 3 of the schedule to the 1874 GW Mining Ordinance provided that the Inspector of Claims for such digging, could make by-laws for the digging, which came into effect once approved by the Governor and published in the *Gazette*.

²⁹³ Item 1 of s 5 of the schedule to the 1874 GW Mining Ordinance.

²⁹⁴ Item 2 of s 5 of the schedule to the 1874 GW Mining Ordinance. Item 4 of s 5 of the schedule to the 1874 GW Mining Ordinance provided that the Engineer or Surveyor had the sole and entire control of the mining areas for which he was appointed. Miners were in terms of item 12 of s 1 of the schedule to the 1874 GW Mining Ordinance obliged to comply with orders issued by qualified officers for the safe and proper working of the diggings or mines or by-laws drafted in respect of the diggings or mine. The Inspector or Engineer could in terms of item 24 of s 1 of the schedule to the 1874 GW Mining Ordinance issue a written notice to a miner to cease digging or to cease his mining operations. He could also compel the miner to perform certain specific work or prohibit the use of a machine, engine or appliance for raising or removing rock, soil or water in a digging or mine.

²⁹⁵ The Mining Board had to comprise of nine members who had to be re-elected every year. Once a Mining Board had been elected, item 2 of s 5 of the schedule to the 1874 GW Mining Ordinance provided that the powers, duties and functions of the Diggers' Committee ceased to exist. Each Mining Board had to draft its own by-laws for the management of the mine for which it was elected. Item 8 of s 6 of the schedule to the 1874 GW Mining Ordinance provided that the by-laws came into effect on the date of proclamation in the *Gazette* and were subject to the approval of both the Governor and the Executive Council for the Griqualand West Province.

²⁹⁶ The rate determined by the Mining Board had to be approved by the Governor and the Executive Council. Each claimholder had to pay the fee within 30 days after the payment became due, failing

Every person of good character and older than 16 years, was entitled to obtain a miner's certificate from the Resident Magistrate for the relevant district.²⁹⁷ During the first six months following the proclamation of a new digging, each miner was only entitled to hold one claim, which could not be transferred during the first three months.²⁹⁸ If a claim was unregistered or unworked for a period of seven days, excluding a Sunday or a public holiday, the Inspector or Overseer would then declare the claim abandoned, unless the holder of the claim had obtained a certificate of reservation from the Inspector or Overseer.²⁹⁹ Any other certificated miner could apply in writing to have the claim registered in his name.³⁰⁰ If there was at any time during the first six months that a digging was proclaimed, less than 12 registered claimholders, the diggings could be closed by proclamation after notice of at least one month was given to this effect.³⁰¹

which it was deemed that the claim was abandoned. Item 9 of s 6 of the schedule to the 1874 GW Mining Ordinance provided that the claimholders had to pay the licence fees to the Registrar of the particular mine, who in turn accounted to the Treasurer of the Griqualand West Province. The Treasurer paid the amounts to the Mining Board on submission of vouchers from the Engineer or Surveyor of the Mine. Item 10 of s 6 of the schedule to the 1874 GW Mining Ordinance provided that the Mining Board had to apply the money for public purposes of the mine as determined by the Engineer or Surveyor of the relevant mine and agreed to by the Minister Board or as determined in the by-laws. There was no prohibition on the content of the by-laws that could be adopted by the Digger's Committees or Mining Boards, with reference to the status of a *quitrent* tenant or lessee. See the *Bank of Africa* case in relation to the functions and powers of a Mining Board and Dale *Mineral Rights* 219.

²⁹⁷ Item 1 of s 1 of the schedule to the 1874 GW Mining Ordinance. The Resident Magistrate could in terms of item 2 of s 1 of the schedule to the 1874 GW Mining Ordinance require the applicant for a miner's certificate, to produce two competent witnesses to the character of the applicant.

²⁹⁸ Item 9 of s 3 of the schedule to the 1874 GW Mining Ordinance. The holder of a prospecting licence who could prove to the satisfaction of the Resident Magistrate that he had found any diamonds, gold or silver under the prospecting licence, was entitled to two claims during the first six months. Item 5 of s 7 of the schedule to the 1874 GW Mining Ordinance.

²⁹⁹ If more than one certificated miner applied for such claim, the claim was sold by public auction. Item 10 of s 3 of the schedule to the 1874 GW Mining Ordinance.

³⁰⁰ Claims were not forfeited if the holder thereof obtained a certificate of reservation from the Inspector or Overseer on the grounds of sickness, necessary absence or other sufficient cause. A certificate of reservation could not be issued for a period of more than 20 working days. A Saturday was regarded as a working day. Item 11 of s 3 of the schedule to the 1874 GW Mining Ordinance. If a certificated miner who took up a claim, failed to register the claim within a period of ten days, the claim would also be declared abandoned and any other certificated miner could apply to have an abandoned claim registered in his name. Items 4 and 7 of s 3 of the schedule to the 1874 GW Mining Ordinance.

³⁰¹ Item 4 of s 3 of the schedule to the 1874 GW Mining Ordinance.

A miner was entitled to the free and undisturbed possession of the claims registered in his name. All claims were issued subject to a servitude of not more than seven feet six inches on one side of each claim for purposes of a roadway.³⁰² The Government was entitled to expropriate a larger portion of a claim, if it required the use thereof for public purposes, subject to the payment of compensation to the holder of the claim.³⁰³ Every claim had to be worked by the claimholder or an agent who was duly authorised in writing to work the claim on behalf of the claimholder and who had to be a certificated miner.³⁰⁴

Claims could be registered for periods of at least one month but not exceeding 12 months.³⁰⁵ Claims could not be held in the name of a firm or joint-stock company and had to be registered in the name of the firm's or joint-stock company's duly accredited agent, who had to be a certificated miner.³⁰⁶ Each person, firm or joint-stock company (through its accredited agent) could hold a maximum of ten full claims in the aggregate at any digging.³⁰⁷ This provided for limited amalgamation of claims but also protected the individual diggers from complete monopolisation.³⁰⁸ The holder of a claim in a digging was entitled to transfer or hypothecate his claim and every transfer of

³⁰² Item 14 of s 3 of the schedule to the 1874 GW Mining Ordinance.

³⁰³ Item 12 of s 1 of the schedule to the 1874 GW Mining Ordinance.

³⁰⁴ Item 22 of s 1 of the schedule to the 1874 GW Mining Ordinance.

³⁰⁵ Item 15 of s 1 of the schedule to the 1874 GW Mining Ordinance. See Dale *Mineral Rights* 342. In the *Murphy* case, the holder of a claim who had given up physical control of his claims, was held liable as he was registered as the owner of the claims.

³⁰⁶ Item 9 of s 1 of the schedule to the 1874 GW Mining Ordinance. See Dale *Mineral Rights* 341.

³⁰⁷ Item 18 of s 1 of the schedule to the 1874 Mining Ordinance. This restriction was later repealed by *Griqualand West Ordinance* No 12 of 1876 dated 20 November 1876.

³⁰⁸ Davenport *Colonial Mining Policy* 56-57. The provisions that applied in respect of diggings regarding the number of claims that could be held by claimholders (item 18 of s 1 of the schedule to the 1874 GW Mining Ordinance) the transfer of claims (item 16 of s 1 of the schedule to the 1874 GW Mining Ordinance) the subdivision of claims (item 36 of s 1 of the schedule to the 1874 GW Mining Ordinance) or the re-amalgamation of claims (item 37 of s 1 of the schedule to the 1874 GW Mining Ordinance) and the hypothecation of claims (item 16 of s 1 of the schedule to the 1874 GW Mining Ordinance) applied similarly in the case of mines.

hypothecation had to be registered.³⁰⁹ Miners were entitled to subdivide their claims and to re-amalgamate their subdivided portions.³¹⁰

Provision was made for the reservation of an area outside each claim for depositing ground, sifting or sorting soil and for machinery and staging. Each miner was obliged to remove any stone, rubbish or other matter which he deposited in the reserved area and failure to do so could result in penalties.³¹¹ It was recognised that it was necessary for each claimholder to have access to an area on which the diamondiferous ground could be spread out.

4.3.3.3 Interests of the quitrent tenant or lessee

As stated above, a person who wanted to prospect for diamonds on Crown land and on reserved private land had to obtain a prospecting licence.³¹² There was no requirement that the consent of the owner of reserved private land had to be obtained for the granting of the prospecting licence.³¹³ The owner of reserved private land was referred to as a *quitrent* tenant and the word "owner" was used in the schedule to the 1874 GW Mining Ordinance to refer to the owner of a claim and not to the owner of the land.³¹⁴

The interests of a *quitrent* tenant³¹⁵ or lessee were protected in that the certificated miner who applied for a prospecting licence in respect of Crown land or reserved private land, had to take out a bond for the sum of £100, with two sureties which the Civil Commissioner had to approve in the sum of £50 pounds each for the proper repair

³⁰⁹ Item 16 of s 1 of the schedule to the 1874 GW Mining Ordinance. Prior to the proclamation of the 1874 GW Mining Ordinance, there was no provision for the hypothecation of claims. See *SA Loan Mortgage and Mercantile Agency v Cape of Good Hope Bank and Littlejohn* 1888-1889 6 SC 163 (hereafter the *Littlejohn* case).

³¹⁰ Items 36 and 37 of s 1 of the schedule to the 1874 GW Mining Ordinance.

³¹¹ Item 30 read with item 26 of s 1 of the schedule to the 1874 GW Mining Ordinance.

³¹² See para 4.3.3.1 above.

³¹³ The position was similar under the 1872 GW Prospecting Proclamation, with the exception that unreserved private land was also regulated under the 1872 GW Prospecting Proclamation, but Crown land was excluded. See para 4.2.3 above.

³¹⁴ See item 12 of s 1 of the schedule to the 1874 GW Mining Ordinance.

³¹⁵ The reference to a *quitrent* tenant, was a reference to the owner of reserved private land.

of any surface damage done on any land or right occupied by any quitrent tenant or lessee.³¹⁶ If the holder of a prospecting licence found any diamonds while prospecting under the prospecting licence, he was obliged forthwith to report the finding to the Civil Commissioner.³¹⁷ The discoverer of the diamonds was entitled to two claims at the place where such diamonds, gold or silver had been found.³¹⁸

4.3.4 Conversion of the diggings on Vooruitzicht and Dutoitspan to mines

On 2 June 1874, Richard Southey issued Griqualand West Proclamation 7 of 1874 in terms of the schedule to the 1874 GW Mining Ordinance to convert the diggings known as "Colesberg *Kopje*" or "De Beer's New Rush" to a mine, to be known as the Kimberley Mine.³¹⁹ The diggings known as "Old De Beer's" or "*Kopje* No 1" were converted to a mine known as the De Beers Mine. The diggings on the farm Dutoitspan were converted to a mine known as the "Dutoitspan Mine". It is submitted that the *de facto* status of the diggings known as Colesberg *Kopje*, Old De Beer's and Dutoitspan, was that they were situated on unreserved private land and therefore not subject to the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance. They were, however, *de jure* according to *Griqualand West Proclamation 7 of 1874*, which was issued a few days after the commencement of the 1874 GW Mining Ordinance³²⁰ proclaimed as public diamond fields.³²¹

³¹⁶ Item 3 of s 7 of the schedule to the 1874 GW Mining Ordinance. The holder of a prospecting licence was in terms of s 5 of the 1872 GW Prospecting Proclamation only required to provide security in the sum of £ 20. See para 4.2.3.2 above.

³¹⁷ Item 4 of s 7 of the schedule to the 1874 GW Mining Ordinance.

³¹⁸ Item 5 of s 7 of the schedule to the 1874 GW Mining Ordinance. The position was similar under s 6 of the 1872 GW Prospecting Proclamation. The discoverer of diamonds on unreserved private land, was in terms of s 6 of the 1872 Prospecting Proclamation also entitled to the free grant of two claims at the place where the diamonds had been discovered. See para 4.2.3.1 above.

³¹⁹ In the *Littlejohn* case the Supreme Court of the Cape of Good Hope simply accepted that the land on which the Kimberley Mine was situated, was Crown land. Griqualand West Proclamation 7 of 1874 was repealed more than a century later in terms of the *Pre-Union Statute Law Revision Act 36 of 1976* (hereafter the Pre-Union Statute Law Act). Welsh 1976 *Annual Survey of South Africa Law* 227.

³²⁰ On 13 May 1874.

³²¹ See para 4.3.2 above. The Bultfontein diggings were later proclaimed as a diamond mine in terms of *Griqualand West Proclamations* 201 of 1881 and 210 of 1882. See *Bultfontein Mining Board v Armstrong and the London and South Africa Exploration Co* 1890-1891 8 SC 236 at 243.

4.3.5 *Griqualand West Ordinance 15 of 1879*

The claimholders of the claims in the Dutoitspan Mine and the Bultfontein Diggings denied that the general rules and regulations contained in the schedule to the 1874 GW Mining Ordinance applied to the Dutoitspan Mine and the Bultfontein Diggings. They accordingly refused to pay the rates levied by the Mining Board for the Dutoitspan Mine and the Inspector of Claims at the Bultfontein Diggings. They also refused to obey any orders from Inspectors.³²² It is submitted that this view was correct, because the purpose of the rules and regulations of the schedule to the 1874 GW Mining Ordinance was to manage diggings and mines of precious stones on Crown lands and on reserved private land in the Province of Griqualand West and not on unreserved private land.³²³

Griqualand West Ordinance 15 of 1897 dated 26 November 1879 was enacted, wherein certain of the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance, relating to Mining Boards and the duties of the Engineer or Surveyor at a mine or the Inspector or Overseer at a digging, were made applicable to the Dutoitspan Mine and the Bultfontein Diggings, in so far as they did not conflict with any private rights.³²⁴

4.3.6 *The end of the Southey administration*

The majority of claimholders in Griqualand West were not satisfied with the provisions of the 1874 GW Mining Ordinance. According to Turrell,³²⁵ their main complaint was that the 1874 GW Mining Ordinance placed significant areas of diggings in the hands of an Engineer or Surveyor, who was responsible to the Government and not the newly elected Mining Boards. The claimholders wanted to be able to adjudicate claim disputes

³²² Preamble of *Griqualand West Ordinance 15 of 1879*.

³²³ Preamble of the schedule to the 1874 GW Mining Ordinance.

³²⁴ Section 1 of *Griqualand West Ordinance 15 of 1879*. See also *Goldschmidt & Co v Du Toit's Pan Mining Board* 1883 2 HCG 195 (hereafter the *Goldschmidt* case); *Queen v Town* 1884 3 HCG 143 (hereafter the *Queen* case).

³²⁵ Turrell *Capital and Labour* 58-59.

and to decide where machinery had to be placed, the rates to be levied and the money to be spent in respect of the mines. The claimholders were not satisfied with the powers of the Engineer, who could prohibit the working of a claim if he was of the view that it was dangerous to do so. There was also a lack of security of tenure. Claimholders of unreserved private land were in particular concerned that landowners of unreserved private land could increase the monthly licence fees payable with regard to the claims.³²⁶

There were complaints from the claimholders on the farm Vooruitzigt on which the De Beers Mine and the Kimberley Mine were situated.³²⁷ A syndicate from Port Elizabeth, represented by Alfred Ebdon, purchased the farm Vooruitzigt from the De Beer brothers. The new landowners of the farm Vooruitzigt were, however, not satisfied with the monthly rental that they received from claimholders working claims at the De Beers Mine and the Kimberley Mine. The new landowners gave notice that they were going to raise the monthly licence fee to ten pounds.³²⁸ This occurred while Griqualand West was under the control of Richard Southey. Southey refused to pay the landowner any money collected and in addition, demanded a refund of all the money paid to the landowners of the farm Vooruitzigt. A long legal battle ensued, which was finally resolved when the landowners of the farm Vooruitzigt agreed to sell the farm to the

³²⁶ It is submitted that this concern was not valid. The monthly licence fees which a landowner of unreserved private land could charge, was in terms of s 8 of the 1872 GW Prospecting Proclamation fixed at one pound per month. See para 4.2.3 above. See also Rotberg *The Founder* 80-81.

³²⁷ Turrell *Capital and Labour* 68. Chilvers *Story of De Beers* 27-28, describes the conditions at the diamond fields as follows: "Endless disputes arose. With the claims at so many different levels there were ceaseless falls of ground, encroachments and serious accidents. None had anticipated that diamonds would be found so far down. Diggers, syndicates and companies constantly amalgamated, not only to lessen their difficulties but also to be better able to purchase the more expensive equipment now required. The calamitous falls of reef, as the barren soft rock encircling the pipe on all sides is called, ruined many workers at Kimberley, De Beers, Bultfontein and Dutoitspan. Titles, too, seemed insecure, and there was much heart-burning about that. Added to this came the increasingly activity of diamond thieves."

³²⁸ This supports the submission that the *de facto* status of the De Beers Mine and the Kimberley mine was that they were situated on unreserved private land and that the provisions of s 29 of the 1871 GW Diggings Proclamation read with s 8 of the 1872 GW Prospecting Proclamation applied in respect thereof. See paras 4.2.1.2 and 4.2.3 above.

Government for £1000.³²⁹ The *Griqualand West Ordinance* 7 of 1875 was promulgated on 3 August 1875 to sanction the purchase of the farm Vooruitzigt by the Government of the Griqualand West Province. It was recorded in the preamble that it was expedient for public purposes that the Government acquire the farm Vooruitzigt. The terms and conditions for the purchase were set out in a schedule to *Griqualand West Ordinance* 7 of 1875.³³⁰

In 1875, the majority of claimholders in Griqualand West revolted against the administration of Richard Southey. It was necessary for British troops to be dispatched to Griqualand West, to disarm the rebels and to dissolve the rebellion, which became known as the "black flag rebellion."³³¹ Richard Southey was dismissed in 1875, following the black flag rebellion. Major William Owen Lanyon replaced him as Administrator.³³² A contributing factor for Southey's dismissal was the declining financial position of the Griqualand West Province.³³³ According to Worger,³³⁴ Southey had misconstrued his role in the administration of Griqualand West and he implemented the wrong form of diamond mining legislation.

³²⁹ Roberts *Kimberley* 122; See Turrell *Capital and Labour* 68-69; *Cape of Good Hope Report of the Commissioner on the working and management of the diamond mines of Griqualand West of 1882* para 33.

³³⁰ It was recorded in s 1 of the schedule to *Ordinance* 7 of 1875, that Alfred Ebdon ceded, assigned and made over all his rights, title, claims and interest in the farm Vooruitzigt, together with all documents minerals and property of every description in or upon the farm Vooruitzigt. See also Newbury *Diamond ring* 36-37; Lenzen *The History of Diamond Production and Diamond Trade* 145; *Cape of Good Hope Report of the Commissioner on the working and management of the diamond mines of Griqualand West of 1882* para 33; Buchanan "Memorandum on the early legislation in diamond matters" para 26.

³³¹ Davenport *Colonial Mining Policy* 59. The name of the rebellion was derived from an incident which triggered the rebellion, which was described by Roberts *Kimberley* 130 as follows: "At one o'clock in the afternoon of Saturday 15 August 1874, a horse-drawn van paraded solemnly through the streets of Kimberley. Seated in the van was a string band, above which fluttered a flag bearing the inscription 'the earth is the Lord's and the fullness thereof'. But what riveted the attention of most spectators was the pile of diggers' implements, ominously topped by a rifle, stacked at the foot of the flagstaff. The symbolism of the gun covering the mining equipment was unmistakable. Kimberley was being treated to its first whiff of organised revolution." See Roberts *The Diamond Magnates* 45.

³³² Currey, the Government Secretary, was also dismissed. Roberts *Kimberley* 130-140; Turrell *Capital and Labour* 73.

³³³ Roberts *Kimberley* 130-140; Turrell *Capital and Labour* 73.

³³⁴ Worger *City of Diamonds* 29.

Major Lanyon was instructed to clear the land problems of Griqualand West and to prepare the way for annexation of Griqualand West to the Cape Colony.³³⁵ Colonel Crossman was appointed to investigate Griqualand West's finances and the grievances that led to the black flag rebellion.³³⁶ Crossman began his enquiry and in January 1876 he reported on the financial position of Griqualand West.³³⁷ In May 1876 Crossman reported on the causes of the black flag rebellion.³³⁸ One of the recommendations he made was that the restriction of each claimholder to only hold ten claims,³³⁹ should be abolished and that provision should be made for the amalgamation of claims.³⁴⁰ Crossman was according to Worger,³⁴¹ influenced by the submissions of a mining engineer who held the view that the subdivision of the Kimberley Mine into quarters, eighths and sixteenths of claims, made profitable working of the mine impossible. The restriction of the number of claims that each person could hold, was abolished in *Griqualand West Ordinance* 12 of 20 November 1876.

4.4 Third period: The annexation of Griqualand West

The entire Province of Griqualand West was in terms of the *Griqualand West Annexation Act* 39 of 1877 annexed as part of the Cape Colony on 15 October 1880. Two of the legislative measures adopted during 1880, were important from a diamond mining perspective. The first is *Griqualand West Ordinance* 6 of 1880,³⁴² of 1 June 1880 to make provision for security of tenure in certain mines and diggings in Griqualand West (hereafter the 1880 GW Fixity of Tenure in Mines Ordinance). The

³³⁵ Major Lanyon presided over Griqualand West until 1878. He was succeeded by Sir Charles Warren in 1879, who in turn was succeeded by James Rose-Innes in 1880 before Griqualand West was annexed as part of the Cape Colony. Turrell *Capital and Labour* 73-74.

³³⁶ Turrell *Capital and Labour* 73.

³³⁷ "Preliminary Report by Lieutenant-Colonel Crossman on the Financial Condition of Griqualand West" Crossman found that the structure of the Government's administration at the diamond fields in Griqualand West, was too large and expensive for the community of Griqualand West. See Worger *City of Diamonds* 29-30.

³³⁸ "Report of Lieutenant-Colonel Crossman, R E, on the affairs of Griqualand West."

³³⁹ Item 18 of s 1 of the schedule to the 1874 Mining Ordinance. See para 4.3.3.2 above.

³⁴⁰ Turrell *Capital and Labour* 73.

³⁴¹ Worger *City of Diamonds* 30.

³⁴² Referred to in s 12 thereof as the "Fixity of Tenure (Mines and Diggings) Ordinance".

second is *Griqualand West Proclamation* 8 of 1880³⁴³ (hereafter the 1880 GW Mining Proclamation) which James Rose-Innes issued on 30 September 1880. Herein, he cancelled the general rules and regulations contained in the schedule to the 1874 GW Mining Ordinance and replaced them with a new set of rules and regulations for the working of mines on Crown land and on reserved private land.³⁴⁴

There was uncertainty as to whether the 1880 GW Mining Proclamation repealed and substituted the schedule to the 1874 GW Mining Ordinance. In *London and South African Exploration Company Limited v Dutoitspan Mining Board*,³⁴⁵ the High Court of Griqualand West held that:

With regard to the argument as to the effect of Proclamation 8 of 1880 on the schedule to Ordinance 10 of 1874, so far as that schedule refers to mines on other than Crown lands, it has certainly been always understood in this Court that the Proclamation did not repeal the application of the schedule to such mines. This point, however, it is unnecessary to decide now ...

In the *Queen* case, it was argued that the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance continued to apply as they were not cancelled by any act of the Legislature. The High Court of Griqualand West, without giving reasons, confirmed that the rules and regulations in the 1874 GW Mining Ordinance continued to apply.³⁴⁶ Four years later, in the *Littlejohn* case, the Supreme

³⁴³ Referred to as "Rules and regulations for the working of Diggings and Mines on Crown Lands or on Private Properties in which the Precious Stones and Minerals belong to the Crown, in the Province of Griqualand West."

³⁴⁴ Item 1 of s 7 of the 1880 GW Mining Proclamation. The preamble of the 1880 GW Mining Proclamation stated as follows: "Whereas under and by virtue of Ordinance No. 10 of 1874, it is provided that it shall be lawful for the Governor of the Province of Griqualand West ... to make general Rules and Regulations for the management of Diggings and Mines within the said Province, and such Rules and Regulations from time to time to alter, amend, cancel and re-enact; Now, therefore, I, under and by virtue of the powers in me vested ... do hereby cancel the General Rules and Regulations contained in the Schedule annexed to the aforesaid Ordinance, No. 10 of 1874, and I do hereby proclaim, declare and make known that the Rules and Regulations contained in the Schedule hereunto annexed shall, until the same be cancelled, altered, or amended, be the General Rules and Regulations for the working of Diggings and Mines on Crown Lands or on Private Properties in which the Precious Stones and Minerals belong to the Crown in the Province of Griqualand West."

³⁴⁵ 1883 2 HCG 154.

³⁴⁶ See also the *Goldschmidt* case.

Court of the Cape of Good Hope held that the schedule to the 1874 GW Mining Ordinance was indeed repealed by the 1880 GW Mining Proclamation.

4.4.1 The 1880 GW Fixity of Tenure in Mines Ordinance

The purpose of the 1880 GW Fixity of Tenure in Mines Ordinance was to provide for secure titles for claimholders in mines and diggings on Crown land and on reserved private land.³⁴⁷ The 1880 GW Fixity of Tenure in Mines Ordinance provided that holders of claims in any mines or diggings situated on Crown lands, could exchange such licences for a perpetual *quitrent* title, which had to be registered in the Deeds Registry of Griqualand West.³⁴⁸ The holder of the perpetual *quitrent* title was entitled to the property in the soil of the claim in perpetuity, including the right to search and take for the holder's own benefit, all precious stones and minerals that could be found therein. In return for the granting of the perpetual *quitrent*, the holder had to pay in advance, a perpetual *quitrent* of six pounds per annum for every claim.³⁴⁹ Every claimholder was entitled to the free and undisturbed possession and enjoyment of all claims granted under the 1880 GW Fixity of Tenure in Mines Ordinance, subject only to the provisions of the regulations and by-laws in force at the mine or diggings.³⁵⁰

In the case of reserved private land, the holder of a licence in mines or diggings situated on the reserved private land could exchange the licence for a lease, for a

³⁴⁷ Preamble of the 1880 GW Fixity of Tenure in Mines Ordinance.

³⁴⁸ Section 3 of the 1880 GW Fixity of Tenure in Mines Ordinance provided that every mortgage, hypothecation or transfer of any claim in respect of which a perpetual *quitrent* title was granted, had to be registered in the Deeds Registry in the same manner as required in respect of immovable property.

³⁴⁹ Sections 1 and 2 of the 1880 GW Fixity of Tenure in Mines Ordinance. The farm Vooruitzicht, on which the Kimberley Mine and the De Beers Mine is situated, became Crown land when it was purchased by the Government of the Province of Griqualand West. See para 4.3.6 above. In 1903, perpetual *quitrent* titles were issued to De Beers Consolidated Mines Limited, who was then the holder of all the claims in the two mines. These perpetual *quitrent* titles were in the form of Certificate of Registered Title T8935/1903 (in respect of the De Beers Mine) and Certificate of Registered Title T8936/1903 (in respect of the Kimberley Mine) were registered in the Kimberley Deeds Office. Section 2 of the 1880 GW Fixity of Tenure in Mines Ordinance provided that every title deed would as far as applicable, be subject to the same conditions, regulations and charges and would have the same force and effect as ordinary *quitrent* title.

³⁵⁰ Section 7 of the 1880 GW Fixity of Tenure in Mines Ordinance.

period not less than three years.³⁵¹ It was expressly stated in the 1880 GW Fixity of Tenure in Mines Ordinance that:³⁵²

Nothing in this Ordinance contained shall be taken or construed as affecting, or interfering with, the rights of the properties or owners of private properties as aforesaid.

Provision was further made for a Mining Board to allocate to every claimholder, sufficient space on the edge of a mine for the erection and maintenance of hauling and other machinery necessary for the working of the claims. The allocation of the additional space was subject to the approval of the Inspector of Mines in respect of the safety of the relevant site.³⁵³

4.4.2 The 1880 GW Mining Proclamation

There was no statutory reservation in the 1880 GW Mining Proclamation of the right to diamonds in favour of the British Crown or the Government. This was not necessary as the rules and regulations contained in the schedule to the 1880 GW Mining Proclamation regulated the prospecting for precious stones or minerals and the working of diggings and mines situated on Crown land and on reserved private land and did not apply to unreserved private land.³⁵⁴

³⁵¹ Section 8 of the 1880 GW Fixity of Tenure in Mines Ordinance provided that the lessee was entitled to renew the lease and the rental payable could not exceed six pounds per annum for every claim. The granting of the lease could not interfere with the rights of the owners of the reserved private land. The 1880 GW Fixity of Tenure in Mines Ordinance referred to the rights of the "proprietors or owners of such private property" and not to a *quitrent* tenant. In terms of the *Griqualand West Registration of Leases (Mines and Diggings) Ordinance* 16 of 1880 dated 22 September 1880 (hereafter the 1880 GW Registration of Leases Ordinance) provision was made for the registration of leases or leasehold titles to claims or portions of claims in mines or diggings. *Griqualand West Ordinance* 16 of 1880 was later repealed in terms of the Pre-Union Statute Law Act. Welsh 1976 *Annual Survey of South Africa Law* 227.

³⁵² Section 10 of the 1880 GW Fixity of Tenure in Mines Ordinance.

³⁵³ Section 9 of the 1880 GW Fixity of Tenure in Mines Ordinance.

³⁵⁴ See the *Murphy* case 329.

4.4.2.1 Rights and obligations of the prospector

Any person, who wanted to prospect or search for diamonds or minerals on Crown land or on reserved private land,³⁵⁵ could take out a licence at the office of the Civil Commissioner of the relevant division.³⁵⁶ The consent of the owner of reserved private land was not required.³⁵⁷ A person who wanted to prospect on unreserved private land had to obtain a prospecting licence in terms of the 1871 GW Diggings Proclamation read with the 1872 Prospecting Proclamation.³⁵⁸ The 1880 GW Mining Proclamation did not specifically repeal the provisions of the 1871 GW Diggings Proclamation and the 1872 GW Prospecting Proclamation.³⁵⁹ A person, who wanted to prospect for diamonds on unreserved private land, would have required the consent of the landowner and a prospecting licence.³⁶⁰ This was confirmed in the prescribed form for a prospecting licence in item 1 of section 1 of the schedule to the 1880 GW Mining Proclamation, wherein it was specifically noted that:

This licence does not give any right to prospect on private property where there is no reservation of precious stones or minerals in favour of the Crown without the consent thereto of the owner or owners of such private property...

A person who wanted to prospect within 500 yards of any other person, who was already *bona fide* prospecting and searching for minerals and diamonds under a prospecting licence, had to obtain the consent of such holder of a prospecting licence.³⁶¹ The holder of a prospecting licence had to be older than 16 years and be in

³⁵⁵ Referred to in this chapter as land that was privately owned, but the title of which contained a reservation of the rights to diamonds in favour of the Crown.

³⁵⁶ Item 1 of section 1 of the schedule to the 1880 GW Mining Proclamation.

³⁵⁷ *Thompson* case 421.

³⁵⁸ This requirement was recorded in the prescribed format for a prospecting licence contained in item 1 of s 1 of the schedule to the 1880 GW Mining Proclamation.

³⁵⁹ On the contrary, item 4 of s 4 of the 1880 GW Mining Proclamation made provision for the reservation of depositing areas outside every mine or diggings on Crown land and on reserved private land, which reservation was subject to the rights of the owner of the property and "the provisions, so far as the same apply, of Sections 23 to 28 inclusive of Proclamation No. 71 of 1871 ... "

³⁶⁰ See para 4.2.3 above.

³⁶¹ Item 6 of s 1 of the schedule to the 1880 GW Mining Proclamation.

possession of a miner's certificate.³⁶² One of the conditions for the issue of a prospecting licence was that the holder had to enter into a bond for the sum of a £100 with two sureties for the repair of any surface damage done by him on land occupied by any *quitrent* tenant or lessee.³⁶³ A person, who found any diamonds or minerals, while prospecting under a prospecting licence, was obliged forthwith to report the discovery to the Civil Commissioner of the relevant division.³⁶⁴ The person, who discovered the diamonds or minerals under a prospecting licence, was entitled to select ten claims at the place where such precious stones or minerals had been found and received a certificate from the Civil Commissioner to this effect.³⁶⁵

4.4.2.2 Rights and obligations of a claimholder

The Governor of Griqualand West had to appoint an Inspector of Mines for every new digging.³⁶⁶ Once a new digging was discovered, the appointed Inspector of Mines had to visit the digging for purposes of allotting and registering claims.³⁶⁷ The Inspector had to measure, and number, all the claims at the digging and prepare a plan after which he had to give notice of a specific date and time when claims would be allocated to certificated miners. The certificated miners had to attend in person on the specific date to have the claims registered in their names.³⁶⁸

³⁶² Item 12 of s 6 of the schedule to the 1880 GW Mining Proclamation. The position was similar under item 1 of s 1 of the schedule to the 1874 GW Mining Ordinance. See para 4.3.3.1 above.

³⁶³ Item 3 of s 1 of the schedule to the 1880 GW Mining Proclamation. The position was similar under item 3 of s 7 of the schedule to the 1874 GW Mining Ordinance. See para 4.3.3.1 above. In the case of unreserved private land, the prospector similarly had to enter into a bond to protect the interests of the landowner, but only for £ 20. See para 4.2.3.2 above.

³⁶⁴ Item 4 of s 1 of the schedule to the 1880 GW Mining Proclamation.

³⁶⁵ Item 5 of s 1 of the schedule to the 1880 GW Mining Proclamation. The discoverer was under the 1872 GW Prospecting Proclamation and the 1874 GW Mining Ordinance entitled to select two claims. See paras 4.2.3 and 4.3.3.1 above.

³⁶⁶ A new digging was defined in item 1 of s 1 of the schedule to the 1880 GW Mining Proclamation, as a digging which was proclaimed a digging after the proclamation of the 1880 GW Mining Proclamation.

³⁶⁷ Item 2 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁶⁸ Item 3 of s 2 of the schedule to the 1880 GW Mining Proclamation. Item 5 of s 2 of the schedule to the 1880 GW Mining Proclamation provided that once two-thirds of the claims in a digging had been allocated and registered, the Inspector had to define an area outside the claims which was reserved for mining purposes. If the digging was situated on Crown land, the Inspector had to fix

At a new digging, each claimholder was, with the exception of the discoverer of the diggings, only entitled to one claim. No claimholder could transfer his claims during the first three months of the proclamation of the digging.³⁶⁹ Any claim that remained unregistered or unworked for a period of seven days, which excluded a Sunday or a public holiday, had to be declared abandoned by the Inspector, unless the Inspector had issued a certificate of reservation.³⁷⁰ Where a claimholder failed to comply within seven days with an instruction from the Inspector to perform certain specific work in respect of his claim, the Inspector similarly had to declare the claim as abandoned.³⁷¹ The number of abandoned claims at a digging had to be posted at the digging or at a conspicuous place at the office of the Inspector of Mines.³⁷² Any certificated miner could apply to obtain abandoned claims and if more than one applicant applied, the claim was sold through a public auction.³⁷³ Otherwise, a claimholder could abandon a claim, by giving written notice of his intention to abandon the claim to the Inspector of Mines.³⁷⁴

Only persons older than 16 years and who had received a miner's certificate,³⁷⁵ were entitled to be registered as or to be a claimholder in any new diggings. Every claimholder was entitled to the free and undisturbed possession of any claim or claims

the site of the camp or township and issue regulations for the cutting of firewood, grazing of cattle and if necessary, the sinking of wells for water.

³⁶⁹ Item 8 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁷⁰ A certificate of reservation could be obtained in the case of sickness, a necessary absence or other sufficient cause. A fee of one shilling was payable for each day that the certificate was issued, but excluding for Sundays and public holidays. A certificate of reservation could not be issued for a period longer than 20 working days. Item 13 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁷¹ Item 9 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁷² Item 10 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁷³ Item 11 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁷⁴ Item 12 of s 2 of the schedule to the 1880 GW Mining Proclamation. See the *Bultfontein Mining Board* case 220.

³⁷⁵ A miner had to obtain a certificate from the Resident Magistrate of the relevant district. The cost to obtain such a certificate, was one pound for a period of 12 months, ten shillings for six months, or five shillings for three months. Item 14 of s 2 of the schedule to the 1880 GW Mining Proclamation.

registered in his name, but subject to a general reservation of seven feet and six inches on one side of each claim for roadways.³⁷⁶

If there were at any time less than 12 registered claimholders at a new digging, the digging could be closed by proclamation after at least one month's notice had been given. The Governor could also if a digging ceased to be worked in a *bona fide* manner, declare the digging to be closed.³⁷⁷ Unless a new digging was proclaimed to be closed, every new digging had to be proclaimed as an established digging after the expiry of six months from its initial proclamation as a new digging.³⁷⁸

The Governor could by proclamation proclaim any digging to be a mine.³⁷⁹ The Governor had to appoint a Registrar for each proclaimed mine. The Registrar of a mine had to keep a register of the claims and claimholders in the mines. This did not apply to mines in respect of which the provisions of the 1880 GW Fixity of Tenure in Mines Ordinance applied. The Registrar further had to perform the same functions as an Inspector of Mines with regard to registration at a digging.³⁸⁰ Mines were under the control of a Mining Board, which consisted of 12 persons elected by the claimholders.³⁸¹

³⁷⁶ Item 15 of s 6 of the schedule to the 1880 GW Mining Proclamation provided that in the event that a larger quantity of ground was required for public purposes or for digging or mine, such ground could be taken by the Governor, subject to the payment of compensation to the owner of the claim.

³⁷⁷ Item 17 of s 2 of the schedule to the 1880 GW Mining Proclamation.

³⁷⁸ Item 1 of s 3 of the schedule to the 1880 GW Mining Proclamation. Where there were more than 50 registered claimholders at a new digging, item 6 of s 2 of the schedule to the 1880 GW Mining Proclamation provided that the claimholders were entitled to apply to the Government to elect a Diggers' Committee comprising of not less than five and not more than nine members. The Diggers' Committee had to make by-laws for the relevant diggings and the by-laws became effective once they had been approved by the Government and published in the *Gazette*. Provision was also made in item 2 of s 3 of the schedule to the 1880 GW Mining Proclamation for the establishment of Diggers' Committees at established diggings where there were more than 50 registered claimholders and for the adoption of by-laws. Item 5 of s 3 of the schedule to the 1880 GW Mining Proclamation provided that in the absence of elected Diggers' Committees, the Inspector of Mines for a specific digging could make by-laws for the digging, which became effective once they had been approved by the Governor and published in the *Government Gazette*.

³⁷⁹ Item 1 of s 4 of the schedule to the 1880 GW Mining Proclamation.

³⁸⁰ Item 3 of s 4 of the schedule to the 1880 GW Mining Proclamation.

³⁸¹ Items 1-5 of s 5 of the schedule to the 1880 GW Mining Proclamation.

Each Mining Board had to draft by-laws for the management of the relevant mine for which it was elected.³⁸²

Provision was also made for a depositing area outside every mine or digging on Crown land and on reserved private land. The reservation of a depositing area on reserved private land was expressly stated to be subject to the rights of the owner of the reserved private land and also to the provisions of sections 23 to 28 of the 1871 GW Diggings Proclamation in so far as they continued to apply.³⁸³ The Governor therefore had to attempt to reach an agreement with the owner of the reserved private land on the terms on which the depositing areas would be used. However, if the owner did not agree to the terms, the Governor could simply cause the depositing areas to be reserved subject to the payment of reasonable compensation to the owner of the reserved private land.³⁸⁴ The depositing area had to be as near as convenient to the mine and the Inspector of Mines had to divide it into zones or belts which ran parallel with the mine.³⁸⁵

Every claimholder was entitled to use an area which in total did not exceed one acre for each full claim held of the depositing area as a depositing floor.³⁸⁶ The claimholder was entitled to sink wells within the depositing floor, which might be necessary for the purposes of working claims in the relevant mine or digging. In the case of Crown land, the consent of the Governor was required and in the case of reserved private land, the

³⁸² Item 10 of s 5 of the schedule to the 1880 GW Mining Proclamation.

³⁸³ Item 4 of s 4 of the schedule to the 1880 GW Mining Proclamation. Sections 23-28 of the 1871 GW Diggings Proclamation provided that the High Commissioner could in the case of reserved private land, agree with the landowner on the terms on which the diamond diggings situated on the land, could be worked. If the landowner did not agree to the terms, the High Commissioner could simply after giving notice to the landowner, enter the land or cause the land to be entered, subject to the payment of reasonable compensation for all injury done to the surface and soil of the land. See para 4.2.1.2 above.

³⁸⁴ Item 4 of s 4 of the schedule to the 1880 GW Mining Proclamation read with s 26 of the 1871 GW Diggings Proclamation.

³⁸⁵ Item 5 of s 4 of the schedule to the 1880 GW Mining Proclamation.

³⁸⁶ Item 11 of s 4 of the schedule to the 1880 GW Mining Proclamation provided that the health and safety at depositing floors were under the control of the Inspector of each mine, but it was regulated by the by-laws adopted by the relevant Mining Board, which had to be approved by the Governor.

consent of the landowner was required for the sinking of the wells.³⁸⁷ Every claimholder of a mine situated on Crown land, had to pay a monthly rental for the use of a depositing floor. The rental was payable for as long as the claim was registered in the name of the claimholder, irrespective of whether the depositing floor was being used. The rental was determined with reference to the position of the depositing floor and its distance from the mine.³⁸⁸

Although there was no requirement that the consent of the landowner of reserved private land be obtained for the grant of a prospecting licence,³⁸⁹ no person was entitled to prospect within 200 yards of any house or building occupied or upon land under cultivation, without the consent of the owner or occupier of the relevant land.³⁹⁰

4.5 Summary and conclusion

In this chapter, the diamond mining legislation that was enacted in Griqualand West during the period 1871 until its annexation as part of the Cape Colony in 1880 was discussed. During this period, Griqualand West was under the control of three different administrations, each of which enacted different diamond mining legislation. During the period 1871 until the annexation of Griqualand West, the prospecting for diamonds and the working of claims in Griqualand West were regulated by the 1871 GW Diggings Proclamation and the 1872 GW Prospecting Proclamation, thereafter the 1874 GW Mining Ordinance and after the annexation of Griqualand West as part of the Cape

³⁸⁷ Item 6 of s 4 of the schedule to the 1880 GW Mining Proclamation.

³⁸⁸ The monthly rental could not exceed the amount of one pound per acre, unless the claimholder specifically agreed thereto. Item 8 of s 4 of the schedule to the 1880 GW Mining Proclamation. Claims in mines or diggings within the Province of Griqualand West had to be registered by the Registrar of Deeds in terms of the 1880 GW Registration of Leases Ordinance. Cessions, assignments, transfers, surrenders, mortgages and hypothecations of claims or cessions had to be registered in terms of s 1 of the 1880 GW Registration of Leases Ordinance. Section 7 of the 1880 GW Registration of Leases Ordinance provided that a lease did not cease or terminate in the case of insolvency of the person entitled to the lease.

³⁸⁹ The position was similar under the 1874 GW Mining Ordinance. See para 4.3.3.1 above.

³⁹⁰ Item 7 of s 1 of the schedule to the 1880 GW Mining Proclamation and recorded in the prescribed format for a prospecting licence in s 1 of the schedule to the 1880 GW Mining Proclamation.

Colony, by the 1880 GW Mining Proclamation and the 1880 GW Fixity of Tenure in Mines Ordinance.

There was, with the exception of land that was subject to the Cradock Proclamation, no statutory reservation in any of the diamond mining legislation of the right to mine diamonds in favour of the British Crown or the Government of the Cape Colony. From the discussion of the diamond mining legislation which each of the three administrations enacted, it appears that the question as to who was entitled to prospect or search for diamonds or to work claims at the diamond fields depended on the specific form of land tenure, and in effect the common law holder of the rights to diamonds.

Three forms of land tenure existed. Firstly, land that was owned by the British Crown, referred to in this chapter as Crown land. The rights to diamonds, would in this instance, by virtue of the *cuius est solum* principle, vest in the British Crown or Government. The second form of land tenure that existed was privately owned land or land that was held under perpetual *quitrent*, where the rights to diamonds were reserved in favour of the Crown or a Government, referred to in this chapter as reserved private land. The third form of land tenure that existed in Griqualand West was privately owned land, without any reservation in the title deed of the rights to diamonds in favour of the British Crown or the Government. This form of land tenure was referred to in this chapter as unreserved private land. The landowner of the unreserved private land was in terms of the *cuius est solum* principle, the holder of the rights to the diamonds *in situ*.

During the period 1871 and 1872, the High Commissioner could in terms of the 1871 GW Diggings Proclamation proclaim a diamond field on Crown land or on reserved private land. In the latter instance, the consent of the landowner was not required. In the case of unreserved private land, the consent of the landowner was required for

the proclamation of a diamond field on his land.³⁹¹ The requirement that a person who intended to prospect for diamonds, had to obtain a prospecting licence, was for the first time regulated under the 1872 GW Prospecting Proclamation. Yet, this was only in respect of private property, which appeared to have included both reserved and unreserved private land. It is submitted that the consent of the landowner of unreserved private land was required to obtain a prospecting licence with regard to his land, but that the consent of the owner of reserved private land was not in terms of the 1872 GW Prospecting Proclamation required.³⁹²

The position was changed with the commencement of the 1874 GW Mining Ordinance, which provided that any person who wanted to prospect for diamonds on Crown land and on reserved private land, had to obtain a prospecting licence. Prospecting for diamonds on unreserved private land was not regulated in terms of the 1874 GW Mining Ordinance. The 1871 GW Diggings Proclamation read with the 1872 GW Prospecting Proclamation continued to apply in respect of the searching for diamonds on unreserved private land and the working of claims on unreserved private land. The position with regard to prospecting on unreserved private land remained unchanged with the adoption of the 1880 GW Mining Proclamation.³⁹³

The rights of the discoverer of diamonds were acknowledged. The discoverer, who found diamonds working under a prospecting licence on private property, was in terms of the 1872 GW Prospecting Proclamation entitled to the free grant of two claims at the place where the diamonds were discovered, but only in respect of private property. No provision was made for the rights of a discoverer of diamonds on Crown land.³⁹⁴ With the commencement of the 1874 GW Mining Ordinance, the discoverer of diamonds under a prospecting licence on Crown land and on reserved private land was entitled to be granted two claims at the place where the diamonds had been

³⁹¹ See para 4.2.1 above.

³⁹² See para 4.2.3 above.

³⁹³ See para 4.4.2.1 above.

³⁹⁴ See para 4.2.3.1 above.

discovered.³⁹⁵ This was increased to ten claims in terms of the 1880 GW Mining Proclamation.³⁹⁶

The obligation of the claimholder to pay royalties, which was acknowledged from the very early discovery of diamonds, was continued. Under the 1871 GW Diggings Proclamation, the landowner of unreserved private land was entitled to determine the royalties payable by the claimholders. The Civil Commissioner had to recover the royalties from the claimholder and account to the land owner of the unreserved private land, withholding an amount equal to the expenses incurred by the Government in respect of the diamond field on the unreserved private land.³⁹⁷ The maximum monthly payment that a landowner of unreserved private land could charge was prescribed in the 1872 GW Prospecting Proclamation. In the case of Crown land and reserved private land, the royalties payable to the Government was prescribed.³⁹⁸ The obligation to pay royalties was continued under the 1874 GW Mining Ordinance³⁹⁹ and the 1880 GW Mining Proclamation.⁴⁰⁰

The developments in the mining methodology and technology also influenced the development of diamond mining legislation in Griqualand West. The 1871 GW Diggings Proclamation did not adequately address the requirements of the diggers. The diggers required additional areas to work their claims and to process or sort the soil hauled from the claims. In the 1874 GW Mining Ordinance provision was made for the reservation of an area outside each claim for depositing ground, sifting or sorting soil and for machines, staging and roadways.⁴⁰¹ The 1880 GW Mining Proclamation also provided for a depositing area outside every mine or digging on Crown land and on reserved private land.⁴⁰²

³⁹⁵ See para 4.3.3.1 above.

³⁹⁶ See para 4.4.2.1 above.

³⁹⁷ See para 4.2.1.2 above; See the *Bultfontein Mining Board* case 209.

³⁹⁸ See para 4.2.1.2 above.

³⁹⁹ See para 4.3.3.1 above.

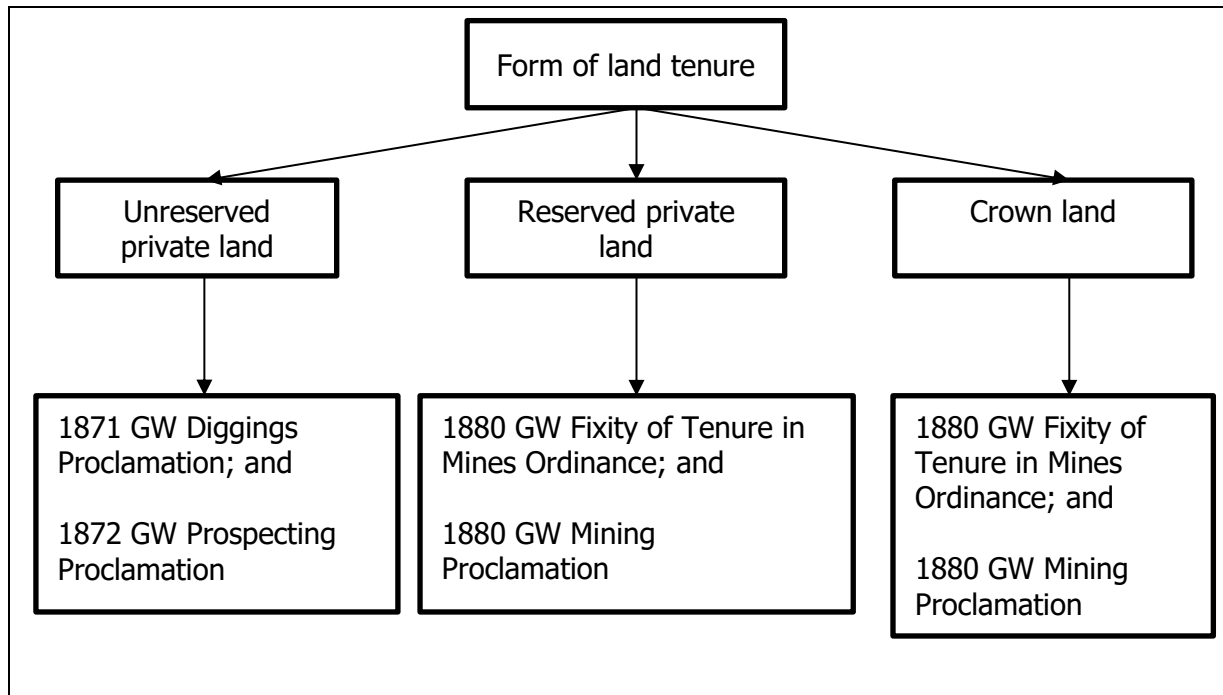
⁴⁰⁰ See para 4.4.2.2 above.

⁴⁰¹ See para 4.3.3.2 above.

⁴⁰² See para 4.4.2.2 above.

The different diamond mining legislation that continued to apply to the prospecting and mining of diamonds in Griqualand West after its annexation as part of the Cape Colony in 1880 is schematically summarised in Figure 4.1 below.

Figure 4.1: Diamond mining legislation applicable in respect of Griqualand West after its annexation as part of the Cape Colony



After the annexation of Griqualand West as part of the Cape Colony in 1880, new challenges emerged. Not only were the claims in the four large diamond mines amalgamated, the diamond mining legislation was also consolidated. This new era in the development of the right to mine diamonds in South Africa is discussed in Part 2 of this thesis in chapter 5.

Part 2: The British Colonies, Boer Republics and the Union of South Africa before 1927

Chapter 5 Cape Colony before 1927

Chapter 6 The Orange Free State before 1927

Chapter 7 The *Zuid-Afrikaansche Republiek* and the Transvaal Colony before 1927

Chapter 8 Natal before 1927

Chapter 5 Cape Colony before 1927

5.1 Introduction

In this chapter, the consolidation of the diamond mining legislation during the period 1883 to 1927 in the former Cape Colony, which after unification in 1910, became known as the Province of the Cape Good Hope is discussed. As the former Cape Colony became part of the Union of South Africa in 1910, all laws in the former colonies continued in force until they were repealed or amended.⁴⁰³

The amalgamation of claims, washing of debris and discovery of the Wesselton Mine are firstly briefly discussed.⁴⁰⁴ During the latter part of the 1880s, the claims in the four large diamond mines in Griqualand West were amalgamated which led to unemployment. Unemployed diggers and workers turned to washing debris and tailings which emanated from the working of the diamond claims. Disputes arose regarding the ownership of diamonds recovered from the washing of tailings and debris. Diggers' and workers' expectations were soon raised when a new mine, which

⁴⁰³ Section 135 of the South Africa Act which was adopted by the British parliament, provided that all laws that were in force in the former four colonies continued in force in the respective provinces until they were repealed or amended by the parliament of the Union of South Africa or by the provincial councils in respect of the matters reserved or delegated to them. Section 8 of the South Africa Act provided that the Executive Government of the Union vested in the King of England and would be administered either by the King in person or by a Governor-General as his representative appointed by the King in terms of s 9 of the South Africa Act. All rights in and to mines and minerals and all rights in connection with the searching for, working of and disposing of minerals or precious stones which at the establishment of the Union vested in the Government of any of the former colonies, vested in terms of s 123 of the South Africa Act in the Governor-General in Council. Section 122 of the South Africa Act provided that Crown lands, public works and all property in the Union and all rights that belonged to the former colonies at the establishment of the Union vested in the Governor-General in Council. Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45. Du Plessis *Inleiding tot die Reg* 52. See Kahn 1961 *Annual Survey of South African Law* 1; Eybers *Constitutional Documents* 517-558; Rautenbach *Rautenbach-Malherbe Staatsreg* 14-15; Basson and Viljoen *South African Constitutional Law* 36-38; Wiechers *Verloren Van Themaat Staatsreg* 196-202.

⁴⁰⁴ See para 5.2 below.

later became known as the Wesselton Mine, was discovered approximately four miles from Kimberley.⁴⁰⁵

From a legislative perspective, the Cape Legislature also commenced with a process of consolidating the diamond mining legislation in the Cape Colony. This consolidating legislation is secondly discussed.⁴⁰⁶ The first law that was passed during this process, was the *Precious Stones and Minerals Mining Act* 19 of 1883 (hereafter the 1883 Cape Precious Stones Act) which was enacted to consolidate the laws relating to alluvial diggings and mines in the Cape Colony.⁴⁰⁷ The 1883 Cape Precious Stones Act was later repealed by the *Precious Stones Act* 11 of 1899 (hereafter the 1899 Cape Precious Stones Act) in which the working of mines and alluvial diggings was regulated separately. The different forms of land tenure continued to influence the development of the right to mine diamonds in the Cape, as will appear from a brief overview of the application of the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act.⁴⁰⁸ There are common features in both the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act insofar as the prospecting or searching for diamonds was concerned. These are thematically below.⁴⁰⁹ A discussion of the working of mines and alluvial diggings in terms of the 1883 Cape Precious Stones Act follows

⁴⁰⁵ Worger *City of Diamonds* 274; Roberts *Kimberley* 277-278; Beet *Diamond Fields* 88-89; Chilvers *Story of De Beers* 191-192; Reunert *Diamonds and Gold* 65-67; Williams *Diamond Mines* Vol 1 345-347. Kimberley was declared a municipality in terms of *Griqualand West Ordinance* 17 of 1879, which was titled "Ordinance for the better regulation of the municipality for the town of Kimberley". Section 89 of *Griqualand West Ordinance* 17 of 1879 limited the rights of the Kimberley Municipality with reference to mining areas and the rights of claimholders and provided that: "Nothing in this Ordinance contained shall be construed so as to authorise the said Municipality to exercise any of the powers acquired therein within any mining area at present existing or which may hereafter be created; or so as to interfere with the rights and privileges of the claimholders of any mine at present existing or which may hereafter be proclaimed, on their depositing floors whether such depositing floors are situate within or without such mining area as aforesaid; or with the rights of the Government or any Mining Board, proprietor or claimholder of any mine on any tramways, tipping sites, roads or other work connected with such mine, whether the same do at present exist or shall hereafter be construed or fixed, or are situate or constructed within or without any such mining area as aforesaid."

⁴⁰⁶ See para 5.3 below.

⁴⁰⁷ *Agri SCA* case 24-25.

⁴⁰⁸ See para 5.3.1 below.

⁴⁰⁹ See para 5.3.2 below.

thereafter,⁴¹⁰ continued by an analysis of the working of mines and alluvial diggings in terms of the 1889 Cape Precious Stones Act.⁴¹¹

This chapter concludes with a discussion of the *Precious Stones Amendment Act 27 of 1907* (hereafter the 1907 Cape Precious Stones Amendment Act), which amended the 1899 Cape Precious Stones Act in material respects in that it made provision for a Crown's share in certain diamond mines.⁴¹² The 1899 Cape Precious Stones Act as amended in terms of the 1907 Cape Precious Stones Amendment Act continued to regulate the prospecting and mining of diamonds in the Cape Colony and after unification in the Province of the Cape of Good Hope, until the 1927 Precious Stones Act repealed them.⁴¹³

5.2 Amalgamation of the claims in the diamond mines

Diamond digging and mining led to an increase in the production of diamonds as diggers and claimholders competed against one another to make profits. This resulted in lower diamond prices and a smaller profit margin. Diamond prices were further negatively impacted by the depression suffered by the European diamond market in 1882. The smaller operators in Griqualand West were unable to survive the lower profit margins and they soon sold their claims to individual capitalists, who were replaced by private companies and thereafter by public joint stock operations.⁴¹⁴

At the forefront of this process of amalgamation were Cecil Rhodes and Barney Barnato, who both embarked on a process of purchasing claims in the diamond mines

⁴¹⁰ See para 5.3.3 below.

⁴¹¹ See para 5.3.4 below.

⁴¹² See para 5.4 below.

⁴¹³ The 1927 Precious Stones Act is discussed in chapter 9 below.

⁴¹⁴ Worger *City of Diamonds* 191; Davidson *Cecil Rhodes* 60-62; Meredith *Diamonds, Gold and War* 118-119; Herbert *Diamond Diggers* 47-58. According to Kapp *Nalatenskappe sonder einde* 58-59, amalgamation of the diamond claims had resulted in only 42 companies and 56 private individuals being active at the mines in comparison to the 142 companies which existed at 1877. See also Beet *et al Knights of the shovel* 110-115.

and shares in claim holding companies.⁴¹⁵ By 1887, Cecil Rhodes succeeded to first amalgamate the claims in the De Beers Mine and held all the claims in the name of his company, the De Beers Company. Two companies dominated the diamond industry in Kimberley in 1887, the De Beers Company of Rhodes and the Kimberley Central Diamond Mining Company, which held the majority of claims in the Kimberley Mine.⁴¹⁶ Barnato became the largest shareholder in the Kimberley Central Diamond Mining Company.⁴¹⁷ The final amalgamation of the De Beers Company and the Kimberley Central Diamond Mining Company resulted in the formation of the company De Beers Consolidated Mines Limited in 1888. After De Beers Consolidated Mines Limited acquired the De Beers Mine and the Kimberley Mine, it commenced negotiations to also acquire the Bultfontein Mine and the Dutoitspan Mine.⁴¹⁸ Some of these

⁴¹⁵ Turrell *Capital and Labour* 206-207; Davenport *South Africa A Modern History* 3rd ed 516; Davenport *South Africa A Modern History* 4th ed 95, 494.

⁴¹⁶ Joel *Ace of Diamonds* 20-26; Davenport *South Africa A Modern History* 3rd ed 516; Davenport *South Africa A Modern History* 4th ed 494; Steyn *Afrikaner-Joernaal* 136.

⁴¹⁷ The second largest interest in the Kimberley Central Diamond Mining Company was held by *Compagnie Française des Mines de Diamant du Cape de Bon Espérance*, known as the French Company. According to Kapp *Nalatenskappe sonder einde* 59, Rhodes acquired control of the French Company with the assistance of the Rothschilds. Hart *Diamond* 43-44; Turrell *Capital and Labour* 206, describes the history of the amalgamation struggle between Rhodes and Barnato as follows: "Rhodes, in pursuit of his dream of total unification on his own terms, bought the Compagnie Française for De Beers. In a brilliant manoeuvre he then sold the Compagnie to the Kimberley Central and placed a Trojan horse in the enemy camp. It gave De Beers a one-fifth share stake in the Kimberley Mine. Then, after a battle of attrition in production, which provoked a collapse in the price of diamonds, Barnato and Rhodes fought each other in the share markets for a controlling interest in Kimberley Mine. The battle for share control, so the story goes, began in earnest in October 1887 and Rhodes emerged as triumphant victor in March 1888. In the struggle Barnato's supporters deserted him for quick profits, while Rhodes' allies remained firm in the share markets for De Beers. Rhodes frequently attempted to buy off Barnato during the struggle, but it was only when Rhodes and his friends controlled three-fifths of the Kimberley Central stock in March 1888 that Barnato capitulated to Rhodes' terms for the amalgamation of the De Beers and Kimberley Mines, and pledged his support of the formation of De Beers Consolidated Mines Limited." Roberts *The Diamond Magnates* 190-203; Warner *History of the Kimberley Club* 29-30. Turrell *Capital and Labour* 206-207; Davenport *South Africa A Modern History* 3rd ed 516; Davenport *South Africa A Modern History* 4th ed 95, 494; Wheatcroft *Randlords* 92-110; Kanfer *The Last Empire* 97-108; Rotberg *The Founder* 180-214; Roberts *Kimberley* 249-263; Worger *City of Diamonds* 191-236. According to Millin *Rhodes* 14-15, 79-92, membership of the Kimberley Club was the trump card. Rhodes offered Barnato membership of the Kimberley Club and stated: "This is no mere money transaction ... I propose to make a gentleman of you."

⁴¹⁸ Hahn *Diamond* 76-80; For details of correspondence from Rhodes regarding the amalgamation see Rothschild and Sons' correspondence in *Rhodes letter 1888*; Sander *Development, Diamonds, Gold and Platinum* 60-62.

companies that have held claims in these two mines, had seen it through for years to avoid amalgamation of their claims.⁴¹⁹

The completion of the amalgamation marked the end of an era. Roberts⁴²⁰ remarks that:

After almost twenty turbulent years diamond mining in Kimberley ceased to be an adventure and became a stable, less romantic industry.

5.2.1 The washing of debris

By the end of 1890 the levels of poverty and unemployment at the diamond fields were extremely high.⁴²¹ Thousands of men lost their jobs as a result of the amalgamation of the claims in the four main diamond mines. Rhodes' policy to reduce labour costs also contributed to the unemployment. According to Worger,⁴²² Rhodes cut the number of men who were employed in the diamond mining industry by one-third in one year, by expanding machine operations in the deep-level mines and by ceasing work in the open-cast mines. Some of the unemployed diggers moved back to the river

⁴¹⁹ There was one final attempt to avoid amalgamation of the claims in August 1888. A group of shareholders in a company challenged a decision to merge their company with De Beers Consolidated Mines Limited by launching an urgent application, *Phillips v Kimberley Central Diamond Mining Co* in the Cape Supreme Court. The shareholders argued that their deed of association prohibited a merger with a company that was not "similar" to their company. The Cape Supreme Court agreed with the shareholders that diamond mining in Kimberley formed only an insignificant part of the powers acquired by De Beers Consolidated Mines Limited, a company which was free to mine diamonds, gold or coal and could carry on banking operations and financial obligations for foreign governments and it was even free to annex a territory and to maintain a standing army. The Cape Supreme Court held that the powers of De Beers Consolidated Mines Limited are as extensive as those of any company that ever existed. The Court, however, also recognised Rhodes' problem and suggested a way to settle the dispute. Rhodes and Barnato held the majority of shares in the Kimberley Central Diamond Mining Company. They used their majority to put the company into voluntary liquidation. They then bought the assets of the Kimberley Central Diamond Mining Company for £5,338,650. Hahn *Diamond* 76-82; Roberts *Kimberley* 262-263. Details of the court application was reported in a number of newspaper articles in the local newspaper in Kimberley, the *Diamond Fields Advertiser* - Anonymous *Diamond Fields Advertiser* (9 August 1888) 3-4; Anonymous *Diamond Fields Advertiser* (17 August 1888) 2; Anonymous *Diamond Fields Advertiser* (21 August 1888) 3.

⁴²⁰ Roberts *Kimberley* 262-263; Hahn *Diamond* 80-82.

⁴²¹ Worger *City of Diamonds* 271-272.

⁴²² Worger *City of Diamonds* 249.

diggings which had previously been abandoned following the discovery of diamonds at the "dry diggings".⁴²³

An alternative method of making money was to work the discarded ground of the mining companies, a process which was referred to as "debris washing." Large heaps of debris had laid on land that was owned either by De Beers Consolidated Mines Limited or the Government of the Cape Colony.⁴²⁴ Previous claimholders have deposited various tailings and debris on the mining areas of the Kimberley Mine and De Beers Mine, prior to 1880 and thereafter. The ownership of these debris and tailings came under scrutiny in *De Beers Consolidated Mines Limited v The Colonial Government*⁴²⁵ when a dispute arose between the Colonial Government and De Beers Consolidated Mines Limited regarding the ownership of the debris and tailings. De Beers Consolidated Mines Limited contended that it bought out its predecessor in title, in 1889 and that this sale included the tailings owned by its predecessor.⁴²⁶ The Company also argued that as the holder of a *quitrent* title under the 1880 GW Fixity of Tenure in Mines Ordinance,⁴²⁷ they were the owners of the soil and that the tailings were soil from the claims that they held.⁴²⁸ The Government responded that a large portion of the tailings and debris was deposited by claimholders before 1880 and was never the property of the claimholders. The Government further, with regard to the tailings and debris that had been deposited after 1880, argued that those tailings and debris had been abandoned.⁴²⁹ The Supreme Court of the Cape of Good Hope held that De Beers Consolidated Mines Limited was the owner of the debris and tailings situated on depositing floors, which the Company occupied and that the Government

⁴²³ See para 3.3 above; Worger *City of Diamonds* 273.

⁴²⁴ Worger *City of Diamonds* 273-274.

⁴²⁵ 11 CTR 47 (hereafter the *Colonial Government* case). This case was also reported as *De Beers Consolidated Mines Limited v The Colonial Government* 1891-1892 9 SC 101 (hereafter the *Colonial Government SC* case).

⁴²⁶ At 49-50.

⁴²⁷ See para 4.4.1 above.

⁴²⁸ The *Colonial Government SC* case 104-105.

⁴²⁹ At 48. The Government argued that the diggers' rights were limited to digging and winning the diamonds from the soil and that this right did not confer *dominium* in the soil, in particular not the soil already taken out of the ground. See the *Colonial Government SC* case 105.

remained the owner of abandoned claims situated on depositing floors not occupied by De Beers Consolidated Mines Limited. The Attorney-General for the Colonial Government informed the Court that the parties would endeavour to reach an agreement regarding the debris which the Court found belonged to the Government.⁴³⁰ An agreement was concluded between De Beers Consolidated Mines Limited and the Colonial Government on 31 October 1892. The agreement provided that the Government would give up all their rights to the tailings and debris which they owned in mining areas 1 and 2 of the Kimberley Mine and the whole of the De Beers Mining Area in favour of De Beers Consolidated Mines Limited, for as long as the Company remained the owners of the Kimberley Mine and the De Beers Mine, in exchange for all the debris held to belong to the Company and situate in mining area 4 of the Kimberley Mine.⁴³¹

More than a century later, the High Court of the Northern Cape Division had to determine in the *Mondira Pula* case whether De Beers Consolidated Mines Limited was the common law owner of the diamonds in tailings, which became known as the Stadium Dump. De Beers Consolidated Mines Limited argued in the *Mondira Pula* case that the Stadium Dump comprised firstly, of tailings produced from mines and claims, in respect of which it, at all relevant times had the right to mine, and secondly from tailings which became the property of the Company in terms of the agreement concluded in 1892. De Beers Consolidated Mines Limited argued further that the tailings were the property of De Beers Consolidated Mines Limited and constituted movable property.⁴³² The High Court confirmed that the effect of the 1880 GW Fixity

⁴³⁰ The Court in response indicated that it would not endorse an unreasonable agreement.

⁴³¹ At 52. After the conclusion of the agreement, a large number of diamond diggers protested that the provisions of the agreement were unreasonable and petitioned that the Kimberley Mining Area 1 be thrown open for all debris washers. A Select Committee of Parliament was appointed in regard to the Kimberley debris area. The "Report of the Parliamentary Select Committee of September 1899" concluded in paragraph 9 on page v thereof that: "after a careful consideration of the facts and the circumstances which led up to the agreement, that it was a fair and equitable one, and cannot recommend the Government to take any steps in the direction of the prayer of the Petition, that the area No. 1 of the Kimberley Mine should be thrown open to the operation of the debris washers."

⁴³² At para 14.

of Tenure in Mines Ordinance, was that De Beers Consolidated Mines Limited acquired the.⁴³³

Property in the soil of the claim in perpetuity, and the right to search for and take for his own benefit all precious stones and minerals that may be found therein.

The High Court further held that tailings formed an integral part of the agreement concluded in 1892 and that the Stadium Dump was clearly regarded by De Beers Consolidated Mines Limited as a valuable asset.⁴³⁴

The river diggers and debris washers in Griqualand West found it difficult to make a living, but their expectations were soon raised when a fifth mine was discovered approximately four miles from Kimberley.⁴³⁵

5.2.2 Discovery of the Wesselton Mine

A new diamond mine was discovered on the farm Benaauwdheidsfontein in September 1890.⁴³⁶ According to Roberts,⁴³⁷ it was surprising that the Wesselton Mine was only

⁴³³ At para 16.

⁴³⁴ At para 30. See para 12.6 below.

⁴³⁵ Worger *City of Diamonds* 274; Anonymous "How diamonds were discovered in Kimberley"; Anonymous 1950 *The Diamond News and the SA Watchmaker and Jeweller* 25-28; Adam 1939 *The Diamond News and the SA Watchmaker and Jeweller* 6-8; Rosenthal 1944 *The Diamond News and the SA Watchmaker and Jeweller* 5-9.

⁴³⁶ Roberts *Kimberley* 277-278, describes the different versions of the discovery of the Wesselton Mine as follows: "Many stories are told about the discovery of the Wesselton Mine. One of the most popular is that told by, among others, Irvine Grimmer. This has it that a prospector working on the farm accidentally stumbled upon indications of diamondiferous gravel in a heap of soil thrown out by an ant bear. 'He followed it up,' claimed Grimmer, 'with the result that the Wesselton Mine was discovered. 'However, Gardner Williams gave another version. According to him, the prospector – an Afrikaner named Fabricius - was wandering aimlessly about the farm and sank 'a hole at random, without any apparent reason, through ten feet of limestone and found yellow ground.' A few months after the discovery, Fabricius gave yet another account to a newspaper reporter. He said that he was riding over the veld (and) observed something glittering in the sand and dismounting from his horse, picked up a handful of surface soil, containing, as he thought, the shining particles. On arriving at home he carefully washed up the soil and was surprised not only at finding a small diamond but still more at the large amount of carbon and garnets in so small a quantity of ground. Further prospecting led to the almost certain surface indications of a diamond mine."

⁴³⁷ Roberts *Kimberley* 278.

discovered at this late stage, as it was known that diamonds could be found on the farm Benaauwdheidsfontein.⁴³⁸

The first owner of the farm Benaauwdheidsfontein was JJ Wessels. The title of the farm was not subject to a reservation of the rights to diamonds in favour of the Crown. Before the discovery of the Wesselton Mine, Wessels retired to Wellington in the Cape and he leased the mineral rights to a Henry Ward. Ward had been prospecting on the farm Benaauwdheidsfontein for a number of years and he employed a certain Fabricius. Ward also appointed a Kimberley firm, to commence with extensive digging operations.⁴³⁹ Soon, others noticed the diamond digging activities on the farm Benaauwdheidsfontein too, and on 5 February 1891 the farm was "rushed."⁴⁴⁰ Since the farm Benaauwdheidsfontein was held under a title granted by the Orange Free State, Ward insisted that it was not subject to the "Cape laws". The "rushers" repudiated Ward's objections and they proceeded to establish the "Wessels' Mine

⁴³⁸ The farm Benaauwdheidsfontein was also one of the farms that was "rushed" by diggers in 1871 shortly before the discovery of Colesberg *Kopje*. The most likely explanation for the late discovery of the diamond mine was that the discovery of diamonds at Colesberg *Kopje* may have distracted the diggers on the farm Benaauwdheidsfontein. The discoverer of the Wesselton Mine also deliberately kept the specific spot where the mine was discovered a secret until his agreement with the owner of the farm Benaauwdheidsfontein was finalised. Roberts *Kimberley* 278. The Wesselton Mine was first named "Premier Mine". It was later with the discovery of the Premier Mine in the *Zuid-Afrikaansche Republiek* changed to Wesselton Mine, in honour of the first landowner of the farm Benaauwdheidsfontein; Williams *Diamond Mines* Vol 1 346-347.

⁴³⁹ Roberts *Kimberley* 277-278; Beet *Diamond Fields* 88-89; Williams *Diamond Mines* Vol 1 346-347; Worger *City of Diamonds* 274; Chilvers *Story of De Beers* 191-192; Reunert *Diamonds and Gold* 65-67;

⁴⁴⁰ Roberts *Kimberley* 278-279, describes the "rushing" onto the farm Benaauwdheidsfontein as follows: "Long before day-break that morning, a stream of 'carts, pedestrians and vehicles of every description' were seen heading for Wessels farm. It was a planned operation, instigated by the Reverend AF. Balmer, secretary of the Labour Bureau at Beaconsfield. Balmer, alarmed at the high rate of unemployment, had been determined to get the farm declared a public digging. Within a matter of hours, some four hundred claims had been pegged out on Benaauwdheidsfontein. The rush continued throughout the following day and the number of pegged-out claims doubled. 'The excitement,' reported the *Independent*, 'reminded old residents of the early days when 'rushes' were frequent, and many are in hopes that the new mine will be the means of supporting a large digging community.'" Haasbroek "Delwersmoleste op Benaauwdheidsfontein en Olifantsfontein" 70-72.

Claimholders and Protection Association" to regulate the new diggings. They petitioned the Governor of the Cape, to grant them legal title to their claims.⁴⁴¹

In *Wessels v Wilson and Hall*⁴⁴² the landowner of the farm Benaauwdheidsfontein brought a court application for an interdict to restrain the diggers from conducting mining operations on his property. The respondents alleged that the mine situated on the farm Benaauwdheidsfontein was a public mine and that they were entitled to work the claims.⁴⁴³ The High Court of Griqualand West held that the private mine situated on the farm Benaauwdheidsfontein had not been proclaimed as a mine in terms of section 76 of the 1883 Cape Precious Stones Act and that it was therefore not a "public mine". Laurence JP held further that even if the Wesselton Mine had been proclaimed a mine, the respondents were not entitled to simply work the mine without complying with the regulations for the working of the mine, issued by the Governor with the landowner's consent. The High Court concluded that:

I do not see that they would be any more entitled to do so in the case of the 'Premier Mine' at Benaauwdheidsfontein, than they would in the case of the mines at Bultfontein and Dutoitspan, which are situated on farms held on similar title.

According to Roberts,⁴⁴⁴ De Beers Consolidated Mines Limited was concerned that the discovery of the new competitive diamond mine could result in an over-production of diamonds which would lead to a fall in the diamond price, bringing back the uncertainties that existed in the diamond industry before. The Company therefore approached Ward to take over his lease with the landowner.⁴⁴⁵ De Beers Consolidated

⁴⁴¹ Worger *City of Diamonds* 275, describes the petitioners' case as follows: "Public working of the new mine, argued the petitioners (1,042 of them), would permit people previously under the thumb of absentee 'moneyed monopolists' and 'on the verge of starvation' to 'be again occupied in winning those glittering gems, as in the past good old days ... '. Adversity was to be a thing of the past, for now 'every honest man would have an opportunity of making a living for himself and [his] family,' while a renewed emphasis on individual enterprise rather than company production (the latter controlled by men 'in whose hearts the welfare of the Colony as a whole finds little or no echo') would benefit the entire country. Prosperity, in short, rested on breaking De Beers' monopoly."

⁴⁴² 1890-1892 6 HCG 88 (hereafter the *Wessels* case).

⁴⁴³ Section 76 read with s 79 of the 1883 Cape Precious Stones Act. See para 5.3.3.2 below.

⁴⁴⁴ Roberts *Kimberley* 279.

⁴⁴⁵ Roberts *Kimberley* 279. It was reported that Ward refused the offer from De Beers Consolidated Mines Limited and he was in favour of having the Wesselton Mine declared a public digging.

Mines Limited entered into lengthy negotiations with the landowner and eventually in December 1891, the Company purchased the farm Benaauwdheidsfontein.⁴⁴⁶

5.3 Consolidating diamond mining legislation

5.3.1 Application of the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act

The 1883 Cape Precious Stones Act commenced on 27 September 1883 and it repealed the 1871 GW Diggings Proclamation,⁴⁴⁷ the 1874 GW Mining Ordinance,⁴⁴⁸ Griqualand West Ordinance 15 of 1879⁴⁴⁹ and the 1880 GW Mining Proclamation.⁴⁵⁰ All existing resolutions, rules, regulations or by-laws in force at the time of commencement of the 1883 Cape Precious Stones Act, remained in force insofar as they were not inconsistent with any of the provisions of the 1883 Cape Precious Stones Act.⁴⁵¹ The rules and regulations contained in the 1880 GW Mining Proclamation therefore continued in force insofar as they were not in conflict with the provisions of

⁴⁴⁶ Roberts *Kimberley* 280-281; Worger *City of Diamonds* 280; Kanfer *The Last Empire* 111-112. The conclusion of a formal agreement between the landowner of the farm Benaauwdheidsfontein and De Beers Consolidated Mines Limited was delayed by the fact that a portion of the farm Benaauwdheidsfontein was situated within the boundaries of the Orange Free State and further by the interests of Ward as the holder of a mineral lease. Ward eventually agreed to cede his interests in the new diamond mine to De Beers Consolidated Mines Limited subject to the condition that he would first be entitled to work the mine and to haul 5 000 000 loads of yellow ground within a period of five years. Ward also suggested that the diamond mine be named the "Premier Mine" in honour of Rhodes, who later became Prime Minister of the Cape Colony in 1890. Rosenthal *Here are Diamonds* 36-41, states that: "Mr. Gardiner Williams, General Manager of De Beers, estimated that Ward recovered no less than 1,100,000 carats during his five years, which realised, he said 18 shillings a carat, or just under £1,000,000 while only £82,500 went into working expenses. At the January board meeting of De Beers in 1895, Colonel (later Sir) David Harris announced that the 5,000,000th load would be treated by Ward within a few days and that the whole of the mine would then revert to the company, which proposed to continue operations at roughly the same rate. 'This' he calculated, will result in an additional £100,000 profit per annum to the De Beers Company. Like so many pioneers, Ward found his luck changeable. He died in 1902 - without a penny to his name." Hahn *Diamond* 85; Beet *Diamond Fields* 88-89.

⁴⁴⁷ See para 4.2.2 above.

⁴⁴⁸ See para 4.3.3 above.

⁴⁴⁹ See para 4.3.5 above.

⁴⁵⁰ See para 4.4.2 above. Section 1 read with the first Schedule to the 1883 Cape Precious Stones Act. The 1872 GW Prospecting Proclamation was, however, not repealed.

⁴⁵¹ Section 44 of the 1883 Cape Precious Stones Act.

the 1883 Cape Precious Stones Act.⁴⁵² The 1883 Cape Precious Stones Act did not, repeal the 1880 GW Fixity of Tenure in Mines Ordinance, with the exception of section 5 thereof.⁴⁵³ The 1883 Cape Precious Stones Act applied to precious stones, gold, silver and platinum,⁴⁵⁴ but only in respect of the territory of Griqualand West and such other areas proclaimed as mining districts within the Cape Colony.⁴⁵⁵

Similar to the diamond mining legislation, which applied in Griqualand West during the period 1871 until 1880, three forms of land tenure were distinguished in the 1883 Cape Precious Stones Act. These forms of land tenure were firstly Crown land, secondly land that was privately owned, but the title deed contained a reservation of the rights to diamonds in favour of the Crown (hereafter in this chapter referred to as reserved private land), and thirdly privately owned land, of which the title deed did not contain a reservation of the rights to diamonds in favour of the Crown (hereafter in this chapter referred to as unreserved private land).⁴⁵⁶ The 1883 Cape Precious Stones Act did not apply to unreserved private land, except in the case of existing mines and alluvial diggings that had already been opened on unreserved private land. Although the working of alluvial diggings or mines on unreserved private land in instances where

⁴⁵² In the *Queen* case, a certain Town was accused of contravening s 1(27) of the schedule to the 1874 GW Mining Ordinance in that he made use of an engine and appliances for the raising or removing of rock or soil from the claims of another company, after the use thereof had been forbidden by the Inspector of Mines. The hauling was carried on with gear passing over the claims of another claimholder and was according to the Inspector of Mines dangerous for persons working beneath the gear. The prosecutor argued that the schedule to the 1874 GW Mining Ordinance, could only have been cancelled by an act of the Legislature and not by the 1880 GW Mining Proclamation. In an appeal from a judgment of the Resident Magistrate, the High Court of Griqualand West held, without giving reasons, that the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance, continued to apply until new rules were framed under the provisions of the 1883 Cape Precious Stones Act. The accused's conviction was sustained.

⁴⁵³ Section 5 of the 1880 GW Fixity of Tenure in Mines Ordinance provided that all transfer fees had to be paid by a transferee and that no transfer would be issued until all licences and other monies due to the Government in respect of a particular claim had been duly paid.

⁴⁵⁴ The definition of "minerals" in s 81 of the 1883 Cape Precious Stones Act. The prospecting and mining for precious metals were later in 1898 separately regulated with the enactment of the *Precious Minerals Act* 31 of 1898. See the *Thompson* case at 414.

⁴⁵⁵ Section 80 of the 1883 Cape Precious Stones Act. This was later changed with the enactment of the *Precious Stones and Minerals Mining Law Amendment Act* 44 of 1887, in which the 1883 Cape Precious Stones Act was made applicable to the entire Cape Colony. Dale *Mineral Rights* 222.

⁴⁵⁶ There was in the case of unreserved private land no reference to the possibility that the rights to diamonds could be held by a person other than the landowner.

the owner of the unreserved private land had not consented to the proclamation of an alluvial digging or mine on his land under the 1883 Cape Precious Stones Act was not regulated under the 1883 Cape Precious Stones Act, it was not entirely unregulated. On 3 August 1894, the *Private Mine Inspection Act* 18 of 1894 (hereafter the 1894 Cape Private Mine Inspection Act) was enacted to provide for the inspection of "private mines and alluvial diggings" and the regulation of certain works therein.⁴⁵⁷

The 1899 Precious Stones Act came into effect on 6 October 1899 and repealed the whole of the 1883 Cape Precious Stones Act, except those provisions which applied to mines and alluvial diggings situated on unreserved private land and which were at the time of the commencement of the 1899 Cape Precious Stones Act duly proclaimed mines and diggings.⁴⁵⁸ The 1899 Cape Precious Stones Act did not apply to unreserved private land.⁴⁵⁹ The 1883 Cape Precious Stones Act therefore continued to apply to existing proclaimed mines or alluvial diggings on unreserved private land. Section 2 of the 1899 Cape Precious Stones Act further provided that the repeal of the laws mentioned in the first schedule thereof, would not affect anything duly done or any right or privilege acquired or any liability incurred with regard to any such laws. The 1880 GW Fixity of Tenure in Mines Ordinance and the 1894 Cape Private Mines Inspection Act were not repealed by the 1899 Cape Precious Stones Act and continued to apply.⁴⁶⁰

⁴⁵⁷ The preamble of the 1894 Cape Private Mines Inspection Act. The Governor of the Cape of Good Hope was in terms of s 3 of the 1894 Cape Private Mines Inspection Act empowered to make rules to regulate the works and machinery and the manner of carrying on such works and the working of a mine or alluvial digging situated on unreserved private land which had not been proclaimed a mine or alluvial digging under the 1883 Cape Precious Stones Act. Section 4 of the 1894 Cape Private Mines Inspection Act provided that such rules would upon proclamation in the *Gazette* be in force and every person who contravened any proclaimed rule was liable to a fine not exceeding 100 pounds and if in default of payment, to imprisonment with or without hard labour for any period not exceeding three months.

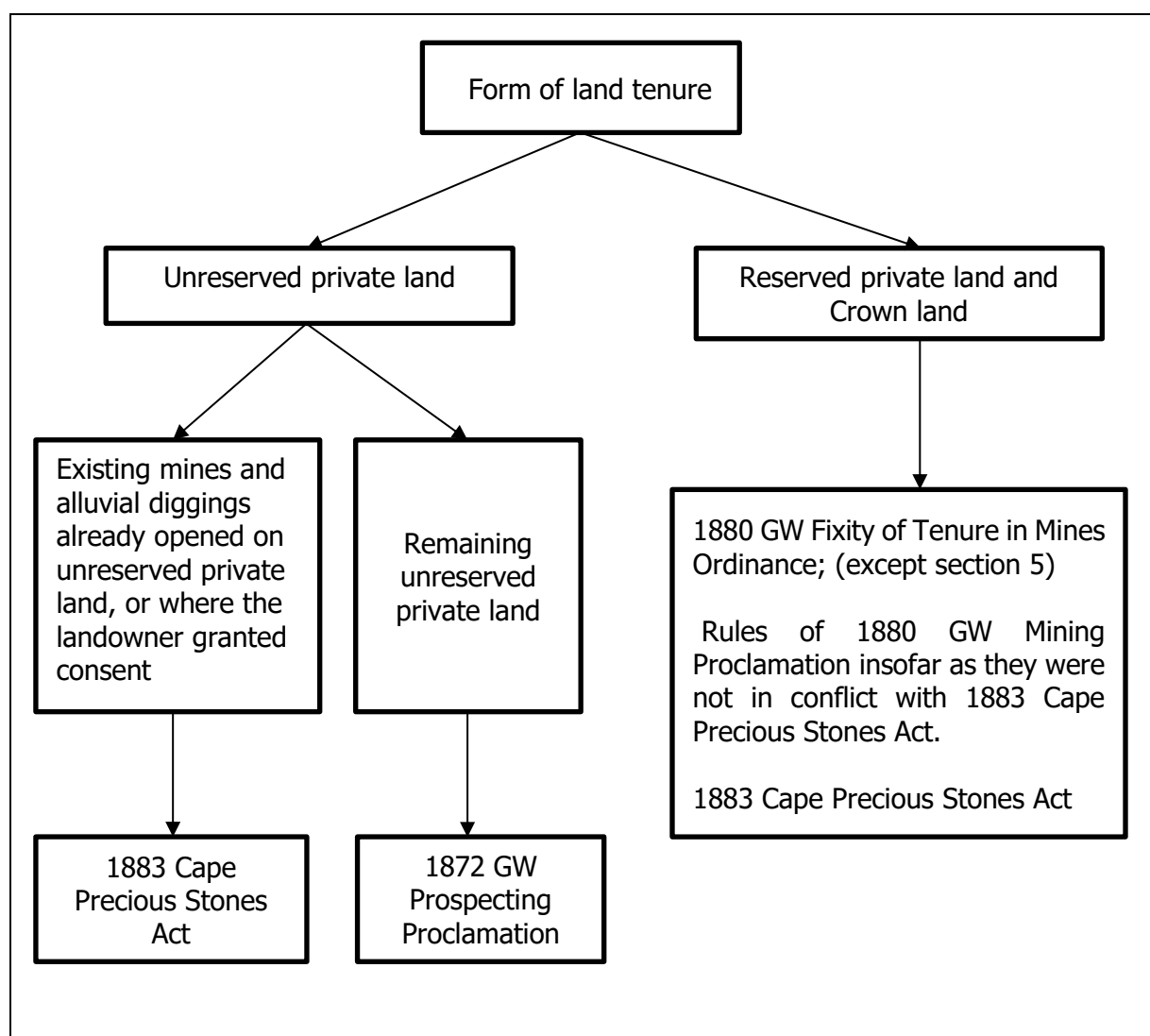
⁴⁵⁸ Section 2 read with the first schedule to the 1899 Cape Precious Stones Act.

⁴⁵⁹ Section 1 of the 1899 Cape Precious Stones Act provided that any reference in the 1899 Cape Precious Stones Act to "private property," would be a reference to privately owned land, the title of which contained a reservation of the right to precious stones or minerals in favour of the Crown. In this chapter this form of land tenure is referred to as reserved private land.

⁴⁶⁰ The *Mondira Pula* case para 18;

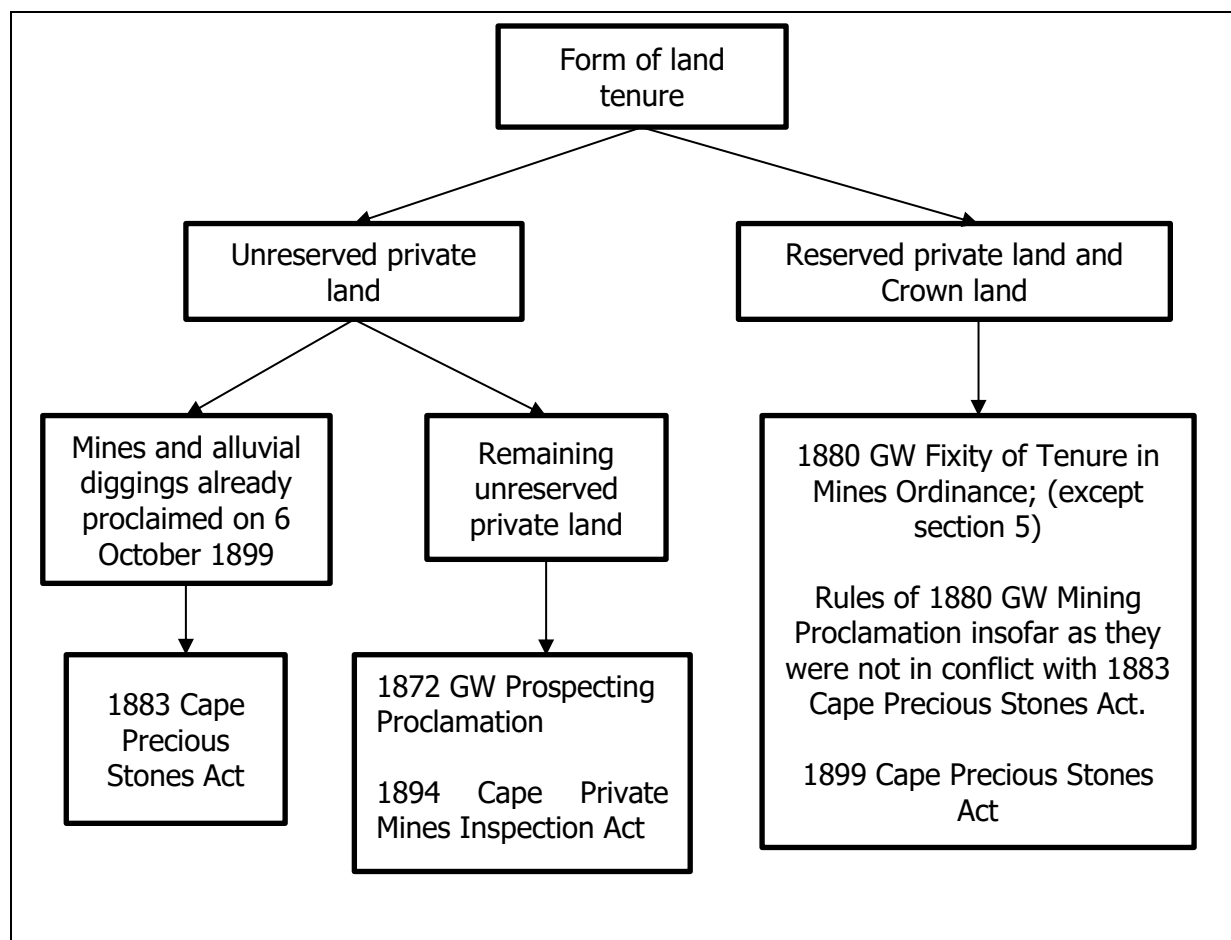
The relevant diamond mining legislation that regulated the prospecting and mining of diamonds under the 1883 Cape Precious Stones Act with reference to the different forms of land tenure is schematically set out in Figure 5.1 below.

Figure 5.1: Diamond mining legislation regulating the prospecting and mining of diamonds under the 1883 Cape Precious Stones Act.



The relevant diamond mining legislation that regulated the prospecting and mining of diamonds under the 1899 Cape Precious Stones Act (before the amendment thereof in terms of the 1907 Cape Precious Stones Amendment Act) with reference to the different forms of land tenure is schematically set out in Figure 5.2 below.

Figure 5.2: Diamond mining legislation regulating the prospecting and mining of diamonds under the 1899 Cape Precious Stones Act.



5.3.2 Prospecting for diamonds under the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act

There are common features in both the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act insofar as the prospecting and searching for diamonds were concerned, which are discussed thematically below.

5.3.2.1 The right to prospect on Crown land and on reserved private land

A person, who wanted to search for diamonds on Crown land or on reserved private land in terms of the 1883 Cape Precious Stones Act, had to obtain a prospecting licence from the office of the Civil Commissioner.⁴⁶¹ No prior notice had to be given to the owner or occupier of the relevant farm and their consent was not required to obtain a prospecting licence. The Civil Commissioner only notified the owner or occupier after the granting of the prospecting licence.⁴⁶²

The 1883 Precious Stones Act was amended in terms of the *Precious Stones and Minerals Mining Law Amendment Act* 44 of 1887 (hereafter the 1887 Cape Precious Stones Amendment Act) in which the rights of the owner of reserved private land were enlarged. The owner of reserved private land was no longer obliged to allow a licensed prospector to prospect on his land. The holder of a prospecting licence had to obtain the consent of the landowner of reserved private land to prospect on the land. The landowner's consent could be granted subject to such lawful terms and conditions agreed upon and to the payment of a consideration.⁴⁶³ The owner of reserved private

⁴⁶¹ Section 3 of the 1883 Cape Precious Stones Act. See the *Thompson* case at 414. In *Dinkel v Union Government* 1929 AD 150 at 161 (hereafter the *Dinkel* case), the Appellate Division held that although s 2 of the 1883 Cape Precious Stones Act provided that any person could apply for a prospecting licence, the words "save as hereinafter excepted" indicated that it was the Legislature's intention to confine the right to apply for a prospecting licence, to certain people, which the Legislature failed to carry into effect. This was later rectified in the 1899 Cape Precious Stones Act by providing that a person had to be of good character.

⁴⁶² Section 6 of the 1883 Cape Precious Stones Act. The holder of a prospecting licence was in terms of s 4 of the 1883 Cape Precious Stones Act in addition entitled to grazing for six horses or mules or for 16 oxen and to take wood and water for domestic use, provided that he paid the owner or occupier of the land ten shillings a day. The holder of a prospecting licence was in terms of s 5 of the 1883 Cape Precious Stones Act obliged to obtain security in the form of a bond for the sum of £200, with sureties to be approved by the Civil Commissioner for the due and proper repair of any surface damage caused by the holder on the land occupied by any *quitrent* tenant or lessee. There was no definition of the term "*quitrent* tenant" in the 1883 Cape Precious Stones Act and it is submitted that the reference to a *quitrent* tenant was intended to refer to the owner of the reserved private land. The general view was that all privately owned land in the Cape Colony, was subject to the Cradock Proclamation. Jones *Conveyancing* 4-5; *De Villiers* case; Dale *Mineral Rights* 216-217.

⁴⁶³ Section 5(2) of the 1887 Cape Precious Stones Amendment Act. The Appellate Division held in the *Thompson* case at 414 with reference to s 5(2) of the 1887 Cape Precious Stones Amendment Act, that: "This was obviously a serious curtailment of the right of the Crown, and a correspondingly

land could prospect on his own land without a prospecting licence and he acquired all the rights of a licensed prospector.⁴⁶⁴ The owner of reserved private land could also protect his land from being proclaimed a digging by preventing the discovery of diamonds on his land by a licensed prospector.⁴⁶⁵

The requirement that the consent of the landowner of reserved private land was necessary to obtain a prospecting licence in respect of reserved private land was continued in the 1899 Cape Precious Stones Act⁴⁶⁶ and the landowner of reserved private land was also entitled to prospect on his own land without a prospecting licence.⁴⁶⁷ Under the 1899 Cape Precious Stones Act, the condition was imposed that an applicant for a prospecting licence had to be a person of good character.⁴⁶⁸ The 1899 Cape Precious Stones further provided that in the case of Crown land, the holder of a prospecting licence had the exclusive right to prospect on the Crown land within a circular area, described as the "prospecting area" of 1000 yards in diameter.⁴⁶⁹

important increase in the rights and privileges of the owner. But the language is clear and definite and not subject to any misconstruction, and full effect must be given to it."

⁴⁶⁴ Section 5(1) of the 1887 Cape Precious Stones Amendment Act. Van der Schyff *Constitutionality* 44.

⁴⁶⁵ See the *Thompson* case at 422.

⁴⁶⁶ Section 5 of the 1899 Cape Precious Stones Act. The landowner was also entitled to demand a lawful consideration as a condition for the granting of his consent and he was also entitled to dictate the terms and conditions in terms of which the holder of the prospecting licence had to prospect for diamonds on his land or on a portion thereof. The 1899 Cape Precious Stones Act was later amended by the 1907 Cape Precious Stones Amendment Act, which is discussed in para 5.4 below. Section 5 of the 1907 Cape Precious Stones Amendment Act provided that the Governor could by notice in the *Gazette* prohibit prospecting and mining on places described in the notice. *Rex v Nolte* 1928 AD 377.

⁴⁶⁷ Section 45 of the 1899 Cape Precious Stones Act.

⁴⁶⁸ The cost of a prospecting licence was two shillings and sixpence per month: s 4 of the 1899 Cape Precious Stones Act. The Appellate Division held in the *Dinkel* case at 159, that a prospecting licence issued in terms of s 4 of the 1899 Cape Precious Stones Act was of a personal nature because the Civil Commissioner was required to satisfy himself that the licensee was a person of good character. The Court held further that the holder of a prospecting licence who allowed the control and supervision of prospecting under his prospecting licence to pass out of his hands, lost the right to claim discoverer's rights in respect of the diamonds found during the course of such prospecting.

⁴⁶⁹ The holder of a prospecting licence was in terms of s 7 of the 1899 Cape Precious Stones Act required to erect a beacon at the centre of the prospecting area and affix a signboard advising that the specific spot was the centre of a prospecting area. The prospecting licence holder could during his prospecting, move the beacon to a different spot on the Crown land provided that he did not interfere with the prospecting area of any other prospecting licence holder. The holder of a

5.3.2.2 The right to prospect on unreserved private land

The 1883 Cape Precious Stones Act did not apply to the prospecting for diamonds on unreserved private land. In the case of unreserved private land, the consent of the landowner was required in order to prospect on his land.⁴⁷⁰ The landowner was entitled, but not obliged to allow prospecting or mining on his land. It is submitted that although the 1883 Cape Precious Stones Act repealed the 1871 GW Diggings Proclamation, the 1872 GW Prospecting Proclamation continued to apply in respect of unreserved private land and a person who wanted to prospect for diamonds on unreserved private land had to obtain the consent of the landowner and a prospecting licence.⁴⁷¹

The 1899 Cape Precious Stones Act similarly did not apply to the prospecting for diamonds on unreserved private land and the 1872 GW Prospecting Proclamation continued to regulate the prospecting for diamonds in respect of unreserved private land situated in the Cape Colony.⁴⁷²

prospecting licence in respect of Crown land was furthermore entitled to grazing for six horses or mules, or for 16 oxen and to take wood and water for domestic use: s 9 of the 1899 Cape Precious Stones Act. In the case of reserved private land, the prospecting licence holder would have had to negotiate the rights of grazing and to use wood and water with the landowner, no doubt for a consideration. This agreement could include the consent of the landowner of reserved private land to conduct prospecting on the relevant reserved private land. According to a note included on the prescribed form for a prospecting licence, in the second schedule to the 1899 Cape Precious Stones Act, prospecting within a distance of 200 yards of any house or building occupied or used by the owner or lessee thereof, was prohibited, unless the owner or lessee consented thereto. It was in terms of s 9 of the 1899 Cape Precious Stones Act possible for different prospecting licence holders to prospect for diamonds on the same Crown land, provided that their prospecting areas did not overlap.

⁴⁷⁰ This appears from the wording of the prescribed prospecting licence contained in the second schedule to the 1883 Cape Precious Stones Act. See also *Imroth v Ward* 1890-1891 8 SC 257 where the landowner of the farm Benaauwdheidsfontein, which was unreserved private land, granted to a third party, the sole and exclusive right to prospect for diamonds on his property. The Wesselton Mine was discovered on the farm Benaauwdheidsfontein. See para 5.2.2 above.

⁴⁷¹ See para 5.3.1 and figure 5.1 in para 5.3.1 above.

⁴⁷² See para 5.3.1 and figure 5.2 in para 5.3.1 above.

5.3.2.3 Rights and obligations of a discoverer of diamonds

If the holder of a prospecting licence discovered any diamonds or minerals, he was obliged to lodge a solemn declaration with the Civil Commissioner.⁴⁷³ The holder of the prospecting licence was then entitled to select 20 claims at the place where such diamonds or minerals had been found and to receive a certificate from the Civil Commissioner as proof. Only one discoverer's certificate could be granted for each place where diamonds or minerals had been found.⁴⁷⁴ The 1899 Cape Precious Stones Act provided that if the holder of a prospecting licence could prove to the satisfaction of the Civil Commissioner that he had discovered diamonds in payable quantities he was entitled, once a diamond mine had been proclaimed, to select 50 claims in a block at a place where the diamonds had been found. The discoverer could select the claims prior to the allocation of any other claims in the mine and was exempted from the payment of licence fees in respect of those claims for as long as he held the claims. Once a certificate for his 50 claims had been granted to the discoverer, his rights to prospect under his prospecting licence in respect of the area to which the certificate referred ceased to exist.⁴⁷⁵ Only one prospector was entitled to discoverer's claims in a diamond mine.⁴⁷⁶

⁴⁷³ Section 8 of the 1883 Cape Precious Stones Act. A similar provision was contained in s 11 of the 1899 Cape Precious Stones Act. Section 11 of the 1899 Cape Precious Stones Act further provided that the discoverer had to make a solemn declaration of the number and value of diamonds found by him. The word "discoverer" was defined in the 1899 Cape Precious Stones Act to mean: "the prospector who had found precious stones while prospecting under a licence issued under the provisions of this Act or any existing law dealing with Precious Stones and Minerals."

⁴⁷⁴ Section 9 of the 1883 Cape Precious Stones Act.

⁴⁷⁵ Section 12 of the 1899 Cape Precious Stones Act. *Lewis and Marks Limited v Mining Commissioner, Klerksdorp* 1927 TPD 912 at 914; *Cape Coast Exploration Limited v Scholtz* 1933 AD 56. If the Governor decided not to proclaim a mine, the discoverer was entitled within three months after receipt of a discoverer's certificate, to beacon off and to hold claims in respect of the area covered in his certificate. In the case of reserved private land the discoverer had to reach an agreement with the landowner. The claims had to be registered with the Registrar of Claims and the Governor was entitled at any time, to proclaim a mine in respect of the claims beacons off: section 14 of the 1899 Cape Precious Stones Act.

⁴⁷⁶ Section 13 of the 1899 Cape Precious Stones Act provided that if a prospecting area was included in a proclaimed mine and another prospecting licence holder held a prospecting licence within the boundaries of the proclaimed mine, the prospector was entitled on the payment of a licence fee, to select two claims within the boundaries of the mine after the discoverer and the owner had

The holder of a prospecting licence could not prospect within 500 yards of any other person already prospecting for precious stones or minerals, unless the other person consented thereto. The holder of a prospecting licence was further prohibited from prospecting within 200 yards of any house or building that was occupied or on any land that was under cultivation, unless the holder obtained the written consent of the landowner or occupier.⁴⁷⁷

5.3.3 The working of mines and alluvial diggings in terms of the 1883 Cape Precious Stones Act

5.3.3.1 Crown land and reserved private land

Existing mines or alluvial diggings which had already been declared as mines or alluvial diggings, were deemed to be mines or alluvial diggings for purposes of the 1883 Cape Precious Stones Act.⁴⁷⁸ If diamonds or minerals were discovered on Crown land or on reserved private land, the Governor could declare the specific area as an alluvial digging or a mine if he was satisfied that diamonds or minerals existed in payable quantities on such land. The Governor was entitled to make such rules, orders, regulations or by-laws as he deemed necessary for the proper laying out, surveying, enlargement or contracting of any mining areas and depositing floors in connection with the alluvial diggings or mine and the proclaimed areas.⁴⁷⁹ He was also entitled to

selected their claims. The rights of the discoverer of diamonds on Crown land and reserved private land were amended by the 1907 Cape Precious Stones Amendment Act. See para 5.4 below.

⁴⁷⁷ Sections 10 and 11 of the 1883 Cape Precious Stones Act. Similar provisions were contained in a note included on the prescribed form for a prospecting licence, in the second schedule to the 1899 Cape Precious Stones Act and s 10 of the 1899 Cape Precious Stones Act. Section 10 of the 1899 Cape Precious Stones Act prohibited the granting of a prospecting licence to dig or search for precious stones on Crown land or reserved private land which was under cultivation or required for the purpose of irrigation. The granting of prospecting licences in any squares, streets, roads, railways or cemeteries was also prohibited. A prospecting licence could in terms of s 10 of the 1899 Cape Precious Stones Act not be granted in respect of any proclaimed mines that were actually used for mining purposes or in respect of any claim in an alluvial digging.

⁴⁷⁸ Section 17 of the 1883 Cape Precious Stones Act.

⁴⁷⁹ Section 18 of the 1883 Cape Precious Stones Act.

proclaim rules and regulations to provide for the proper management of all diggings and mines.⁴⁸⁰

The holder of every licensed claim in any mine was entitled to use and occupy one acre of ground in the neighbourhood of or in proximity to the mine as a depositing site, also referred to as depositing floors. Claimholders could use the depositing floors for the purpose of depositing soil, reef or shaly ground and for the purpose of sinking wells, laying tramways or doing and performing other works and matters relating to mining operations. The landowner was entitled to charge a sum not exceeding one pound per month in respect of each depositing site.⁴⁸¹ In practice, the claimholders paid the amounts due for rent of depositing sites to the Inspector of Claims, who in

⁴⁸⁰ Section 71 of the 1883 Cape Precious Stones Act. In the rules and regulations, the Governor could prescribe the manner in which the claims had to be worked and provide for the granting of miners' certificates which entitled persons to hold and work claims in any alluvial digging or mine. The Governor could also proclaim rules and regulations for the protection of life and limb. Every claimholder who had not already held a title under the 1880 GW Fixity of Tenure in Mines Ordinance would receive a certificate of registration in a prescribed form. Section 29 of the 1899 Cape Precious Stones Act made the 1880 GW Fixity of Tenure Ordinance applicable to the entire Cape Colony. Every claimholder who did not hold a title under the 1880 GW Fixity of Tenure Ordinance had to receive a certificate of registration; See para 4.4.1 above.

⁴⁸¹ Section 35 of the 1883 Cape Precious Stones Act. The following description of the use of depositing sites, is quoted by Reunert *Diamonds and Gold* 55-56 from Gardner Williams, the General Manager of De Beers Consolidated Mines Limited's Technical Report: "The depositing floors are made by removing the bush and grass from a fairly level piece of ground. The land is then rolled and made as hard and smooth as possible. The De Beers floors on Kenilworth ... are laid off in rectangular sections, 600 yards long and 200 yards wide. Each section holds about 50,000 loads. The depositing is done by horses on portable tram lines extending at right angles from the main lines on either side of the floors ... For a time the blue ground remains on the floors without much manipulation. The heat of the sun and moisture soon have a wonderful effect upon it. Large pieces, which were as hard as ordinary sandstone when taken from the mine, soon commence to crumble. At this stage of the work, the winning of the diamonds assumes more the nature of farming than mining. The ground is continually harrowed to assist pulverization, by exposing the larger pieces to the action of the sun. Spans of mules were formerly used for drawing the harrow to and fro, but steam traction engines with gear for drawing the harrows, on Fowler's well-known steam-ploughing system, are now employed at both Kimberley and De Beers. The length of time necessary for the ground to be exposed before it becomes sufficiently pulverised for washing depends on the season of the year and the amount of rain. The blue ground of the four mines differs as to the length of time necessary for pulverisation. The blue from Kimberley Mine becomes quite well pulverised in three months during the summer, whilst that from De Beers requires double that time. The longer the ground remains exposed, the better it is for washing." The Technical Report was attached to Williams' General Manager's Report for 1890.

turn paid the money over to the Civil Commissioner of the district to account to the landowner.⁴⁸²

In *Orpen NO v Leicester Brilliant Syndicate Limited*⁴⁸³ the High Court of Griqualand West had to consider the different and competing interests of a claimholder and landowner to decide whether the landowner was entitled to payment where a claimholder had not made use of the depositing floors. The Receiver-General of Revenue sued the claimholder on behalf of the Colonial Government for claim licence money and rent in respect of certain depositing floors attached to the claims.⁴⁸⁴ Hopley J stated that the Legislature must have considered the two different interests when the legislative measures were adopted. Firstly, the interest of the claimholder who wished to mine on the land with as few burdens as possible and secondly, the interest of the landowner who wanted considerable benefits from the discovery of diamonds on his land. The landowner expected compensation for the surface damage and the disturbance of possession, as a consequence of the diamond mining operations on his

⁴⁸² For a discussion of the process of diamond mining, including the diamond washing machinery and gears used, see Reunert *Diamonds and Gold* 55-57. In *London and South Africa Exploration Co v De Beers Consolidated Mines Limited* 1892-1893 10 SC 231, the plaintiff was the registered owner of the farm Dutoitspan. The landowner let certain claims in the Dutoitspan Mine to the defendant, together with an additional area allocated as a depositing floor. One of the conditions of the lease agreement was that should any portion of the premises leased as a depositing floor, be discovered to be diamondiferous, the claimholder would surrender the diamondiferous ground to the landowner. The landowner in turn agreed to then grant to the claimholder an alternative area of land as a depositing floor, equal in extent to the land surrendered and further to compensate the claimholder for any wells, sheds, huts and tramways constructed on the surrendered land. The landowner proceeded to prospect on a portion of the depositing ground forming part of the leased premises and discovered that the land was indeed diamondiferous. The landowner thereafter entered into an agreement with a syndicate to lease the diamondiferous ground forming part of the leased premises to the syndicate. The defendant forcibly ejected the syndicate from the depositing floors. The Supreme Court of the Cape of Good Hope held that in the absence of an express reservation in the lease agreement the landowner had no right to prospect for diamonds in the land, as that would interfere with the use of the ground as depositing floors. In this instance, there was such an express reservation in the lease agreement and the Court ordered the defendant to surrender the ground as requested by the landowner, but awarded damages in favour of the defendant.

⁴⁸³ 1895-1898 8 HCG 148.

⁴⁸⁴ The High Court of Griqualand West held at 152 that the landowner had to institute the action in its name, as the landowner was the party beneficially interested. In this case, the landowner intervened as co-plaintiff.

property, which the landowner was obliged to allow.⁴⁸⁵ The High Court held that the claimholder was obliged to pay the rental for the depositing sites, irrespective of whether the claimholder in fact used the depositing site or not.⁴⁸⁶

In *London and South African Exploration Company v Mylchreest*⁴⁸⁷ the landowner of the farm Dutoitspan leased certain claims in the Dutoitspan Mine to the respondent. The respondent entered into a lease agreement with the owner of the neighbouring farm, Benaauwdheidsfontein, to use the leased ground situated on the farm Benaauwdheidsfontein as depositing floors. The landowner of the farm Dutoitspan applied to the High Court of Griqualand West for an interdict to restrain the respondent as claimholder, from removing the diamondiferous ground taken from the claims situated on the farm Dutoitspan onto the neighbouring farm Benaauwdheidsfontein. The landowner alleged that it had made suitable depositing sites available on the farm Dutoitspan for the claimholders to use. The reason for the landowner's dissatisfaction was that in practice, once a claimholder manipulated and processed the ground, a large number of small diamonds that the claimholder usually discarded, remained in

⁴⁸⁵ At 155.

⁴⁸⁶ In this regard, the High Court at 157 held as follows: "Now I do not think that there can be any doubt that sect. 34 works practical expropriation of that portion of the owner's land which overlies and immediately surrounds the mine. As soon as the mine is discovered and proclaimed the Commissioner must have it surveyed. The number of claims is determined, a belt of two hundred yards wide is reserved round the margin of the mines, and further areas, containing at least an acre for every claim in the mine is likewise surveyed and set apart for the various uses connected with the proper and efficient working of the mine. From the date of such survey this area - embracing the mine, the reserved belt of two hundred yards round its margin, and the general mining area containing the depositing-floors and any other space that may be necessary for proper mining-is entirely taken from the control of the owner of the soil, so much so that he and his servants could be treated as trespassers thereon by the Governing Body of the mine, in whom for the future its control is vested. There is nothing that I can see to prevent the Mining Board or other Governing Body from fencing off the area from the rest of the farm, and it is certain that it becomes entirely impossible to carry on any agricultural or pastoral occupation on any portion thereof. The landowner therefore entirely loses such portion of his ground, at all events for so long as the mine is worked and the only persons who have the right to use and occupy it are the claimholders in such mine. That right is inevitably 'attached' to the claims in the mine, and is not a matter of arrangement with the landlord at all." This decision was confirmed on appeal by the Supreme Court of the Cape of Good Hope in *Leicester Brilliant Syndicate Limited v The Colonial Government* 1898 15 SC 121. For a discussion of the legal position governing the use of the surface of proclaimed land see Franklin and Kaplan *Mining and Minerals* 40-44.

⁴⁸⁷ 1886-1887 4 HCG 289.

the soil which then reverted to the landowner at the termination of the lease agreement. The applicant alleged that the removal of the diamondiferous ground to the neighbouring farm resulted in the loss of its security for the payment of rental by the claimholder. The response from the respondent was that he had to hire the additional depositing sites as the depositing sites that the landowner of the farm Dutoitspan allocated to him were not sufficient. The High Court of Griqualand West decided that the respondent was entitled to remove the diamondiferous ground from the claim and to manipulate it wherever it was convenient for the claimholder. The High Court further held that there was ample security for rent in the form of the claims and machinery.

Claim licences were regarded as personal in nature and a firm or joint-stock company was not entitled to be registered as a claimholder. Their claims had to be registered in the name of such firm's or joint-stock company's duly accredited agent or agents who had to reside at the relevant alluvial digging or mine.⁴⁸⁸ The holder of a claim in an alluvial digging or mine could transfer the claim to another, provided that the transfer was registered and that all rates, liens, licence monies, royalties or rents due in respect of the property had been paid.⁴⁸⁹

Claims could be declared to be abandoned in the following two circumstances: Firstly, if a claimholder failed to pay licence monies, royalties or rents for a period of 30 days, the Inspector was entitled to declare the relevant claims to be abandoned.⁴⁹⁰ Secondly,

⁴⁸⁸ Section 20 of the 1883 Cape Precious Stones Act. See the *Dinkel case* at 162. Section 30 of the 1899 Cape Precious Stones Act contained a similar provision and provided that claims in a mine could not be registered in the name of a firm or joint-stock company and had to be registered in the names of not more than two people residing in the division in which the mine was situated as the accredited agent or agents. Dale *Mineral Rights* 341 and 354 emphasises that this position was undesirable and left much scope for uncertainty where registers did not disclose that it was held by the claimholder in a representative capacity. Dale *Mineral Rights* 341 and 354.

⁴⁸⁹ Section 25 of the 1883 Cape Precious Stones Act. Sections 32-35 of the 1899 Cape Precious Stones Act also provided that claims in mines could be transferred and hypothecated, provided that the transfer and/or hypothecation was registered with the Registrar of Claims.

⁴⁹⁰ Section 28 of the 1883 Cape Precious Stones Act. See the *Bultfontein Mining Board case*. In *Adams v White* 1895-1898 8 HCG 122, the High Court of Griqualand West had to decide whether a claimholder at an alluvial digging, could claim vindication of a diamond which had been recovered from his claim, by a third party. The plaintiff was the registered holder of a claim and had ceased

in the event that digging or mining operations had not been carried on in at least five claims at an alluvial digging or mine for a period of 12 weeks and in respect of which the licences on not less than one-tenth of all the claims in such digging or mine had not been paid for a period of two months. Such digging or mine could then be proclaimed to be abandoned and the alluvial digging or mine was thereafter closed.

The digging or mine could at any time again be proclaimed a digging or a mine under the 1883 Cape Precious Stones Act.⁴⁹¹ The Governor was entitled in the case of an abandoned alluvial digging or a mine, to grant a lease for the purpose of digging or mining at the abandoned digging or mine and was subject to the payment of a royalty, based on the gross amount derived from the sale of the diamonds.⁴⁹²

Where an alluvial digging had been declared on reserved private land, the owner was entitled to claim one half of the licence monies, rents or royalties which the Government collected in respect of such digging or leases as compensation from the

working the claim for months, but left the claim in charge of his neighbour. The claimholder paid his monthly licence fee to prevent the claim being declared abandoned by the Inspector of Mines in terms of s 28 of the 1883 Cape Precious Stones Act. Another digger who held a licence which entitled him to work any vacant claim in the relevant digging, began to work the plaintiff's claim, despite being warned that the claim still belonged to the plaintiff. The digger shortly thereafter found a valuable diamond, which he sold to the defendant. The plaintiff as the registered claimholder of the relevant claim, instituted action against the defendant and the digger, claiming the recovery of the diamond and damages. The plaintiff alleged that the defendant had unlawfully trespassed on the area covered by his registered claim. The defendant pleaded that the plaintiff as claimholder merely had the right of digging for and winning diamonds and that the plaintiff could not claim vindication of a diamond not won by the plaintiff. The High Court of Griqualand West decided in favour of the plaintiff and held firstly, that there was no evidence that the plaintiff had abandoned his claim and secondly, that the diamonds *in situ* belonged to the Crown, but once they had been won or severed from the surface of the earth, they belonged to the claimholder, who could recover any diamonds removed from his claim by third parties. The judgement of the High Court of Griqualand West was, however, overturned on appeal. In *White v Adams* 1897 14 SC 152, the Supreme Court of the Cape of Good Hope held as follows: "The error into which, with due respect, the Court below has fallen is to treat the holder of a claim in an alluvial digging as the absolute owner of the soil and of all the diamonds therein. The effect of several decisions of this Court is to regard such a claimholder as having a right to dig for and win diamonds, but not as having any *jus in re*. Upon finding a diamond he becomes the owner thereof, and as the lawful occupier of the land he may prevent trespasses thereon, and may recover damages for such trespasses, but if someone else found a diamond and sold it to an innocent purchaser he is not entitled to follow it into the hands of such purchaser." For a discussion of the concept of ownership of unserved minerals and severance thereof see Dale *Mineral Rights* 79-80.

⁴⁹¹ Section 30 of the 1883 Cape Precious Stones Act.

⁴⁹² Section 31 of the 1883 Cape Precious Stones Act.

Public Treasury for any surface damage sustained by the declaration and opening of a digging on his land.⁴⁹³ It was possible for holders of claims in alluvial diggings⁴⁹⁴ and at mines⁴⁹⁵ to amalgamate their claims.⁴⁹⁶ Section 69 of the 1883 Cape Precious Stones Act dealt with the expansion or divergence of a mine. If it was discovered that the soil which contained diamonds expanded or diverged in any direction, the registered claimholders in such a mine were entitled to follow such soil. The soil lying outside of the actual declared boundaries of claims was held to be the common property of the then registered claimholders in such mine and worked at the expense and for the benefit of the claimholders in *pro rata* shares and proportions according to the assessed value of the holdings in such mine.⁴⁹⁷ The provision for the divergence of a mine was contrary to the *cuius est solum* principle.⁴⁹⁸

⁴⁹³ Section 33 of the 1883 Cape Precious Stones Act. The Government was in terms of s 36 of the 1883 Cape Precious Stones Act in respect of alluvial diggings entitled to make such rules and regulations for the election of a Diggers' Committee as he deemed necessary and to define the duties, powers, functions and authorities of such Diggers' Committees. In the case of a mine, the Commissioner was in terms of s 39 of the 1883 Cape Precious Stones Act entitled to order the election of a Mining Board and to frame all rules and regulations for the more efficient management and control of the mine and of mining areas by such Mining Board. In the event that nine-tenths in the assessed value of any mine became the property of one person, or firm or partnership or company, the Mining Board would be dissolved and no new Mining Board would be elected whilst the mine was so held.

⁴⁹⁴ Sections 25 and 26 of the 1883 Cape Precious Stones Act.

⁴⁹⁵ Section 59 of the 1883 Cape Precious Stones Act.

⁴⁹⁶ Section 36 of the 1899 Cape Precious Stones Act contained a similar provision.

⁴⁹⁷ Section 69 of the 1883 Cape Precious Stones Act.

⁴⁹⁸ Dale *Mineral Rights* 84, 219-220; See para 2.1 above. In *London and SA Exploration Co v Bultfontein Mining Co* 1890-1891 8 SC 55, the landowner of the farm Bultfontein instituted an action against a number of defendants for trespassing on portions of the farm Bultfontein. The landowner alleged that it had entered into lease agreements in respect of the portions of the farm Bultfontein, but that it was prevented from giving unrestricted use and enjoyment to the lessee as a result of the trespassing. The defendant pleaded that it was entitled to access the portions as they were merely extensions or expansions of the Bultfontein Mine as contemplated in section 69 of the 1883 Cape Precious Stones Act. The Supreme Court of the Cape of Good Hope held that it was clear from the evidence that the land in question had been reserved as "virgin claims" with the full knowledge that it was diamondiferous and that there was no "discovery" by the defendants of any expansion of the diamondiferous soil at any depth below the surface, as was required under section 69 of the 1883 Cape Precious Stones Act. The Court also considered the argument that the occupation of the land was justified on the basis that the claimholders had a servitude of necessity over the land, but held that a servitude of necessity could not be claimed beyond what absolute necessity required. The Court decided that other ground was available which was not diamondiferous, which the defendants could use with much less inconvenience to the landowner.

The 1883 Cape Precious Stones Act was amended in 1886 in terms of the *Precious Stones and Minerals Act Further Amendment Act* 18 of 1886 (hereafter the 1886 Cape Precious Stones Amendment Act). Section 1 of the 1886 Cape Precious Stones Amendment Act provided that every registered claimholder in any proclaimed alluvial digging, would be entitled to use and occupy a piece of ground within the proclaimed area of the alluvial digging for the purpose of a residence for the holder of the claim without any payment. The Inspector of the diggings had to mark out the relevant area for each claim, which could not be more than 50 square feet in extent.⁴⁹⁹

⁴⁹⁹ Section 95 of the 1899 Cape Precious Stones Act contained a similar provision. In *Grutzner v Maddox* 1886-1887 4 HCG 211, a digger at alluvial diggings erected and occupied a house on an area or land adjacent to his claims. This area was, however, not situated within the proclaimed mining area. The landowner instituted action against the digger for payment of rental for the use and occupation of the owner's land. The property was unreserved private land and no diamond mine had been proclaimed on the land. In the court *a quo*, the Magistrate of Barkly West held that the occupation of the dwelling house was an entitlement attached to the right to work claims and dismissed the action. The High Court of Griqualand West upheld the appeal and decided that the digger used and occupied the landowner's land without any statutory entitlement. See also *Executors of Hofmeyr v De Waal* 1880-1882 1 SC 424; *McFarland v De Beer's Mining Board* 2 HC 398 and *Dale Mineral Rights* 221. In *Jacobs v Hughes* 1893-1895 7 HCG 37, the plaintiff was the owner of a farm in the district of Barkly West, the title deed of which was subject to a reservation of all minerals in favour of the Crown. The farm was thus reserved private land as referred to in this chapter. An alluvial digging had been proclaimed on the farm in terms of the 1883 Cape Precious Stones Act. The defendant had pegged off a portion of the proclaimed area and claims and he obtained registered certificates from the Claims Registrar. The defendant, however, never conducted any mining or digging operations in respect of his claim, instead, he carried on the business of a canteen keeper on the portion of the farm that formed the subject of his claims. The landowner instituted action against the defendant for damages and an interdict to prevent him from continuing with his canteen business. The defendant raised an exception that no cause of action had been disclosed, and he argued that the landowner had no rights over the proclaimed area. The High Court of Griqualand West dismissed the exception and held that the 1883 Cape Precious Stones Act as amended by the 1886 Cape Precious Stones Amendment Act and the 1887 Cape Precious Stones Amendment Act involved a derogation of the rights of the landowner, but only in so far as may be necessary for fulfilling their objects, namely to provide facilities for the prospecting and exploitation of minerals reserved to the Crown. The Court held further that s 11 of the 1887 Cape Precious Stones Amendment Act contained a special provision reserving all the common law rights of owners and others, in so far as there was no express provision to the contrary. The defendant was in terms of the 1883 Cape Precious Stones Act entitled to acquire the claims for mining purposes and he was further in terms of s 1 of the 1886 Cape Precious Stones Amendment Act entitled to a piece of ground within the area for the purpose of a private residence. The Court concluded that there was nothing in the legislation that authorised the defendant to use the claim ground for the purposes of trade or to erect a canteen or store thereon and to carry on any other business against the landowner's wish.

The 1886 Cape Precious Stones Amendment Act further provided that a claimholder in any alluvial digging who intended to sink a shaft in his claim to a depth of more than 15 feet, had to give notice to the Inspector of the diggings. If the claimholder's claim was situated at a distance of more than 200 yards from all the other claims in the digging that were being worked, he was in addition, after he had given notice to the Inspector, entitled to mark out ten claims adjoining his claim. No other person was entitled to dig or search for diamonds in any of the ten claims marked out while the claimholder continued to sink the shaft.⁵⁰⁰ If the claimholder found any diamonds in his claim at a depth of more than 15 feet, he had to report the finding to the Inspector within three days of the finding.⁵⁰¹ The person who found the diamonds in his claim at this depth would be entitled to receive certificates of registration of the ten claims he had marked out himself. In return, he had to pay ten shillings a month for each claim.⁵⁰²

5.3.3.2 The working of mines and alluvial diggings on unreserved private land

Any mine or alluvial digging that had already been opened on unreserved private land was deemed to be a mine or an alluvial digging and could be proclaimed as if it was situated on Crown land. There are two important actions to take into account before a place could be deemed an alluvial digging or a mine and be proclaimed as such. First, if diamonds had been discovered on unreserved private land, the owner had to give consent to the establishment of an alluvial digging or mine on his property. Secondly, where the landowner of the unreserved private land had sold, let or given a

⁵⁰⁰ Section 2 of the 1886 Cape Precious Stones Amendment Act. A similar provision was contained in s 96 of the 1899 Cape Precious Stones Act and later in s 71 of the 1927 Precious Stones Act. See para 9.4.8.5 below.

⁵⁰¹ Section 3 of the 1886 Cape Precious Stones Amendment Act. A similar provision was contained in s 97 of the 1899 Cape Precious Stones Act. A claimholder was in terms of s 97 of the 1899 Cape Precious Stones Act, liable to a penalty not exceeding 50 pounds sterling and if he was in default of payment, he was sentenced to imprisonment with or without hard labour for a period not exceeding six months.

⁵⁰² Section 4 of the 1886 Cape Precious Stones Amendment Act read with s 21 of the 1883 Cape Precious Stones Act. A similar condition was contained in s 98 of the 1899 Cape Precious Stones Act.

number of at least 24 licences to work claims on his land or to search for diamonds on his property over a surface of 20 000 square feet, the place where such claims or licences would be worked was then also deemed to be an alluvial digging or a mine and could be proclaimed and defined as such as if it was situated on Crown land.⁵⁰³ The provisions of the 1883 Cape Precious Stones Act which applied to Crown land then applied *mutatis mutandis* to such proclaimed diggings or mines on privately owned land.⁵⁰⁴ The landowner was entitled to determine the licence money, and rent or royalties paid for each claim.⁵⁰⁵ The landowner was, however, obliged to contribute ten per cent of any licence monies, rents or royalties he had received in respect of such digging or mine for the maintenance of order and good government.⁵⁰⁶

In the case of abandonment of claims in a mine situated on unreserved private land, written notice of the fact that the claim had been abandoned had to be given to the landowner. The landowner was then afforded a period of 30 days to indicate whether he would accept all the liabilities and responsibilities of an ordinary claimholder with regard to such abandoned claim and if he failed to do so, the abandoned claim became the responsibility of the relevant Mining Board.⁵⁰⁷

⁵⁰³ Section 76 of the 1883 Cape Precious Stones Act.

⁵⁰⁴ Section 79 of the 1883 Cape Precious Stones Act; See Dale *Mineral Rights* 220-221; *Agri SCA* case par 36.

⁵⁰⁵ Section 76 of the 1883 Cape Precious Stones Act. See the *Wessels* case discussed in para 5.2.2 above.

⁵⁰⁶ Section 77 of the 1883 Cape Precious Stones Act. See *Colonial Government v London and South African Exploration Company* 1895 12 SC 194; In *London and South African Exploration Co Limited v Trustees of Isaacs & Co* 1884 3 HCG 174 at 175, the High Court of Griqualand West, held that the landowner of the farm Dutoitspan on which the Dutoitspan mine was situated, was entitled to claim from the trustees of an insolvent firm which held claims in the Dutoitspan mine, licence money for the use and occupation of the claims, from the date of the appointment of the trustees to the date of the abandonment of the claims.

⁵⁰⁷ Section 78 of the 1883 Cape Precious Stones Act. See *London and SA Exploration Company v Bultfontein Mining Board* 1889-1890 7 SC 45. In *London and South African Exploration Company Limited v Dutoitspan Mining Board* 1883 2 HCG 154, the High Court of Griqualand granted an interim interdict to the landowners of the farm Dutoitspan to prevent the Dutoitspan Mining Board from interfering with their proprietary rights and to prevent the alleged abandoned claims becoming the property of the Dutoitspan Mining Board. In the *Bultfontein Mining Board* case at 218, in a judgment by Solomon J, the Supreme Court of the Cape of Good Hope, held that once land had been assigned for mining purposes, it continued to be claim property, irrespective of whether the landowner took over the claims. The abandoned claims thus continued to be "claim property" for

5.3.4 *The working of mines and alluvial diggings in terms of the 1899 Cape Precious Stones Act*

The working of mines and alluvial diggings was regulated separately under the 1899 Cape Precious Stones Act.

5.3.4.1 Working of mines

The 1899 Cape Precious Stones Act made provision for the appointment of an Inspector for each mine. Once a mine⁵⁰⁸ had been proclaimed on Crown land or reserved private land, the appointed Inspector of the mine had to attend at the mine after giving notice in the *Gazette* and in a newspaper of a specific day on which the

as long as it remained within the defined limits of the mine. Solomon J further held as follows: "Now, whatever may be the correct legal terms to apply to the relative positions of the owner of a claim and owner of the soil, one thing at least appears to me to be quite clear, and that is, that all the statutes, from the earliest to the latest, recognise that one of the rights enjoyed by a claimholder is fixity of tenure. The right of fixity of tenure is to be inferred from the various provisions of Proclamation 71 of 1871, more particularly the sections regarding the forfeiture ... and the general conclusion which I draw from these provisions is, that a claimholder was not liable to be dispossessed of his claim at the mere will of the owner of the soil, but he was entitled to continue to search for diamonds for an indefinite period unless he had become disentitled under the provisions of either Section 10 or Section 17, by the subsequent statutes Ordinance 10 of 1874 and Proclamation 8 of 1880 ... the position of a claimholder as regards his tenure was still further improved. In Ordinance 10 of 1874, the provisions of forfeiture set forth in Proclamation 71 of 1871 do not again appear, but in place thereof it is provided in Section 5, Subsection 6, that a claim in which the Inspector may order particular work to be done, and in which such work shall not be begun or faithfully continued for seven days shall be declared abandoned. And again, in Proclamation 8 of 1880, his position is still further improved, as in that statute all forfeiture is done away with, and instead thereof it is provided that a claim in any mine shall be considered abandoned when the registered and lawful owner of the same shall give notice in writing to the Inspector of his intention to abandon the same. The same provision is repeated in Act 19 of 1883, with the addition, that a claim shall be considered abandoned also when it shall have been abandoned in accordance with any rule, regulation, ordinance, or law heretofore in force. The position then appears to be this, that a person who has once become a claimholder in a mine continues to be such, in the absence of course of transfer, until he of his own accord abandons his claim in the manner provided by the Act, or until they become abandoned in accordance with the provisions of some previous statute."

⁵⁰⁸ The word "mine" was defined in s 3 of the 1899 Cape Precious Stones Act to mean: "a place where precious stones have been found, and which has been or shall be duly proclaimed as such by the Governor." This definition was amended by the 1907 Cape Precious Stones Amendment Act to mean: "an area of ground bearing precious stones which is continuous in its formation and is contained within a pipe or similar geological formation together with any directly connected overflow or extension of the same." See *Union Government v Pringle and Swiegers* 1923 CPD 337 at 346.

Inspector would be allocating claims in the proclaimed mine. After the discoverer, owner and prospector had selected their claims,⁵⁰⁹ the remaining claims in the mine were publicly sold either individually or in blocks consisting of not more than 20 claims.⁵¹⁰ On proclamation of a mine, the Governor was entitled to make rules, orders, regulations and by-laws for the layout and survey of the mining areas and depositing floors.⁵¹¹

Provision was also made for the survey of an area around a mine for the purpose of depositing floors, tipping sites and matters connected with the proper and sufficient working of the mine. This area had to be proclaimed and was described as a "mining area."⁵¹² In the case of reserved private land the Civil Commissioner had to give the landowner three months' notice before the proclamation of a mine or mining area on his land. The proclamation of reserved private land was subject to the reservation in favour of the owner of the reserved private land of the free and uninterrupted use of his homestead. This included a circular area of 200 yards in all directions around the landowner's principal house as a centre, together with all buildings and *kraals* which would not be included in the proclaimed area. The landowner also retained the full and preferential right to use so much water as he would require for domestic purposes and for the purposes of irrigation and watering stock or driving any mill or machinery existing at the time of the proclamation.⁵¹³ The landowner was responsible to survey

⁵⁰⁹ The word "claim" was defined in s 1 of the 1899 Cape Precious Stones Act to mean: "any portion of ground assigned for mining purposes within any proclaimed 'Mine' or 'Alluvial Diggings,' and shall in the case of a 'Mine' be a square figure measuring not more than thirty feet each way."

⁵¹⁰ Section 20 of the 1899 Cape Precious Stones Act.

⁵¹¹ The Minister was in terms of s 51 of the 1899 Cape Precious Stones Act entitled to order that a Mining Board be elected for a mine. Every Mining Board was in terms of ss 63 and 64 of the 1899 Cape Precious Stones Act entitled to levy rates on claims and on property in the mining area used for the general purposes of the mine and further to fix tariffs for the removal of reef and water. Section 66 of the 1899 Cape Precious Stones Act provided that rules, regulations and by-laws had the effect of law once they had been promulgated in the *Gazette*. In the event that nine-tenths in the assessed value of any mine became the property of or subject to the exclusive control of one person, firm or partnership or company, the Mining Board was in terms of s 71 of the 1899 Cape Precious Stones Act dissolved.

⁵¹² Section 38 of the 1899 Cape Precious Stones Act.

⁵¹³ Section 39 of the 1899 Cape Precious Stones Act.

the area of land that was reserved to him at his own costs.⁵¹⁴ The Governor could not proclaim a mine on reserved private land without the consent of the landowner. If the landowner of reserved private land himself prospected on his land or if he had given permission to a prospecting licence holder to prospect on his land, the Governor could proclaim a mine on the reserved private land without the consent of the landowner.⁵¹⁵ At every mine there was in addition to a mining area, a reserve of 100 yards round the margin of the mine which had to be used exclusively for hauling ground from the claims and transporting it to depositing sites. Every claimholder in any mine established under the 1899 Cape Precious Stones Act was further entitled to use and occupy free of charge, one acre of ground in the neighbourhood of or in proximity to the mine. This ground was referred to as a depositing site and had to be pointed out by the Inspector. The depositing site could not encroach on the 100 yards reserve around the mine. Claimholders were entitled to use the depositing sites for the purpose of depositing soil, reef or shaly ground⁵¹⁶ and for the purpose of sinking wells, laying tramways or performing other works relating to mining operations. The Inspector had to survey each depositing site at the costs of the relevant claimholder.⁵¹⁷ The landowner of reserved private land on whose land a mine was proclaimed was entitled to demand from the Public Treasury, three-fourths of the licence money that the Government collected in respect of each claim for which the landowner provided a depositing site.⁵¹⁸

⁵¹⁴ Section 40 of the 1899 Cape Precious Stones Act.

⁵¹⁵ Section 41 of the 1899 Cape Precious Stones Act.

⁵¹⁶ The term "reef of shaly ground" was defined in s 1 of the 1899 Cape Precious Stones Act to apply to "the shale rock or soil outside and around diamondiferous claims, and shall not include what is commonly known as 'Floating Shale,' or shale and rock in or covering the actual claims."

⁵¹⁷ Where several claims were held by one person, the depositing sites attached thereto could be surveyed and beacons off in one block: s 42 of the 1899 Cape Precious Stones Act. The Governor was in terms of s 117 of the 1899 Cape Precious Stones Act entitled to proclaim rules and regulations to regulate the manner of working claims and machinery at any mine or digging within a mining area for purposes of health and safety and for the proper management of all diggings and mines.

⁵¹⁸ Section 47 of the 1899 Cape Precious Stones Act. Every lessee who leased Crown land from the Government and every lessee of reserved private land, was for the duration of the lease, in terms of s 48 of the 1899 Cape Precious stones Act entitled to all the rights and privileges conferred upon any owner of reserved private land, provided that the lease agreement was registered in the Deeds

The 1899 Cape Precious Stones Act also provided for the abandonment of claims. If a claimholder was in arrears with the payment of his licence monies, royalties, rent or transfer dues for a period of six months the Inspector was entitled, after sending a letter of demand, to declare the claims to be abandoned. Where mining operations had not been carried out for a period of three months in five claims at any mine situate on Crown land or reserved private land and in respect of which nine-tenths or more of all the claims in the mine had not been paid for a period of three months, section 43 of the 1899 Cape Precious Stones Act provided that the mine could be proclaimed abandoned and was forthwith closed. The mine could again be proclaimed a mine.⁵¹⁹

5.3.4.2 The working of alluvial diggings

5.3.4.2.1 Rights and duties of the discoverer of alluvial diamonds

The holder of a prospecting licence, who could prove to the satisfaction of the Civil Commissioner that he had found alluvial diamonds in payable quantities, was entitled to receive a certificate from the Commissioner confirming that once the place had been proclaimed as an alluvial digging, he could select 20 claims. The discoverer was exempted from the payment of licence fees in respect of such claims and his rights under the prospecting licence ceased to exist once he received a discoverer's certificate.⁵²⁰

Registry against the relevant title deed and provided further that the lease agreement contained a specific provision that the lessee would hire the land together with the rights of the owner in respect of precious stones and minerals. If the lease agreement did not contain the specific provision, the lessee was in terms of s 49 of the 1899 Cape Precious Stones Act not entitled to the rights and privileges conferred on the owner of reserved private land. The lessee was, however, entitled to compensation from the owner and lessor in respect of disturbance, damage or injury caused as a result of the exercise by any person of a right or power under the 1899 Cape Precious Stones Act. Where the parties could not agree on the compensation, the amount had to be determined by arbitration.

⁵¹⁹ Section 37 of the 1899 Cape Precious Stones Act.

⁵²⁰ Section 82 of the 1899 Cape Precious Stones Act.

5.3.4.2.2 Rights and duties of claimholders

Before claims could be pegged off⁵²¹ in respect of Crown land or reserved private land on which an alluvial digging had been proclaimed, the Inspector had to read the proclamation deeming the alluvial diggings on the ground proclaimed. At least two weeks prior notice in the *Gazette* had to be given of the date on which the proclamation would be read.⁵²² The discoverer of the diamonds was first entitled to select his claims. Thereafter the owner of the reserved land was entitled to do so. The size of each claim at an alluvial digging was 30 square feet unless the Governor determined otherwise by proclamation.⁵²³ After the reading of the proclamation, any other person of "full age" could peg off one claim on the area proclaimed.⁵²⁴ The procedure to be adopted at the pegging of the claims was not prescribed in the 1899 Cape Precious Stones Act. The practice that was adopted for many years before and after the commencement of the 1899 Cape Precious Stones Act, was that the peggers had to line up when the relevant proclamation was read. A flag was then dropped as a signal that the reading was over and that the ground was open for pegging. Until the flag was dropped, nobody was entitled to enter the land for the purpose of pegging a claim and only persons who lined up at the reading of the proclamation was entitled to peg a claim.⁵²⁵

⁵²¹ The term "peg off" was defined in s 1 of the 1899 Cape Precious Stones Act to denote "performance of any of the ways prescribed by this Act as necessary to be done to define the boundaries of a claim for the purpose of appropriation."

⁵²² Section 84 of the 1899 Cape Precious Stones Act.

⁵²³ Section 89 of the 1899 Cape Precious Stones Act. The Governor was in terms of s 109 of the 1899 Cape Precious Stones Act entitled to make rules and regulations for the election of Diggers' Committees at alluvial diggings. The Governor was also in terms of s 111 of the 1899 Cape Precious Stones Act entitled at any time to direct that any Diggers' Committee was abolished or dissolved.

⁵²⁴ Section 85 of the 1899 Cape Precious Stones Act. This section was later in terms of s 30 of the 1907 Cape Precious Stones Amendment Act repealed and replaced with new provisions for the pegging of claims. After the proclamation of a new alluvial digging, the discoverer and owner had to peg off the claims to which they were entitled under the 1899 Cape Precious Stones Act, failing which their rights were forfeited. Thereafter for the first seven days after the proclamation of the alluvial digging, any certificated miner could peg off one claim. After the expiry of the seven days, any certificated miner could peg off not more than six claims on the proclaimed area.

⁵²⁵ In *Vorster v Muller and the Minister of Mines* 1918-1923 GWLD 126, the plaintiff did not present himself at the place where the proclamation was read, he instead took up a position on the adjoining farm from which he could see the dropping of the flag and the beginning of the rush. He then proceeded to cross the boundary of the proclaimed area and pegged his claim before anybody

In order to be registered as a claimholder, a person had to apply to the Diggers' Committee of the relevant alluvial digging for a certificate that he was of good character and a fit and proper person to be registered as a claimholder.⁵²⁶ Before an application for a certificate was considered, the applicant first had to post his details for at least seven days in a conspicuous place and in such manner as the Diggers' Committee or the Inspector of Claims had determined.⁵²⁷

It was also possible for claimholders in alluvial diggings to transfer and hypothecate their claims, provided that such transfers and hypothecations were registered.⁵²⁸ Similar provisions applied regarding the abandonment of claims in alluvial diggings as related to mines. Where digging operations had not been carried out for a period of three months in five claims at any mine situated on Crown land or reserved private land on which the alluvial diggings were situated and in respect of which nine-tenths or more of all the claims in the alluvial diggings had not been paid for a period of three months, the alluvial diggings could be proclaimed abandoned and were forthwith closed.⁵²⁹

5.3.4.2.3 Rights of the landowner of reserved private land

The Governor could not proclaim an alluvial digging on reserved private land without the consent of the landowner. If the landowner of reserved private land himself

who had lined up could reach the place. The Griqualand West Local Division held that the practice of pegging claims was a reasonable practice and not inconsistent with the 1899 Cape Precious Stones Act. The Court held at 130 that: "... the Legislature, by not interfering with the mode by which claims were allowed to be pegged, sanctioned the then existing practice, and that the plaintiff, having failed to comply with that practice, and having started from a spot much nearer to the claims than the place where the proclamation was read, his pegging had no legal effect, and he had no right to the claims in dispute in this action." See Dale *Mineral Rights* 336-344 in regard to the pegging of claims.

⁵²⁶ See Dale *Mineral Rights* 345 regarding the registration of claims. See also Franklin and Kaplan *Mining and Minerals* 662-662. If there was no Diggers' Committee, the applicant for a certificate was in terms of s 91(b) of the 1899 Cape Precious Stones Act required to apply for a certificate to the Inspector of Claims. The Inspector had to summon two registered claimholders within the area of the relevant alluvial digging to assist him in deciding the application. The decision was taken by a majority vote of the Inspector and the registered claimholders.

⁵²⁷ Section 91(d) of the 1899 Cape Precious Stones Act.

⁵²⁸ Section 101 read with ss 27, 28, 30 and 33 to 35 of the 1899 Cape Precious Stones Act.

⁵²⁹ Section 107 read with ss 43 and 44 of the 1899 Cape Precious Stones Act.

prospected on his land or if he had given permission to a prospecting licence holder to prospect on his land, the Governor could proclaim an alluvial digging on the reserved private land without the consent of the landowner.⁵³⁰

The owner of reserved private land on which an alluvial digging had been proclaimed was entitled to select 50 claims after the discoverer had selected his claims, on

⁵³⁰ Section 41 of the 1899 Cape Precious Stones Act. In the *Thompson* case, the landowner of reserved private land on which an alluvial digging was proclaimed, brought an application to declare the proclamation of the alluvial digging to be *ultra vires*. In this case, the reserved private land which formed the subject of the dispute was owned by its previous owner at the time when diamonds in payable quantities were discovered by the holder of a prospecting licence. The previous owner in the meantime sold and transferred the relevant reserved land to Thompson, the landowner at the time of the proclamation. Thompson brought the application on the basis that the reference to s 41 of the 1899 Cape Precious Stones Act was a reference to the owner at the time of the proclamation and not to the owner of the reserved private land at the time of the prospecting which led to the discovery of the diamonds. Thompson argued that he himself had not prospected nor allowed anyone else to prospect on his farm since he became the owner thereof and as a consequence, the Government had no right to proclaim it as an alluvial digging. Thompson argued further that the Legislature had gradually increased the rights of landowners and that the protection afforded to landowners of reserved private land in s 41 of the 1899 Cape Precious Stones Act would be meaningless if the word "owner" was interpreted to refer to the owner at the time of the discovery of the diamonds and not the owner at the time of the issue of the proclamation. The Griqualand West Local Division held in favour of Thompson, namely that the consent from the landowner at the time of the proclamation was required. The Appellate Division upheld the appeal. Solomons ACJ held that it was possible to interpret the reference to "owner" in s 41 of the 1899 Cape Precious Stones Act to mean either the owner of the reserved private land at the time of prospecting which led to the discovery of diamonds, or at the time of the issue of the proclamation and that either of these two possible interpretations gave rise to difficulties. The Appellate Division decided that these difficulties were easier to overcome if the reference to "owner" is interpreted to refer to the owner at the time of prospecting. The Appellate Division stated the following at 407 in regard to the effect of the proclamation of a mine or alluvial digging on reserved private land: "Now the proclamation as a mine of any private property, the title to which contains a reservation to the Crown of precious stones, has important consequences not only to the owner but also to the discoverer, to the Government and to the public. As regards the owner his private property is thrown open to the public for the purpose of being worked as a mine. He retains, however, the free and uninterrupted use of this homestead and cultivated lands, as well as certain water rights, and has moreover the privilege of selecting 50 claims next after the discoverer, and of receiving portion of the licence money collected by the Government in respect of each claim for which he provides a depositing site. As regards the discoverer he has the right to select 50 claims in block, prior to the allotment of any other claims, which shall be free of licence monies so long as they are held by him. As regards the Government the proclamation of the mine is the method instituted by the Legislature for enabling the Crown to avail itself of the reservation in its favour of the precious stones on the proclaimed property. The principal rights which thereupon accrue to it are those of publicly selling the remaining claims in the mine after the discoverer and owner have selected their claims, and of receiving the licence monies provided for in the Act. It will be seen, therefore, that not only the owner himself but also the discoverer, the Government and public are materially interested in the proclamation of any private property as a mine."

condition that the owner paid one month's licence money in advance. If the landowner was also the discoverer of the diamonds, he was entitled to his rights both as discoverer of the diamonds and as owner of the reserved private land.⁵³¹

The landowner of reserved private land on which an alluvial digging was proclaimed, was in addition entitled to demand from the Public Treasury one-half of the licence monies, rents or royalties collected by the Government in respect of the diggings as full compensation for any surface damage he might sustain or may have sustained as a result of the proclamation of the alluvial diggings on his land.⁵³² In the event that a mine was discovered on or near an alluvial digging the Governor could at any time by proclamation, remove the relevant area which was required for the mine from the proclaimed alluvial digging.⁵³³

5.4 1907 Cape Precious Stones Amendment Act

The 1899 Cape Precious Stones Act was amended with the commencement of the 1907 Cape Precious Stones Amendment Act on 21 September 1907. These changes only applied to new mines proclaimed after 21 September 1907 and not to mines that had already been proclaimed.⁵³⁴ The 1907 Cape Precious Stones Amendment Act amended the 1899 Cape Precious Stones Act in material respect in that it made provision for a Crown's share in a diamond mine that was discovered on Crown land and on reserved private land.

The discoverer of a new mine on Crown land was in terms of section 7(1) of the 1907 Cape Precious Stones Amendment Act entitled to an undivided 50% share of the extent

⁵³¹ Section 113 of the 1899 Cape Precious Stones Act.

⁵³² Section 114 of the 1899 Cape Precious Stones Act.

⁵³³ Section 115 of the 1899 Cape Precious Stones Act.

⁵³⁴ Section 2 of the 1907 Cape Precious Stones Amendment Act. The word "mine" was defined in s 3 of the 1907 Cape Precious Stones Amendment Act to mean: "an area of ground bearing precious stones which is continuous in its formation and is contained within a pipe or similar geological formation together with any directly connected overflow or extension of the same."

of the mine.⁵³⁵ The Crown was entitled to the remaining 50% share after the discoverer's share had been allocated. The discoverer of a new mine on Crown land was entitled to work the mine.⁵³⁶

The discoverer of a new mine on reserved private land was entitled to an undivided 25% share of the extent of the mine and was entitled to work the mine.⁵³⁷ If the owner of reserved private land discovered a new mine on his own land, he was entitled to an undivided 50% share of the extent of the mine and he was also entitled to work the mine.⁵³⁸ The Crown was entitled to the remaining 50% share after the discoverer's and owner's shares had been allocated.⁵³⁹

Figure 5.3 below schematically summarises the undivided shares to which the discoverer and the Crown were entitled to in terms of the 1907 Cape Precious Stones Amendment Act in respect of a diamond mine discovered on Crown land.

⁵³⁵ Section 7 of the 1907 Cape Precious Stones Amendment Act. Section 12 of the 1899 Cape Precious Stones Act provided that the discoverer of diamonds on Crown land was entitled to 50 claims. See para 5.3.2.3 above.

⁵³⁶ Section 15 of the 1907 Cape Precious Stones Amendment Act. A "mineholder" was defined in s 4 of the 1907 Cape Precious Stones Amendment Act to mean: "the person entitled under the provisions of this Act to work a mine."

⁵³⁷ Sections 8, 9 and 15 of the 1907 Cape Precious Stones Amendment Act. The owner of reserved private land was in terms of s 46 of the 1899 Cape Precious Stones Act entitled to 50 claims. See para 5.3.2.3 above.

⁵³⁸ Sections 9 and 15 of the 1907 Cape Precious Stones Amendment Act. The owner of reserved private land was in terms of s 46 of the 1899 Cape Precious Stones Act entitled to 50 claims.

⁵³⁹ Sections 8 and 9 read with s 11 of the 1907 Cape Precious Stones Amendment Act.

Figure 5.3: Undivided shares in a diamond mine discovered on Crown land.

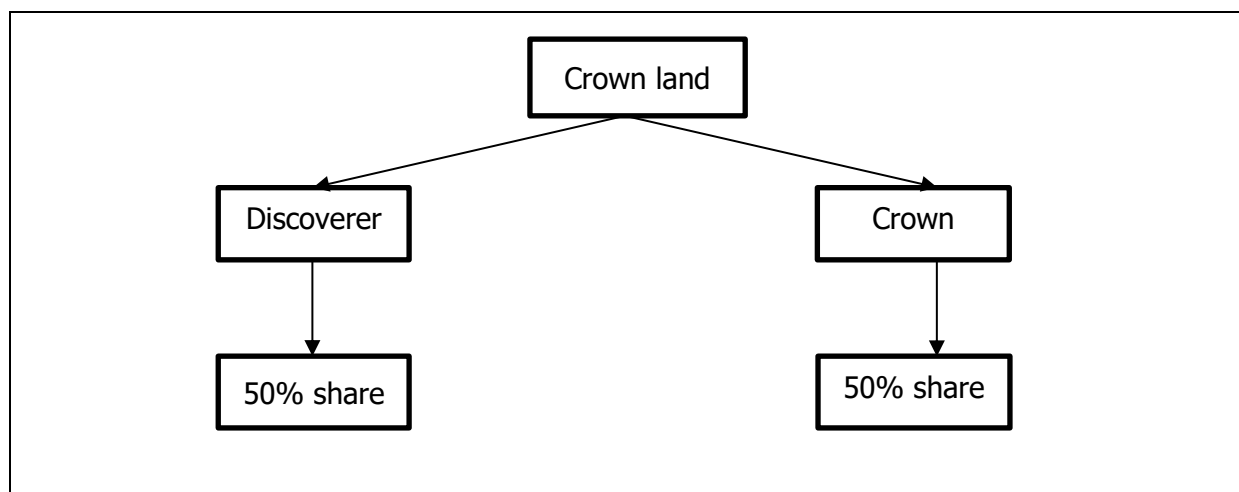
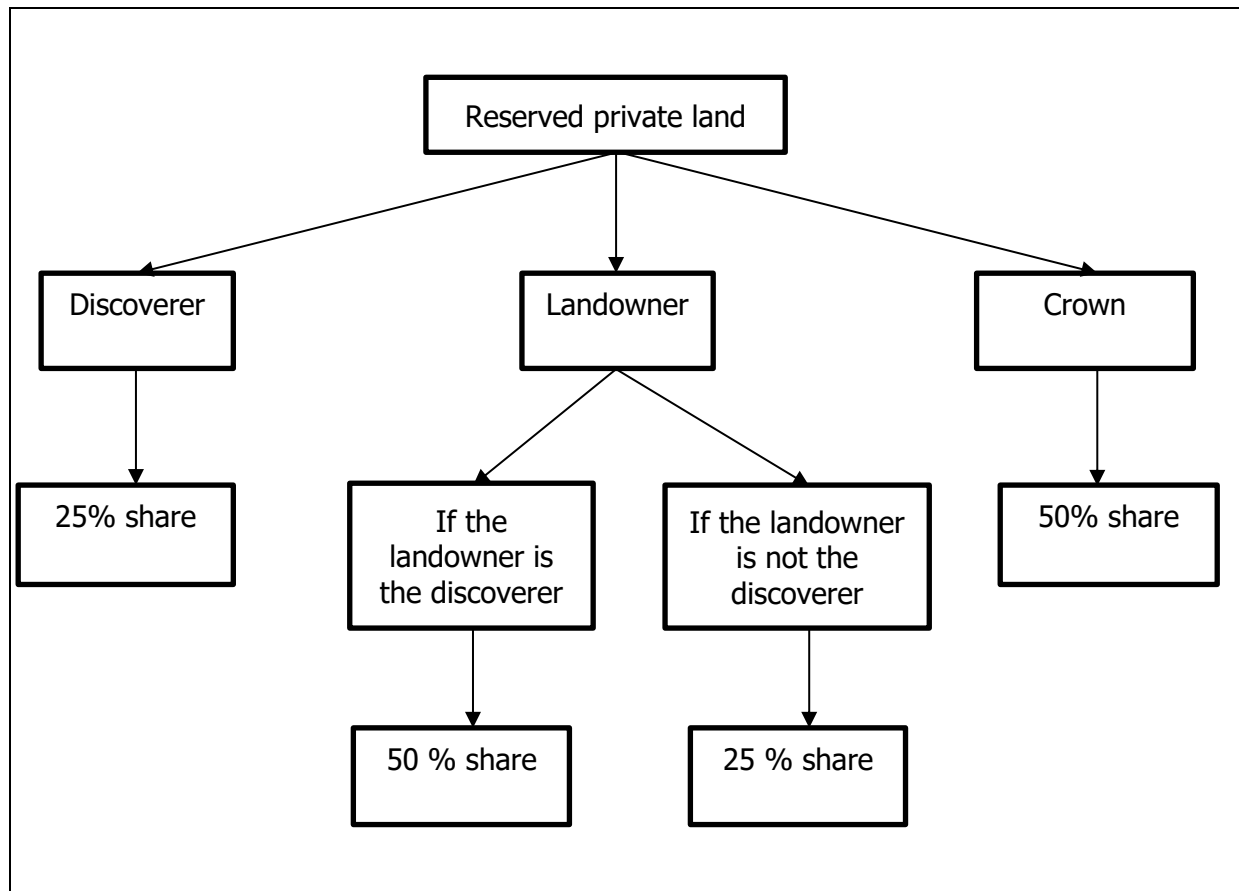


Figure 5.4 schematically summarises the undivided shares to which the discoverer, owner and the Crown were entitled to in respect of a diamond mine discovered on reserved private land.

Figure 5.4: Undivided shares in a diamond mine discovered on reserved private land.



The discoverer and owner could in terms of section 13 of the 1907 Cape Precious Stones Amendment Act apply to the Governor for a discoverer's or owner's certificate in respect of their respective shares in a mine. These certificates had to be registered in the office of the Civil Commissioner of the relevant district in the case of Crown land and in the case of reserved private land. The certificates had to be registered in the Deeds Office against the title deeds of the reserved private land.

The discoverer had to notify the Minister in writing within nine months after the proclamation of the new mine whether he intended to work the mine or not.⁵⁴⁰ If the

⁵⁴⁰ Section 16 of the 1907 Cape Precious Stones Amendment Act.

discoverer of a new mine on reserved private land was not willing to work the mine, the owner had to notify the Minister whether he intended to work the mine, or not.⁵⁴¹ The person who worked the mine was referred to as the mineholder. The mineholder had to provide the working capital⁵⁴² necessary for the effective working of the mine. The mineholder also had to render annual accounts to the Minister and any other joint holder of a share in the mine. The mineholder could set off the working capital actually expended against the net profit of the mine.⁵⁴³ The net profits derived from the working of a mine had to be divided between the Crown, the mineholder and any other person that held a joint share in the mine, on an annual basis and in proportion to their respective shares therein.⁵⁴⁴

If the mineholder refused to work the mine or failed to notify the Minister within the prescribed period, or if the mineholder failed to find the necessary capital for the working of the mine within 12 months after the proclamation of the mine, the Governor could call for public tenders for the working of the mine under contract.⁵⁴⁵ If the Governor could not find a satisfactory tenderer for the working of the mine, he could lease the mine to the discoverer or owner on terms as they both agreed upon. If they failed to reach an agreement, the Governor could grant the lease to any other person. The rental income that was received had to be divided between the joint shareholders in proportion to their respective shares in the mine.⁵⁴⁶ The discoverer or owner could

⁵⁴¹ Section 17 of the 1907 Cape Precious Stones Amendment Act.

⁵⁴² The term "working capital" was defined in section 19 of the 1907 Cape Precious Stones Amendment Act to mean: "the actual capital expended on the equipment and development of the mine after the date of proclamation, but shall not include the purchase price, if any, paid by the mineholder for the mine or any mining rights or any costs of prospecting previous to proclamation." The term "net profits" was defined in s 20 of the 1907 Cape Precious Stones Amendment Act to mean: "that profit left after paying all amounts not being capital outlay actually expended during the year in winning and disposing of precious stones, together with salaries, wages, director's fees, auditor's fees, taxes, insurance, printing, stationery, advertising, maintenance of plant and buildings, agencies, legal expenses, survey expenses, arbitration expenses and office expenses."

⁵⁴³ Section 18 of the 1907 Cape Precious Stones Amendment Act.

⁵⁴⁴ Section 22 of the 1907 Cape Precious Stones Amendment Act.

⁵⁴⁵ Section 25 of the 1907 Cape Precious Stones Amendment Act.

⁵⁴⁶ Section 26 of the 1907 Cape Precious Stones Amendment Act.

transfer or mortgage his shares in a mine provided that he obtained the Governor's consent.⁵⁴⁷

5.5 Summary and conclusion

This chapter discussed, the legislation that was enacted in the Cape Colony during the period 1883 to 1927 and which impacted the development of the right to mine diamonds in South Africa. During this period two main statutes were enacted to regulate the prospecting for and mining of diamonds and to consolidate the laws relating to alluvial diggings and mines in the Cape Colony, namely the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act. The 1907 Cape Precious Stones Amendment Act made substantial amendments to the 1899 Cape Precious Stones Act and applied to new diamond mines discovered after its commencement on 21 September 1907.

There was with the exception of land that was subject to the Cradock Proclamation, no statutory reservation in any of the diamond mining legislation of the right to mine diamonds in favour of the British Crown or the Government of the Cape Colony. In both the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act, the provisions that regulated the prospecting and mining for diamonds, depended on the specific form of land tenure. Three forms of land tenure existed, namely Crown land, reserved private land, and unreserved private land.

The 1883 Cape Precious Stones Act regulated the prospecting for diamonds on Crown land and on reserved private land. A person, who wanted to prospect for diamonds on Crown land and on reserved private land had to obtain a prospecting licence from the office of the Civil Commissioner. The 1883 Cape Precious Stones Act initially provided that the consent of the owner of reserved private land was not required and it was not even necessary to notify the owner before an applicant could obtain a prospecting

⁵⁴⁷ Section 27 of the 1907 Cape Precious Stones Amendment Act. If the Governor consented to the transfer or mortgage, the transfer or mortgage had to be passed before the Civil Commissioner of the relevant district, who had to send copies of all mortgage bonds to the Registrar for filing.

licence. This position was changed with the commencement of the 1887 Cape Precious Stones Amendment Act which afforded more protection to the owner of reserved private land. The owner of reserved private land was no longer obliged to allow a licensed prospector to prospect on his land and the holder of a prospecting licence had to obtain the consent of the landowner of reserved private land to prospect on the land. The landowner's consent could be granted subject to such lawful terms and conditions agreed upon, including the payment of a consideration. The owner of reserved private land could prospect on his own land without a prospecting licence and he acquired all the rights of a licenced prospector.

The position regarding the prospecting for diamonds on Crown land and reserved private land remained the same under the 1899 Cape Precious Stones Act, with the exception that only persons of good character could apply for a prospecting licence. The right to prospect for diamonds in respect of reserved private land under the 1883 Cape Precious Stones Act (as amended by the 1887 Cape Precious Stones Amendment Act), and the 1899 Cape Precious Stones Amendment Act thus vested in the landowner, despite the fact that the rights to diamonds vested in the Crown. In the case of Crown land, the right to prospect for diamonds vested in the Crown.⁵⁴⁸

The 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act did not regulate the prospecting for diamonds on unreserved private land. A person who wanted to prospect for diamonds on unreserved private land had to obtain the consent of the landowner and a prospecting licence in terms of the 1872 GW Prospecting Proclamation. The right to prospect for diamonds in the case of unreserved private land thus vested in the owner of the unreserved private land, which was in terms of the *cuius est solum* principle also the holder of the rights to diamonds.⁵⁴⁹

Both the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act regulated the digging or mining for diamonds in alluvial diggings and in mines. The

⁵⁴⁸ See para 5.3.2.1 above.

⁵⁴⁹ See para 5.3.2.2 above.

provisions of the 1883 Cape Precious Stones Act relating to the working of alluvial diggings and mines on Crown land, applied in two instances to unreserved private land. Firstly, in the case of an existing alluvial digging or mine that had already been opened on the unreserved private land at the time of commencement of the 1883 Cape Precious Stones Act and secondly, where the owner of the unreserved private land consented to the establishment of an alluvial digging or mine on his property and if he had sold, let or given at least 24 licences to work the claims on his land or to search for diamonds on his property over a surface of 20 000 square feet. The 1899 Cape Precious Stones Act did not apply to unreserved private land and the limited application of the 1883 Cape Precious Stones Act to the working of mines and alluvial diggings on unreserved private land, continued to apply in respect of those alluvial diggings and mines despite the repeal of the 1883 Cape Precious Stones Act.⁵⁵⁰ New alluvial diggings or mines discovered on unreserved private land after 6 October 1899 were not regulated in terms of the 1899 Cape Precious Stones Act. The Governor of the Cape of Good Hope was, however, in terms of the 1894 Cape Private Mine Inspection Act entitled to make rules to regulate the working of alluvial diggings or mines on unreserved private land.⁵⁵¹

The 1907 Cape Precious Stones Amendment Act amended the 1899 Cape Precious Stones Act in material respect in that it for the first time made provision for a Crown's share in a diamond mine that was discovered on Crown land and on reserved private land. The 1907 Cape Precious Stones Amendment Act only applied to new mines and not to mines that had already been proclaimed.⁵⁵² The discoverer of a new mine on Crown land was entitled to an undivided 50% share of the extent of the mine and he was also entitled to work the mine. After the commencement of the 1907 Cape Precious Stones Amendment Act on 21 September 1907 the right to mine diamonds vested with the discoverer of a new mine on Crown land, in that the discoverer was

⁵⁵⁰ See figure 5.2 in para 5.3.1 above.

⁵⁵¹ See para 5.3.1 above.

⁵⁵² See para 5.4 above.

entitled to elect to work the mine. If the discoverer notified the Minister of his intention to work the mine within nine months and if he provided the working capital, no one else was entitled to work the mine. The Crown was entitled to the remaining undivided 50% share of the extent of the mine.⁵⁵³

The discoverer of a new mine on reserved private land was entitled to an undivided 25% share of the extent of the mine and was entitled to work the mine. The landowner of reserved private land, who discovered a new mine on his own land was entitled to an undivided 50% share of the extent of the mine. He was also entitled to work the mine and was regarded as the mineholder. If a licensed prospector discovered the mine on the reserved private land, the owner of the reserved private land was entitled to an undivided 25% share in the extent of the mine. The Crown was entitled to the undivided 50% share that remained after the allotment of the discoverer's and owner's share.⁵⁵⁴ The right to mine diamonds in respect of a new diamond mine discovered on reserved private land, also vested with the discoverer.

The Crown was in terms of the 1907 Cape Precious Stones Amendment Act only entitled to a share of a new diamond mine discovered on Crown land and on reserved private land. In other words, it was in respect of land where the rights to diamonds vested in the Crown. The Crown was not entitled to a share in a diamond mine discovered on unreserved private land. It is submitted that the Crown was not entitled to co-ownership of the mine. The content of the Crown's share in the mine was that the Crown was entitled to share in the profits derived from the working of the mine. The Crown's entitlement to share in the profits must also be viewed in the context that it only applied in respect of Crown land and reserved private land. Thus, it means, where the Crown was the holder of the rights to diamonds. This continued to be the

⁵⁵³ Section 7(1) of the 1907 Cape Precious Stones Amendment Act. See para 5.4 and figure 5.3 in para 5.4 above.

⁵⁵⁴ Section 9 of the 1907 Cape Precious Stones Amendment Act. See para 5.4 above.

position with the establishment of the Union of South Africa. In the next chapter, the development of the right to mine diamonds in the Orange Free State is discussed.

Chapter 6 The Orange Free State before 1927

6.1 Introduction

The development of the right to mine diamonds in the Orange Free State during the period 1854 until 1927 is discussed in this chapter. The Republic of the Orange Free State came into existence with the signing of the *Bloemfontein Convention* on 23 February 1854.⁵⁵⁵ The Orange Free State existed as a Republic from 1854 until 1902. An elected *Volksraad* governed the Republic during this period. At the end of the second Anglo-Boer war with the signing of the *Treaty of Vereeniging* on 31 May 1902, the Orange Free State became a British Colony known as the Orange River Colony.⁵⁵⁶ Different diamond mining legislation was enacted under each of these two administrations.

With effect from 31 May 1910, the Orange River Colony was united with the other colonies in a legislative union under one Government under the name of the Union of

⁵⁵⁵ In the 1940s the Orange Free State was known as the *Transorangia*. It was mainly occupied by the Griquas under captain Adam Kok III, the Sothoes, the Barolong, the Tlokwa, *Trekboers* and the *Voortrekkers*. In February 1848, Sir Smith annexed the *Transorangia* as part of the Cape Colony known as the Orange River Sovereignty. The independence of the Orange Free State was restored with the signing of the Bloemfontein Convention in 1854. The effect of the Bloemfontein Convention was that the British Government agreed to acknowledge the sovereignty of the land situated between the Orange River and the Vaal River. Welsh *A History of South Africa* 207; Hahlo and Kahn *The Union of South Africa* 63-64. Bosman "Die Groot Trek tot 1838" 239-240; Erasmus 2010 *Fundamina* 42-48; Manson, Mbenga and Peires "Consolidation and expansion of the colonial presence" 143-145; Warden "Reminiscences" 15-17; Couzens *Battles of South Africa* 111-116; Visagie "Uittog en vestiging van die Voortrekkers in die binneland" 145-149; Oelofse "Die Vrystaat 1843-1909" 65; Davenport *South Africa A Modern History* 2nd ed 105; Davenport *South Africa A Modern History* 3rd ed 187-189; Davenport *South Africa A Modern History* 4th ed 170-171; Davenport and Saunders *South Africa A Modern History* 84, 198-199; Binckes and Kotzé *Die Groot Trek* 99, 487-495; Giliomee *Die Afrikaners 'n Biografie* 133-134; Beet *et al Knights of the shovel* 31-32; Langner "Die Republiek op trek" 7-13; Giliomee "'n Ideale gemenebes in Afrika-omstandighede" 15-21. Van Schoor "The Orange Free State" 233-234; Walker *A History of South Africa* 225-228, 267-270; Steyn *Afrikaner-Joernaal* 120; Thompson "Co-operation and Conflict: The High Veld" 422-423; Kiewiet *A History of South Africa* 64-66.

⁵⁵⁶ In theory another administration was established when a responsible government was granted to the Orange River Colony in 1907. Hahlo and Kahn *The Union of South Africa* 110-112; Knowles and Knowles *British Overseas Empire* 56; Oelofse "Die Vrystaat 1843-1909" 74; Davenport *South Africa A Modern History* 2nd ed 162; Walker *A History of South Africa* 487-503.

South Africa.⁵⁵⁷ The diamond mining legislation that existed in the former colonies continued to apply when the Union of South Africa was established and were only repealed with the commencement of the 1927 Precious Stones Act.⁵⁵⁸

This chapter commences with a brief discussion of the early land tenure conditions in the Republic of the Orange Free State, to determine whether there was a similar statutory reservation of the right to precious stones as was the position under the Cradock Proclamation.⁵⁵⁹ The 1871 OFS Diamond Fields Ordinance which was the first diamond mining legislation enacted in the Republic of the Orange Free State, is secondly discussed.⁵⁶⁰ All the statutes of the Republic of the Orange Free State were in 1891 codified under different chapters in the *Wetboek van den Oranjevrijstaat* (hereafter the 1891 OFS Statute). The 1871 OFS Diamond Fields Ordinance was included in the 1891 OFS Statute as Chapter 116 with certain additional provisions. Thirdly, this chapter discusses the 1891 OFS Statute with the amendments thereto insofar as it related to the prospecting and mining of diamonds.⁵⁶¹

This chapter concludes with a discussion of the 1904 OFS Precious Stones Ordinance.⁵⁶² After the second Anglo-Boer war the *Mining of Precious Stones Ordinance* 4 of 1904 (hereafter the 1904 OFS Precious Stones Ordinance) was enacted in respect of the Orange River Colony and continued to apply when the Orange River Colony became the Province of the Orange Free State as part of the Union of South Africa.⁵⁶³

⁵⁵⁷ Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45; Oelofse "Die Vrystaat 1843-1909" 65.

⁵⁵⁸ Section 135 of the South Africa Act. Eybers *Constitutional Documents* 551-552. The development of the right to mine diamonds under the 1927 Precious Stones Act is discussed in chapter 9 below.

⁵⁵⁹ See para 6.2 below. The Cradock Proclamation is discussed in para 2.3 above.

⁵⁶⁰ See paras 3.4 above and 6.3 below.

⁵⁶¹ See para 6.4 below.

⁵⁶² See para 6.5 below.

⁵⁶³ The 1904 OFS Precious Stones Ordinance was repealed in 1927 when the Government of the Union of South Africa enacted the 1927 Precious Stones Act to consolidate the diamond mining legislation which applied in the different provinces.

6.2 Early land tenure conditions in the Republic of the Orange Free State

During the period 1854 to 1902, the Legislative powers of the Republic of the Orange Free State vested in an elected *Volksraad*. One of the *Volksraad*'s first duties in 1854 was to draft a *Constitution for the Republic of the Orange Free State*.⁵⁶⁴ It was recorded in the first *Constitutie van den Oranjevrijstaat* of 1854 (hereafter the 1854 OFS Constitution) that in the absence of legislation adopted by the *Volksraad*, the Roman Dutch law would be the basic law of the Orange Free State.⁵⁶⁵ The *cuius est solum* principle therefore applied in respect of land situated in the Orange Free State. There was no statutory reservation of the right to precious stones with regard to the land situated in the Republic of the Orange Free State in favour of the Government. The Cradock Proclamation did not apply in respect of land situated in the Orange Free State, despite the fact that it was previously annexed as part of the Cape Colony.⁵⁶⁶

As discussed in chapter 3, the Government of the Orange Free State also competed for the legal control of the diamond fields after the discovery of the diamonds in the late 1860s.⁵⁶⁷ The Government of the Orange Free State initially granted a number of

⁵⁶⁴ See Van der Merwe *et al* "South Africa" 95-100; Oelofse "Die Vrystaat 1843-1909" 65; Giliomee "'n Ideale gemenebes in Afrika-omstandighede" 15-17; Davenport *South Africa A Modern History* 4th ed 74-75.

⁵⁶⁵ Section 57 of the 1854 OFS Constitution. In *Ordinance* 1 of 1854, the reference to "Roman-Dutch law" in the 1854 OFS Constitution was defined as follows: "the Roman-Dutch law ... must be taken to mean only in so far as it was found in force in the Cape Colony at the time of the appointment of the English judges in the place of the previously existing Council of Justice [that is, on January 1, 1828] and not to include any new laws and institutions, local or general, which may have been introduced into Holland, and which are not based on, or are in conflict with the old Roman-Dutch law, as expounded in the textbooks of Voet, van Leeuwen, Grotius, de Papegaay, Merula, Lybrecht, van der Linden van der Keessel and the authorities cited by them." Hahlo and Kahn *The Union of South Africa* 21-22; Fagan "Roman-Dutch Law" 54; Du Plessis *Inleiding tot die Reg* 49-50; Van Zyl *Beginnels van Regsvergelyking* 288-289; The law that was applied was according to Oelofse "Die Vrystaat 1843-1909" 65-66, the Roman-Dutch law as applied in the Cape Colony.

⁵⁶⁶ By Proc dated 14 March 1849, Sir Harry Smith declared that the Roman-Dutch law as received and administered in the courts of the Cape Colony would be the law of the Orange River Colony. Article 12 of Proc of 14 March 1849 provided that no Cape Ordinance would have any effect in the Orange River Sovereignty unless it was specifically re-enacted there. Bosman "Die Groot Trek tot 1838" 239-240; Erasmus 2010 *Fundamina* 42-48; Hahlo and Kahn *The Union of South Africa* 63; Manson, Mbenga and Peires "Consolidation and expansion of the colonial presence" 143-145; Warden "Reminiscences" 15-17; Couzens *Battles of South Africa* 111-116; Visagie "Uittog en vestiging van die Voortrekkers in die binneland" 145-149; Oelofse "Die Vrystaat 1843-1909" 65.

⁵⁶⁷ See para 3.4 above.

farms to their first owners in the form of deeds of grants. These farms were situated in what became known as Griqualand West. In the *Giddy* case, the proprietary status of one of these farms, Dutoitspan on which the Dutoitspan Mine was discovered, came under scrutiny, first before the High Court of Griqualand West and thereafter the Privy Council. In the *Giddy* case the Privy Council considered the nature of land tenure in the Orange Free State.⁵⁶⁸ The Court had to interpret the following condition which was included in the initial grant of the farm Dutoitspan:

That the said land will further be subject to all conditions and regulations as are already, or may in future, be fixed, referring to lands granted on the same conditions; and, lastly, that the owner shall be bound to the prompt payment of a yearly quitrent of the sum of £1 10s. sterling.

The farm Dutoitspan was included in the proclamation of Griqualand West as a British territory.⁵⁶⁹ In the *Giddy* case, the Government of Griqualand West pleaded that the farm Dutoitspan was held under perpetual *quitrent*. It was therefore subject to a reservation of precious stones and minerals to the State as *dominus directus* of the soil. Thus, all rights that formerly vested in the Government of the Orange Free State were vested in the British Crown.⁵⁷⁰ The Government argued that the farm Dutoitspan was initially granted to the landowner on perpetual *quitrent*, which was a form of land tenure known in Roman Dutch Law as *emphyteusis*, in terms of which the grantee acquired only a *usufruct* in respect of the land and no rights to the diamonds emanating from the land. The landowners did not deny that the Roman Dutch Law was the ordinary law of the Orange Free State. They did, however, argue that the particular grant was not intended to have limited operation and that full ownership of the land

⁵⁶⁸ The facts of the *Giddy* case are briefly as follows – The landowner of the farm Dutoitspan, the London and South African Exploration Company, represented by Webb, instituted an action against Giddy, one of the Commissioners appointed in respect of Griqualand West. The action was instituted for the payment of all licence monies, royalties or rents collected by the relevant Government of Griqualand West, in respect of the diggings situated on the farm Dutoitspan and for an account of the amount which the Government retained to defray the public expenditure for the maintenance of order and good government at the farm Dutoitspan. See para 4.3.2 above.

⁵⁶⁹ See para 4.1 above.

⁵⁷⁰ The Government further contended that all payments which had been made to the landowners in terms of s 29 of the 1871 GW Diggings Proclamation, had been made in error. See para 4.2.1.1 above.

was granted to the grantee, including the diamonds therein. The Privy Council agreed with the judgement of the High Court of Griqualand West, which held that the landowner of the farm Dutoitspan was entitled to receive a portion of the licence fees as provided for in section 29 of the 1871 GW Diggings Proclamation. The Privy Council held that the tenure in question was not an *emphyteusis* or *erfpacht*, but that the grant of the farm Dutoitspan was a special grant without any reservation of the rights to precious stones in favour of the Crown or State. The Privy Council stated that:⁵⁷¹

It is to be observed that the Roman-Dutch law was declared to be the common law of the *Orange State* only "where no other law had been made by the Volksraad." It may well be that the Boers who formed the people of this State intended, in making these grants, to confer full proprietary rights on the grantees, and that, whilst adopting in some respects the emphyteutic form of grant, it was not intended to confer upon the grantees usufructuary interests only.

Their Lordships are therefore brought to the conclusion that the *Orange State* could not have lawfully claimed the property of the minerals on this farm, and if so, the Crown cannot claim them...

There was thus no general reservation of the rights to diamonds in respect of the land situated in the Republic of the Orange Free State.

6.3 The 1871 OFS Diamond Fields Ordinance

The *Volksraad* enacted the 1871 OFS Diamond Fields Ordinance in May 1871 after the discovery of diamonds at the river diggings in Griqualand West and on the farms Koffiefontein and Jagersfontein in 1870.⁵⁷² The Government of the Orange Free State

⁵⁷¹ At 930. The Privy Council concluded that the proprietary status of the farm Dutoitspan at the time that the diamond fields were proclaimed as a British territory on 27 October 1871, was that it was privately owned land without any reservation of the rights to precious stones in favour of the Crown. This position continued to exist in terms of the 1871 GW Quieting Proclamation. See para 4.2.2 above.

⁵⁷² The Koffiefontein and Jagersfontein Mines were not the only diamond mines that were discovered in the Orange Free State. Three diamond mines were discovered in the Boshof district, namely the Roberts Victor Mine which was discovered on the farm Damplaats in 1905, the Blaauwbosch Mine which was discovered on the farm Catherine's Fancey and the New Elands Mine was discovered on the farm New Elands. Diamondiferous kimberlite was discovered between the towns Welkom and Theunissen in the northern part of the Orange Free State which had been mined since 1910. The Star Mine was discovered south of the town Welkom and northeast of the town Theunissen on the farms Stieniesrust, Vergelegen and Leeukop. The Agisanang Mine, previously known as the Rex Diamond Mine, was discovered south of Welkom and north of Theunissen on the farms

took the first initiative in respect of the diamond fields and proclaimed legislation to regulate the mining of diamonds in areas of land which fell within the boundaries of the Orange Free State.⁵⁷³ Although there was no distinction between different forms of land tenure, such as land owned by the Government of the Republic of the Orange Free State and privately owned land, it appears that the 1871 OFS Diamond Fields Ordinance only regulated the working of claims on private land. The 1871 Diamond Fields Ordinance did not regulate the searching or prospecting for diamonds and a person who wanted to prospect for diamonds in the Orange Free State would have required the consent of the landowner by virtue of the *cuius est solum* principle.⁵⁷⁴

6.3.1 *The right to work diggings*

There was no express statutory provision in the 1871 OFS Diamond Fields Ordinance, which reserved the right to diamonds in favour of the Government of the Republic of the Orange Free State. If diamonds were discovered on land situated within the Orange Free State and if the landowner wanted to open diggings on his land, the landowner had to notify the *Landdrost* of the district within whose jurisdiction the farm was situated.⁵⁷⁵ The *Landdrost* had to provide a written report of the discovery to the State President who had to send a suitable person to the place where the diamonds had been discovered. The person who inspected the place of the discovery had to provide a written report to the State President.⁵⁷⁶

Wynandsfontein and *Clewer*. The Samada Mine was discovered on the farm *Kaapvallei* near Virginia. The Lace Mine was discovered in 1906 on the farm Ruby and the Voorspoed Mine was discovered on the farm Voorspoed near Kroonstad. The Monastery Mine was discovered on the farm Monastery in the Marquard District. Wilson, McKenna and Lynn *Occurrence of Diamonds* 80-81; *Mineral Resources Report* 61; Cattelle *The Diamond* 227-311-314.

⁵⁷³ See para 3.4 above. It was recorded in the preamble of the 1871 OFS Diamond Fields Ordinance that it was necessary to determine what had to be done with land situated within the boundaries of the Orange Free State on which precious stones or valuable metals had already been found or might in the future be found.

⁵⁷⁴ The prospecting for diamonds was only regulated almost 22 years later with the enactment of *Law* 27 of 1894, but only in respect of land that was owned by the Government of the Republic of the Orange Free State. See para 6.4.2 below. The rights of the prospector who discovered diamonds were for the first time regulated in *Law* 27 of 1894. Prospecting on private land in the Orange Free State was only regulated in 1899 with the enactment of *Law* 16 of 1899. See para 6.4.4 below.

⁵⁷⁵ Section 1 of the 1871 OFS Diamond Fields Ordinance.

⁵⁷⁶ Section 2 read with s 3 of the 1871 OFS Diamond Fields Ordinance.

The State President could decide to purchase the land if he was of the view that it was in the interest of the Orange Free State. The State President could, however, only purchase the land with the consent of the landowner and subject to the payment of an amount for the value of the land.⁵⁷⁷ If the State President decided not to buy the land, the Government had to "supervise" the diggings to be established on the land.⁵⁷⁸ The State President could proclaim public diggings on the land which was taken over by the Government and he could also proclaim such diggings for the general public on land which the landowner refused to sell.⁵⁷⁹ The landowner only had to report the discovery of diamonds on his land if he intended to open diggings on his land. There was no provision in the 1871 OFS Diamond Fields Ordinance that the landowner was obliged to allow the opening of diggings on his land.⁵⁸⁰

6.3.2 Rights and obligations of the claimholder

The 1871 OFS Diamond Fields Ordinance only regulated the working of claims in respect of proclaimed diggings.⁵⁸¹ Every person who wanted to work a claim in a public digging had to obtain a diggers licence.⁵⁸² The State President had to appoint a

⁵⁷⁷ Section 4 of the 1871 OFS Diamond Fields Ordinance provided that the value of the land was fixed at one pound sterling per morgen for the land alone which excluded the improvements. Improvements had to be valued by three appraisers, two of whom had to be appointed by the State President and one by the landowner. There was no right of appeal against the valuation of the three valuers. See Dale *Mineral Rights* 204; Van der Schyff *Property in Minerals and Petroleum* 114.

⁵⁷⁸ Section 4 of the 1871 OFS Diamond Fields Ordinance. Section 16 of the 1871 OFS Diamond Fields Ordinance provided that if the State President decided not to purchase the land, it had to be worked under the control of the Government. The Government Inspector was then in terms of s 17 of the 1871 OFS Diamond Fields Ordinance obliged to pay the landowner one-half of the monthly rental received in respect of all claim licences that had been allocated on the private land. The remaining one-half was used to cover the Government's expenses.

⁵⁷⁹ Section 6 of the 1871 OFS Diamond Fields Ordinance.

⁵⁸⁰ This was later confirmed with the enactment of *Law* 16 of 1899 which provided that the Government was not entitled to proclaim a public digging or prospecting area on private land unless the landowner either prospected on the land or granted permission to others to prospect on the land. See para 6.4.4 below.

⁵⁸¹ The working of claims in unproclaimed diggings was only regulated in 1898 with the enactment of *Law* 10 of 1898. See para 6.4.3 below.

⁵⁸² Section 7 of the 1871 OFS Diamond Fields Ordinance.

Government Inspector for each digging. The Government Inspector exercised control over the property on which the digging was opened and he was responsible for the leasing of claims at the diggings to members of the public.⁵⁸³ Only citizens of the Republic of the Orange Free State could apply to be admitted as diggers. If the applicant for a diggers licence was not a citizen of the Republic of the Orange Free State, the applicant had to promise obedience to the laws of the Orange Free State before he could acquire a claim.⁵⁸⁴ Claims could only be transferred with the consent of the Government Inspector.⁵⁸⁵ There was no prohibition on the number of claims that each person could hold and claims could be held by natural persons and companies.⁵⁸⁶

6.3.3 *The Koffiefontein Mine*

The first diamonds in the Orange Free State was discovered in July 1970 on the farm Koffiefontein.⁵⁸⁷ Initially very little digging was done at the farm Koffiefontein,⁵⁸⁸

⁵⁸³ The Government Inspector was in terms of s 7(d) of the 1871 OFS Diamond Fields Ordinance obliged to keep a register with the names, surnames and last place of residence of each person who applied to be admitted as a digger. Section 17 of the 1871 OFS Diamond Fields Ordinance provided that the Government Inspector further had to provide security in the sum of £500 for his financial responsibilities and had to submit a monthly report regarding his financial administration to the relevant *Landdrost*. The Government Inspector had to submit a monthly report to the State President regarding his conduct as Government Inspector and the state of affairs at his digging. The Government Inspector could in terms of s 7(e) of the 1871 OFS Diamond Fields Ordinance in the interest of peace and safety order diggers to leave a digging.

⁵⁸⁴ Section 7(a) of the 1871 OFS Diamond Fields Ordinance.

⁵⁸⁵ Section 7(g) of the 1871 OFS Diamond Fields Ordinance. Section 7 of the 1871 OFS Diamond Fields Ordinance provided that each claim was limited to 30 square feet in extent and claimholders had to pay a monthly licence fee of at least ten shillings in advance.

⁵⁸⁶ Section 9 of the 1871 OFS Diamond Fields Ordinance provided that a Board of Management had to be appointed for every digging which comprised of the Government Inspector as the chairman and six members who had to be elected by the diggers. The Board of Management of every digging had to draft regulations to maintain good order at the diggings. Section 10 of the 1871 OFS Diamond Fields Ordinance provided that the regulations had to be approved by the Executive Council. Every digger was in terms of s 7 of the 1871 OFS Diamond Fields Ordinance obliged to subscribe to and obey the prescribed regulations. The State President and the Executive Council were further in terms of s 19 of the OFS Diamond Fields Ordinance empowered to draft regulations for the diggers regarding the use of wood, water and pasturage, for buildings and cultivated land as they deemed necessary.

⁵⁸⁷ Bruton *Diamonds* 34.

⁵⁸⁸ The farm Koffiefontein was initially owned by a Griqua, a certain Klaas Kok, who sold it to Barend Jacobus Engelbrecht in 1844. According to McGill *Koffiefontein* 5-6, the son of Engelbrecht told him that his father at first called the farm "*Koffiepit*" translated as "Coffee Bean" because he had found

mainly because of the discovery of diamonds at the dry diggings on the farms Dutoitspan,⁵⁸⁹ Bultfontein⁵⁹⁰ and Vooruitzigt in Griqualand West.⁵⁹¹ A Government Inspector was appointed for the diggings at Koffiefontein but he was recalled in 1872 after many of the diggers abandoned their claims and left for the dry diggings at the diamond fields.⁵⁹² The mine at Koffiefontein had lain practically dormant until April 1877 when positive newspaper articles on the profitability of the Koffiefontein Mine revived interest in the mine.⁵⁹³ This prompted Sibert Frederick Gerhardus Rörich, who was then the landowner of the farm Koffiefontein, to sink a 50 feet shaft to perform tests in respect of the mine. Rörich found diamonds which were approximately £3 000,00 worth and valued at just over one pound a carat. Rörich engaged a surveyor in 1878 to peg out 1700 claims at 30 square feet on both the farms Koffiefontein and the adjacent farm Ebenezer and to survey a township comprising 168 stands. Rörich called his township "Rörichsburg" and advertised the stands and claims to the public. With the allotment of each claim Rörich also allotted a free depositing site of 60 square feet and prepared his own regulations for the working of the claims.⁵⁹⁴

a coffee bean in the fountain near the farm. There are also other explanations of the origin of the name Koffiefontein. The discovery of the kimberlite pipe on the farm Koffiefontein was linked to the diamond diggings at the Vaal River in 1870. The diggers at the river diggings needed supplies which had to be transported from Cape Town to the river diggings by oxwagon. The first diamond was discovered on the farm Koffiefontein in July 1870 when a transport rider, a certain Willem Bam, transported goods from Colesberg and *outspanned* on the site where the Koffiefontein Mine was later discovered. Bam showed the diamond to diggers at the river diggings and soon a number of diggers rushed to the farm Koffiefontein. Jacobs *Oranje Blanje Blou* 121-122; Erasmus 2010 *Fundamina* 38-48; Beet *Diamond Fields* 92-93; Bruton *Diamonds* 34.

⁵⁸⁹ See para 3.3.1 above.

⁵⁹⁰ See para 3.3.2 above.

⁵⁹¹ See para 3.3.3 above. According to McGill *Koffiefontein* 7, it was reported that: "the few earliest diggers there had made a general skedaddle when the wonderful finds at Colesberg *Kopje* (Kimberley mine) reached their astonished ears ... there were only 30 holes of which only two or three went down to a depth that could test the mine. A 9 carat stone was the biggest stone known to have been found."

⁵⁹² Jacobs *Oranje Blanje Blou* 122.

⁵⁹³ According to a newspaper article which was published in "The Friend" on 19 April 1877, the "Free State Diamond Mine – Koffyfontein" was regarded as the next "new rush". McGill *Koffiefontein* 7.

⁵⁹⁴ McGill *Koffiefontein* 7. According to McGill, Rörich's nett income from the allotment of the claims on 28 November 1878, was £70 000.

The Koffiefontein Mine was proclaimed a public digging on 28 December 1878 in terms of the 1871 OFS Diamond Fields Ordinance and a Government Inspector was again appointed.⁵⁹⁵ The appointed Government Inspector did not issue any regulations as a result of the small number of diggers that applied for licences to work claims. The Government continued to apply the previous regulations prepared by the landowner. The interest in the Koffiefontein Mine, however, faded. The Government Inspector issued a report on 2 June 1879, stating that the Koffiefontein Mine had not yet proved to be profitable and as a result, the Executive Council of the Orange Free State recalled the Government Inspector.⁵⁹⁶

There was thereafter renewed interest in the Koffiefontein Mine when a number of companies acquired claims in the Koffiefontein Mine.⁵⁹⁷ The Government of the Orange Free State decided to exercise control over the diggings at Koffiefontein as a result of the increase in the scale of digging activities. The interest in the Koffiefontein Mine did not last long and by 1885 all claimholders had abandoned their claims. A contributing factor to the loss of interest in the Koffiefontein Mine was that an overproduction of diamonds had negatively impacted the diamond market which resulted in declining diamond prices during the middle of the 80s in the nineteenth century.⁵⁹⁸ The landowner then appointed Wilhelm Diehl to prospect the Koffiefontein Mine and in return Diehl was promised 100 claims.

Towards the end of 1880 the London and Orange Free State Exploration Company Limited, a subsidiary of De Beers Consolidated Mines Limited bought the farms Koffiefontein and Ebenezer from Rörich⁵⁹⁹ and changed the name of the Rörichsburg

⁵⁹⁵ McGill *Koffiefontein* 7.

⁵⁹⁶ McGill *Koffiefontein* 8.

⁵⁹⁷ They included the Standard Diamond Mining Company, the National Diamond Mining Company and the landowner of the farm Koffiefontein. McGill *Koffiefontein* 9.

⁵⁹⁸ The position improved with the consolidation of the diamond mining companies in Kimberley. See para 5.2 above. McGill *Koffiefontein* 10.

⁵⁹⁹ In 1880 Cecil Rhodes sent a certain Osborne to buy the farms Koffiefontein and Ebenezer from Rörich. McGill describes the transaction as follows: "According to a son of Thomas Glasson Osborne, his father clinched the deal for Rhodes and his friends. Rörich wanted £100 000 but he refused to accept a cheque for that amount. Osborne had to return to Kimberley with it, as Rörich insisted on

Township to Koffiefontein.⁶⁰⁰ In the late 1880s there was renewed interest in the Koffiefontein Mine when a number of diggers "rushed" the Koffiefontein Mine and unilaterally took up claims. The landowner removed them by force but the Government insisted that the Koffiefontein Mine was a public digging. Following an application to court, an agreement was reached between the Government of the Orange Free State and the landowner of the farm Koffiefontein in terms of which the landowner agreed that the Koffiefontein Mine would be re-opened and that a number of claims would be allotted to the landowner with the remaining claims to be sold by public auction.⁶⁰¹

6.3.4 *The Jagersfontein Mine*

In 1870 when diamonds were discovered on the farm Jagersfontein, a certain Jacoba Magdalena Cecilia Visser was the owner of the farm, the widow of the previous owner Cornelius Johannes Visser.⁶⁰² The first diamonds were discovered on the farm Jagersfontein by Mrs Visser's farm manager a certain Jacob de Klerk. According to

payment in gold. A grandson of Rörich has stated that his grandfather did not trust the 'Rooineks,' who he regarded as adventurers, hence his request for payment in gold coins. In spite of gigantic efforts, only £80 000 could be raised in Kimberley. Osborne returned with that valuable load, and, it is said, that when Rörich saw the coins, he was willing to accept them in full payment. They were counted and recounted for days to make sure of the amount." McGill *Koffiefontein* 9.

⁶⁰⁰ McGill *Koffiefontein* 9.

⁶⁰¹ McGill *Koffiefontein* 10-11, states that a deputation of two directors of the London and Orange Free State Exploration Company accompanied by their attorney, a certain Fischer, met the Executive Council in Bloemfontein on 30 August 1889 to discuss the re-opening of the Koffiefontein Mine. A translation of the agreement is recorded as "Memorandum of Agreement between the Orange Free State Government and the Koffiefontein Mine Bloemfontein 31 August 1899" in Anonymous *Letter Book General*. The minutes of the meeting recorded that 300 claims would be allotted to the landowner and the remaining claims would be sold by public auction. On 31 August 1889 an agreement was signed between President Reitz, acting on behalf of the Orange Free State and two of the directors of the landowner. There was no reference to the agreement in later minutes of the Executive Council and McGill stated that he could not find any evidence that President Reitz had submitted it to the Council for approval.

⁶⁰² The farm Jagersfontein was initially owned by a Griqua, a certain Evert Jagers, who sold the farm to Cornelius Johannes Visser in 1856. Jacobs *Oranje Blanje Blou* 80-81; Du Plessis, Van der Mescht and Visser *Jagersfontein* 13; Beet *Diamond Fields* 91; Draper and Frames *The Diamond* 23-24. According to Herbert *Diamond Diggers* 27- 28, the farm Jagersfontein which was situated in a territory occupied by the Grikwas, belonged to the Visser family for a number of years and the Vissers had a strange arrangement with the Griqua leader Adam Kok III. Hahn states that "Whenever Kok and his wife visited Jagersfontein, the resident Visser wife had to pay tribute by stripping off all the clothes she was wearing at the time and handing them to Kok's wife. Fortunately this custom had fallen into disuse in 1870 when there was only an old widow Visser on the farm." Hahn *Diamond* 23-24.

Chilvers,⁶⁰³ De Klerk noticed that small garnets mixed with pebbles of agate were sprinkled on the dry bed of a little stream on the farm and he remembered that the diggers at the river diggings believed that garnets were indicators of the presence of diamonds. De Klerk began prospecting using a common wire sieve and discovered a diamond of approximately 50 carats at a depth of six feet deep. The discovery of diamonds on "dry land" resulted in interest from numerous diggers. At first Mrs Visser only permitted her family members to search for diamonds on her farm but later she also permitted other diggers, provided that they were citizens of the Orange Free State to search for diamonds. Mrs Visser granted the diggers claims at half a pound and in return the diggers had to pay her one-fifth of the value of the diamonds found on the farm Jagersfontein.⁶⁰⁴

The Fauresmith Mining Company concluded an agreement with Mrs Visser in terms of which she agreed to lease the farm Jagersfontein to the company for a period of five years.⁶⁰⁵ Due to the shortage of water, the Fauresmith Mining Company had to use a dry sifting method of digging which was time consuming.⁶⁰⁶ Following the discovery of diamonds on the farm Jagersfontein, the Government of the Orange Free State decided not to purchase the farm. Public diggings were opened on the farm in terms of section 16 of the 1871 OFS Diamond Fields Ordinance by virtue of Government Notice 179 of 1871 which was published on 5 August 1871.⁶⁰⁷ A Government Inspector was appointed for the diggings.

⁶⁰³ Chilvers *Story of De Beers* 15; Jacobs *Oranje Blanje Blou* 80-81; Du Plessis, Van der Mescht and Visser *Jagersfontein* 13; Beet *Diamond Fields* 91; Draper and Frames *The Diamond* 23-24.

⁶⁰⁴ Hahn *Diamond* 24.

⁶⁰⁵ The Fauresmith Mining Company was formed by a number of inhabitants of the town Fauresmith in 1878 to dig for diamonds on the farm Jagersfontein; Du Plessis, Van der Mescht and Visser *Jagersfontein* 14; Jacobs *Oranje Blanje Blou* 81.

⁶⁰⁶ Du Plessis, Van der Mescht and Visser *Jagersfontein* 14.

⁶⁰⁷ The Jagersfontein Mine produced two famous diamonds, the "Excelsior" which weighed more than 900 carats and the "Reitz" or "Jubilee" diamond, which weighed more than 600 carats uncut. Beet *Diamond Fields* 91, 118-119; Jacobs *Oranje Blanje Blou* 83; Simons *Cullinan Diamonds* 24 describes the discovery of the Excelsior diamond as follows: "On the late afternoon of 30 June 1893, a black worker on Jagersfontein Mine in the Orange Free State noticed something gleamingly brightly in the sunlight from a load of gravel that he was shovelling into a wagon. Gingerly, he picked it out

The Jagersfontein Mine and Estate Companie (Beperkt) bought the farm Jagersfontein on public auction from the executors of the deceased estate of Mrs Visser.⁶⁰⁸ The New Jagersfontein Mining and Exploration Company Limited (hereafter the New Jagersfontein Company) became the sole owner of the Jagersfontein Mine when it acquired all the claims in the Jagersfontein Mine.⁶⁰⁹

6.4 The 1891 OFS Statute

In 1891 the *Volksraad* of the Orange Free State adopted the 1891 OFS Statute which was a codification of all statutes of the Orange Free State in 146 chapters.⁶¹⁰ Chapter 116⁶¹¹ of the 1891 OFS Statute was in essence a codification of the 1871 OFS Diamond Fields Ordinance with certain additional provisions regulating the management of diggings and the requirement that the transfer of claims be registered.⁶¹² There was no statutory reservation of the rights to diamonds in favour of the Government. There

of the mass of surrounding pebbles and, suspecting that it might be a diamond, immediately handed it over to the mine manager. For his honesty, he was rewarded with £500, a horse and a bridle. The stone was indeed a diamond; in fact, at 995,2 carats it was the largest that had yet been discovered. Only the famous Cullinan diamond 3 106 carats, retrieved from Premier Mine in 1905, was to surpass it. Besides, it was not only a diamond of exceptional quality but it was a rare 'blue-white' - a colour for which Jagersfontein Mine was justly famous. It is not surprising that it was given the triumphant name 'Excelsior'; Bruton *Diamonds* 35 records a story by JT McNish, that the owner of the Jagersfontein Mine concluded an agreement with Wernher, Beit and Co that the owner would sell all diamonds found between July 1892 and at midnight on 30 June 1893 to Wernher, Beit and Co. An overseer became suspicious of a labourer before the time ran out, but could not find any positive evidence. Half an hour before midnight the labourer gave himself up to the mine overseer and produced a top quality diamond, which was subsequently named the Excelsior.

⁶⁰⁸ Deed of Transfer 35447/1888.

⁶⁰⁹ "Director's Report of the New Jagersfontein Company for the financial year ended 31 March 1892." The history of the New Jagersfontein Company's involvement and operation of the Jagersfontein Mine was discussed by the High Court of the Orange Free State in the *Ataqua* case paras 4-6. See also Joel *Ace of Diamonds* 89.

⁶¹⁰ Scholtz *Die Konstitusie* 62; Dale *Mineral Rights* 205; Oelofse "Die Vrystaat 1843-1909" 73.

⁶¹¹ The mining of precious metals and precious stones, excluding diamonds, was regulated in Chapter 115 of the 1891 OFS Statute.

⁶¹² Sections 32-35 of chapter 116 of the 1891 OFS Statute. Chapter 117 of the 1891 OFS Statute regulated the ranking of bonds in respect of diamond claims. Chapter 120 of the 1891 OFS Statute provided for a search system on diamond diggings. It provided for the erection of searching rooms and for the compulsory search of every labourer every time that they left the mine. Provision was made for penalties if a person refused to be searched. Chapter 70 of the 1891 OFS Statute imposed taxes on so-called "male coloured persons" who worked on public diamond diggings. See Dale *Mineral Rights* 203-205.

was also from a diamond mining perspective no distinction between different forms of land tenure.⁶¹³ Sections 11 to 16 of chapter 116 of the 1891 OFS Statute dealt with the establishment and powers of a Mine Management Board and were a codification of sections 8 to 13 of the 1871 OFS Diamond Fields Ordinance. These provisions did not apply to the diggings at Jagersfontein. Separate provisions for the management of the Jagersfontein diggings and the town of Jagersfontein were included as chapter 121 of the 1891 OFS Statute.⁶¹⁴

The *Volksraad* of the Orange Free State adopted a number of laws to amend or supplement the 1891 OFS Statute, insofar as they related to the mining of diamonds. These are briefly discussed in the sections to follow.

6.4.1 Law 1 of 1892 – Compulsory working of claims in the Koffiefontein Mine

The conditions at the Koffiefontein Mine deteriorated because of the abandonment of a number of claims at the Mine.⁶¹⁵ The *Volksraad* therefore enacted *Law 1* of 1892 to provide for the compulsory working of claims at the Koffiefontein Mine.⁶¹⁶ Section 1 of *Law 1* of 1892 provided that all claimholders at the Koffiefontein Mine had to work their claims to the satisfaction of the Government Inspector, who could prescribe the quantity of ground to be worked and the manner in which the claims had to be worked.

A claimholder could apply in writing to the Government Inspector to be exempted from the obligation to work his claim. The Government Inspector could exempt a

⁶¹³ Section 1 of chapter 69 of the 1891 OFS Statute dealt with *quitrent* and provided that every farm was liable to the payment of an annual *quitrent* for the benefit of the Government. Chapter 115 of the 1891 OFS Statute which applied to precious metals and precious stones distinguished between Government land and private land but did not apply in respect of diamonds. The position in respect of diamonds changed later with the enactment of *Law 27* of 1894. See para 6.4.2 below.

⁶¹⁴ Sections 2 and 3 of chapter 121 of the 1891 OFS Statute provided for an elected Mine Management Board consisting of seven members to manage the Jagersfontein diggings. Members of the Mine Management Board at the Jagersfontein diggings had to be elected by the registered claimholders, the boards of directors of diamond mining companies represented by one of their members and by the duly authorised managers of diamond mining companies established in other countries or colonies. Every ten claims or portion thereof carried one vote. Dale *Mineral Rights* 205.

⁶¹⁵ See para 6.3.3 above.

⁶¹⁶ *Law 1* of 1892 is titled: "Compulsory Working of Claims in the Mine at Koffyfontein" and was enacted on 15 May 1892.

claimholder from the obligation to work his claims for a period of six months, which period could be renewed for a further period of six months.⁶¹⁷ The Government Inspector was authorised in consultation with the Board of Management, to issue regulations prescribing the manner in which claims had to be worked and the quantity of ground that had to be worked.⁶¹⁸ If a claimholder failed to work his claims to the satisfaction of the Government Inspector, the claims could be declared to be forfeited.⁶¹⁹

6.4.2 Law 27 of 1894 – Prospecting and working of claims on Government land

In *Law 27 of 1894*⁶²⁰ the *Volksraad* made provision for the prospecting for and the working of precious metals, precious stones and minerals on Government land.⁶²¹ A person, who wanted to prospect for diamonds on land which the Government of the Republic of the Orange Free State owned, had to obtain permission from the State President. The conditions under which the prospecting for diamonds and the working of claims had to be performed had to be determined in a written agreement.⁶²² The prospector who discovered diamonds was entitled to select and beacon off, for himself a block of not more than 50 claims, unless the parties agreed otherwise in the written agreement.⁶²³

⁶¹⁷ Section 2 of *Law 1 of 1892*.

⁶¹⁸ Section 6 of *Law 1 of 1892* provided that these regulations had legal effect upon publication in the *Government Gazette* by the State President.

⁶¹⁹ Sections 3 and 4 of *Law 1 of 1892*. The Government Inspector first had to notify the claimholder in writing to comply with the regulations within two months of receiving the notice.

⁶²⁰ *Law 27 of 1894* which was titled: "Prospecting for, Developing and Working Precious Metals, Precious Stones, and Minerals on Government Lands" came into effect on 17 July 1894 and repealed all law in conflict therewith.

⁶²¹ There was no definition of the term "Government land" in *Law 27 of 1894*.

⁶²² Section 1 of *Law 27 of 1894*.

⁶²³ Section 2 of *Law 27 of 1894*. The size of each claim was in terms of s 2 of *Law 27 of 1894* read with s 19 of chapter 116 of the 1891 OFS Statute not larger than 30 square feet. *Law 27 of 1894* was later repealed in terms of the 1904 OFS Precious Stones Ordinance. See para 6.5 below.

6.4.3 *Law 10 of 1898 – Working of unproclaimed diggings*

The working of unproclaimed diggings was for the first time regulated in *Law 10 of 1898*.⁶²⁴ The State President was empowered in consultation with the Executive Council, to declare that an unproclaimed digging would be worked under the control of the Government. The State President could also appoint a Government Inspector for such digging.⁶²⁵ The appointed Government Inspector had to supervise the workings at the digging and the compound thereon and had to submit monthly reports to the State President of his conduct and the state of affairs of the digging.⁶²⁶ The Executive Council was also entitled in the interest of public order and in order to assist the Government Inspector, to appoint six policemen for each unproclaimed digging.⁶²⁷

Law 10 of 1898 further provided that the Government was in respect of unproclaimed diggings situated on private land entitled to occupy and build dwellings on the private land for the appointed Government Inspector and for the policemen stationed on the land, without having to pay any compensation to the landowner. The Government could in addition, build offices and other buildings on such private land and could further allocate land for depositing rubbish and to be used as a cemetery or for any other public purpose. The Government had, in consultation with the registered landowner, to beacon off and survey the portions of land to be used for public purposes. The portions of private land used for public purposes under *Law 10 of 1898* remained the property of the registered owner, but the buildings erected on the private land remained movable buildings and were owned by the Government.⁶²⁸

⁶²⁴ *Law 10 of 1898* was titled: "Unproclaimed Diggings" and came into effect on 2 June 1898.

⁶²⁵ Section 1 of *Law 10 of 1898*.

⁶²⁶ Section 2 of *Law 10 of 1898*.

⁶²⁷ Section 3 of *Law 10 of 1898*.

⁶²⁸ Section 4 of *Law 10 of 1898*. A monthly tax of five shillings per claim was levied to cover the Government's exercising control over the unproclaimed diggings. A new s 5(a) was later, with effect from 4 July 1899 inserted in terms of *Law 27 of 1899*, which provided that the State President was empowered if he deemed it necessary, wholly or partially, to exempt alluvial diggings on the Vaal River from the taxes imposed in terms of s 5 of *Law 10 of 1898*.

If the owner of the private land refused to have the mine surveyed the Government could have the mine surveyed.⁶²⁹ The Executive Council was empowered as far as possible in consultation with the owner of the unproclaimed diggings, to issue regulations for the preservation of good order at the diggings.⁶³⁰

6.4.4 Law 16 of 1899 – Prospecting and working of claims on private land

In *Law 16 of 1899*⁶³¹ the *Volksraad* provided that the Government was not entitled to proclaim a public digging or a prospecting area⁶³² on private land or to compel the owner of private land to allow his land to be prospected, unless the owner of the private land himself prospected on his land or granted permission to others to prospect on his land.⁶³³ In the instance that the owner of private land prospected on his land or granted permission to others to prospect on his land, it was deemed that he had consented to his land being proclaimed a public digging by the Government in the event that diamonds were discovered on his land.⁶³⁴

The owner of the private land which was being prospected was entitled to one-half of all the claims on his farm, which were referred to as "owners' claims". The remaining one-half of the claims were then made available to the public. The dividing line between the owner's claims and the claims available for the public was as near as possible through the centre of every mine and had to be agreed upon between the landowner and the Government.⁶³⁵ The holder of owner's licences was not liable to pay licence fees in respect of his owner's claims.⁶³⁶

⁶²⁹ Section 5 of *Law 10 of 1898*.

⁶³⁰ Section 6 of *Law 10 of 1898*.

⁶³¹ *Law 16 of 1899* which was titled: "Supplementing and Amending Chapter CXVI of the Statutes (Diamond Law)" came into effect on 9 September 1899 and repealed all conflicting legal provisions. *Law 16 of 1899* was later repealed in terms of the 1904 OFS Precious Stones Ordinance.

⁶³² There was no statutory provision for the proclamation of a "prospecting area".

⁶³³ Section 1 of *Law 16 of 1899*.

⁶³⁴ Section 2 of *Law 16 of 1899*.

⁶³⁵ Section 3 of *Law 16 of 1899*. If the two parties could not reach agreement the dispute was referred to two arbitrators, one appointed by each of the two parties. The two arbitrators would then appoint a third party as umpire.

⁶³⁶ Section 4 of *Law 16 of 1899*.

Law 16 of 1899 did not apply in respect of private land which had already been thrown open as public diggings.⁶³⁷ It also did not apply in respect of private land which was already being worked as unproclaimed diggings if the landowner of the private land had applied within six months from the commencement of *Law* 16 of 1899 to have his land thrown open under the provisions of *Law* 10 of 1898 and provided that the taxes payable under *Law* 10 of 1898 had been paid.⁶³⁸

6.5 1904 OFS Precious Stones Ordinance

The second Anglo-Boer War between Great Britain and the Republic of the Orange Free State and the *Zuid-Afrikaansche Republiek* commenced on 11 October 1899 and ended on 31 May 1902 with the signing of the *Treaty of Vereeniging*. The British Government annexed the former Republic of the Orange River under the name of the Orange River Colony.⁶³⁹

The *1904 OFS Precious Stones Ordinance* commenced on 17 June 1904 to regulate the mining of precious stones in the Orange River Colony. The 1904 OFS Precious Stones Ordinance repealed chapter 116 of the 1891 OFS Statute⁶⁴⁰ which regulated the mining of diamonds in the former Republic of the Orange Free State.⁶⁴¹ The 1904

⁶³⁷ Section 6 of *Law* 16 of 1899.

⁶³⁸ Section 6 of *Law* 16 of 1899.

⁶³⁹ Van Schoor *Marthinus Steyn* 253-288; Hahlo and Kahn *The Union of South Africa* 110-115; De Bruin *Regshistoriese studie*. The British Government granted a responsible government to the Orange River Colony in 1907; Oelofse "Die Vrystaat 1843-1909" 74; Walker *A History of South Africa* 487-503.

⁶⁴⁰ See para 6.4 above.

⁶⁴¹ Section 126 read with schedule A to the 1904 OFS Precious Stones Ordinance. Chapter 120 of the 1891 OFS Statute, which provided for a search system on diamond diggings was also repealed. The provisions of chapter 121 of the 1891 OFS Statute which regulated the mining of diamonds at the Jagersfontein Mine were, with the exception of ss 44, 48, 49 and 51 thereof not repealed. *Law* 1 of 1892 which provided for the compulsory working of claims in the Koffiefontein Mine was also not repealed by the 1904 OFS Precious Stones Ordinance. *Law* 27 of 1894 which provided for the prospecting for diamonds and the working of claims on Government land and *Law* 10 of 1898 which provided for the working of unproclaimed diggings, were repealed insofar as they related to precious stones. *Law* 16 of 1899 which provided that the Government of the Orange Free State was not entitled to proclaim a digging on private land or to compel the owner of private land to allow his land to be prospected on was also repealed. Section 126 read with schedule A to the 1904 OFS Precious Stones Ordinance.

OFS Precious Stones Ordinance provided for a whole new system to regulate the prospecting for and mining of diamonds in the Orange River Colony. Two different forms of land tenure were specifically recognised in the 1904 OFS Precious Stones Ordinance, namely Crown land and private land. The term "Crown land" was defined to mean:⁶⁴²

all the unalienated Crown land and all land the property of the Government of this Colony in whatever way acquired; and any land alienated by the Crown with a reservation thereto of precious stones.

The term "private land" was defined to mean:⁶⁴³

any area of land of which the ownership is vested in any person as shown by the title deed or deed of transfer and in the title of which there is no reservation to the Crown of precious stones.

The right to prospect for or to mine diamonds under the 1904 OFS Precious Stones Ordinance depended on the specific form of land tenure. There was no statutory reservation of the right to mine diamonds in favour of the Crown or Government in the 1904 OFS Precious Stones Ordinance. The *Crown Land Disposal Act* 13 of 1908 which provided that all precious stones, precious metals and base metals and other minerals on Crown land alienated thereunder had to be reserved to the Crown, was a reservation of the rights to precious stones in respect of Crown land, which the Crown was entitled to do in its capacity as landowner and in terms of the *cuius est solum* principle as the holder of the rights to diamonds.⁶⁴⁴ There was thus no general

⁶⁴² Section 5 of the 1904 OFS Precious Stones Ordinance. The definition of "Crown land" in the 1904 OFS Precious Stones Ordinance includes land which was in the previous chapters referred to as "Crown land" and "reserved private land". In the remaining part of this chapter, the term "unalienated Crown land" will be used to refer to land that was owned by the Government of the Orange River Colony and the term "alienated Crown land" will be used to refer to land that was privately owned but the title deed of which contained a reservation of the rights to diamonds in favour of the Government of the Orange River Colony. The term "Crown land" will be used in the remaining part of this chapter to refer to the definition thereof in the 1904 OFS Precious Stones Ordinance, which included both unalienated Crown land and alienated Crown land.

⁶⁴³ Section 5 of the 1904 OFS Precious Stones Ordinance. Private land as defined in the 1904 OFS Precious Stones Ordinance was in the previous chapters referred to as "unreserved private land." In the remaining part of this chapter, the term "private land" will be used with reference to the definition thereof in the 1904 OFS Precious Stones Ordinance.

⁶⁴⁴ See Dale *Mineral Rights* 208.

reservation of the rights to diamonds in favour of the Crown or any Government in respect of all land situated in the Orange River Colony.⁶⁴⁵

6.5.1 The right to prospect

Any person or company, who wanted to prospect for diamonds on Crown land had to obtain a prospecting licence from the Lieutenant-Governor. The prospecting licence was granted subject to such terms as the Lieutenant-Governor would determine and further to the 1904 OFS Precious Stones Ordinance and the *Land Settlement Ordinance* of 1902.⁶⁴⁶ The consent of the owner of alienated Crown land was not necessary for the granting of a prospecting licence in respect of his land. It is submitted that the right to prospect for diamonds vested in the Crown in its capacity as the holder of the rights to diamonds in respect of unalienated and alienated Crown land.

In the case of private land, the right to prospect for diamonds vested in the landowner in his capacity as the holder of the rights to diamonds. The landowner of private land did not require a prospecting licence if he or his servants wanted to prospect for diamonds on his own land. The only condition was that the landowner of the private land had to give the Resident Magistrate written notice of his intention to prospect for diamonds on his private land.⁶⁴⁷ Any other person who wanted to prospect on private land required the written consent of the owner of the private land and had to obtain a prospecting licence from the Resident Magistrate.⁶⁴⁸ If the landowner of private land

⁶⁴⁵ For a different view see Van der Schyff *Property in Minerals and Petroleum* 115.

⁶⁴⁶ The Lieutenant-Governor could in terms of s 10 of the 1904 OFS Precious Stones Ordinance determine the period for which the prospecting licence was granted. In the case of Crown land, a monthly fee of five shillings was payable in advance and every prospecting licence had to be registered with the Resident Magistrate.

⁶⁴⁷ Sections 11(1) and 34 of the 1904 OFS Precious Stones Ordinance. If the landowner of the private land prospected for diamonds on his land without having given written notice to the Resident Magistrate, he was liable to a fine not exceeding ten pounds.

⁶⁴⁸ Section 11(2) of the 1904 OFS Precious Stones Ordinance. The landowner of private land could, however, in terms of s 11(2) of the 1904 OFS Precious Stones Ordinance only grant written permission to a white person over the age of 15 years. The duration of the prospecting licence granted in respect of private land, was determined by the Resident Magistrate but was limited to the duration of the landowner's written consent. The number of employees who were entitled to prospect under a prospecting licence on private land was prescribed. Section 11(3)(b) of the 1904 OFS Precious Stones Ordinance provided that the holder of a prospecting licence on private land

did not personally prospect or grant permission to others to prospect on his land, the Government could not without the landowner's consent proclaim the private land or any part thereof an alluvial digging, mine or prospecting area.⁶⁴⁹ If the landowner had granted permission to others to prospect on his land or if he himself prospected on his land, the landowner was deemed to have consented to his land being proclaimed a mine or an alluvial digging by the Government in the event of diamonds being discovered thereon.⁶⁵⁰ The landowner of alienated Crown land had to allow the holder of a prospecting licence to prospect on his land.

6.5.2 Rights and obligations in the case of the discovery of diamonds

A prospector or landowner who discovered diamonds had to give notice to the Resident Magistrate of the discovery and of the place where the discovery was made, within 30 days of the discovery of the diamonds. Thereafter the discoverer had to submit monthly declarations to the Inspector⁶⁵¹ in which he reported on the number, weight and value of the diamonds he had found and of the amount of pulverised ground measured in loads of 16 cubic feet to each load which had yielded the diamonds.⁶⁵²

The holder of a prospecting licence who discovered diamonds and who could prove to the satisfaction of the Head of the Mines Department firstly, that he had discovered a new diamond mine which was not merely an extension of an already discovered mine,

could only employ six white persons in addition to so-called "coloured labour." An additional licence was required for every additional six white persons employed. There appeared to be no restrictions on the number of so-called "coloured labour" to be used. The Head of the Mines Department or his Deputy could in terms of s 12 of the 1904 OFS Precious Stones Ordinance enter any private land where prospecting was being conducted for purposes of inspecting the prospecting activities.

⁶⁴⁹ Section 2 of the 1904 OFS Precious Stones Ordinance. *Boyd v Nel* 1922 AD 414 at 415.

⁶⁵⁰ Section 3 of the 1904 OFS Precious Stones Ordinance. The interests of the owner of private land were protected in that the holder of the prospecting licence was in terms of s 11(3)(a) of the 1904 OFS Precious Stones Ordinance required to obtain the permission of the landowner to enter upon any such land used as a garden, orchard, vineyard, nursery, plantation or "ornamental pleasure ground" or on land under cultivation of within 100 yards of any spring, reservoir, dam or water works or within 200 yards of any house, homestead or building. This prohibition only applied in respect of private land and no similar protection was afforded to the owner of alienated Crown land.

⁶⁵¹ As "Inspector" is defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean the appointed Inspector of Mines for the mining district.

⁶⁵² Section 14 of the 1904 OFS Precious Stones Ordinance.

secondly that there were reasonable grounds for believing that diamonds existed therein in payable quantities, and finally that he had not waived his rights as discoverer of the mine and had received a discoverer's certificate from the Head of Mines Department in which it was confirmed that he was entitled to the rights of a discoverer as set out in section 15(1) of the 1904 OFS Precious Stones Ordinance.⁶⁵³

The holder of a prospecting licence thereafter had to lodge a solemn declaration with the Inspector. If the holder of a prospecting licence could prove to the satisfaction of the Inspector that he discovered the diamonds, and if he could produce a discoverer's certificate from the Head of the Mines Department,⁶⁵⁴ he was on the proclamation of a diamond mine entitled to certain rights.

⁶⁵³ Section 15(3) of the 1904 OFS Precious Stones Ordinance. Section 40(2) of the 1904 OFS Precious Stones Ordinance provided that the discoverer's certificate had to be registered in the office of the Resident Magistrate. In the case of private land the certificate had to be registered against the title deed of the private land.

⁶⁵⁴ Issued in terms of s 15(3) of the 1904 OFS Precious Stones Ordinance. See *Ex Parte Friedlander* 1906 ORC 16. In *Morgenster Syndicate v Voorspoed Diamond Mining Co. Limited, New Randfontein Reefs Limited and the Head of the Mines Department of the Orange River Colony* 1906 ORC 45, the High Court of the Orange Free State had to adjudicate a dispute regarding two competing claims for purposes of allocating the rights of a discoverer. The plaintiff syndicate claimed that a member of their syndicate (a certain Montgomery) entered into a written prospecting contract with the Government of the Orange River Colony on 18 July 1905, to prospect for diamonds on the farm Morgenster. The syndicate claimed that on 6 December 1905 a prospecting licence was granted to Montgomery on behalf of the syndicate and that the syndicate immediately commenced with prospecting operations on the farm which resulted in the discovery of diamonds on the farm Morgenster. The syndicate argued that it discovered a diamond mine which extended onto the adjacent farm Voorspoed and that the Voorspoed diamond mine which was discovered on the farm Voorspoed, was merely an extension of an already existing diamond mine on the farm Morgenster. The first defendant was the landowner of the farm Voorspoed and the second defendant was the holder of a prospecting licence to prospect for diamonds obtained on 30 October 2005. The evidence before the High Court was that the mining engineer of the second defendant had already commenced with prospecting operations on the farm Voorspoed on 20 September 1905, but without any prospecting licence. The mining engineer made certain geological observations and sank two shafts on the farm Voorspoed which led to the discovery of yellow diamondiferous ground in both shafts. The mining engineer reported to the second defendant that he had discovered a diamond pipe and he returned to the farm with an experienced prospector. The mining engineer and prospector sank a few more shafts and discovered more diamonds during October 1905. The syndicate argued that because the second defendant was not the holder of a prospecting licence when it first discovered the diamond mine on the farm Voorspoed, the second defendant could not be the discoverer of the mine in terms of the 1904 OFS Precious Stones Ordinance. The High Court held that although the second defendant might not have been the discoverer so as to entitle it to the rights of the discoverer under s 15 of the 1904 OFS Precious Stones Ordinance, it was the *de facto* discoverer of the Voorspoed Mine. The Court held further that the syndicate could not then

One of the most important changes to the diamond mining legislation that previously applied in the former Republic of the Orange Free State was that the 1904 OFS Precious Stones Ordinance provided for an undivided share in new diamond mines in favour of the Government of the Orange River Colony. This was irrespective of whether the diamond mines were proclaimed on Crown land or on private land. The shares to which a discoverer, an owner of private land and the Government were entitled to, are as follows:

- (a) Where the diamond mine was discovered on Crown land, the discoverer was entitled to an undivided 50% share of the extent of the diamond mine.⁶⁵⁵ The Crown was entitled to the undivided 50% share which remained after deducting the discoverer's share.⁶⁵⁶
- (b) Where the diamond mine was discovered on private land and the discoverer was not the landowner, but a discoverer who prospected with the consent

when it found an extension of the Voorspoed Mine or pipe into the farm Morgenster, claim to have discovered a new mine. The Court also indicated that the landowner of private land could in any event prospect for diamonds on his own land without being the holder of a prospecting licence. The Court held further that the second defendant complied with all the requirements to claim the rights of a discoverer in that it obtained a prospecting licence, albeit after the first discovery and it had established to the satisfaction of the Head of the Mines Department that there were reasonable grounds for believing that diamonds existed in the Voorspoed Mine in payable quantities. The facts that emerged from the evidence led before the High Court were that the syndicate only obtained its prospecting licence on 6 December 1905 and after it became aware of the discovery of the mine on the farm Voorspoed. The prospecting operations that were conducted by the syndicate on the farm Morgenster in December 1905 were to test the ground and to determine whether the Voorspoed Mine extended into the farm Morgenster. The prospector of the syndicate in respect of the farm Morgenster, was specifically instructed by the syndicate to begin his prospecting operations at the corner of the farm Morgenster abutting on Voorspoed and which was nearest to a shaft of the second defendant. Prospectors of the syndicate admitted that they could see the diamondiferous ground situated on the farm Voorspoed from a distance. The High Court concluded that the syndicate found its first diamond on the farm Morgenster on the 11th or 12th December 1905 and what it found was merely an extension of the Voorspoed Mine which had already been discovered on the farm Voorspoed by the second defendant. For a discussion of the history of the discovery of the Voorspoed mine see Birkholtz *The story of Voorspoed* 3-6.

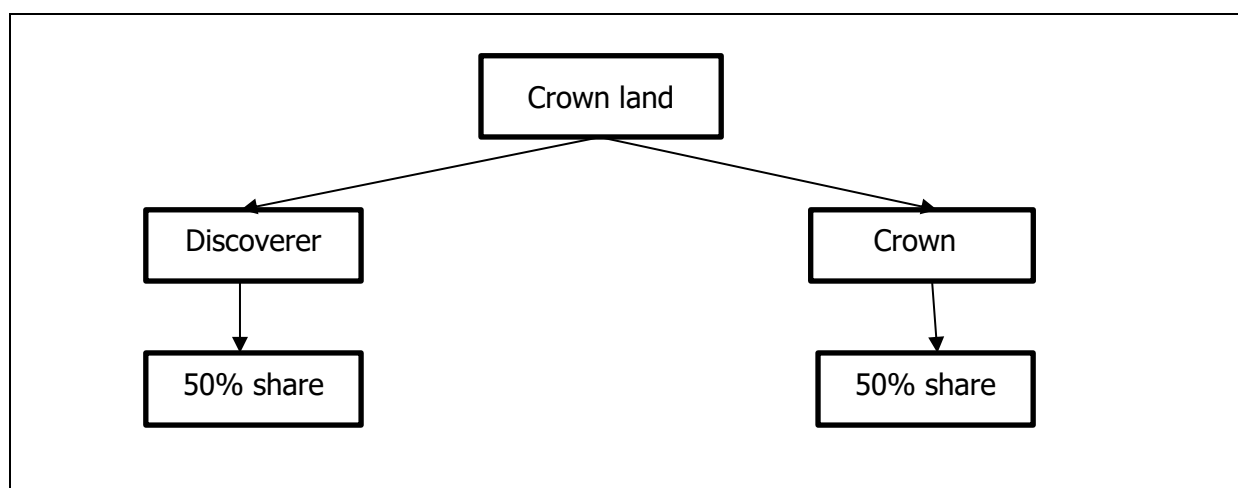
⁶⁵⁵ See figure 6.1 below.

⁶⁵⁶ Section 40(1) read with s 15 of the 1904 OFS Precious Stones Ordinance. See figure 6.1 below. The 1904 OFS Precious Stones Ordinance did not prescribe in detail the manner in which the share of the Government in new mines had to be determined. This was changed with the enactment of the *Mining of Precious Stones Amendment Ordinance* 30 of 1907 (hereafter the 1907 OFS Amendment Ordinance).

of the landowner, the discoverer was entitled to an undivided one-fifth share of the interest in the mine to which the landowner of the private land was entitled.⁶⁵⁷ The landowner of private land was entitled to an undivided 60% share of the extent of the mine, which included the share of the discoverer.⁶⁵⁸ The discoverer was thus entitled to an undivided 12%, the landowner to an undivided 48% and the Crown⁶⁵⁹ to the remaining undivided 40% share of the extent of the mine.⁶⁶⁰

Figure 6.1 schematically illustrates the different undivided shares in a new diamond mine proclaimed on Crown land.

Figure 6.1: Undivided shares in a new diamond mine proclaimed on Crown land.



⁶⁵⁷ Section 15(1) of 1904 OFS Precious Stones Ordinance.

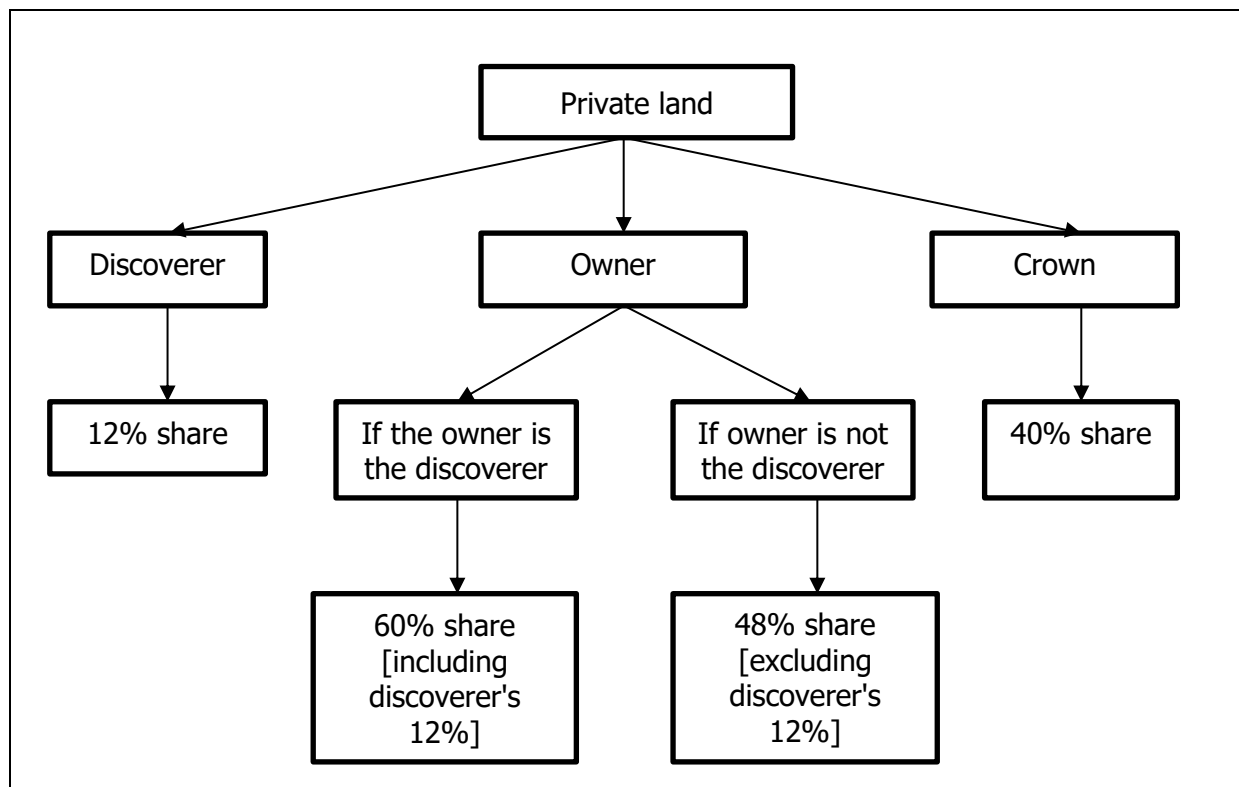
⁶⁵⁸ Section 35 of the 1904 OFS Precious Stones Ordinance.

⁶⁵⁹ The 1904 OFS Precious Stones Ordinance did not provide a definition of "Crown." It is submitted that the word "Crown" in the 1904 OFS Precious Stones Ordinance should be interpreted to refer to the Government of the Orange River Colony. The term "Crown land" is defined in s 5 of the 1904 OFS Precious Stones Ordinance to include: "the property of the Government of this Colony ... "

⁶⁶⁰ Section 40(1) of the 1904 OFS Precious Stones Ordinance. See figure 6.2 below. The prospector could in terms of s 15(1) of the 1904 OFS Prospecting Ordinance agree to divide the shares on a different basis.

Figure 6.2 schematically portrays the different undivided shares in a new diamond mine proclaimed on private land.

Figure 6.2: Undivided shares in a new diamond mine proclaimed on private land.



The working of mines and alluvial diggings were regulated separately in the 1904 OFS Precious Stones Ordinance. The 1904 OFS Precious Stones further recognised certain existing mines and the prior repealed laws that applied in respect of those mines, with certain exceptions, continued to apply thereto.⁶⁶¹ The right to mine diamonds in terms of the 1904 OFS Precious Stones Ordinance in respect of new mines and existing mines are discussed below, followed by a discussion of the working of alluvial diggings.

6.5.3 New mines

Where diamonds had been discovered under the 1904 OFS Precious Stones Ordinance the Lieutenant-Governor had to appoint a qualified person to test the character, the

⁶⁶¹ See para 6.5.4 below.

payability and the extent of the place where the diamonds had been discovered.⁶⁶² The Lieutenant-Governor could, when he was satisfied that there were reasonable prospects that diamonds existed in payable quantities, cause the area containing diamonds to be surveyed. Thereafter the area could be proclaimed a mine⁶⁶³ or an extension of an existing or previously discovered mine. In the case of private land the Lieutenant-Governor could only proclaim a mine on the private land, if the owner of the private land had himself prospected on his land or allowed his land to be prospected for diamonds or if the owner of the private land otherwise consented to the proclamation.⁶⁶⁴ The *cuius est solum* principle therefore continued to apply.⁶⁶⁵

The fact that the 1904 OFS Precious Stones Ordinance provided for shares in diamond mines, should not be confused with the concept of a right to mine. The term "right to mine" was not referred to in the 1904 OFS Precious Stones Ordinance.⁶⁶⁶ The landowner of private land on which a mine was proclaimed was entitled to elect to work the entire mine for the purpose of winning diamonds and was regarded as the mineholder.⁶⁶⁷ The landowner had to notify the Head of the Mines Department within nine months whether he intended to work the mine or not.⁶⁶⁸ If the landowner decided to work the mine he had to provide the working capital⁶⁶⁹ necessary for the effective

⁶⁶² Section 19 of the 1904 OFS Precious Stones Ordinance.

⁶⁶³ A "mine" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "any area of ground bearing precious stones which is continuous in its formation and is contained within a pipe or similar geological formation together with any directly connected overflow or extension of the same."

⁶⁶⁴ Section 20 of the 1904 OFS Precious Stones Ordinance.

⁶⁶⁵ See para 2.1 above. In this chapter, the term "new mine" is used to refer to diamond mines that were proclaimed in terms of the 1904 OFS Precious Stones Ordinance.

⁶⁶⁶ The words "digging" or "mining" were defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "the winning of precious stones including all work necessary for the purpose, irrespective of whether such mining is effected by underground mining works, open cuttings, boring or otherwise."

⁶⁶⁷ The "mineholder" was defined in s 5 of the 1904 OFS Precious Stones Ordinance, to mean the person entitled to work a mine.

⁶⁶⁸ Section 41 of the 1904 OFS Precious Stones Ordinance. *Blaauwbosch Diamonds Limited v Union Government (Minister of Finance)* 1915 AD 599 at 607.

⁶⁶⁹ The term "working capital" was defined in s 47 of the 1904 OFS Precious Stones Ordinance, to mean: "the actual capital expended on the equipment and development of the mine after the date of proclamation together with a sum to be decided upon by the Board prescribed in section fifty-two as necessary for the purpose of carrying on mining operations, and shall include any sum paid

working of the mine. Furthermore, he had to provide a yearly account to the Head of the Mines Department in which he had to set the working capital he actually had spent together with interest (at the rate of ten per cent per annum), off against the net profit of the mine. The Government was not entitled to share in the produce of the mine until the aggregate net profits⁶⁷⁰ of the mine after allowing for previous losses, equalled the working capital expended from time to time together with the interest thereon.⁶⁷¹ During the period from the date of proclamation of the mine and the date when the working capital and interest had been set off and balanced against the profits of the mine, the landowner had to pay to the Government a tax of five shillings monthly in advance for every 900 square feet of the total surface of the mine. The owner's obligation to pay the tax ceased to be payable, from the date when the working capital and interest equalled the accumulated profits.⁶⁷²

by the mineholder in respect of land or any right over land acquired by him under the provisions of sections eighty-seven and eighty-nine, but shall not include the purchase price, if any, paid by him for the mine, or any mining rights or any costs of prospecting previous to proclamation."

⁶⁷⁰ The term "net profits" was defined in s 48 of the 1904 OFS Precious Stones Ordinance, to mean: "that profit left after paying all amounts not being capital outlay actually expended during the year in winning and disposing of precious stones together with salaries, wages, director's fees, auditor's fees, taxes, insurance, printing, stationery, advertising, maintenance of plant and buildings, agencies, legal expenses, survey expenses, arbitration expenses and office expenses."

⁶⁷¹ Section 42 of the 1904 OFS Precious Stones Ordinance. Section 42 of the 1904 OFS Precious Stones Ordinance was later amended in terms of the 1907 OFS Amendment Ordinance. Section 6 of the 1907 OFS Amendment Ordinance specified the time when the annual accounts had to be prepared by the landowner. Section 7(1) of the 1907 OFS Amendment Ordinance provided that the annual account had to be submitted to the Head of the Mines Department within four months of the date of the closing of the financial year or within four months from the first day of January. The mineholder was in terms of s 8 of the 1907 OFS Amendment Ordinance obliged to pay any sum due to the Government to the Colonial Treasurer within five months of the date of the closing of the mine's financial year or within five months of the first day of January. If the mineholder was a company, s 10(1) of the 1907 OFS Amendment Ordinance provided that it had to submit copies of all communications made by the directors or officers of the company to its shareholders, to the Head of the Mines Department.

⁶⁷² Section 42 of the 1904 OFS Precious Stones Ordinance. The 1907 OFS Amendment Ordinance was enacted to define in more detail the manner in which the share of the Government in mines proclaimed under the 1904 OFS Precious Stones Amendment Ordinance had to be ascertained and paid to the Government of the Orange River Colony. The mineholder of each mine proclaimed under the 1904 OFS Precious Stones Ordinance was required to as soon as possible after the promulgation of the 1907 OFS Amendment Ordinance, submit a proposed scheme to the Head of the Mines Department in respect of the equipment and development of the mine. The scheme had to show in detail the plans and specifications, the works on which the expenditure of working

From the date when the working capital and interest equalled the accumulated profits, the net profit obtained from the working of the mine had to be divided between the Government and the mineholder in proportion to their respective shares in the mine.⁶⁷³ The nature of the Government's share in a mine was that it was entitled to share in the profits derived from the working of the mine. Although the Government was entitled to share in the profits derived from the working of the mine, the Government was not in the case of private land entitled to allocate or award any entitlements to mine diamonds to any other person, but to the landowner, provided that the landowner complied with the relevant requirements.⁶⁷⁴ The right to mine diamonds in respect of a diamond mine proclaimed on private land thus vested in the landowner in his capacity as the holder of the rights to diamonds.

In the case of Crown land, the discoverer of a diamond mine proclaimed on the Crown land was for purposes of the 1904 OFS Precious Stones Ordinance the mineholder and entitled to mine for diamonds.⁶⁷⁵

capital would be required together with a detailed estimate of the proposed expenditure thereon and the period over which the expenditure would be incurred.

⁶⁷³ Section 44 of the 1904 OFS Precious Stones Ordinance. Section 50 of the 1904 OFS Precious Stones Ordinance provided that where a small mine not exceeding 135 000 square feet in extent was proclaimed, the Lieutenant-Governor could lease the Government's portion to the landowner or mineholder on such terms as could be agreed to. Where such a lease agreement was concluded the provisions of ss 42, 43 and 44 of the 1904 OFS Precious Stones Ordinance did not apply. *Blaauwbosch Diamonds Limited v Union Government (Minister of Finance)* 1915 AD 599 at 605.

⁶⁷⁴ Section 53 of the 1904 OFS Precious Stones Ordinance provided that the Lieutenant-Governor could in the following instances call for public tenders for the working of the mine under a contract:

- (a) if the landowner refused to work the mine;
- (b) if the landowner failed to notify the Head of the Mines Department of his decision to work the mine within the period of nine months;
- (c) if the landowner failed to find the necessary capital for the working of the mine within 12 months after its proclamation;
- (d) if the landowner failed to properly work the mine; or
- (e) if the landowner failed to carry out a decision of the Board.

The terms and conditions of the contract had to be agreed upon between the Lieutenant-Governor and the landowner. If no acceptable tender was received for the working of the mine the Lieutenant-Governor could lease the mine to the landowner on such terms as agreed to between the parties. If such a lease agreement was entered into, ss 42-44 of the 1904 OFS Precious Stones Ordinance did not apply to the lease.

⁶⁷⁵ Section 56 of the 1904 OFS Precious Stones Ordinance.

6.5.3.1 Rights and obligations of the mineholder in respect of proclaimed diamond mines

The 1904 OFS Precious Stones Ordinance also made provision for the proclamation of an additional area described as a mining area. The Lieutenant-Governor could at the request of the mineholder proclaim an area in the neighbourhood of or in proximity to the mine as a mining area. The mining area had to be surveyed and beacons off. It had to be of sufficient extent to be used for purposes of depositing floors,⁶⁷⁶ machinery and tipping sites, for sinking wells, laying tramways, erecting compounds and other necessary buildings. Also, it had to be of sufficient extent for purposes of performing all matters and things relating to the proper and efficient working of the mine.⁶⁷⁷ In the case of private land, a mining area could not be proclaimed on the land unless the landowner of the private land consented thereto.⁶⁷⁸

In addition to a mining area there was also a buffer area of 150 yards in width, which was reserved round the margin of the proclaimed mine. This reserve was deemed to be part of the proclaimed mining area and had to be used exclusively for machinery for the purpose of hauling ground from the mine and for the laying of tram rails or other means of transport for the purpose of carrying such ground to the depositing sites.⁶⁷⁹ The proclaimed mining area could only be used for the purposes prescribed

⁶⁷⁶ The term "depositing floors" was not defined but the term "depositing sites" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "a piece of land used for depositing and working of ground bearing precious stones and for the accumulation of washed ground."

⁶⁷⁷ Section 21(1) of the 1904 OFS Precious Stones Ordinance.

⁶⁷⁸ Section 21(4) of the 1904 OFS Precious Stones Ordinance.

⁶⁷⁹ Section 21(5) of the 1904 OFS Precious Stones Ordinance. Every mineholder was further in terms of s 87(1) of the 1904 OFS Precious Stones Ordinance entitled to acquire a piece of land situated outside the proclaimed mining area from a landowner for the purpose of constructing a dam or reservoir. The mineholder did not require the landowner's consent to use the land for these purposes, unless there was a homestead or other buildings, burial grounds, gardens, orchards or land under irrigation on such land. The mineholder could further in terms of s 87(2) of the 1904 OFS Precious Stones Ordinance take water from any natural running river, stream or watercourse on the landowner's land for the purpose of working the relevant mine. The mineholder could acquire a piece of land from the landowner for the erection of a pump station, provided that the mineholder had to leave a sufficient supply of water to the landowner or his representative or lessee for household or agricultural purposes and for watering his stock. Section 88 of the 1904 OFS Precious Stones Ordinance provided that the mineholder could also lead water by means of pipes, ducts, furrow or otherwise from such dam or watercourse of the mining area. In return for

in the 1904 OFS Precious Stones Ordinance and the mineholder acquired no rights to mine in the proclaimed mining area. If a further mine was later discovered within the proclaimed mining area and if the further mine was not merely an extension of the proclaimed mine, the proclaimed mining area together with the buffer area was revoked to allow the new mine to be proclaimed.⁶⁸⁰

Every mineholder had to carry on mining operations to the satisfaction of the Head of the Mines Department. The mineholder could obtain the permission of the Head of the Mines Department to suspend work for a number of reasons. These reasons could include the fact that time was required for the erection or repair of machinery or shafts, the influx or scarcity of water, a fall of reef on the mine, or the scarcity of labour. The mineholder could also apply for permission to suspend work because the *bona fide* mining and working expenses of the mine could not be met by the sale of diamonds found therein.⁶⁸¹ The mineholder could only transfer or mortgage his interest in a proclaimed mine with the consent of the Lieutenant-Governor.⁶⁸²

No township could be established on any proclaimed mine or mining area unless the land required for the establishment of the township, had first been deproclaimed.⁶⁸³

acquiring these rights, the mineholder had to pay an amount as agreed to between the landowner and the mineholder had to pay an amount as agreed to between the landowner and the mineholder and if they failed to reach an agreement, s 87 of the 1904 OFS Precious Stones Ordinance provided that the amount had to be determined by arbitration. If the mine was deproclaimed, s 88 of the 1904 OFS Precious Stones Ordinance provided that the abovementioned rights acquired under s 87 of the 1904 OFS Precious Stones Ordinance together with any buildings or improvements except movable structures erected on the land, reverted to the landowner. All wood that grew on land which had been proclaimed as a mine or mining area, belonged to the landowner who was in terms of s 94 of the 1904 OFS Precious Stones Ordinance entitled to dispose thereof as he deemed fit. A mineholder was in terms of s 95 of the 1904 OFS Precious Stones Ordinance entitled to cut down any wood growing on a mine if it interfered with the proper development of the mine, but the wood remained the property of the landowner.

⁶⁸⁰ Section 22 of the 1904 OFS Precious Stones Ordinance.

⁶⁸¹ Section 51 of the 1904 OFS Precious Stones Ordinance. See Dale *et al Mineral and Petroleum Law* MPRDA212(28) for a discussion of the contractual obligation to conduct work in a particular manner as opposed to working continuously. See also *Doyershoek Asbestos Mine (Pty) Limited v Estate Snyman* 1956 2 SA 304 (A).

⁶⁸² Section 55(1) of the 1904 OFS Precious Stones Ordinance.

⁶⁸³ Section 99 of the 1904 OFS Precious Stones Ordinance. The registered holder of any holding in a mine was in terms of ss 58 and 59 of the 1904 OFS Precious Stones Ordinance entitled to abandon

6.5.3.2 Interests of the landowner

The proclamation of a mine on private land had a negative impact on the landowner's ownership of alienated Crown land and private land. The surface rights of the owner of alienated Crown land and private land that were included in a proclamation of the area as a mine were automatically, and by operation of law, suspended until the proclamation of the land as a mine was revoked or cancelled.⁶⁸⁴ The 1904 OFS Precious Stones Ordinance furthermore had a negative impact on the interests of a lessee of Crown land or private land. If the land included in the proclamation was subject to a lease of the surface rights, the Head of the Mines Department had to notify the lessee of the proclamation of the leased land as a mine, where after the lease ceased to exist.⁶⁸⁵

6.5.4 Existing mines

The 1904 OFS Precious Stones Ordinance recognised a number of proclaimed and unproclaimed mines as existing mines. The laws that applied in respect of the specific existing mines continued to apply thereto and the 1904 OFS Precious Stones Ordinance only applied to such existing mines, insofar as its provisions were not repugnant to

the whole or any portion off such holding on giving written notice of such abandonment to the Resident Magistrate. The Lieutenant-Governor was entitled after giving three months' written notice to the owner, to grant a lease of any mine or part of the mine which had been abandoned for such period and on such terms as he deemed fit, the details of which had to be published in the *Gazette*.

⁶⁸⁴ Section 23 of the 1904 OFS Precious Stones Ordinance; See Franklin and Kaplan *Mining and Minerals* 39-44 for a discussion of similar effects that the proclamation of land had on the rights of the landowner with reference to the Mining Rights Act.

⁶⁸⁵ Sections 23 and 24 of the 1904 OFS Precious Stones Ordinance. The lessee was, however, entitled to claim compensation. In the case of alienated Crown land, the amount of compensation had to be agreed to by the lessee of the alienated Crown land and the Head of the Mines Department and the Governor had to pay the compensation to the lessee. In the case of private land, the compensation had to be agreed to by the lessee of the private land and the landowner and the Head of the Mines Department and both the landowner and Governor had to pay the compensation in proportion to their respective shares in the mine. If no agreement could be reached the amount of compensation had to be determined by arbitration.

any of the prior repealed laws. The Government had no share or proprietary rights in any of the existing mines.⁶⁸⁶

6.5.4.1 Proclaimed existing mines

Three proclaimed diamond mines were recognised as existing mines for purposes of the 1904 OFS Precious Stones Ordinance. Firstly, the diamond mine situated on the farm Jagersfontein and worked by the New Jagersfontein Company.⁶⁸⁷ Secondly the diamond mine on the farm Koffiefontein, which was worked by *Koffyfontein* Mines Limited and other claimholders and thirdly the mine known as Ebenezer Mine.⁶⁸⁸

The mineholders⁶⁸⁹ and other claimholders in respect of the proclaimed existing mines had to pay a monthly licence fee of ten shillings for every claim of 900 square feet within the proclaimed area to the Resident Magistrate.⁶⁹⁰ All the claim licence monies which the Government collected were divided equally between the Government and the owner of the land on which the proclaimed existing mine was situated.⁶⁹¹

All rights pertaining to the *Koffyfontein* Estates Limited and to the New Jagersfontein Company as embodied in any legal agreement entered into between the companies and the Government of the previous Orange Free State, and which existed at the date

⁶⁸⁶ Section 60(1) read with s 61(1) and s 63 of the 1904 OFS Precious Stones Ordinance. The 1904 OFS Precious Stones Ordinance did not annul or vary any lawful contract entered into by the mineholders of the proclaimed existing mines and the unproclaimed existing mines with reference to the specific mines prior to the enactment of the 1904 OFS Precious Stones Ordinance.

⁶⁸⁷ In this study the name New Jagersfontein Company refers to the New Jagersfontein Mining and Exploration Company Limited. See para 6.3.4 above.

⁶⁸⁸ Section 60 of the 1904 OFS Precious Stones Ordinance.

⁶⁸⁹ The word "mineholders" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "the person entitled under the provisions of this Ordinance to work a mine."

⁶⁹⁰ Section 60(2) of the 1904 OFS Precious Stones Ordinance. A "claim" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "a portion of the land assigned for mining purposes within any proclaimed alluvial digging or any existing mine within the meaning of this *Ordinance* of a size fixed by this *Ordinance*, in respect of such existing mine or alluvial digging respectively. The land assigned for mining purposes as aforesaid with reference to existing mines shall be deemed to be the area respectively recognised as claims in the said mines, at the time of the coming into operation of this *Ordinance*." The word "claimholder" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "the registered holder of the right to dig for precious stones in a claim."

⁶⁹¹ Section 60(5) of the 1904 OFS Precious Stones Ordinance.

of annexation of the Orange River Colony, were deemed to continue in force under the 1904 OFS Precious Stones Ordinance.⁶⁹² Section 63(d) of the 1904 OFS Precious Stones Ordinance provided that nothing in the 1904 OFS Precious Stones Ordinance would in any way limit the rights and powers possessed at the date of promulgation of the 1904 OFS Precious Stones Ordinance by the *Koffyfontein* Estates Limited and the New Jagersfontein Company as owners of the farm Koffiefontein and Jagersfontein on which the Koffiefontein Mine, Ebenezer Mine and the Jagersfontein Mine were situated - from exercising all the rights, powers and privileges, which the companies lawfully possessed at that time. The 1904 OFS Precious Stones Ordinance could also not affect or limit the rights and powers of claimholders, future mineholders or lessees to let or dispose of any areas of ground as required for purposes of depositing and washing sites, reef tips, laying down tramways, erecting machinery, compounds, stables and such other buildings as would be necessary for properly carrying on mining operations at the mine.⁶⁹³

6.5.4.2 Unproclaimed existing mines

Section 61 of the 1904 OFS Precious Stones Ordinance recognised those diamond mines that were owned and worked at the time of coming into operation of the 1904 OFS Precious Stones Ordinance by the Lace Diamond Mining Company Limited, the Orange Free State and Transvaal Diamond Mines Limited, the New *Driekopjes* Diamond Mining Company Limited and the Monastery Diamond Mines and Estate Company Limited, as unproclaimed existing mines.

The holder of an unproclaimed existing mine was entitled to prospect and mine for diamonds within the farm or area on which the unproclaimed existing mine was situated, which at the date when application was made in respect thereof under the provisions of *Law* 16 of 1899⁶⁹⁴ was registered under one title without having to pay

⁶⁹² Section 63(c) of the 1904 OFS Precious Stones Ordinance.

⁶⁹³ Section 63(d) of the 1904 OFS Precious Stones Ordinance.

⁶⁹⁴ See para 6.4.4 above.

any licence or other fee. If any further mine was discovered on the said area, a tax of five shillings would be payable in respect of every claim of 900 square feet of the surface area of the further mine.⁶⁹⁵

6.5.5 Working of alluvial diggings

The 1904 OFS Precious Stones Ordinance provided for the division of alluvial diggings into claims and the allocation thereof to claimholders. The provisions of the 1904 OFS Precious Stones Ordinance regarding the proclamation of new mines applied equally to the proclamation of alluvial diggings. The Lieutenant-Governor first had to appoint a qualified person to test the character, the payability and the extent of the place where the diamonds had been discovered.⁶⁹⁶ If the Lieutenant-Governor was satisfied that there were reasonable prospects that diamonds existed in payable quantities, he could after first causing the area containing diamonds to be surveyed, proclaim the area an alluvial digging⁶⁹⁷ or an extension of an existing or previously discovered alluvial digging. In the case of private land, he could only proclaim an alluvial digging on private land if the landowner of the private land had prospected on his land or

⁶⁹⁵ Section 61(2) of the 1904 OFS Precious Stones Ordinance. If any of the taxes payable in respect of any of the unproclaimed existing mines became four months in arrears the Lieutenant-Governor could, after giving the claimholders at least one month written notice to pay all the arrear taxes, declare the mine or any such claims therein to be forfeited and could invite public tenders for the working thereof. The Government was in terms of s 62 of the 1904 OFS Precious Stones Ordinance obliged to divide the net revenue derived by the Government's acceptance of the tender equally between the Crown and the landowner. The Lieutenant-Governor was in terms of s 61(4) of the 1904 Precious Stones Ordinance obliged to accept the tender that was in his opinion the most advantageous. Claimholders of the unproclaimed mines could abandon any claim within the surface area of the mines, by giving written notice to the Resident Magistrate. The Lieutenant-Governor could then after giving three months' written notice to the landowner, grant a lease of the unproclaimed existing mine or part of the mine which had been abandoned for such period and on such terms as he deemed fit.

⁶⁹⁶ Section 19 of the 1904 OFS Precious Stones Ordinance.

⁶⁹⁷ An "alluvial digging" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "such an area as may from time to time be proclaimed by the Lieutenant-Governor as such, and any area that has heretofore been so proclaimed under any previous law and is at the date of the promulgation of this *Ordinance* being worked as such."

allowed his land to be prospected for diamonds or if the owner of the private land otherwise consented to the proclamation.⁶⁹⁸

The surface rights of the owner of private land or alienated Crown land included in a proclamation of the area as an alluvial digging were also suspended until the proclamation of the land as an alluvial digging was revoked or cancelled.⁶⁹⁹ In the case of private land, at least three months written notice had to be given to the landowner before the proclamation of the landowner's private land as an alluvial digging.⁷⁰⁰ In the case of private land the landowner could request that he be entitled to the uninterrupted use of his principal homestead and a circular area of 200 yards in radius around the homestead and also of all buildings, burial grounds, kraals and watercourses situated outside the circular area.⁷⁰¹ This area which was reserved for the uninterrupted use of the landowner of private land was not included in the proclamation of an alluvial digging. The Lieutenant-Governor could, however, at the request of any person, expropriate the reserved portions of land or buildings but subject to the payment of the value thereof to the landowner as compensation.⁷⁰²

In the case of the proclamation of an alluvial digging on alienated Crown land, the landowner was in addition to the payment of any compensation for the expropriation of his surface rights, entitled to peg off for himself after the prospector's rights had

⁶⁹⁸ Section 20 of the 1904 OFS Precious Stones Ordinance.

⁶⁹⁹ Section 23 of the 1904 OFS Precious Stones Ordinance. Sections 23 and 24 of the 1904 OFS Precious Stones Ordinance which applied in respect of existing lease agreements, applied equally to the alluvial diggings. See para 6.5.3.2 above. See Franklin and Kaplan *Mining and Minerals* 39-44 for a discussion of the effects of proclamation of land on the rights of the landowner with reference to the Mining Rights Act.

⁷⁰⁰ Section 25 of the 1904 OFS Precious Stones Ordinance provided that the notice had to be served on the landowner personally or on his duly authorised agent and the notice had to be published in the *Gazette*.

⁷⁰¹ Section 26 of the 1904 OFS Precious Stones Ordinance. The landowner was in terms of s 28 of the 1904 OFS Precious Stones Ordinance obliged to cause the areas of land that he was entitled to under s 26 to be beaconed off. These provisions did not apply in respect of a proclaimed mine.

⁷⁰² If the Government and the landowner could not agree on the amount of compensation, the dispute was referred to arbitration and the costs of the arbitration were in terms of s 27 of the 1904 OFS Precious Stones Ordinance payable by the claimholder who requested the expropriation.

been satisfied, ten claims which if possible the landowner had to elect in the form of a rectangular block.⁷⁰³

6.5.5.1 The rights of the discoverer of alluvial diamonds

The holder of a prospecting licence who could prove to the satisfaction of the Inspector of Mines that he had found alluvial diamonds and that there were reasonable prospects of believing that the diamonds existed in payable quantities, would receive a certificate from the Resident Magistrate confirming that he was entitled to select 50 claims in a block⁷⁰⁴ of a specific size at the place where the diamonds had been found. The discoverer was exempted from the obligation to pay licence money in respect of his discoverer's claims for as long as the discoverer held the claims.⁷⁰⁵ The Head of Mines had to be satisfied that a genuine discovery had been made.⁷⁰⁶ Once a certificate had been issued to the discoverer, no other person could prospect at the place where the diamonds had been discovered and within a further distance thereof as determined by the Head of Mines in respect of the specific discovery.⁷⁰⁷

⁷⁰³ These claims were in terms of 30 of the Precious Stones Ordinance subject to the payment of the usual monthly licence fees.

⁷⁰⁴ The term "block of claims" or "block" was defined in s 5 of the 1904 OFS Precious Stones Ordinance to mean: "any number of continuous claims."

⁷⁰⁵ Section 65 of the 1904 OFS Precious Stones Ordinance. This position was later changed in terms of the *Discoverer's Claims (Licence) Act* 9 of 1908 (hereafter the 1908 OFS Discoverer's Act). Section 1 of the 1908 OFS Discoverer's Act provided that the discoverer of an alluvial digging which fell under the 1904 OFS Precious Stones Ordinance was only entitled to hold claims which he had selected as discoverer under the 1904 OFS Precious Stones Ordinance free of charge, if he was carrying on mining operations on such claims. If the discoverer failed to commence *bona fide* mining operations to the satisfaction of the Head of the Mines Department on the selected alluvial claims within three months after he had selected his claims, the Head of the Mines Department could in terms of s 2 of the 1908 OFS Discoverer's Act give notice in the *Gazette* that licence fees would become due and payable on the said claims on a specific date at least three months from the date of the notice. Section 4 of the 1908 OFS Discoverer's Act provided that the licence fee payable by the discoverer was the amount as determined by the Lieutenant-Governor in terms of s 76 of the 1904 OFS Precious Stones Ordinance and where no amount had been determined, the fee was one pound per month payable in advance for each claim. The landowner of the land on which the alluvial digging was situated was entitled to demand and receive out of the Public Revenue, one-half of the licence money collected in respect of the alluvial digging.

⁷⁰⁶ Section 65 of the 1904 OFS Precious Stones Ordinance.

⁷⁰⁷ Section 65 of the 1904 OFS Precious Stones Ordinance.

6.5.5.2 The rights of the owner of private land on which an alluvial digging was proclaimed

The owner of private land on which an alluvial digging had been proclaimed was entitled to select, after the discoverer had selected his block of 50 claims, 100 claims in a block or a number of claims therein equal to three-tenths of the extent of land proclaimed, whichever was the greater.⁷⁰⁸ The owner could also at any time after the proclamation of an alluvial digging, peg off for himself on any part of the proclaimed area which was not held under a claim licence any number of claims, provided that the total number of claims held by the landowner did not exceed 100 claims.⁷⁰⁹

The owner of private land on which an alluvial digging was proclaimed, was further entitled to demand and receive one-half of the licence money collected in respect of the alluvial digging.⁷¹⁰ If the owner of the private land was also the discoverer of the diamonds he was in addition, also entitled to the rights of a discoverer.⁷¹¹ The owner was exempted in perpetuity from the obligation to pay any licence fees or stamp duties.⁷¹² If the Lieutenant-Governor decided not to proclaim an alluvial digging at the place where the alluvial diamonds had been found within three months after the date of the issue of a discoverer's certificate,⁷¹³ the owner of the private land and the discoverer could proceed to mark off the claims to which they were entitled as owner and as discoverer, as if an alluvial digging had been proclaimed.⁷¹⁴

6.5.5.3 Right to work claims in an alluvial digging

After an alluvial digging had been proclaimed, the claims remaining after the discoverer and owner of the private land had selected their claims were made available for

⁷⁰⁸ Section 66 of the 1904 OFS Precious Stones Ordinance.

⁷⁰⁹ Section 66 of the 1904 OFS Precious Stones Ordinance.

⁷¹⁰ Section 67 of the 1904 OFS Precious Stones Ordinance.

⁷¹¹ See para 6.5.5.1 above.

⁷¹² Section 66 of the 1904 OFS Precious Stones Ordinance.

⁷¹³ In terms of s 65 of the 1904 OFS Precious Stones Ordinance.

⁷¹⁴ The claims pegged off by the owner and the discoverer had to be registered and ss 65-69 read with s 69 of the 1904 OFS Precious Stones Ordinance applied thereto.

pegging off for the public.⁷¹⁵ In order to peg off a claim, a person had to obtain a licence from the office of the Inspector or the Resident Magistrate. The licence entitled him to peg off one claim on the area proclaimed.⁷¹⁶

The size of each claim on an alluvial digging was 90 square feet.⁷¹⁷ Every holder of claims in alluvial diggings situated on Crown land and on private land, had to pay a monthly licence fee as determined by the Lieutenant-Governor. If no licence fee had been determined a licence fee of one pound per month was payable in advance for each claim.⁷¹⁸ A claimholder was in addition, without any extra payment, entitled to a

⁷¹⁵ Section 69 of the 1904 OFS Precious Stones Ordinance. If the remaining area were according to the Lieutenant-Governor too small to be suitable for public pegging, the Lieutenant-Governor could sell or otherwise dispose of the claims on such terms as he deemed fit.

⁷¹⁶ Sections 70 and 71 of the 1904 OFS Precious Stones Ordinance. Only white persons older than 18 years could obtain a licence. Section 72 of the 1904 OFS Precious Stones Ordinance prohibited the pegging of claims between sunset and sunrise or on Sundays or Public Holidays. The regulations in force in respect of the pegging of claims for precious metals under the *Mining of Precious Metals Ordinance* 3 of 1904 applied *mutatis mutandis* to the pegging of claims for diamonds at proclaimed alluvial diggings. For a discussion of the *Mining of Precious Metals Ordinance* 3 of 1904 see Dale *Mineral Rights* 206-207.

⁷¹⁷ Section 75 of the 1904 OFS Precious Stones Ordinance. Any person who wilfully pegged off a claim in excess of 90 square feet would in terms of s 74 of the 1904 OFS Precious Stones Ordinance, on conviction be liable to a fine not exceeding £100 or to imprisonment with or without hard labour for a period not exceeding six months and would be liable to forfeit the claim so pegged off by him.

⁷¹⁸ Section 76 of the 1904 OFS Precious Stones Ordinance. The claimholder was in addition, in terms of s 90(1) of the 1904 OFS Precious Stones Ordinance, entitled to access to any natural river, stream, pool or watercourse within the proclaimed area of the alluvial digging and was further entitled to take water therefrom for mining or domestic purposes but subject to certain conditions. The claimholder had to leave sufficient water for the use of the landowner for agricultural and domestic purposes and for watering his stock. In the case of a dispute between the owner and claimholder regarding the quantity of water required by the landowner, the dispute was in terms of s 90(2) of the 1904 OFS Precious Stones Ordinance referred to the Head of the Mines Department for a decision. Section 91 of the 1904 OFS Precious Stones Ordinance provided that a claimholder was only entitled to construct a dam or weir in any natural running watercourse within an alluvial digging and could only lead any pipe, duct or furrow therefrom, after he obtained a licence from the Inspector. The Inspector was in terms of s 92 of the 1904 OFS Precious Stones Ordinance obliged to give notice of an application for a licence to the landowner and to all other claimholders within the alluvial digging, who were then afforded a period of 14 days to lodge any objections to the granting of a licence. If the Inspector received objections within the period of 14 days, he had to hear evidence on behalf of both sides and then decide whether to grant or refuse the application. Provision was also made for the lodgement of an appeal to the Head of the Mines Department within seven days of the decision of the Inspector. All wood that grew on land which had been proclaimed as an alluvial digging, belonged to the landowner who was in terms of s 94 of the 1904 OFS Precious Stones Ordinance entitled to dispose thereof as he deemed fit. A claimholder was in terms of s 95 of the 1904 OFS Precious Stones Ordinance entitled to cut down any wood growing

piece of land within the proclaimed area for the purpose of erecting a residence for such claimholder and accommodation for his employees.⁷¹⁹ The Inspector had to mark out the piece of land for each claimholder after consultation with the landowner.⁷²⁰

Claimholders could transfer their claims or portions thereof with the consent of the Inspector or the Resident Magistrate.⁷²¹ A person could peg off only one claim but could by transfer acquire not more than ten claims.⁷²² If it appeared to the Head of the Mines Department that a claimholder did not properly work at least one of the claims he had hold, he had to give the claimholder written notice to properly work at least one of the claims within a period of three months. If the claimholder failed to adhere to the notice, the licence fees payable on all the claims the claimholder held were doubled until the claimholder commenced with the proper working of the claim.⁷²³

The Lieutenant-Governor could make such regulations for the election of a Diggers' Committee for any alluvial digging or portion thereof as he deemed fit and to define the duties, powers, functions and authorities of the Diggers' Committee. The Inspector in charge of the relevant alluvial digging was *ex-officio* the chairman of the Diggers' Committee. If no Diggers' Committee was elected, the relevant Inspector was entitled to carry out the duties of the Diggers' Committee as determined in the regulations.⁷²⁴ The Lieutenant-Governor could further at any time direct that any Diggers' Committee would be abolished or dissolved.⁷²⁵

on a claim if it interfered with the proper development of the claim, but the wood remained the property of the landowner.

⁷¹⁹ Section 77 of the 1904 OFS Precious Stones Ordinance.

⁷²⁰ Section 77 of the 1904 OFS Precious Stones Ordinance.

⁷²¹ Section 79 of the 1904 OFS Precious Stones Ordinance. The transfer of a claim had to be registered by the Inspector or Resident Magistrate and a fee of five shillings had to be paid.

⁷²² Section 80(1) and (2) of the 1904 OFS Precious Stones Ordinance.

⁷²³ Section 81 of the 1904 OFS Precious Stones Ordinance. If the claimholder failed to pay the double licence fees, the Head of the Mines Department could in terms of s 82 of the 1904 OFS Precious Stones Ordinance, declare the claims held by the claimholder to be forfeited.

⁷²⁴ Section 84 of the 1904 OFS Precious Stones Ordinance.

⁷²⁵ Section 85 of the 1904 OFS Precious Stones Ordinance.

Any claimholder in respect of an alluvial digging was entitled to apply to the Inspector for a stand which could be used for purposes of a residence or for trading purposes or for housing of labourers or for mining purposes.⁷²⁶ If no "well founded" objections were received the Inspector could grant the licence and had to define the boundaries of the stand within a proclaimed alluvial digging.⁷²⁷

No township could be established on any proclaimed alluvial digging, unless the land required for the establishment of the township had first been deproclaimed.⁷²⁸

6.6 Summary and conclusion

This chapter discussed the development of the right to mine diamonds in the Orange Free State before the Union Government enacted the 1927 Precious Stones Act. During this period 1871 OFS Diamond Fields Ordinance originally regulated the mining of diamonds, the provisions of which were later incorporated as chapter 116 of the 1891 OFS Statute, the latter being a codification of all the statutes of the Orange Free State. The *Volksraad* of the Republic of the Orange Free State adopted a number of laws to amend or supplement the 1891 OFS Statute. During the period 1871 until the commencement of the 1904 OFS Precious Stones Ordinance, a person who wanted to prospect for diamonds or work claims on land owned by the Government, had to obtain a permission from the State President.⁷²⁹ The conditions under which the prospecting for diamonds and working of claims had to be performed on Government land had to be determined in a written agreement. A person, who intended to prospect for diamonds during this period on private land, required the permission of the

⁷²⁶ Definition of "stand" in s 5 of the 1904 OFS Precious Stones Ordinance. Mining purposes could in terms of ss 96 and 97 of the 1904 OFS Precious Stones Ordinance include to erect a mining plant or machinery or to use the stand as a tailings site to exploit the claim.

⁷²⁷ The size of each stand was 150 square feet in extent. Section 96 of the 1904 OFS Precious Stones Ordinance. Section 98 of the 1904 OFS Precious Stones Ordinance provided for the Head of the Mines Department to issue licences for trading stands in a proclaimed alluvial digging to persons approved by him. The Head of the Mines Department could only issue one such licence for every 100 existing claim licences. All stand licence money collected by the Government had to be divided equally between the landowner of the land on which the stands were situated and the Government.

⁷²⁸ Section 99 of the 1904 OFS Precious Stones Ordinance.

⁷²⁹ By virtue of *Law 27* of 1894. See para 6.4.2 above.

landowner.⁷³⁰ Once a landowner had granted permission to another to prospect for diamonds on his land, or if the landowner himself conducted prospecting on his land, it was deemed that he had consented to his land being proclaimed a public digging if diamonds were discovered on the land.

During the period of annexation of the Orange Free State and thereafter as part of the Union of South Africa, the 1904 OFS Precious Stones Ordinance was enacted to regulate the prospecting for and mining of diamonds in the Orange River Colony, and after 1910 in the Province of the Orange Free State. A person or company who wanted to prospect for diamonds on Crown land had to obtain a prospecting licence from the Lieutenant-Governor and the consent of the owner of alienated Crown land was not necessary for the granting of a prospecting licence in respect of his land. The owner of private land did not require a prospecting licence if he or his servants wanted to prospect for diamonds on his own land. Any other person who wanted to prospect on private land required the written consent of the owner of the private land and had to obtain a prospecting licence from the Resident Magistrate.⁷³¹

One of the most important changes to the diamond mining legislation that previously applied in the former Republic of the Orange Free State was that the 1904 OFS Precious Stones Ordinance provided for an undivided share in the profits derived from the working of new diamond mines in favour of the Government. This was irrespective of whether the diamond mine was proclaimed on Crown land or on private land. The discoverer of diamonds on Crown land was in terms of the 1904 OFS Precious Stones Ordinance entitled to an undivided 50% share of the profits derived from the working of a diamond mine proclaimed on Crown land. The Government was entitled to the remaining 50% share.⁷³² Where a diamond mine had been discovered on private land the landowner was entitled to a 60% share of the profits derived from the working of

⁷³⁰ By virtue of *Law* 16 of 1899. See para 6.4.4 above.

⁷³¹ See para 6.5.1 above.

⁷³² See figure 6.1 in para 6.5.2 above.

the mine (which included the discoverer's 12% share) and the Government to the remaining 40% share of the profits derived from the working in the mine.⁷³³

The question as to who was entitled to mine diamonds under the 1904 OFS Precious Stones Ordinance depended on the form of land tenure. The landowner of private land on which a diamond mine had been proclaimed, was entitled to elect to work the entire mine for the purpose of winning diamonds. In the case of a diamond mine proclaimed on Crown land, the holder of a discoverer's certificate was entitled to elect to work the mine.

The Government of the Orange River Colony did not acquire any share or proprietary rights in a number of existing mines that were specifically referred to in the 1904 OFS Precious Stones Ordinance which included the Koffiefontein Mine and the Jagersfontein Mine.

There was no statutory reservation of the rights to diamonds in favour of the Crown or any Government in respect of the Orange Free State. The reservation of the rights to diamonds in favour of the Crown or Government in the *Crown Land Disposal Act* 13 of 1908 was a reservation of the rights to diamonds in respect of alienated Crown land, which the Crown was entitled to do in its capacity as landowner. There was no general reservation of the rights to precious stones in respect of all land situated in the Orange Free State and the Cradock Proclamation did not apply in respect of the Orange Free State.

The 1904 OFS Precious Stones Ordinance as amended continued to apply in the Province of the Orange Free State under the Union Government until it was repealed by the 1927 Precious Stones Act.⁷³⁴ In the next chapter a discussion follows on the development of the right to mine diamonds in the *Zuid-Afrikaansche Republiek*.

⁷³³ See figure 6.2 in para 6.5.2 above.

⁷³⁴ The 1927 Precious Stones Act is discussed in chapter 9 below.

Chapter 7 The *Zuid-Afrikaansche Republiek* and the Transvaal Colony before 1927

7.1 Introduction

In this chapter the historical development of the right to mine diamonds in the former *Zuid-Afrikaansche Republiek* (hereafter the ZAR), which after unification in 1910 became known as the Province of Transvaal is discussed.⁷³⁵

The ZAR came into existence with the signing of the *Sand River Convention* on 17 January 1852. The *Sand River Convention* provided that the British Government formally renounced all its rights with regard to the ZAR.⁷³⁶ From a political perspective, at least five administrations governed the ZAR during the period 1852 until 1927. The first was the period from 1854 until 1877 when the ZAR was governed by a *Volksraad*.⁷³⁷ On 12 April 1877, a British colony of Sir Shepstone from Natal annexed

⁷³⁵ The *South Africa Act* of 1909 [9 EDW 7 CH 9] (hereafter the South Africa Act) was passed by the British Parliament and assented to by King Edward VII on 20 September VII. A *Royal Proclamation* of 2 December 1909 declared that from 31 May 1910 the Government and Parliament of the Union of South Africa had full power and authority within the boundaries of the four colonies. Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45; Rautenbach *Rautenbach-Malherbe Staatsreg* 14; Zimmermann and Visser "Introduction-South African Law as a mixed legal system" 18-19; Girvin "The architects of the mixed legal system" 119; Wiechers *Verloren Van Themaat Staatsreg* 196-201; Basson and Viljoen *South African Constitutional Law* 36-37; Eybers *Constitutional Documents* 517-558. See paras 1.3.2 and 6.1 above.

⁷³⁶ Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45; Oelofse "Die Vrystaat 1843-1909" 65; Davenport and Saunders *South Africa A Modern History* 197-198; Davenport *South Africa A Modern History* 2nd ed 123; Davenport *South Africa A Modern History* 3rd ed 187-189; Davenport *South Africa A Modern History* 4th ed 170-171; Changuion and Steenkamp *Omstrede land* 58, 60, 339-339; Welsh *A History of South Africa* 206; Giliomee *Die Afrikaners 'n Biografie* 136-137; Scott "Regspiegeling in die Transvaal 1836-1910" 91-92; Visagie "Uittog en vestiging van die Voortrekkers in die binneland" 147; Bosman "Die Groot Trek tot 1838" 243-247; Millin *Rhodes* 248; Thompson "Co-operation and Conflict: The High Veld" 420-421; Kiewiet *A History of South Africa* 66.

⁷³⁷ The *Grondwet van de Zuid-Afrikaansche Republiek* (hereafter the 1858 ZAR Constitution) was finalised and enacted on 13 February 1858 approximately eight years after the signing of the *Sand River Convention*. Section 1 of the 1858 ZAR Constitution confirmed that the name of the State would be the: "*Zuid-Afrikaansche Republiek*." It was recorded in s 7 of the 1858 ZAR Constitution that all land or farms situated within the territory of the ZAR which had not yet been given out were declared to be the property of the State, subject to the condition that such land could be obtained by members of the public. Section 12 of the 1858 ZAR Constitution provided that the people of the ZAR delegated the function of legislation to a *Volksraad* which was the highest

the ZAR, which led to the first Anglo-Boer War between Britain and the ZAR. During this period of annexation, the *Volksraad* was dissolved and legislation was issued through the executive authority. Britain's annexation of the ZAR ended with the signing of the *Pretoria Convention* on 3 August 1881. In terms of the *Pretoria Convention* the British Government granted the ZAR complete self-government subject to the "suzerainty" of the British Crown. The ZAR was formally returned to its former Government on 8 August 1881. This position endured with Stephanus Johannes Paulus Kruger as the State President until the second Anglo-Boer War commenced between Britain and the ZAR and the Republic of the Orange Free State on 11 October 1899.⁷³⁸ The second Anglo-Boer ended on 31 May 1902 with the signing of the *Treaty of Vereeniging*. This resulted in the ZAR becoming a British Colony known as the Transvaal Colony. The Transvaal Colony was with effect from 31 May 1910 united with the other British Colonies under one Government in the name of the Union of South Africa. The former Transvaal Colony became a province of the Union of South Africa

authority in the ZAR. The *Volksraad* of the ZAR legislated in three different ways, firstly by promulgating "Laws", secondly by following the formal procedure of the 1858 ZAR Constitution and thirdly by passing informal *besluiten* or resolutions. Various laws adopted by the *Volksraad* was in the form of *besluiten* or resolution which were done spontaneously during its sessions. According to Hahlo and Kahn *The Union of South Africa* 87-88, the validity of these resolutions adopted by the *Volksraad* was later in the 1890s criticised. An Appendix to the ZAR Constitution of 9 September 1859 which was adopted by a resolution of the *Volksraad*, provided that the courts were obliged to regard all resolutions of the *Volksraad* as law and that the courts were not entitled to make remarks or to pass judgements in regard to such resolutions. It was further provided that what had been decided by the *Volksraad* could not be subjected to cognisance of any court. In *Brown v Leyds* 1897 OR 17, judge Kotzé held that the 1858 ZAR Constitution was the fundamental law of the ZAR and that all laws of the *Volksraad* which were contrary thereto, were invalid. The *Volksraad* thereafter passed *Law 1* of 1897 on 1 March 1897 in which it was provided that the courts were not entitled to pass judgment on the validity of laws enacted by the *Volksraad*. Judge Kotzé criticized *Law 1* of 1897 in public and as a result he was dismissed by the State President. Van der Walt "Vier jare van spanning 1896-1899" 387-388. Eybers *Constitutional Documents* 358, 364-409, 418, 508-513; Bulpin *Golden Republic* 70-71; Nixon *Story of the Transvaal* 20-21; Changuion and Steenkamp *Omstrede land* 58-73 and 338-339; Giliomee "Consolidation and expansion of the colonial presence" 150-151; Scott "Regspleging in die Transvaal 1836-1910" 92, 99-101; Rotberg *The Founder* 122-123; Van der Schyff *Property in Minerals and Petroleum* 115.

⁷³⁸ Bulpin *Golden Republic* 130-139 and 165; Krüger *Paul Kruger* 105-107, 125-133, 256-257; Hahlo and Kahn *The Union of South Africa* 88-89; Changuion and Steenkamp *Omstrede land* 79-80 and 357-361; Giliomee "From territorial expression to sovereign state" 194-196; Pienaar *Land Reform* 72-75 Walker *A History of South Africa* 391; Steyn *Afrikaner-Joernaal* 148-153.

in the name of the Province of Transvaal.⁷³⁹ The diamond mining legislation that existed in the former colonies continued to apply when the Union of South Africa was established. These were only repealed with the commencement of the 1927 Precious Stones Act.⁷⁴⁰

Chapter 7 discusses the historical development of the right to mine diamonds in the former ZAR and Transvaal Colony in five parts. In the first part, the early land tenure conditions⁷⁴¹ and resolutions that the *Volksraad* in the ZAR adopted which related to mining are discussed.⁷⁴² A study of the historical development of the diamond mining legislation in the former ZAR cannot be undertaken without also considering the development of the gold mining legislation. A number of laws which became known as the "Gold Laws" were enacted in the ZAR mainly to regulate the mining of precious metals. During the period 1871 until 1898 the mining of diamonds in the ZAR was regulated together with precious metals in the Gold Laws. The historical development of the Gold Laws has been extensively researched by other scholars and formed the subject of separate studies and will therefore only be briefly discussed.⁷⁴³ Each Gold Law was in many respects a mere continuation in an amended form of its predecessors.⁷⁴⁴ The discussion of the Gold Laws in the second part of this chapter is therefore limited to a discussion of the right to mine diamonds.⁷⁴⁵

⁷³⁹ In theory, a sixth administration was established when the British Government granted independence and responsible government to the former Transvaal Colony in 1906. Hahlo and Kahn *The Union of South Africa* 127-129; Krüger *The Making of a Nation* 45. Changuion and Steenkamp *Omstrede land* 112-114 and 376-379; Giliomee *Die Afrikaners 'n Biografie* 202-220; Nasson "The war for South Africa" 206-217; Kruger "Die Tweede Vryheidsoorlog 1899-1902" 407-433; Pretorius "Almal se oorlog: Die Anglo-Boereoorlog (1899-1902)" 235-254; Simons *Cullinan Diamonds* 45; Walker *A History of South Africa* 487-503.

⁷⁴⁰ Section 135 of the South Africa Act. Eybers *Constitutional Documents* 551-552; See para 1.3.2 above.

⁷⁴¹ See para 7.2 below.

⁷⁴² See para 7.3 below.

⁷⁴³ Kaplan *Gold Mining Laws*. See also Dale *Mineral Rights* 177-203 and Van der Schyff *Constitutionality* 32-40.

⁷⁴⁴ Chief Justice Innes held in *Greathead v Transvaal Government and Randfontein Estate and Gold Mining Co Limited* 1910 TS 276 at 288 (hereafter the *Greathead* case) that the large number of Gold Laws were passed as they were deemed necessary due to the rapid growth of a new industry under special surroundings.

⁷⁴⁵ See para 7.4 below.

As far as could be ascertained, there were no reports of the discovery of diamond mines in the ZAR during the period 1871 until 1897 in the ZAR. The diamonds that were discovered in the ZAR before 1897 were mostly of an alluvial nature.⁷⁴⁶ The prospecting for and the mining of precious stones in the ZAR were only with the enactment of *Law 22 of 1898* regulated in separate legislation, which is thirdly discussed.⁷⁴⁷ This part is followed with a brief discussion of the discovery of one of the most important diamond mines in South Africa, the Premier Mine, which was later renamed as the "Cullinan Mine."⁷⁴⁸

Chapter 7 concludes with a discussion of the *Precious Stones Ordinance 66 of 1903* (hereafter the 1903 Tvl Precious Stones Ordinance), which was enacted after the end of the Second Anglo-Boer War. The purpose of the 1903 Tvl Precious Stones Ordinance was to regulate the mining of precious stones in the Transvaal Colony⁷⁴⁹ and includes a discussion of the *Precious Stones (Alluvial) Amendment Act 15 of 1919* (hereafter the 1919 Alluvial Amendment Act) which the Government of the Union of South Africa enacted in respect of the Province of Transvaal to amend the 1903 Tvl Precious Stones Ordinance.⁷⁵⁰

7.2 Early land tenure conditions

The first form of legislation in the area north of the Vaal River, which later became part of the ZAR, was the *Drie en Dertig Artikelen Zijnde Algemeene Bepalingen en Wetten voor de Teregtzittingen*⁷⁵¹ which were drafted in 1849 by the "Voortrekker

⁷⁴⁶ Becker states that there were reports in 1893 of the discovery of diamonds in gold bearing ore near Klerksdorp. The Rietfontein diamond pipe was reported to be the first diamond pipe that was discovered in the ZAR in 1897. Becker 1897 *Science* 726; Williams *Diamond Mines* Vol 2 134.

⁷⁴⁷ See para 7.5 below.

⁷⁴⁸ See para 7.6 below.

⁷⁴⁹ See para 7.7 below.

⁷⁵⁰ Certain provisions of the 1919 Alluvial Amendment Act also applied in respect of the other provinces in the Union of South Africa. See para 7.7.9 below.

⁷⁵¹ Which translates to the *Thirty-Three Articles Being General Regulations and Laws for Law Sessions* (hereafter the Thirty-Three Articles).

Republic" and confirmed by a *Volksraad* resolution on 23 May 1849.⁷⁵² Article 31 of the Thirty-Three Articles provided that in all cases in which laws were insufficient, the *Hollandsche Wet* would form the basis. This was, however, only in a moderate way and according to the customs of South Africa and for the prosperity and welfare of the community.⁷⁵³ The 1859 Annexure to the 1858 ZAR Constitution defined the *Hollandsche Wet* of the *Thirty-Three Articles* to be Van der Linden's *Koopmanshandboek* as the statute of the state (insofar as it was not in conflict with the 1858 ZAR Constitution or other resolutions or laws of the ZAR).⁷⁵⁴ The Roman Dutch law therefore applied in the ZAR when the *Sand River Convention* was concluded in 1852. The landowners of privately owned land would therefore according to the *cuius est solum* principle have been the owners of the surface of the land, including

⁷⁵² Eybers *Constitutional Documents* 349-357; Scott "Regspeling in die Transvaal 1836-1910" 92. A group of *Voortrekkers* broke away from the Republic of *Natalia* in 1843 in protest against the latter's submission to the British Government. The *Voortrekkers* established a "Voortrekker Republic" north of the Vaal River. Davenport *South Africa A Modern* 4th ed 72-73; Davenport *South Africa A Modern* 3rd ed 80-81; Davenport *South Africa A Modern* 2nd ed 60-61; Changuion and Steenkamp *Omstrede land* 36; Davenport and Saunders *South Africa A Modern History* 81-82; Du Plessis "The South African Republic" 252-253; Hahlo and Kahn *The Union of South Africa* 21; Du Plessis *Inleiding tot die Reg* 49-50.

⁷⁵³ According to Scott "Regspeling in die Transvaal 1836-1910" 92, the reason for the qualification was to prevent that cruel penalties which were provided for in some of the Roman-Dutch laws be implemented in the ZAR.

⁷⁵⁴ Where Van der Linden was silent or not sufficiently clear, *Het Rooms-Hollandsche Reg*, or the Law-book of Simon van Leeuwen and *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, or the Introduction of Hugo de Groot would be followed by the judges as supplementary sources, subject always to local legislation. Eybers *Constitutional Documents* 356-357; Hahlo and Kahn *The Union of South Africa* 21; Edwards *The History of South African Law - An Outline* 84-85; Praagh *The Transvaal and its Mines* 70; Du Plessis "The Historical Functions of the Law" 100. The *Thirty-Three Articles* were later repealed by Proc 34 of 1901; Du Plessis *Inleiding tot die Reg* 50; Van Zyl *Beginsels van Regsvergelyking* 288. According to Scott "Regspeling in die Transvaal 1836-1910" 93-95, the courts relied mostly on the Roman-Dutch law as interpreted by the courts in the Cape Colony.

the minerals below the surface.⁷⁵⁵ This was confirmed in *Rocher v Registrar of Deeds*⁷⁵⁶ in which Mason J held as follows:⁷⁵⁷

As I understand our law, the owner of the surface of the land is the owner of the whole of the land and of all minerals in it; he is the owner of what is above and what is below. It is unnecessary to determine how far, in these days of airships (which at present have not arrived in any numbers in South Africa), the *dominium* extends upwards. What I am concerned with at present is *dominium* downwards, and I think it is perfectly clear that the owner of the surface is the owner of all the minerals underneath it.

With the annexation of the ZAR by Britain in 1900 during the second Anglo-Boer War, a number of laws were repealed by *Proclamation* 34 of 1901, including the Thirty-Three Articles and the 1858 ZAR Constitution.⁷⁵⁸ Article 17 of *Proclamation* 34 of 1901, however, provided for the continued application of the Roman Dutch law and stated as follows:⁷⁵⁹

The Roman-Dutch law except in so far as it is modified by legislative enactments shall be the law of this Colony.

⁷⁵⁵ According to Wessels *Roman-Dutch law* 486: "The Dutch jurists accepted the principle of the Roman law that the owner of land is the owner not only of the superficies, but all that is found below the surface. Hence by the law of Holland the minerals under the ground belong to the owner of the land. Where there was no reservation in the title this was the law throughout South Africa until the mineral wealth came to be explored." Kaplan *Gold Mining Laws* 9; See also Praagh *The Transvaal and its Mines* 517. In *Le Roux v Loewenthal* 1905 TS 742 the Supreme Court of the Transvaal held that a cession of coal and coal rights in which the coal was situated cannot pass the *dominium* of coal not severed from the soil and that such a cession could at most confer to the cessionary the right to mine and remove the coal. See also the *Kimberley Divisional Council* case; The Supreme Court of the Transvaal confirmed in *Neebe v Registrar of Mining Rights* 1902 TS 65 at 85 (hereafter the *Neebe* case) that: "By the Roman-Dutch law the ownership in the minerals lies in the *dominus* of the soil. The Gold Law has not entirely abrogated the Common Law, but it has modified it to the extent of giving the State the right of disposing of the precious metals."

⁷⁵⁶ 1911 TPD at 315.

⁷⁵⁷ At 315. Dale *Mineral Rights* 76.

⁷⁵⁸ Scott "Regsplicing in die Transvaal 1836-1910" 101.

⁷⁵⁹ According to Scott "Regsplicing in die Transvaal 1836-1910" 101-102, this continued to be the position under the South Africa Act which applied in the Union of South Africa. Section 135 of the South Africa Act provided that laws which applied in the different colonies, continued to apply until amended or repealed.

7.3 Resolutions adopted by the Volksraad prior to 1871 relating to mining

The *Volksraad* of the ZAR adopted a number of resolutions relating to minerals following the discovery of gold in the ZAR. According to Webster⁷⁶⁰ the first person "registered" as a prospector in the ZAR was a certain Pieter Jacob Marais who prospected for alluvial gold.⁷⁶¹ Marais found a few specks of alluvial gold in the Crocodile River and some in the Jukskei River in October 1853. Thereafter, Marais obtained permission from the *Volksraad* to prospect for gold.⁷⁶² The *Volksraad* granted Marais the exclusive right to prospect for gold in the ZAR. Marais was also promised an award of 5 000 pounds in ore together with the prospects of the position of mine manager if he found gold in payable quantities. In return Marais had to undertake that he would keep his findings confidential.⁷⁶³ Marais managed to find gold, some of it in

⁷⁶⁰ Webster *At the Fireside* 10-11.

⁷⁶¹ Bulpin *Golden Republic* 80-81, states that in 1836 the *Voortrekkers*, on their expedition under Andries Hendrik Potgieter to the Zoutpansberg situated in the northern part of the area which became known as the ZAR, reported that they had noticed ancient mine workings and that these *Voortrekkers* had done a bit of informal prospecting. One of these prospectors, a certain Bronkhorst reported that they had brought back some of the gold ore and that the gold mine was situated in the Zoutpansberg facing Louis Trichardt's camp. According to Bulpin there were rumours as early as 1806 that a certain John Barrow had published an imaginative map showing a high mountain range north of the Vaal River that was rich in gold. See also Bulpin *Golden Republic* 2nd ed 91-92.

⁷⁶² Davenport *Digging Deep* 76-77; Coates 1987 *Contree* 31; Bulpin *Golden Republic* 81; Bulpin *Golden Republic* 2nd 91-92. Bulpin *Golden Republic* 2nd 93 states the following: "Poor Marais! If only he had known that those few specks of gold he had found in the river known as the Jukskei, from an old broken wagon 'yoke key' found abandoned there, had been washed down from the source of the river on the fabulous Witwatersrand, he might have found the key then and there to the world's greatest treasure house."

⁷⁶³ Coates 1987 *Contree* 33. The terms of the agreement concluded between Marais and the *Volksraad* were recorded in Rosenthal *Gold* 13-14. In the first clause of the agreement it was recorded that Marais would keep details of all gold discoveries made by him within the ZAR confidential and that he would only reveal such information to the ZAR authorities. The last clause of the agreement stipulated as follows: "If, however, it should happen that the aforesaid Mr. P.J. Marais should make known any report concerning the conditions on the gold mines that may be found or anything referring to these, to any foreign state, government, or individuals, by which the peace or liberty of this republic shall be imperilled, he shall be punishable by death, without appeal." According to Bulpin *Golden Republic* 81, a commission was formed in every district in the ZAR to aid and watch over Marais. See also Bulpin *Golden Republic* 2nd ed 93-94; Davenport *Digging Deep* 77-78; Van Zyl *Discovery of Wealth* 50.

the *Jukskei* River just north of the Witwatersrand outcrop, but not in payable quantities.⁷⁶⁴

The *Volksraad* resolved by *Volksraad* Resolution of 14 to 23 September 1858⁷⁶⁵ that the owners of land where minerals had been found had to lease or sell such land to the Government of the ZAR for a reasonable price. This resolution was later repealed by a *Volksraad* Resolution of 21 September 1859.⁷⁶⁶ This resolution provided that the exploitation of mines in the ZAR had to be made available for development by companies under the protection of the Executive Council.⁷⁶⁷ By *Volksraad* Resolution of 7 April 1866⁷⁶⁸ the State President of the ZAR was authorised to issue laws relating to gold and other mines.⁷⁶⁹

On 31 October 1866, the *Volksraad* adopted *Ordonnantie* 5 of 1866, *Bepalende de Wet op het Mijnwezen* (hereafter the 1866 Tvl Ordinance). It was stated in the preamble of the 1866 Tvl Ordinance that it was necessary to provide for the extracting of minerals and for the working of mines situated within the ZAR. Further, all mining companies had to be constituted in accordance with the 1866 Tvl Ordinance. Mining companies were required to account under oath to the Government of the ZAR in respect of all minerals mined and had to pay a certain percentage of the estimated value of the minerals mined to the Government.⁷⁷⁰ A possible explanation for the

⁷⁶⁴ According to Bulpin *Golden Republic* 81-82, Marais searched the entire ZAR and must have passed every gold deposit in the ZAR, but he was too rushed and was only searching for alluvial gold in rivers. Marais' report to the *Volksraad* was negative, but many people thought he was lying and that he was concealing his finds. The *Volksraad* then summoned Marais to appear before it in September 1855 to report on his prospecting activities, but at the end of August 1855 he left the ZAR quietly; Bulpin *Golden Republic* 2nd ed 94; Webster *At the Fireside* 11; Rosenthal *Gold* 12-14.

⁷⁶⁵ Article 29.

⁷⁶⁶ Article 68. According to Badenhorst, this policy was a form of expropriation. Badenhorst 1991 *TSAR* 119. Van der Schyff *Property in Minerals and Petroleum* 115-116.

⁷⁶⁷ Dale *Mineral Rights* 176.

⁷⁶⁸ Article 711.

⁷⁶⁹ Dale *Mineral Rights* 176.

⁷⁷⁰ Section 2 of the 1866 Tvl Ordinance provided that a mining company had to pay one-half per cent of the value of lead, one and a half per cent of copper, one-half of iron, one-half of tin and one per cent of other minerals. The 1866 Tvl Ordinance was adopted prior to the discovery of diamonds in 1866 and no specific reference was made to diamonds. Section 3 of the 1886 Tvl Ordinance provided that every mining company that discovered precious metals had to notify the Government of the discovery. Rosenthal *Gold* 82; Van der Schyff *Property in Minerals and Petroleum* 116.

specific reference to mining companies in the 1866 Tvl Ordinance could be that during the period 1855 to 1871, the Government of the ZAR granted a number of concessions to mining companies.⁷⁷¹ Another explanation could be that, with the exception of alluvial gold, the gold was mostly so far below the surface that only mining companies would have been able to provide the necessary funds for the mining of the deeper gold deposits.⁷⁷² The discovery of gold in the ZAR was a two edged sword as the ZAR was in a financial crisis, largely as a result of the citizens of the ZAR's reluctance to pay taxes.⁷⁷³ The *Volksraad* of the ZAR also felt threatened so soon after the signing

⁷⁷¹ According to Kaplan *Gold Mining Laws* 217-219, 229-230, concession grants had the fundamental characteristics that they were generally negotiated individually with the relevant authority and the terms and conditions of each concession were specific to the relevant grant and could accordingly not strictly be regarded as "law". The concessions further conferred monopoly rights upon the grantee to engage in some specified form of economic activity and as a result precluded freedom of competition. Later in 1875, a Gold Law, *Law 6 of 1875*, made provisions for the Executive Council to grant concessions to companies in instances where the precious metals or precious stones could not effectively be worked by individual diggers. A contributing factor to the granting of concessions was that although the opening up of goldfields began to transform the economy of the ZAR in the form of increased imports, stimulated regional markets and transport riding, there was very little direct income for the ZAR. Kaplan *Gold Mining Laws* 113-114, explains that: "Chief Justice Kotzé estimated that gold to the value of between £130 000 and £150 000 had been produced by the diggers in 1876. Cartwright estimates that during the years 1873, 1874 and 1875 the diggers were producing gold to the value of at least £300 00 to £400 000 per year, and adds 'the mystery that still remains unsolved is what became of all that gold.' No doubt the ZAR asked the same question. President Burgers apparently 'began to worry about his vanishing gold', and certainly the re-established Volksraad (of 1881) shared his concern over the depletion of the ZAR mineral resources with minimal tangible return to the country. The Volksraad had looked to the goldfields as a means of saving the crumbling ZAR economy; instead, under the claims system the administration of the fields had cost more than the direct revenue collected by the treasury under the Gold Law. More importantly, the diggers were not viewed as providing any assistance in facilitating the capital accumulation so vital to any economic revival in the ZAR."

⁷⁷² Hocking *Oppenheimer and Son* 73. In 1869 a farmer Jacobus du Preez, the owner of the farm *Eersteling* which is situated in the northern part of the ZAR near what is currently known as the town Polokwane, prospected on his own farm. He discovered a gold-bearing quartz vein that crossed a stream on his farm. Du Preez invited a prospector Edward Button to his farm to investigate his discovery. In the middle of 1870 Button went to the farm *Eersteling* and after investigations he confirmed the discovery. The reef was named "Natalia Reef". The discovery was initially kept a secret but after the *Volksraad* adopted a resolution on 21 December 1870 to authorise the Government of the ZAR to grant reasonable rewards for the finding of precious stones and precious minerals such as gold and silver, Button notified the magistrate of Lydenburg of the discovery and claimed a reward for discovering gold on the farm *Eersteling*. Davenport *Digging Deep* 81-82; Bulpin *Golden Republic* 132; Bulpin *Golden Republic* 2nd ed 160-161; Rosenthal *Gold* 81-82. Dale *Mineral Rights* 177; Hahlo and Kahn *The Union of South Africa* 760.

⁷⁷³ Davenport *Digging Deep* 77; Giliomee *Die Afrikaners 'n Biografie* 194-197.

of the *Sand River Convention* and the possibility of interference from the British Government.⁷⁷⁴

In the 1870s the diamond rush occurred on the banks of the Vaal River and the Orange River.⁷⁷⁵ The *Volksraad* of the ZAR resolved on 7 June 1870⁷⁷⁶ to adopt the recommendation that land between the Vaal River and the Harts River be thrown open to the public subject to certain conditions, which included that the Government of the ZAR reserved a portion of the land for the digging of diamonds and other precious stones. Then, a percentage of the diamonds and other precious stones discovered on any private land had to be paid over to the Government in accordance with the laws of the ZAR. The *Volksraad* resolved that the Government of the ZAR would have the exclusive right to dig for diamonds and precious stones and to dispose of the diamonds and other precious stones on land "thrown open."⁷⁷⁷

On 21 June 1870 the Volksraad adopted a resolution⁷⁷⁸ in which it granted a concession to a company made up of AJ Munnich, JM Posno and HB Webb. According to Kaplan,⁷⁷⁹ the three members of the company included a *Volksraad* colleague of President MW Pretorius. The concession entailed that the company would have the exclusive right to search for diamonds in an area at the river diggings,⁷⁸⁰ for a period of 21 years from 22 June 1870, but subject to the payment of a royalty of six per cent on the value of all diamonds discovered.⁷⁸¹ The President, MW Pretorius, together with the State Secretary and approximately 30 men from the ZAR represented the Government of the

⁷⁷⁴ Davenport *Digging Deep* 77.

⁷⁷⁵ See para 3.2 above.

⁷⁷⁶ Article 159.

⁷⁷⁷ The Government had to compensate the landowner for any damage to buildings or land under cultivation and where rights to search or dig for diamonds on such land were granted to others, such persons had to provide security to compensate damage. The percentage payable on diamonds was determined in a resolution of the *Volksraad* of 14 June 1870 to be six percent of the value of the diamonds calculated at three pounds per carat.

⁷⁷⁸ Article 208.

⁷⁷⁹ Kaplan *Gold Mining Laws* 88.

⁷⁸⁰ See para 3.2 above.

⁷⁸¹ Williams *Diamond Mines* Vol 1 159.

ZAR.⁷⁸² The diggers refused to accept the concession and declared themselves independent and the *Volksraad* cancelled the concession.⁷⁸³ There were competing claims from to the diamond fields from the Orange Free State, the southernmost Tswana chiefdom and the Griqua chiefdom of Nicholas Waterboer.⁷⁸⁴ Shortly thereafter, the so-called dry diggings were discovered.⁷⁸⁵ There were again competing claims to the diamond fields, which were resolved by the referral thereof to arbitration and concluded with an award by Keate, the Lieutenant-Governor of Natal.⁷⁸⁶

According to Rosenthal,⁷⁸⁷ the Keate-award left the poverty-stricken ZAR angry and displeased by the wealth opened up across its southern border. This further contributed to the adoption in its future Gold Laws that the right of mining all precious stones and precious metals belonged to the State.⁷⁸⁸ There was until 1898 no specific legislation in the ZAR dealing with the mining of precious stones only. The mining of precious stones was with effect from 1871 regulated together with precious metals by the suite of laws known as the Gold Laws.⁷⁸⁹

⁷⁸² Beet and Terpend *Vaal Diamond Diggings* 33.

⁷⁸³ Bulpin *Golden Republic* 129; Bulpin *Golden Republic* 2nd ed 156-157; Bruton *Diamonds* 32; See para 3.2.1 above.

⁷⁸⁴ Thompson *History of South Africa* 117. See para 3.4 above.

⁷⁸⁵ See para 3.3 above.

⁷⁸⁶ President Pretorius was compelled to resign as State President of the ZAR in 1871 mainly because of the manner in which he dealt with the dispute in respect of the diamond fields and because he consented to the award by Keate. The *Volksraad* of the ZAR repudiated the award on the ground that Pretorius had no authority to submit the dispute to arbitration. Bulpin *Golden Republic* 130-139, states that: "Pretorius and the State Attorney Frederich Klein presented the Transvaal case in such a miserable inapt fashion, that they brought hardly anything in writing to substantiate their claims, and did no research at all to allow them to repudiate even the wildest assertions of their rivals." Pretorius simply proceeded to print money in the hope that gold would soon be found. State President Burgers stopped the printing of money. When the first excitement regarding the Natalia Reef on the farm *Eersteling* subsided, Burgers was relieved and he in a letter to his wife wrote on 9 July 1873: "as otherwise Sir Henry Barkly will jump these like he did with the diamond fields." Krüger *Paul Kruger* 105-107; Nixon *Story of the Transvaal* 30; Bruton *Diamonds* 33-34.

⁷⁸⁷ Rosenthal *Gold* 82-83.

⁷⁸⁸ Rosenthal *Gold* 83, states that the discovery of gold in the ZAR could not have happened at a more opportune time. The entire revenue of the ZAR between 1 August 1871 and 31 July 1872, was \$204 000. Although its nominal expenditure was only \$177 000 there was little cash in circulation. Most business in the ZAR was done by using bluebacks, a form of paper money. The lowest denomination of this form of money, was six pence, which equalled ten cents.

⁷⁸⁹ Praagh *The Transvaal and its Mines* 519.

7.4 The Gold Laws between 1871 and 1898

In his thesis, Kaplan⁷⁹⁰ analyses the various Gold Laws and the relevant *Volksraad* resolutions that were adopted in the ZAR during the period 1871 until 1967.⁷⁹¹ There were 26 Gold Laws and resolutions which were adopted during the period 1871 until 1898, which regulated the mining of both precious metals and precious stones.⁷⁹² These Gold Laws were revised and amended almost on an annual basis between 1886 and 1898.⁷⁹³

The first Gold Law, *Law 1* of 1871⁷⁹⁴ which was adopted by the *Volksraad* on 26 October 1871 contained the first statutory reservation of the right to mine precious

⁷⁹⁰ For a list of the Gold Laws and relevant *Volksraad* resolutions see Kaplan *Gold Mining Laws* xi-xiii.

⁷⁹¹ The farms comprising the Witwatersrand gold fields were proclaimed during September and October 1886 which according to Kaplan *Gold Mining Laws* 297-298, had a dramatic effect on the economy of the ZAR. Kaplan, states that approximately 68 gold mining companies which had a nominal capital of 15 million dollars, were formed to mine in the Witwatersrand area. Gold output rose from 8 171 ounces in 1886 to over 359 000 ounces in 1889 and the revenue of the ZAR increased dramatically.

⁷⁹² Kaplan *Gold Mining Laws* 2, emphasises that the term "Gold Law": "has been adopted by the courts and legal writers as a convenient shorthand designation of the 1871 Law and has been applied as well to the successive enactments governing gold mining." In the *Greathead* case 288, Innes CJ described the Gold Laws as follows: "Between 1871 and 1898 the Volksraad passed a large number of statutes dealing with mining for precious metals. These successive measures were rendered necessary by the rapid growth of a new industry in an amended form of its predecessors, and it is not surprising that to one not familiar with the history of this legislation, and of the circumstances, which produced it, the task of interpreting a particular Gold Law presents considerable difficulty. By 1889, however, the Gold Law had assumed a shape, the main features of which were retained until 1908. The policy of the successive statutes had become, and it subsequently remained, consistent, though new provisions were added, and old ones were amended, in order to deal with new situations, some of which were created by the decisions of the courts. The policy and scope of the Gold Law of 1889, and its successors, was to vest the sole right of mining for, and disposing of, precious metals in the State. So soon as an area was proclaimed as a digging, the right to peg out claims for prospecting and mining was, speaking generally, thrown open to the public under the supervision of the Government. But substantial portions of the mineral resources of the land were reserved to the owner, in the shape of mynpacht rights and special claims. So far as the surface was concerned, the exclusive rights of the owner were recognised to portion of it, such as his werf, garden, his cultivated lands and so on; but subject to those reservations, the Government had in effect the control of the surface for purposes connected with the industry, and the welfare of the population which it attracted." See also *Klippoortje Tramway Co v The Government* 1905 TS 542; *Marshall's Township Syndicate Limited v The Registrar of Mining Rights* 1906 TS 397; Franklin and Kaplan *Mining and Minerals* 334-335, 416; Van der Schyff *Property in Minerals and Petroleum* 116-119.

⁷⁹³ For details of these amendments see Kaplan *Gold Mining Laws* 300-308.

⁷⁹⁴ The title of *Law 1* of 1871 is: "*Regerende de ontdekking, het beheer en bestuur van de velden waarop edelgesteenten en edele metalen in dezen Staat gevonden word*" which translates to:

stones in the ZAR. There was prior to the enactment of the first Gold Law in 1871 no specific reservation of the rights to minerals in the land granted to owners by the Government of the ZAR.⁷⁹⁵ Section 1 of *Law 1* of 1871 provided that the right to mine precious stones and precious metals belonged to the State, but subject to the rights already obtained by private persons.⁷⁹⁶ *Law 1* of 1871 was adopted a mere 9 days after Keate awarded in favour of Waterboer in the dispute regarding the diamond fields and it is submitted that the loss of the diamond fields must have contributed to the insertion of the reservation in the first Gold Law.⁷⁹⁷ The second Gold Law, *Law 2* of 1872 was adopted a year later.⁷⁹⁸ Section 1 of *Law 2* of 1872 again specifically reserved the right to mine land which contained precious stones to the State, but subject to the rights already obtained by private persons, companies and landowners. In the third Gold Law, *Law 7* of 1874⁷⁹⁹ it was again recorded that the right to mine all precious stones and precious metals belonged to the State.⁸⁰⁰ There was, however, no qualification in respect of the rights already obtained by private persons, companies and landowners.⁸⁰¹

"Regulating the discovery, control and management of the land on which precious stones and precious metals are found in this State."

⁷⁹⁵ Kaplan *Gold Mining Laws* 9; Dale *Mineral Rights* 177; Badenhorst 1991 *TSAR* 121; Badenhorst "Development of Mineral and Petroleum Law" 1-22; Viljoen *Die Diamantnywerheid van Suid-Afrika* 193; Van der Schyff *Property in Minerals and Petroleum* 117.

⁷⁹⁶ Although *Law 1* of 1871 also referred to precious stones, it was according to Kaplan *Gold Mining Laws* 2, adopted to regulate the mining of gold in the ZAR and became known as the first Gold Law; Van der Schyff *Constitutionality* 33; Badenhorst 1999 *Stellenbosh Law Review* 102; Badenhorst *Juridiese Bevoegdheid* 90-91; *Agri SCA* case para 37.

⁷⁹⁷ See para 3.4 above.

⁷⁹⁸ The title of *Law 2* of 1872 is similar to the title of *Law 1* of 1871. It was stated in the preamble of *Law 2* of 1872 that it was necessary to regulate the discovery, the control and management of lands on which precious stones and precious metals had been discovered.

⁷⁹⁹ The third Gold Law was adopted on 18 November 1874. The title of *Law 7* of 1874 was similar to *Law 1* of 1871 and *Law 2* of 1872.

⁸⁰⁰ Section 1 of *Law 7* of 1874.

⁸⁰¹ Dale *Mineral Rights* 179. Provision was made in s 4 of *Law 7* of 1874 for the appointment of a Gold Commissioner who had to determine the boundaries of the gold fields and issue licences in return for the payment of monthly licence fees. See Van der Schyff *Constitutionality* 34; Van der Schyff *Property in Minerals and Petroleum* 117.

Law 6 of 1875⁸⁰² was adopted by a resolution of the *Volksraad* on 3 and 4 June 1875⁸⁰³ and repealed all laws and provisions contrary to the provisions thereof, but subject to existing interests or privileges acquired under any such repealed provisions.⁸⁰⁴ It was recorded in section 3 of *Law 6* of 1875 that the right to mine all precious stones and precious metals belonged to the State, but subject to all previous rights that were lawfully transferred to private persons.⁸⁰⁵

Law 1 of 1883 was adopted by a resolution of the *Volksraad* on 21 June 1883⁸⁰⁶ and all laws and regulations in conflict with *Law 1* of 1883 were repealed.⁸⁰⁷ Section 2 of *Law 1* of 1883 went further than its predecessors and stated that the property in and the right to mine all precious stones and precious metals belonged to the State, but subject to previous lawful transfer of rights to private persons and partnerships. According to Dale⁸⁰⁸, this constitutes a form of statutory expropriation as the legislature did not merely reserve the right to mine precious stones or precious metals to the State, but also the ownership in such precious stones or precious metals *in situ*. Dale⁸⁰⁹ further emphasises that this provision was contrary to the *cuius est solum* principle as

⁸⁰² The title of *Law 6* of 1875 is: "Wijzigende de Wetten betreffende de Goudvelden" which translates to "Amending the laws relating to the gold fields."

⁸⁰³ Articles 190 and 192.

⁸⁰⁴ Section 1 of *Law 6* of 1875; Van der Schyff *Constitutionality* 34; Van der Schyff *Property in Minerals and Petroleum* 117.

⁸⁰⁵ Van der Schyff *Constitutionality* 34. The purpose of *Law 6* of 1875 was to regulate the discovery and mining of gold and not diamonds. Section 5 of *Law 6* of 1875 provided that the Government on being notified of the existence of precious stones or precious metals, had to take such steps to determine the existence of gold in payable quantities and if this was confirmed that the area had to be proclaimed as a gold field. Provision was also made in s 6 of *Law 6* of 1875 for the appointment of a Gold Commissioner who was in charge of and had jurisdiction over the gold fields. See Dale *Mineral Rights* 180.

⁸⁰⁶ Article 402.

⁸⁰⁷ Section 1 of *Law 1* of 1883. The title of *Law 1* of 1883 is: "op het delven van en handel drijven in edele metalen en edelgesteenten in de Z.A. Republiek" which translates to "on the digging of and dealing in precious metals and precious stones in the ZAR." *Law 1* of 1883 was the first Gold Law that was adopted by Paul Kruger as State President of the ZAR. Van der Schyff *Constitutionality* 35-36.

⁸⁰⁸ Dale *Mineral Rights* 182; Van der Schyff *Property in Minerals and Petroleum* 118.

⁸⁰⁹ Dale *Mineral Rights* 182.

it envisaged a separation of the ownership of precious stones or precious minerals *in situ* from that of the land.⁸¹⁰

The next Gold Law, *Law 8* of 1885⁸¹¹ reverted to the position under the first Gold Law⁸¹² and reserved only the right to mine and dispose of precious stones and precious metals to the State and not the ownership of the precious stones and precious metals.⁸¹³ *Law 8* of 1889⁸¹⁴ confirmed that the right to mine and dispose of precious stones and precious metals belonged to the State.⁸¹⁵ There was no longer a reservation of the "ownership" in the precious metals and precious stones to the State.⁸¹⁶ The reservation of the right to mine and dispose of precious stones and precious metals in favour of the State was continued in the subsequent Gold Laws.⁸¹⁷

⁸¹⁰ According to Badenhorst 1991 *TSAR* 119, this provision was not in line with other legislation of the ZAR and should be attributed to poor draftmanship and not as an attempt to reserve ownership of minerals to the State. Badenhorst "Development of Mineral and Petroleum Law" 1-16-1-17; See *Agri SCA* case para 38. Again the main purpose of *Law 1* of 1883 appears to have been to regulate the discovery of gold and not diamonds. The State President was in terms of s 3 of *Law 1* of 1883 entitled with the consent of the Executive Council, to proclaim any state owned land and to open the land for the public.

⁸¹¹ *Law 8* of 1885 was adopted by a resolution of the Volksraad on 30 July 1885. The title of *Law 8* of 1885 was similar to the title of *Law 1* of 1883.

⁸¹² *Law 1* of 1871. See Badenhorst 1999 *Stellenbosch Law Review* 91.

⁸¹³ Section 1 of *Law 8* of 1885 provided that it applied to diamonds, rubies, gold and such other precious stones and precious metals as the State President determined with the consent of the Executive Council. Van der Schyff *Constitutionality* 33-36. Sections 1 and 2 of *Law 19* of 1895 contained similar provisions. See also the *Agri SCA* case para 38. The Government was in terms of s 3 of *Law 8* of 1885 authorised to appoint a state mineralogist to conduct a geological survey of the minerals in a district and to report thereon and further to advise the Government on all aspects of the mining and exploitation of the mineral resources of the ZAR. The Government was in terms of s 4 of *Law 8* of 1885 empowered to appoint a commission to examine any aspect of mining and to report thereon to the Government. Sections 9 and 10 of *Law 19* of 1895 contained similar provisions.

⁸¹⁴ The title of *Law 8* of 1889 was similar to the title of *Law 1* of 1883 and *Law 8* of 1885. *Law 8* of 1889 was enacted with effect from 28 November 1889.

⁸¹⁵ Section 1 of *Law 8* of 1889.

⁸¹⁶ Section 2 of *Law 8* of 1889 provided that it applied to diamonds, rubies, gold and such other precious stones and precious metals as the State President determined with the consent of the Executive Council. According to Dale *Mineral Rights* 189, *Law 8* of 1889 was in essence a continuance of the previous Gold Law, *Law 8* of 1885.

⁸¹⁷ Section 1 of *Law 10* of 1891 confirmed that the right to mine and dispose of precious stones and precious metals vested in the State. Section 2 of *Law 10* of 1891 provided that it applied to diamonds, rubies, gold and such other precious stones and precious metals as determined by the State President on the advice of the Executive Council. Sections 1 and 2 of *Law 18* of 1892, *Law*

7.5 Law 22 of 1898

It became clear with the discovery of alluvial diamonds near Pretoria that separate legislation was required to regulate the searching for and mining of diamonds.⁸¹⁸ On 1 November 1898 the *Volksraad* enacted Law 15 of 1898 to regulate the mining of precious metals in the ZAR.⁸¹⁹ During the same session, the *Volksraad* adopted Law 22 of 1898 to separately regulate the mining for and dealing in diamonds and other precious stones. Law 22 of 1898 only came into effect on 1 January 1899 and during the period 1 November 1898 to 31 December 1898, there was no statutory provision that regulated the prospecting or mining for diamonds in the ZAR. One of the most important diamond mines in South Africa, the Premier Mines (later known as the Cullinan Mine) was discovered in December 1898 during this hiatus.⁸²⁰

Law 22 of 1898⁸²¹ came into effect on 1 January 1899 and repealed all previous laws and resolutions of the *Volksraad* and regulations relating to the digging and dealing in precious stones.⁸²²

7.5.1 Statutory reservation of the right to mine diamonds

Section 1 of Law 22 of 1898 confirmed without any qualification, that the right to mine and to dispose of all diamonds and to deal in diamonds vested in the State.⁸²³

19 of 1895 and ss 1 and 2 of Law 21 of 1896 contained similar provisions as ss 1 and 2 of Law 10 of 1891.

⁸¹⁸ Praagh *The Transvaal and its Mines* 519.

⁸¹⁹ Law 15 of 1898 repealed Law 21 of 1896 with effect from 1 November 1898 and all other laws inconsistent with the provisions thereof, but subject to the reservation of all rights and claims acquired thereunder.

⁸²⁰ See para 7.6 below.

⁸²¹ Law 22 of 1898 was titled: "*Op het delven van-en handeldrijven in edelgesteenten in de Zuid-Afrikaansche Republiek*" which translates to "On the digging of and dealing in precious stones in the ZAR."

⁸²² Section 139 of Law 22 of 1898. The term "precious stones" was not defined in Law 22 of 1898, but s 2 of Law 22 of 1898 provided that it applied to diamonds and such other precious stones as the State President determined by proclamation in the *Staatscourant* on the advice of and with the consent of the Executive Council.

⁸²³ Dale *Mineral Rights* 194.

Law 22 of 1898 distinguished between two forms of land tenure, private land and State land.⁸²⁴

7.5.2 *The right to prospect*

Every landowner was entitled after giving notice of his intention to the Mine Commissioner or *Landdrost* and without having to obtain a licence, to search for diamonds on his own property.⁸²⁵ Any person who had the written permission of the landowner to prospect on private property was entitled to obtain a prospecting licence upon payment of ten pounds to prospect on such land. A prospecting licence could not be granted for a period longer than one year.⁸²⁶ Any person who wanted to prospect for diamonds on State owned land, had to obtain a prospecting licence and pay a fee of ten pounds.⁸²⁷ Every discoverer of diamonds was obliged to give notice within 24 hours of his discovery together with particulars of the discovery to the Mine Commissioner.⁸²⁸ The State Mine Inspector had to determine the payability and the extent of the land where the diamonds had been discovered.⁸²⁹ Despite the fact that the right to mine diamonds vested in the State, the owner of private land was entitled to prospect on his own land without having to obtain a prospecting licence.

⁸²⁴ Private land was defined in s 3 of *Law 22* of 1898 to mean: " ... de gronden aan private personen of maatschappijen toebehoorende, blijkens grondbrief of transport" which translates to "land conferred on private persons or companies by virtue of deeds of grant or deeds of transfer." State land was defined in s 3 of *Law 22* of 1898 to mean: " ... alle gronden den Staat toebehoorende" which translates to "all land that belonged to the State."

⁸²⁵ Section 4 of *Law 22* of 1898.

⁸²⁶ The word "*prospecteeren*" which translates to "prospecting" was defined in s 3 of *Law 22* of 1898, to mean all activities necessary with the intention of discovery of precious stones. A prospector who obtained the written permission of the landowner for a period of longer than one year, could obtain a renewal of the prospecting licence subject to the payment of a fee of five pounds. A prospecting licence could in terms of s 5 of *Law 22* of 1898 only be renewed once for a period not exceeding six months.

⁸²⁷ Section 6 of *Law 22* of 1898.

⁸²⁸ Section 8 of *Law 22* of 1898.

⁸²⁹ Section 9 of *Law 22* of 1898. Section 10 of *Law 22* of 1898 prohibited the searching for or digging for precious stones in cities, towns, public areas, roads, railways, cemeteries, gardens and such other land as determined by the Mine Commissioner or *Landdrost*.

7.5.3 Proclamation of a public digging

The State President could, with the advice and consent of the Executive Council and if possible after consultation with the landowner of private land, proclaim such private land as a public digging.⁸³⁰ The landowner of private land was therefore not entitled to oppose the proclamation of a public digging on his land.⁸³¹ If the State President resolved to proclaim a public digging on private land or on State land, the Surveyor-General had to cause the proclaimed ground to be pegged off into a network of claims adjoining one another.⁸³² A diagram had to be prepared depicting the *werf* or the land, the owner's claims, the discoverer's claims and the other claims which would be open to the public.⁸³³

7.5.4 The rights of the landowner

The landowner of land where diamonds had been discovered was entitled in the event that the land was proclaimed a public digging, to the reservation of one-eighth of the total number of pegged claims situated in a block, before the proclaimed land was opened to the public. The landowner was entitled to be awarded at least 90 claims.⁸³⁴ The landowner of private land that was declared a public digging was further entitled after consultation with the Government, to reserve a portion of his land for purposes of his farmyard and to continue to use water for his family and cattle and for irrigation purposes.⁸³⁵ In the case of the discovery of diamonds on his reserved private land, such land could only be proclaimed as part of the public digging with the consent of the landowner.⁸³⁶ The landowner was then entitled to be awarded 30 owner's claims

⁸³⁰ Section 11 of *Law* 22 of 1898.

⁸³¹ Section 12 of *Law* 22 of 1898.

⁸³² The size of each claim was 30 square feet. Section 14 of *Law* 22 of 1898.

⁸³³ Section 14 of *Law* 22 of 1898.

⁸³⁴ Section 23 of *Law* 22 of 1898. The landowner had to pay a monthly licence fee of five shillings per claim and if he sold or transferred a claim to another person, s 23 read with s 25 of *Law* 22 of 1898 provided that a monthly licence fee of 20 shillings per claim was payable by the new claimholder.

⁸³⁵ Section 78 of *Law* 22 of 1898. The quantity of water that the landowner could use, had to be determined by proclamation.

⁸³⁶ Section 19 of *Law* 22 of 1898.

in respect of the proclaimed area. The discoverer was also entitled to only ten discoverers' claims where the diamonds had been discovered. The landowner was entitled to receive one-half of all the licence money paid in respect of the owner's claims, discoverers' claims and ordinary claims.⁸³⁷ If the landowner sold or leased his mineral rights with regard to the land, the holder of the rights to diamonds or the lessee of such rights, was entitled to the owner's claims, provided that the agreement was contained in a notarial deed and registered.⁸³⁸

7.5.5 The rights of the discoverer

The discoverer of diamonds on unproclaimed land was entitled to the reservation of a certain number of claims in one block. This reservation of claims was only possible and done after the landowner's selection of his owners' claims. However, the reservation was done before the pegged claims were made available to the public. Furthermore, reservation of claims was on condition that the farm where the diamonds in alluvial form had been discovered, was situated at least 2 miles from an existing alluvial digging or new diamond pipe.⁸³⁹ If the discoverer discovered the diamonds while he was the holder of a prospecting licence granted under sections 5 and 6 of *Law 22* of 1898, or if he was the landowner of the land where the diamonds had been discovered and provided that he had given notice of the discovery, he was entitled to be awarded 30 discoverers' claims. In any other circumstance the discoverer was entitled to be awarded ten claims unless the discoverer made himself guilty of overreaching.⁸⁴⁰

⁸³⁷ Sections 79 and 80 of *Law 22* of 1898.

⁸³⁸ Section 81 of *Law 22* of 1898.

⁸³⁹ Section 24 of *Law 22* of 1898.

⁸⁴⁰ Section 24 of *Law 22* of 1898. The discoverer was in terms of s 25 of *Law 22* of 1898 obliged to pay a monthly licence fee of five shillings per discoverer's claim and if he transferred his claim to someone else, the ordinary licence fee of 20 shillings was payable per claim by the new claimholder.

7.5.6 *The rights and obligations of claimholders*

The holder of a claim was entitled to dig or mine⁸⁴¹ for diamonds together with certain ancillary rights. The claimholder was entitled without having to pay additional licence fees,⁸⁴² to the use of a hoisting site,⁸⁴³ a machine site,⁸⁴⁴ a depositing site,⁸⁴⁵ water rights⁸⁴⁶ and a residence site⁸⁴⁷ outside the diamond bearing land.⁸⁴⁸ *Law 22* of 1898 also listed certain additional minerals which were deemed to be by-products associated with diamonds. If these by-products were recovered with diamonds under a claim licence, such minerals also belonged to the claimholder. These minerals were, topaz, garnets, olivine, zirconia and other minerals associated with diamonds.⁸⁴⁹

Claimholders were entitled to sell or transfer their claims or portions thereof.⁸⁵⁰ Claims that were not renewed prior to their expiry dates lapsed and reverted to the

⁸⁴¹ The terms "delven" or "mijnen" were defined in s 3 of *Law 22* of 1898 to mean to intentionally win the precious stones described in s 2, including all work necessary, irrespective of whether the winning occurred by virtue of underground mining, open cast or by drilling or otherwise.

⁸⁴² Section 53 of *Law 22* of 1898.

⁸⁴³ Section 50 of *Law 22* of 1898 provided that a hoisting site had to be used for hoisting equipment and machinery. An area outside the diamond bearing ground had to be reserved as hosting sites, provided that an area of 50 feet had to be left open between the diamond bearing ground and the hoisting sites. The area to be allocated as hoisting sites had to be determined by the Mine Commissioner and on the advice of the State Mine Engineer. Claimholders had to submit applications for hoisting sites in terms of s 53 of *Law 22* of 1898.

⁸⁴⁴ Every claimholder was in terms of s 48 of *Law 22* of 1898 entitled to erect machinery on his claims for purposes of working his claims. A claimholder was not entitled to allow washed soil to be stored on his claim. The surface of a machine site was in terms of s 51 of *Law 22* of 1898 approximately 100 square feet per claim. Claimholders had to submit applications for machinery sites in terms of s 53 of *Law 22* of 1898.

⁸⁴⁵ The surface of a depositing site was in terms of s 52 of *Law 22* of 1898 250 square feet per claim. Claimholders had to submit applications for depositing sites in terms of s 53 of *Law 22* of 1898.

⁸⁴⁶ Section 55 of *Law 22* of 1898 provided that the Mine Commissioner had to draft regulations in consultation with the Head of Mines in the ZAR regarding the use of water by claimholders and taking the rights of the landowner of private land into account. Claimholders only acquired the right to use water in accordance with the regulations and did not acquire ownership of water from any river, or canal. Claimholders had to submit applications for water rights in terms of s 57 of *Law 22* of 1898.

⁸⁴⁷ Section 32 of *Law 22* of 1898.

⁸⁴⁸ Section 49 of *Law 22* of 1898.

⁸⁴⁹ Section 32 of *Law 22* of 1898.

⁸⁵⁰ Section 34 of *Law 22* of 1898. If a portion of a claim was sold or transferred, an approved surveyor diagram had to be registered in respect of the portion and the full licence fee was payable in respect thereof. Section 35 of *Law 22* of 1898 provided that the transfer of claims or portions

Government of the ZAR. The previous holder of lapsed claims could during the period of three months from the expiry date, recover his claims by paying an additional licence fee equal to the arrear licence fees. If the previous claimholder failed to pay the arrear licence fees within the three month period, all his rights with regard to the claims lapsed.⁸⁵¹ A claimholder could also abandon his claims by giving written notice of the abandonment to the Mine Commissioner or *Landdrost*. The Head of Mines had to sell the abandoned claims within six weeks of receipt of the notice of abandonment by public auction to the highest bidder.⁸⁵²

7.6 The discovery of the Premier Mine

Two diamond mines were discovered in the ZAR in the 1890s, namely the Rietfontein Mine⁸⁵³ and the Premier Mine, which later became known as the Cullinan Mine.⁸⁵⁴ Although the discovery of the Premier Mine is attributed to Sir Thomas Cullinan, the discovery of the Premier Mine became the subject of a court action before the Supreme

thereof had to be registered in the office of the Mine Commissioner or *Landdrost*. See Dale *Mineral Rights* 335-367 regarding pegging and registration of claims.

⁸⁵¹ Section 36 of *Law* 22 of 1898 provided that the Head of Mines was then obliged to sell the lapsed claims on public auction to the highest bid.

⁸⁵² Section 37 of *Law* 22 of 1898. Section 38 of *Law* 22 of 1898 provided that if a claimholder was on commando or on special service, his claims were protected while he was on commando and for a further period of 30 days after returning from commando, provided that he had given notice that he was called to special service or to commando to the Mine Commissioner or *Landdrost*. During the period that the claimholder was on commando or special service he was exempted from complying with his duties as claimholder, unless he allowed someone else to work his claims. See the *Neebe* case.

⁸⁵³ A certain Frames discovered the Rietfontein diamond pipe in September 1897 on the farm Rietfontein 501, situated near the Magaliesberg. According to Draper and Frames *The Diamond* 29, the Rietfontein Mine was the smallest diamondiferous pipe that had been discovered by 1898, but it appeared to be phenomenally rich, although the bulk of the diamonds emanating from this mine were not of a very good quality; Bekker 1897 *Science* 726. Another mine, the Seta Mine was proclaimed in 1903 and is situated in the northern part of what was then known as the Transvaal Colony; Wilson, McKenna and Lynn *Occurrence of Diamonds* 38. According to Cattelle *The Diamond* 301, it was a known fact that there were diamonds in the Pretoria district for years before the discovery of the Premier Mine. Three small mines were discovered near Pretoria, the Schuller Mine, the Montrose Mine and the Kaalfontein Mine. See Williams *Diamond Mines* Vol 2 134.

⁸⁵⁴ Wilson, McKenna and Lynn *Occurrence of Diamonds* 75; According to Cattelle *The Diamond* 300, the Premier Mine was the greatest known diamond mine in the world and it is in extent as large as the four diamonds mines owned by De Beers Consolidated Mines Limited in Kimberley - Roberts *The Diamond Magnates* 345; Hocking *Oppenheimer and Son* 32.

Court of the Transvaal in 1910.⁸⁵⁵ The historical facts regarding the discovery appear from *Williams v The Premier (Transvaal) Diamond Mining Co Limited and the Union Government*.⁸⁵⁶ A certain Williams obtained the permission of Prinsloo, the owner of the farm Elandsfontein, on which the Premier Mine was discovered to search for diamonds on the farm Elandsfontein. Williams discovered the diamond pipe on the farm Elandsfontein on 20 December 1898. There was no statutory provision in force in the ZAR which regulated the prospecting for or mining of diamonds in December 1898.⁸⁵⁷ Williams duly notified the mining commissioner and furnished him with particulars of his discovery in December 1898. After *Law* 22 of 1898 came into effect, Williams submitted an application for ten claims which he alleged were due to him as the discoverer of the mine.⁸⁵⁸ At that stage there were also other prospectors searching for alluvial diamonds on the farm Beynestpoort adjoining the farm Elandsfontein.⁸⁵⁹ Thomas Cullinan prospected on the farm Beynestpoort and came to the conclusion that there was a diamondiferous kimberlite pipe on the neighbouring farm Elandsfontein. The owner of the farm Elandsfontein, Prinsloo, refused to allow anyone to prospect on his farm.⁸⁶⁰ It was only at the end of the second Anglo-Boer War and after Prinsloo had died, that Cullinan succeeded in purchasing the farm Elandsfontein from Prinsloo's daughter.⁸⁶¹ Cullinan raised the purchase price by selling

⁸⁵⁵ Beet *Diamond Fields* 94.

⁸⁵⁶ 1910 TS 811 (hereafter the *Williams case*).

⁸⁵⁷ *Law* 22 of 1898 only came into effect on 1 January 1899 and *Law* 15 of 1898 repealed the previous *Law* 21 of 1896 with effect from 1 November 1898.

⁸⁵⁸ At 815-816.

⁸⁵⁹ Davenport *Digging Deep* 254-255.

⁸⁶⁰ According to Cartwright *Diamonds* 45, "Tom Cullinan had visited this area before the war and, having seen a beautiful blue-and-white diamond found by a prospector on the boundary (actually under the fence) of the farm Elandsfontein, he was convinced that the pipe was on this farm. He would have given his ears to be allowed to prospect on this farm but, after he had interviewed the owner, one Willem Petrus Prinsloo senior, he knew he hadn't a hope. At that time Prinsloo, who had fenced off the section of Elandsfontein where Cullinan wanted to prospect and build a house, was a rich man. He did not need option money or payments for prospecting rights. He was not interested in selling his farm nor did he want shares in a mining company that might establish a mine on his farm. What it boiled down to was that, as long as this Prinsloo lived, nobody would be allowed to get at the treasure that might be hidden there." See Taylor *African Treasures* 113-117; Norman *The extraordinary world of diamonds* 109-110; Beet *Diamond Fields* 94-95; Herbert *Diamond Diggers* 94-96.

⁸⁶¹ Chilvers *Story of De Beers* 192-193.

shares in his company Premier Syndicate Limited (hereafter Premier Syndicate).⁸⁶² Cullinan registered the farm Elandsfontein in the name of his company, Premier Transvaal and soon thereafter in 1902, he discovered the mine.⁸⁶³

The mine was named the Premier Mine in honour of Cecil Rhodes, who passed away in the same year.⁸⁶⁴ Williams alleged in his court action that Premier Transvaal was aware that Williams was the discoverer of the Premier Mine when it became the owner of the farm Elandsfontein in November 1902.⁸⁶⁵ The Premier Mine was proclaimed on 22 January 1904 in terms of section 15 of the 1903 Tvl Precious Stones Ordinance.⁸⁶⁶

⁸⁶² The Premier Syndicate was converted to a limited liability company, named the Premier (Transvaal) Diamond Mining Company Limited (hereafter Premier Transvaal). Simons *Cullinan Diamonds* 25.

⁸⁶³ Cullinan described the details of his discovery as follows: "I then had a look at the property and found that the alluvial wash extended up the valley, leading to the eminence on which the Premier Mine lies, and over the full area of the mine. I found garnets and carbon - the natural indications of a mine - spread pretty well all round. I decided that the diamonds found below must have come from a mine which must be somewhere on the highest point of the hill, what was exactly where the mine afterwards proved to be. My first shaft went right down into the mine, and in fact all my shafts were into the mine ground, showing that the extent of diamondiferous ground was so large - 3,500 claims - that you could not miss it." Chilvers *Story of De Beers* 193. See also Kanfer *The Last Empire* 159-160.

⁸⁶⁴ Davenport *Digging Deep* 256. In order to avoid confusion, the name of the "Premier Mine" in Kimberley was changed to the "Wesselton Mine". See para 5.2.2 above.

⁸⁶⁵ See the *Williams* case 816.

⁸⁶⁶ GG 3 of 22 January 1904. An owner's certificate was issued to Premier Transvaal in respect of its 40% share in the Premier Mine. The Owner's Certificate was registered against Deed of Transfer 2521/1902 and in the Mining Titles Office on 29 November 1910. The State was in terms of s 27(1) of the 1903 Tvl Precious Stones Ordinance entitled to the remaining 60% share. De Beers Consolidated Mines Limited at that stage had an opportunity to purchase shares in Premier Transvaal, but the mining engineer, a certain Francis Oats, who was also the Chairman of the board of directors of De Beers Consolidated Mines Limited came to the conclusion that the Premier Mine was a "fake." Cartwright *Diamonds* 49-51, states that Louis Ryersbach, a director of Rand Mines and an acknowledged diamond expert, held the view that the Premier Mine had been "salted" and that the diamonds that had been shown to him, emanated from the Jagersfontein Mine and not from the Premier Mine. According to Davenport the story was told that Alfred Beit who was regarded as a diamond expert, visited the Premier Mine in 1903 and realised that De Beers Consolidated Mines Limited had made a mistake not to purchase shares in Premier Transvaal which were offered to the company at what was then regarded as a moderate price. It is reported that Beit was so shocked to see the extent of the Premier Mine that he suffered a stroke shortly thereafter and died. Cartwright doubts that Beit's irritation and shock in discovering that a competitor was bigger and more efficient caused Beit's death as he died in England on 30 May 1906 after another stroke not related to the first stroke. The first stroke was a slight stroke that he suffered. Beit's explanation was that the cause of his illness was that he walked all over the property of the Premier Mine on a very hot day after a heavy meal. De Beers Consolidated Mines Limited thereafter had to pay a large amount of money to obtain shares in Premier Transvaal. See also

Williams claimed in his declaration that he was entitled to ten claims or an interest equivalent thereto and an account of the profits in the Premier Mine, alternatively that he was entitled to payment of £250 000 damages.⁸⁶⁷ Williams stated that after *Law 22* of 1898 came into force, he applied to be awarded ten claims in respect of the Premier Mine.⁸⁶⁸ Premier Transvaal argued that *Law 15* of 1898 which came into operation on 1 November 1898 repealed all prior laws relating to gold and precious stones and that the prior *Gold Law 21* of 1896 was applicable to diamonds, but *Law 15* of 1898 not. *Law 22* of 1898 only came into operation on 1 January 1899 with effect that there was no law in existence relating to the mining of diamonds between 1 November 1898 and 1 January 1899. Premier Transvaal argued further that Williams' claims were based on a discovery of diamonds in December 1898 and that *Law 22* of 1898 made no provision to protect rights previously acquired as had been done in the 1903 Tvl Precious Stones Ordinance. It also argued that even if Williams could rely on *Law 22* of 1898, Williams did not hold a prospecting licence to prospect or search for diamonds and that he did not have the written consent of the landowner as was required by section 5 of *Law 22* of 1898. The Union Government's case was that the previous *Law 21* of 1896 gave a discoverer of precious stones certain rights provided that certain formalities had been complied with. *Law 21* of 1896 ceased to have effect on 1 November 1898 and the new provisions that were enacted in terms of *Law 22* of 1898 only took effect on 1 January 1899. The Union Government argued further that Williams could not during the hiatus claim rights as a discoverer without compliance with any formalities.⁸⁶⁹

The Supreme Court of Transvaal agreed with Premier Transvaal and the Union Government and held that it followed from a consideration of the language of section 8 and other provisions of *Law 22* of 1898, that none of the provisions of *Law 22* of 1898 relating to prospecting, could apply to prospecting or discoveries made prior to

Davenport *Digging Deep* 256-257; Kanfer *The Last Empire* 159-160; Hocking *Oppenheimer and Son* 32-33; Simons *Cullinan Diamonds* 39-40.

⁸⁶⁷ At 816.

⁸⁶⁸ At 812.

⁸⁶⁹ At 813 to 814.

the commencement of *Law 22* of 1898.⁸⁷⁰ After an analysis of the remaining provisions of *Law 22* of 1898, the Supreme Court held that *Law 22* of 1898 only applied to discoveries of precious stones made after the commencement of *Law 22* of 1898. Williams was therefore not entitled to claim any rights as a discoverer of the Premier Mine.⁸⁷¹

During the period 1904 to 1905 four diamonds larger than 300 carats in size were discovered at the Premier Mine.⁸⁷² The two major diamond producers in South Africa during this time were De Beers Consolidated Mines Limited and Premier Transvaal. There was at this stage a major economic recession which resulted in a collapse of the share prices on the New York Stock Exchange in 1907. The demand for diamonds from South Africa reduced, which led to a decline of diamond prices.⁸⁷³

⁸⁷⁰ At 818.

⁸⁷¹ At 820.

⁸⁷² This included the stone, reported to be the largest known gem diamond discovered, the Cullinan diamond which was discovered in 1905. Chilvers *Story of De Beers* 194, describes this discovery as follows: "Frederik Wells, the surface manager of the time, saw it glittering up the side of the crater on June 25, 1905 and was given £2,000 as a reward for finding it. The stone weighed 3,023 carats in rough, and measured 4 ½ inches by 2 ¼ inches by 2 inches. It was cut by Ascher of Amsterdam, into nine large and a number of smaller stones. Cullinan stones are in the Royal crown and sceptre of Britain." The largest stone, approximately 530 carats was called the "Star of Africa" and another large stone, approximately 317 carats, was called the "Lesser Star of Africa." Davenport *Digging Deep* 254. According to Cartwright *Diamonds* 61-62, the Cullinan diamond was first discovered by a mineworker, who called Wells to the site. Cartwright states that the mineworker: "left the mine with money enough to buy a herd of cattle, and that was the equivalent of winning a sweepstake to him. He went home to collect a wife or two and live the life of Reilly for the rest of his days." After the discovery, the Cullinan diamond was inspected by three geologists, who came to the conclusion that it had been part of a much larger stone. It was unusual to use a family name for a large stone in those days as according to a legend: "name a gem for a man and bring trouble on his house." Cartwright *Diamonds* 61-62; Wheatcroft *Randlords* 225-226; Hocking *Oppenheimer and Son* 33; Wilson, McKenna and Lynn *Occurrence of Diamonds* 75; Joel *Ace of Diamonds* 88-89; Crookes *Diamonds* 76-80; Simons *Cullinan Diamonds* 32-33; Cruise *Louis Botha's War* 96-97; Hahn *Diamond* 108-109; Herbert *Diamond Diggers* 94-100. According to Simons *Cullinan Diamonds* 45, the Cullinan diamond was after independence and responsible government was granted to the former Transvaal Colony, by virtue of a decision taken by the newly elected Legislated Assembly (led by General Louis Botha) as a token of loyalty bought by the Government and offered as a gift to King Edward VII of Britain. Simons states that the Cullinan diamond was conservatively valued at approximately £9 million, but that the Government of Transvaal bought the diamond for the nominal sum of £150 000. The Transvaal Government was in terms of the 1903 TvI Precious Stones Ordinance (discussed in para 7.7 below) entitled to a 60% share and thus only paid £60 000 for the diamond.

⁸⁷³ Davenport *Digging Deep* 257-258; Wheatcroft *Randlords* 225-226.

7.7 1903 Tvl Precious Stones Ordinance

The *Crown Land Disposal Ordinance* 57 of 1903 was enacted in the Transvaal Colony after the second Anglo-Boer War. It provided for the reservation of all rights to minerals, mineral products and precious stones to the Crown on land granted by the Crown.⁸⁷⁴ It is submitted that the State would in any event as landowner be entitled to reserve the rights to minerals in its favour.⁸⁷⁵

The Transvaal Colony suffered the same fate as the Orange River Colony.⁸⁷⁶ Very soon after the change in control, the legislation regulating the mining of diamonds was changed. The 1903 Tvl Precious Stones Ordinance came into effect on 7 August 1903 and repealed *Law* 22 of 1898 and any other law repugnant to or inconsistent with it, but subject to the recognition of existing rights or privileges acquired under the previous laws.⁸⁷⁷

7.7.1 Statutory reservation of the right to mine diamonds

The right to mine for and to dispose of all precious stones in the Transvaal Colony vested in terms of section 3 of the 1903 Tvl Precious Stones Ordinance in the Crown.⁸⁷⁸ The 1903 Tvl Precious Stones Ordinance distinguished between two forms of land

⁸⁷⁴ Section 7 of the *Crown Land Disposal Ordinance* 57 of 1903. This provision was amended by *Ordinance* 13 of 1906 in that the reservation was permissible but not obligatory. *Agri SCA* case para 42. Dale points out that this reservation was wider than the reservation in the Cradock Proclamation in which only the rights to mine precious stones, gold and silver were reserved to the Crown. Dale *Mineral Rights* 196; Van der Schyff *Constitutionality* 38; Van der Schyff *Property in Minerals and Petroleum* 121.

⁸⁷⁵ Badenhorst 1991 *TSAR* 120.

⁸⁷⁶ See para 6.5 above.

⁸⁷⁷ Section 1 of the 1903 Tvl Precious Stones Ordinance; Van der Schyff *Property in Minerals and Petroleum* 121.

⁸⁷⁸ Section 3 of the 1903 Tvl Precious Stones Ordinance provided that: "The right of mining for and disposing of all precious stones is vested in the Crown."

tenure, Crown land⁸⁷⁹ and private land.⁸⁸⁰ Although the statutory reservation of the rights to precious stones in favour of the Crown was unqualified and absolute, it appears that as in the case of other colonies, the question as to who was entitled to prospect for or to mine diamonds depended on the specific form of land tenure.

7.7.2 Right to prospect on Crown land

A person who wanted to prospect on Crown land situated in the Transvaal Colony had to obtain a prospecting licence at the office of any District Registrar.⁸⁸¹ Only white male inhabitants of the Transvaal Colony older than 18 years could obtain a prescribed prospecting licence.⁸⁸² The holder of a prospecting licence was entitled to enter upon

⁸⁷⁹ The term "Crown land" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean: "all unalienated Crown Land and all land the property of the Government of this Colony in whatever way acquired; and any land alienated by the Crown with an express reservation to it of precious stones or minerals." Dale *Mineral Rights* 197.

⁸⁸⁰ The term "private land" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean: "any area of ground of which the ownership is vested in an individual or company as shown by title or deed of transfer and in the title of which there is no reservation by the Crown of precious stones and minerals." The definition of "private land" was later in terms of s 1 of the 1919 Alluvial Amendment Act amended to read: "any area of land which is not Crown land."

⁸⁸¹ The term "precious stones" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to include: "diamonds and any other gems or stones proclaimed such by the Lieutenant-Governor."

⁸⁸² The form of the prospecting licence was prescribed in Form No 1 of Schedule 1 to the 1903 Tvl Precious Stones Ordinance. The word "prospecting" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean: "the doing of all work which is necessary for the search of precious stones or which has in view the testing of the payability of the place in which precious stones have been found." The definition of "prospecting" was later in terms of s 1 of the 1919 Alluvial Amendment Act amended to mean and include: "all work which is necessary for or incidental to the search for precious stones or which is required for the purpose of determining whether precious stones exist in sufficient quantities to justify the mining commissioner in granting a certificate of discovery and shall include trial-washing to such extent as may be permitted or determined by the mining commissioner."

and prospect for diamonds on any Crown land situated within the Transvaal Colony.⁸⁸³ The consent of the owner of alienated Crown land⁸⁸⁴ was therefore not required.

The holder of a prospecting licence had the exclusive right to prospect for a period not exceeding one month within an area referred to as a "prospecting area."⁸⁸⁵ The holder of a prospecting licence was obliged to prospect for diamonds relating to any prospecting area he had pegged out, but subject to any regulations made by the Commissioner of Mines. If in the opinion of the District Registrar⁸⁸⁶ a prospector failed to prospect, he would forfeit his prospecting licence and was then not permitted to take out a prospecting licence for a period of six months.⁸⁸⁷

⁸⁸³ Section 4(1) of the 1903 Tvl Precious Stones Ordinance. *Buitendach v West Rand Proprietary Mines* 1925 TPD 745 at 750 (hereafter the *Buitendach* case). Section 4(2) of the 1903 Tvl Precious Stones Ordinance provided that the Lieutenant-Governor could by proclamation in the *Gazette* exclude any place from prospecting. No holder of a prospecting licence could prospect on any public square, street, road, railway, cemetery, public works or on any area proclaimed a mine or alluvial digging or mining area or on any area proclaimed as a stand township or on any land held under any mining title issued under *Law* 15 of 1898 or within 20 yards of a prospecting area or in any town or village or in any so-called "native location" without the consent of the Commissioner for Native Affairs. Dale *Mineral Rights* 197.

⁸⁸⁴ The term "alienated Crown land" was not defined in the 1903 Tvl Precious Stones Ordinance and is used in this chapter to refer to land that was alienated by the Government of the Transvaal Colony subject to the reservation in favour of the Crown of the rights to diamonds.

⁸⁸⁵ Section 4(3) of the 1903 Tvl Precious Stones Ordinance provided that a prospecting area was 1000 yards square in extent and the holder of a prospecting licence was obliged to put in and to maintain pegs not less than two feet high above the ground with details of his name and the date of pegging. Every prospector was for the duration of his prospecting licence entitled to move to any portion of Crown land open for prospecting, provided that he did not interfere with the prospecting area of any other prospector.

⁸⁸⁶ The term "District Registrar" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean: "the District Registrar or Assistant District Registrar of Mining Rights for the mining district for which he is appointed."

⁸⁸⁷ Section 4(5) of the 1903 Tvl Precious Stones Ordinance. Section 4(6) of the 1903 Tvl Precious Stones Ordinance provided that in the case of unoccupied Crown land, every prospector was for the purpose of *bona fide* prospecting entitled to graze free of costs, four draught animals and with the consent of the District Registrar a maximum of 16 draught animals, provided that the prospector could show that they were necessary. The holder of a prospecting licence was in addition, entitled to use such water and to cut such timber for his personal use as the District Registrar authorised.

7.7.3 Right to prospect on private land

The owner of private land was entitled to prospect on his own land without having to obtain a prospecting licence. The owner could, either himself or through his servants prospect on his own land. This was, however, on condition that he gave notice of his intention to prospect to the District Registrar.⁸⁸⁸ A landowner of private land could also grant written consent to any other person to prospect for diamonds on his land, provided also that he gave notice to the District Registrar.⁸⁸⁹ Although the right to prospect for diamonds vested in the Crown, it was the owner of private land in his capacity as the holder of the rights to diamonds, who was entitled to prospect on his own land and third parties could only prospect on private land, with the consent of the landowner.

7.7.4 Rights and duties of the discoverer of diamonds

Every prospector⁸⁹⁰ who discovered any diamonds was obliged within 30 days of the discovery, to notify the District Registrar of the discovery and of the place where the diamonds had been discovered. The discoverer thereafter had to lodge with the District Registrar on a monthly basis solemn declarations in the prescribed form.⁸⁹¹ This form made provision to set out the weight and value of the diamonds which the discoverer

⁸⁸⁸ Section 7(1) read with s 21 of the 1903 Tvl Precious Stones Ordinance. Any person who prospected for precious stones without a prospecting licence on Crown land or on private land, unless he was the owner of the land, was in terms of s 73 of the 1903 Tvl Precious Stones Ordinance on conviction liable to a penalty not exceeding £100 and if he was in default of payment, to imprisonment with or without hard labour for a period not exceeding 12 months.

⁸⁸⁹ Section 7(2) of the 1903 Tvl Precious Stones Ordinance. The landowner of private land had to notify the District Registrar and provide him with the name and address of the person to whom he had given permission to prospect on his land. The Transvaal Provincial Division held in the *Buitendach* case 751 that an owner of private land who allowed prospecting on his land with the result that his land was thereafter proclaimed under the 1903 Tvl Precious Stones Ordinance was not liable to his neighbouring owner for any nuisance or inconvenience caused to them as a result of the proclamation if he had done nothing other than taking or permitting the steps to be taken which resulted in the proclamation and if he had lawfully availed himself of the rights granted by s 42 of the 1903 Tvl Precious Stones Ordinance. Dale *Mineral Rights* 197.

⁸⁹⁰ A "prospector" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean: "a person who holds a licence to prospect for precious stones."

⁸⁹¹ The relevant form of the declaration was prescribed in Schedule 2 of the 1903 Tvl Precious Stones Ordinance. Dale *Mineral Rights* 197.

had found, including the amount of ground measured in loads of 16 cubic feet to each load which had yielded the same.⁸⁹²

Any holder of a prospecting licence who could prove to the satisfaction of the District Registrar with whom he had lodged the declaration that he had discovered diamonds on Crown land and that there were reasonable prospects that diamonds existed in payable quantities, was entitled to receive a discoverer's certificate.⁸⁹³ On the proclamation of a diamond mine, the holder of a discoverer's certificate was entitled to an undivided 10% share of the profits in a proclaimed mine, if the extent of the mine exceeded 270 000 square feet.⁸⁹⁴ A discoverer's certificate could only be issued in respect of Crown land.⁸⁹⁵

Once the District Registrar had issued a discoverer's certificate, all prospecting except that of the holder of the discoverer's certificate at the place where the discovery was made and within such distance which the Commissioner of Mines determined, had to cease.⁸⁹⁶ If the Lieutenant-Governor decided not to proclaim a mine within six months after the granting of a discoverer's certificate, the discoverer could proceed to dig for diamonds within an area agreed to by the Commissioner of Mines with the same rights and obligations as if such place had been proclaimed a mine.⁸⁹⁷

7.7.5 Proclamation of a mine and an alluvial digging

The Lieutenant-Governor had to take certain steps to test the character, the payability and the extent of the place where diamonds had been discovered, before he could

⁸⁹² Section 8 read with s 21 of the 1903 Tvl Precious Stones Ordinance.

⁸⁹³ Section 9(2) of the 1903 Tvl Precious Stones Ordinance.

⁸⁹⁴ Section 9(1) of the 1903 Tvl Precious Stones Ordinance provided that here the extent of the mine did not exceed such area, the discoverer was entitled to such undivided portion thereof as an area of 27 000 square feet bears to the whole extent of the mine.

⁸⁹⁵ Section 9(1) read with the definition of a "discoverer" in s 2 of the 1903 Tvl Precious Stones Ordinance. A "discoverer" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean (own underlining): "a duly licensed prospector who has discovered precious stones on Crown Lands".

⁸⁹⁶ Section 9(3) of the 1903 Tvl Precious Stones Ordinance.

⁸⁹⁷ Section 10 of the 1903 Tvl Precious Stones Ordinance.

proclaim a place a mine or an alluvial digging.⁸⁹⁸ If the Lieutenant-Governor was satisfied that there were reasonable prospects that diamonds existed in payable quantities, he had to cause the extent of the area where diamonds had been discovered to be surveyed and he could then proclaim the surveyed area a mine if it contained a diamond pipe, or an alluvial digging if it contained an alluvial deposit.⁸⁹⁹

The Lieutenant-Governor could in addition cause an area that was not diamondiferous to be surveyed and proclaim such area as a mining area. The mining area had to be of sufficient extent to be used for depositing floors, machinery and tipping sites and all other matters connected with the proper and efficient working of the mine.⁹⁰⁰ Section 16(3) of the 1903 Tvl Precious Stones Ordinance provided that a mining area could only be proclaimed on private land with the consent of the landowner, except if the mining area was proclaimed for the purpose of working a mine that had already been proclaimed on such land.⁹⁰¹ The Mine Commissioner had to give the landowner of the private land at least three months' notice of the Lieutenant-Governor's intention to proclaim a mining area on the private land.⁹⁰²

The extent of the mining area had to be sufficient for the purpose of depositing diamondiferous soil from the mine as well as reef or shaly ground. Furthermore, the mining area had to be suitable for the purpose of sinking wells, laying tramways, erecting compounds and other necessary buildings and works relating to mining operations at the mine.⁹⁰³

⁸⁹⁸ Section 14 of the 1903 Tvl Precious Stones Ordinance.

⁸⁹⁹ Section 15 of the 1903 Tvl Precious Stones Ordinance. Dale *Mineral Rights* 197.

⁹⁰⁰ Section 16(1) of the 1903 Tvl Precious Stones Ordinance. The proclaimed mining area could in terms of s 16(2) of the 1903 Tvl Precious Stones Ordinance by proclamation in the *Gazette* be reduced or enlarged at the discretion of the Lieutenant-Governor in accordance with the requirements of the mine.

⁹⁰¹ See the *Buitendach* case 751.

⁹⁰² Section 19 of the 1903 Tvl Precious Stones Ordinance. The notice had to be served on the landowner personally or on his duly authorised agent and had to be published three times in the *Gazette*.

⁹⁰³ Section 16(4) of the 1903 Tvl Precious Stones Ordinance provided that the area allocated for depositing floors had to be in the neighbourhood of or in proximity to the mine but could not encroach on an area of 100 yards round the margin of the mine, which was reserved to be used

The proclamation of a mine and a mining area had a drastic impact on the rights of a landowner. The surface rights of the landowner that was included in the proclamation of a mine and a mining area was immediately on the publication of the proclamation, suspended until such time as the proclamation was revoked or cancelled.⁹⁰⁴ If land included in a proclaimed mine or mining area was subject to a lease agreement, but excluding a mineral lease, the lease agreement was with effect from the date on which the lessee was notified by the Mine Commissioner, terminated. The lessee was in the case of Crown land entitled to such compensation as agreed to with the Mine Commissioner.⁹⁰⁵

7.7.6 Rights of the landowner

The owner of private land on which a proclaimed mine or a portion thereof was situated, was entitled to an undivided 40% share of the profits in such mine or a portion thereof.⁹⁰⁶

If the landowner let his land together with his rights in respect of diamonds to a lessee and provided that the lease was duly registered in the Deeds Office, the lessee was during the term of the lease entitled to the rights that accrued to the landowner and

exclusively for machinery for hauling ground from the mine and the laying of tram-rails for transporting ground to the depositing area.

⁹⁰⁴ Section 17 of the 1903 Tvl Precious Stones Ordinance.

⁹⁰⁵ Section 17 of the 1903 Tvl Precious Stones Ordinance. In the case of private land, the landowner, the lessee and the Mine Commissioner had to agree to the compensation payable to the lessee. If no agreement could be reached, the amount of compensation had to be determined by arbitration. The arbitration was conducted in accordance with the procedures prescribed in the *Expropriation of Lands and Arbitration Clauses Proclamation* of 1902. Section 18 of the 1903 Tvl Precious Stones Ordinance provided that in the case of Crown land the word "lease" could include any title under which the land was held and a lessee included the holder of any such title. In the case of alienated Crown land, the holder of the title to such Crown land, would be deemed to be a lessee for purposes of s 17 of the 1903 Tvl Precious Stones Ordinance and he would lose his ownership of such Crown land included in the proclaimed mine and mining area. In the case of Crown land the compensation was paid to the lessee from the Colonial Treasury and in the case of private land, the compensation was paid by the landowner and the Colonial Treasurer in shares in proportion to their respective interests in the mine as owner and the Crown, discussed in para 7.7.7 below.

⁹⁰⁶ Section 22(1) of the 1903 Tvl Precious Stones Ordinance. Section 22(2) of the 1903 Tvl Precious Stones Ordinance provided that the landowner had to pay licence money to the revenue officer of the relevant district, at the rate of ten shillings per month for every 900 square feet of area included in such mine or portion thereof.

he was subject to the obligations of the landowner under the 1903 Tvl Precious Stones Ordinance. On the termination of the lease agreement the rights that accrued to the lessee under the 1903 Tvl Precious Stones Ordinance reverted to the landowner.⁹⁰⁷ If the rights to diamonds in respect of private land were reserved to another person (excluding the Crown) the holder of the rights to diamonds was entitled to the rights conferred by the 1903 Tvl Precious Stones Ordinance on the landowner.⁹⁰⁸

If the Lieutenant-Governor decided not to proclaim a mine on private land after a declaration of the discovery had been lodged⁹⁰⁹ the landowner was entitled after the expiry of six months from the date of lodging of the declaration, to beacon off and mine on his own land within an area agreed to by the Mine Commissioner. The Lieutenant-Governor was, however, entitled at any time to proclaim a mine on such land.⁹¹⁰

7.7.7 Right to work a mine

The Crown was in respect of a mine proclaimed on private land entitled to the remaining undivided 60% share of the profits in the mine, after deducting the

⁹⁰⁷ Section 26(1) of the 1903 Tvl Precious Stones Ordinance.

⁹⁰⁸ Section 26(2) of the 1903 Tvl Precious Stones Ordinance. The landowner was in terms of s 24 of the 1903 Tvl Precious Stones Ordinance entitled once every three months, to demand and receive from the public revenue, one-half of the licence money that was paid to the Colonial Treasurer in respect of stands in a township proclaimed on his land. The Lieutenant-Governor was in terms of s 69 of the 1903 Tvl Precious Stones Ordinance entitled at any proclaimed mining area or alluvial digging, to select without payment, as many sites of such size as required for public buildings, sanitary purposes of burial grounds, provided that such sites did not interfere with the proper and efficient working of the mine or any claims in the alluvial digging. The Lieutenant-Governor could in terms of s 70 of the 1903 Tvl Precious Stones Ordinance cause any portion of the proclaimed mining area or alluvial digging to be surveyed into stands and to cause it to be proclaimed a stand township. The preferent right to or lease of stands in the stand township had to be sold by public auction by the Mine Commissioner and the proceeds of the sale after deduction of the expenses had to be paid to the registered owner of the land. The licence money received in respect of such stands had to be paid to the Colonial Treasurer. The Transvaal Provincial Division held in *Treasury Trove Diamonds Limited v Thom* 1927 TPD 810 that s 69 of the 1903 Tvl Precious Stones Ordinance did not entitle the Lieutenant-Governor to grant a part of a proclaimed alluvial digging to a private individual as a water supply site.

⁹⁰⁹ The declaration had to be lodged in terms of s 8 of the 1903 Tvl Precious Stones Ordinance.

⁹¹⁰ Section 22(3) of the 1903 Tvl Precious Stones Ordinance.

landowner's undivided 40% share.⁹¹¹ The Crown was in respect of a mine proclaimed on Crown land, entitled to the remaining undivided 90% share after deducting the discoverer's 10% share.⁹¹² The Crown had to issue an owner's certificate or discoverer's certificate to the landowner or discoverer, certifying the extent of their shares in the mine.⁹¹³ The owner of private land on which a mine was situated was entitled to elect to work the entire mine for the purpose of winning diamonds therefrom and had to notify the Mine Commissioner within three months of the proclamation of the mine whether he intended to work the mine or not.⁹¹⁴ Although the right to mine precious stones vested in the Crown, the landowner was the only person entitled to elect to work the mine.⁹¹⁵ In the case of Crown land, the discoverer of the mine was entitled to elect to work the mine and he was subject to the obligations conferred on the owner in respect of the working of the mine.⁹¹⁶

⁹¹¹ Section 22 read with s 27(1) of the 1903 Tvl Precious Stones Ordinance. Dale *Mineral Rights* 198.

⁹¹² Section 9 read with s 27(1) of the 1903 Tvl Precious Stones Ordinance.

⁹¹³ The owner's certificate and discoverer's certificate had to be registered in the proper office for registering mining rights and also against the title deeds of the land on which the mine was proclaimed. Section 27(2) of the 1903 Tvl Precious Stones Ordinance.

⁹¹⁴ Section 28 of the 1903 Tvl Precious Stones Ordinance.

⁹¹⁵ The Lieutenant-Governor could in terms of s 34 of the 1903 Tvl Precious Stones Ordinance, in the following instances call for public tenders for the working of the mine under a contract:

- (a) If the owner of the mine refuse to work the mine;
- (b) If the owner failed to notify the Mine Commissioner that he intended to work the mine within the prescribed period of three months;
- (c) If the owner failed to find the necessary capital for the working of the mine within 12 months after proclamation of the mine; or
- (d) If the owner failed to carry out the decision of the Board in respect of any differences referred to the Board.

The terms of the contract had to be agreed to by the landowner and the Lieutenant-Governor and if they could not agree, the terms and conditions had to be decided by the Board. Any profits derived from the working of the mine by a third person, were divided between the Crown and the landowner in proportion to their respective shares in the mine. If the Lieutenant-Governor could not obtain a suitable tenderer for the working of the mine, he could in terms of s 35 of the 1903 Tvl Precious Stones Ordinance lease the mine to the landowner,

⁹¹⁶ Section 38 of the 1903 Tvl Precious Stones Ordinance. According to Simons *Cullinan Diamonds* 38, the directors of Premier Transvaal regarded the provision to the Crown of a 60% share, in respect of a diamond mine proclaimed on private land as unjust. Simons states that the 1903 Tvl Precious Stones Ordinance was enacted following an official report on the Premier Mine dated 26 June 1903, which revealed that the mine was one of "great magnitude and richness ... and should prove of great importance to this country." He states further with reference to the Crown's share that: "This was a margin which Premier's directors regarded as grossly unjust as it represented a tax considerably higher than that imposed on the Kimberley mines. Premier endeavoured to have the

Where the mine was worked by the holder of the owner's certificate, the owner had to provide the necessary capital⁹¹⁷ for the effective working of the mine. The owner had to render annual accounts in which he had to set off against the net produce of the mine, his actual capital expenditure together with interest thereon. This was calculated at the rate of ten per cent per annum from the date of the expenditure. The Crown was not entitled to receive any share of the net produce until the whole amount of the capital together with the interest thereon had been set off.⁹¹⁸ The net produce was then after the set off of the capital, divided between the Crown and the owner in proportion to their respective shares in the mine.⁹¹⁹

The owner of the mine could transfer or mortgage his interest in a mine provided that if the Crown held an interest in the mine, the owner first had to obtain consent from the Lieutenant-Governor.⁹²⁰ The registered holder of an interest in a mine was entitled to abandon the whole or any portion of his interest in the mine on giving the Registrar

relevant clauses of the Ordinance amended, but with no success. It would have been understandable if the mine had collapsed under such a heavy weight of taxation, but in those early days since- Premier has consistently proved itself a survivor."

⁹¹⁷ The word "capital" was defined in s 31 of the 1903 Tvl Precious Stones Ordinance with reference to the definition thereof in the *Profits Tax (Gold Mines) Proclamation 1902*. Section 31 of the 1903 Tvl Precious Stones Ordinance was with effect from 2 September 1908 repealed by s 1 of the *Precious Stones Amendment Act* 21 of 1908 (hereafter the 1908 Tvl Precious Stones Amendment Act).

⁹¹⁸ Section 29 of the 1903 Tvl Precious Stones Ordinance. Section 29 of the 1903 Tvl Precious Stones Ordinance was repealed by s 1 of the 1908 Tvl Precious Stones Amendment Act.

⁹¹⁹ Section 30 of the 1903 Tvl Precious Stones Ordinance. Section 30 of the 1903 Tvl Precious Stones Ordinance was repealed by s 1 of the 1908 Tvl Precious Stones Amendment Act. The landowner was in terms of s 32 of the 1903 Tvl Precious Stones Ordinance required to conduct his mining operations to the satisfaction of the Mine Commissioner unless the work was suspended with the consent of the Mine Commissioner for one of the following reasons, namely:

- (a) time was required for the erection or repair of machinery;
- (b) the influx or scarcity of water;
- (c) a fall of reef in the mine; or
- (d) scarcity of labour.

If there were any differences between the owner of a mine and the Crown in respect of the working of a mine or in respect of any matter that affected their respective interests in the mine, s 33 of the 1903 Tvl Precious Stones Ordinance provided that the issue had to be referred for a final decision to a Board. The owner and the Crown were represented on the Board in accordance with their respective shares in the mine and the Crown's representative was appointed by the Lieutenant-Governor.

⁹²⁰ Section 36 of the 1903 Tvl Precious Stones Ordinance. The transfer or mortgage had to be registered in respect of transfers of mining rights issued under *Law* 15 of 1898.

written notice of such abandonment.⁹²¹ Figure 7.1 schematically summarises the different undivided shares in a new diamond mine proclaimed on Crown land.

Figure 7.1: Undivided shares in a diamond mine proclaimed on Crown land.

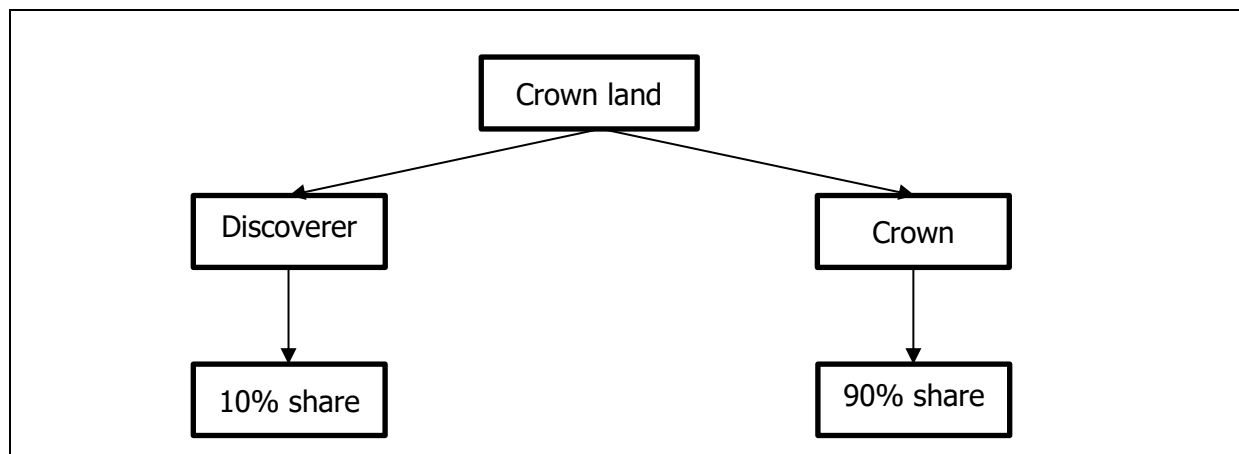
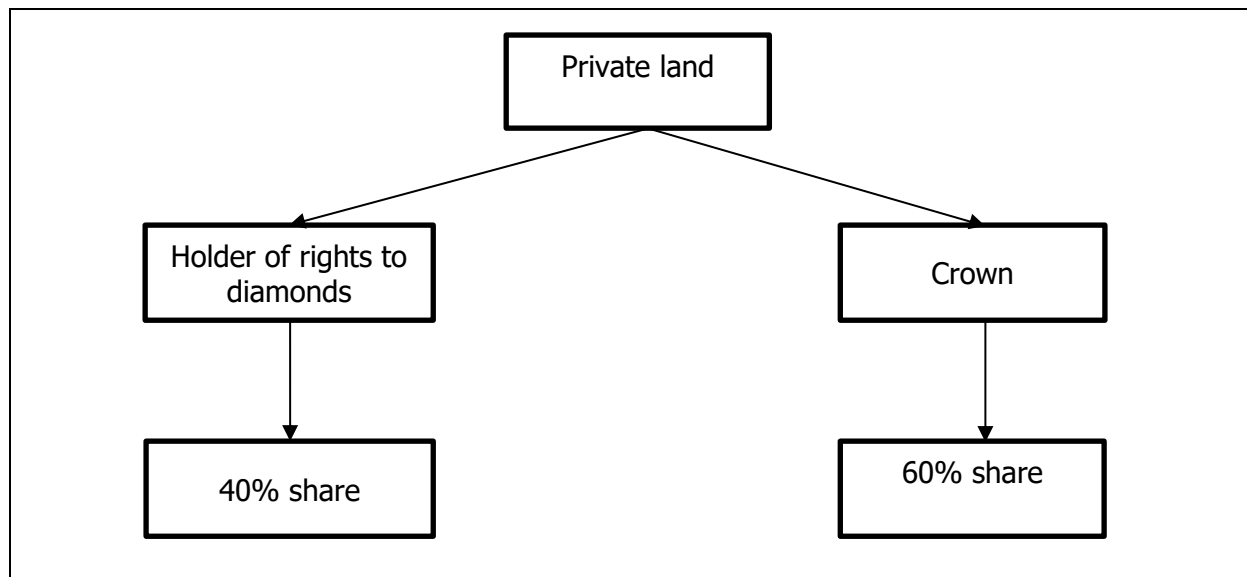


Figure 7.2 is a schematical description of the owner's share and the Crown's different shares in a new diamond mine proclaimed on private land.

⁹²¹ Section 39 of the 1903 Tvl Precious Stones Ordinance. Section 40 of the 1903 Tvl Precious Stones Ordinance provided that the Lieutenant-Governor was entitled to grant a lease of any mine or part of a mine which had been abandoned on terms and conditions that he deemed fit and which had to be published in the *Gazette*.

Figure 7.2: Owner's and Crown's share in a diamond mine proclaimed on private land.



7.7.8 Alluvial diggings

The working of alluvial diggings was regulated separately in the 1903 Tvl Precious Stones Ordinance. The duties and rights of the discoverer of diamonds, the rights of the owner of private land on which an alluvial digging was proclaimed, and the working of claims in alluvial diggings are reviewed in the following sections.

7.7.8.1 Duties and rights of the discoverer

In order to receive a certificate from the District Registrar for the entitlement to select 50 claims in block at the place where diamond had been found, certain requirements had to be met. First, the holder of a prospecting licence who discovered alluvial diamonds had to lodge a declaration of the discovery in terms of section 8 of the 1903 Tvl Precious Stones Ordinance. Also, he had to be able to prove to the satisfaction of the District Registrar that he had found alluvial diamonds and that there were reasonable prospects for believing that they existed in payable quantities. Only then was he entitled to receive a certificate from the District Registrar certifying that he was

entitled to select 50 claims in block⁹²² at the place where the diamonds had been found.⁹²³ The discoverer was exempted from the obligation to pay licence money in respect of the claims that he selected for as long as the claims were held by the discoverer in his own right.⁹²⁴ Once a discoverer's certificate had been issued all further prospecting, except by the holder of the discoverer's certificate at the place where the

⁹²² A "block of claims" or "block" was defined in s 2 of the 1903 Tvl Precious Stones Ordinance to mean: "any number of contiguous claims."

⁹²³ Section 41 of the 1903 Tvl Precious Stones Ordinance. In *Lewis and Marks Limited v Mining Commissioner, Klerksdorp* 1927 TPD 912 (hereafter the *Lewis* case) in a judgment by Tindall J in chambers, he referred to s 82 of the 1899 Cape Precious Stones Act and held that: "the similarity of the wording in s 41 of Our Ordinance and s 82 of the Cape Act leads one to think that the draftsmen must have had the Cape Act before him when he drafted the Transvaal Ordinance." The Court held that the 1899 Cape Precious Stones Act does not expressly state that the discovery must be genuine, but that that requirement was implied from the statement that the discoverer must satisfy the Civil Commissioner that he had found diamonds. Tindall J held further that the reason why the Legislature in the case of the ZAR inserted the condition in s 41 of the 1903 Tvl Precious Stones Ordinance, that the Minister must be satisfied that a genuine discovery had been made, could be because in the Cape, the discoverer was only entitled to select his claims upon proclamation, whereas in the ZAR, the discoverer was entitled to select his claims at once irrespective of whether proclamation occurs or not. The applicant bore the onus to prove that the Minister was satisfied. This judgment was confirmed on appeal. In his judgment, De Waal J considered the functions of the Mining Commissioner and Minister. He held that the Mining Commissioner was the "middle man" and he could not issue a discoverer's certificate unless the Minister had made known that he was satisfied that a genuine discovery had been made. In the *Lewis* case the application and subsequent appeal were dismissed as there was no evidence that the Minister was satisfied that the discovery was genuine. Solomon J in his judgment on appeal held at 920-921 with reference to the meaning of "discovery" as follows: "There is nothing in the Ordinance which defines what a discovery is. But, presumable, a discovery means the finding of precious stones in payable quantities on a new geological horizon that is, a geological horizon upon which no precious stones in payable quantities have hitherto been found. There are two elements that must enter into any discovery: one is the newness of the find, in the sense that it must not be a find of precious stones upon a diamondiferous occurrence which is already known, and the other is that precious stones must be found in payable quantities. The first element is a geological problem...that is, as to whether the new find is really upon a new geological horizon or not; the other is purely a question of value. Now sec. 41 leaves the question of payability to the decision of the mining commissioner, but it reserves the question of the genuineness of the discovery, in the sense presumably that the alleged discoverer has found these stones upon a new geological horizon, to the decision of the Minister of Mines." The position in the province of the Cape of Good Hope that a discoverer could only select claims in the Cape Province if an alluvial digging was proclaimed, was with effect from 10 April 1952 amended in terms of section 2 of the *Precious Stones Amendment Act* 19 of 1952.

⁹²⁴ Section 41 of the 1903 Tvl Precious Stones Ordinance. *Russell v Van Holdt* 1929 TPD 287 at 291. The Appellate Division held in *Rex v Gibson* 1929 AD 392 at 398 that although the 1903 Tvl Precious Stones Ordinance did not specifically provide for the transfer of claims, s 41 of the 1903 Tvl Precious Stones Ordinance clearly contemplated the transfer of discoverer's claims.

discovery had been made and within a distance as determined by the Mine Commissioner, had to cease.⁹²⁵

7.7.8.2 Rights of the owner of private land on which an alluvial digging was proclaimed

The owner of private land on which an alluvial digging had been proclaimed was entitled after the discoverer had selected his 50 claims, to select 100 or a number of claims equal to 30% of the extent of his land proclaimed, whichever of the two was the greater. This selection was on condition, that he had paid the licence money thereon one month in advance. If the owner was also the discoverer of the diamonds, the owner was in addition entitled to the rights of the discoverer, namely first to select a block of 50 claims.⁹²⁶

The owner of private land on which an alluvial digging was proclaimed was further entitled to demand and receive out of the public revenue one-half of the licence money collected in respect of such alluvial digging.⁹²⁷ If the Lieutenant-Governor decided not to proclaim an alluvial digging at the place where alluvial diamonds had been discovered within three months after the date of the issue of the discoverer's certificate,⁹²⁸ the owner of the private land and the discoverer were entitled to mark off and work the claims to which they would have been entitled if an alluvial digging had been proclaimed on the land.⁹²⁹

7.7.8.3 Working of claims in an alluvial digging

After an alluvial digging had been proclaimed and after the landowner and the discoverer had selected the claims to which they were entitled, the remaining proclaimed area was available to the public for the pegging of claims. If the remaining area was in the opinion of the Lieutenant-Governor too small to be suitable for public

⁹²⁵ Section 41 of the 1903 Tvl Precious Stones Ordinance.

⁹²⁶ Section 42 of the 1903 Tvl Precious Stones Ordinance. *Russell v Van Holdt* 1929 TPD 287 at 289.

⁹²⁷ Section 43 of the 1903 Tvl Precious Stones Ordinance.

⁹²⁸ Section 41 of the 1903 Tvl Precious Stones Ordinance.

⁹²⁹ Section 44 of the 1903 Tvl Precious Stones Ordinance.

pegging the Lieutenant-Governor was entitled to sell or otherwise dispose of the claims in such remaining area on such terms as he deemed fit.⁹³⁰

Only white male persons older than 18 years could obtain a licence at the office of the District Registrar entitling him to peg off one claim in the area proclaimed as an alluvial digging.⁹³¹ If a person pegged out a claim but failed to take out a claim licence within a period of three days thereafter, he was deemed to have abandoned his claim and the District Registrar had to declare the claim to be abandoned.⁹³² Claimholders had to pay licence money in respect of each claim.⁹³³ Every registered claimholder in an alluvial digging was, while he was working his claim, also entitled to the use and occupation without extra payment, of a piece of ground within the proclaimed area for the purpose of a residence for such claimholder and accommodation for his employees. The piece of ground had to be marked out for each claimholder by the relevant inspector.⁹³⁴

If a diamond pipe was discovered in respect of any portion proclaimed to be an alluvial digging, notice of the discovery had to be given in terms of section 8 of the 1903 Tvl Precious Stones Ordinance.⁹³⁵ The Lieutenant-Governor could proclaim a mine at the

⁹³⁰ Section 45 of the 1903 Tvl Precious Stones Ordinance.

⁹³¹ Section 46 of the 1903 Tvl Precious Stones Ordinance. Claims could in terms of s 47 of the 1903 Tvl Precious Stones Ordinance not be pegged off between sunset and sunrise or on Sundays. The size of each claim in an alluvial digging was in terms of s 50 of the 1903 Tvl Precious Stones Ordinance 150 square feet.

⁹³² Section 53 of the 1903 Tvl Precious Stones Ordinance. Claimholders could in terms of s 55 of the 1903 Tvl Precious Stones Ordinance also abandon their claims in terms of ss 39 and 40 of the 1903 Tvl Precious Stones Ordinance. Section 48 of the 1903 Tvl Precious Stones Ordinance provided that in pegging off claims, the regulations made under *Law* 15 of 1898 or any amendments thereof, continued to apply.

⁹³³ In the case of alluvial diggings proclaimed on Crown land and on private land, s 51 of the 1903 Tvl Precious Stones Ordinance provided that the amount was determined by the Lieutenant-Governor and if no amount was fixed by him, the licence money was one pound per month which was payable in advance for each claim or portion of a claim. Licence monies were fixed for alluvial diggings at Christiana by Government Notice 527 in the *Gazette* of 1 June 1906 and Government Notice 1067 in *Gazette* of 19 October 1906. Licence monies for alluvial claims in river beds were determined in Government Notice 294 in *Gazette* of 8 March 1907. Licence monies for alluvial claims on the farms Goedehoop No 78, Cawood's Hop 79, Catherina 20, Honesty 40, Geluk 24 and for Bloemhof, were determined by Government Notice 990 in *Gazette* of 27 August 1909.

⁹³⁴ Section 52 of the 1903 Tvl Precious Stones Ordinance. *Rex v Thom* 1927 TPD 621 at 629.

⁹³⁵ Section 75(1) of the 1903 Tvl Precious Stones Ordinance.

place where such discovery was made and the provisions of the 1903 Tvl Precious Stones Ordinance relating to the working of a mine applied in respect thereof. This was applicable only if a reasonable time was allowed to any claimholder in the former alluvial digging to work out his claim to a depth of ten feet from the surface. If a diamond pipe was discovered on private land, the discoverer was entitled to an undivided 25% per cent of the 40% share to which the owner was entitled to, under the 1903 Tvl Precious Stones Ordinance.⁹³⁶ The discoverer was thus entitled to a 10% share in respect of the profits of the mine.

The Lieutenant-Governor was entitled to make rules and regulations for the election of a Diggers' Committee at any alluvial digging and to define the duties, powers, functions and authorities of such Diggers' Committee.⁹³⁷ He could further direct that a Diggers' Committee be elected for an alluvial digging.⁹³⁸ The Lieutenant-Governor could also direct that any Diggers' Committee be abolished or dissolved.⁹³⁹

7.7.9 1919 Alluvial Amendment Act

On 15 May 1919, the Government of the Union of South Africa enacted the 1919 Alluvial Amendment Act to amend the 1903 Tvl Precious Stones Ordinance. With the exception of certain specific provisions, the 1919 Alluvial Amendment Act applied only with regard to the Province of Transvaal.⁹⁴⁰ Certain specific provisions of the 1919 Alluvial Amendment Act, however, also applied to alluvial diggings, farms and lots in the province of the Cape of Good Hope (except in respect of private property where

⁹³⁶ Section 75(2) of the 1903 Tvl Precious Stones Ordinance.

⁹³⁷ Section 56 of the 1903 Tvl Precious Stones Ordinance. The rules and regulations for the Diggers' Committee at the Christiana alluvial diggings were published in Government Notice 1203 in the *Gazette* of 18 November 1904 and in Government Notice 694 in the *Gazette* of 13 July 1906.

⁹³⁸ Section 57 of the 1903 Tvl Precious Stones Ordinance.

⁹³⁹ Section 58 of the 1903 Tvl Precious Stones Ordinance.

⁹⁴⁰ Section 24(1) of the 1919 Alluvial Amendment Act.

the title deeds did not contain a reservation to the Crown of the precious stones and minerals),⁹⁴¹ and the Province of the Orange Free State.⁹⁴²

In the Province of Transvaal any so-called white male person of at least 18 years, could after the expiry of three months from the commencement of the 1919 Alluvial Amendment Act obtain a claim licence from the Mining Commissioner on payment of the prescribed licence money. The holder of a claim licence was entitled to peg on any portion of an alluvial digging for which the licence was held, the number of claims authorised by the licence.⁹⁴³ No person could peg a claim in any place which had been

⁹⁴¹ Hereafter in this chapter referred to as unreserved private land.

⁹⁴² Section 24(2) of the 1919 Alluvial Amendment Act. The provisions of the 1919 Alluvial Amendment Act which also applied in respect of alluvial diggings, farms and lots in the Province of the Cape of Good Hope (excluding unreserved private land) and the Province of the Orange Free State, were s 10 - dealing with offences and penalties for excess pegging, s 11 - dealing with the requirements of obtaining a digger's certificate, s 12 - dealing with the cancellation of a digger's certificate, s 13 - providing for a list of persons whose applications for digger's certificates had been refused or certificates which had been cancelled to be transmitted by the Diggers' Committee to the Mining Commissioner, s 14 - restricting the issue of diggers' certificates to persons who had previously been refused a digger's certificate or whose digger's certificate had been cancelled, s 17 - providing for licence money to be payable on discoverers' claims when they were not worked, s 18 - providing for a declaration of abandonment when a discoverer's claims had been exhausted, s 19 - prohibiting the working in partnership with a so-called native labourer, s 20 - prohibiting persons who had been convicted in any colony or territory in the Union of South Africa of certain offences from residing, working or visiting any alluvial digging for a period of 15 years after such conviction, s 21 - providing for the transfer and subdivision of land to affect the power of the Governor-General to proclaim alluvial diggings and s 22 - empowering the Mining Commissioner to order washing operations to be carried out by prospectors. A miner's certificate issued under s 32 of the 1907 Cape Precious Stones Amendment Act was regarded as a digger's certificate on payment of a registration fee. The provisions of ss 92, 93 and 94 of the 1899 Cape Precious Stones Act and s 32 of the *Precious Stones Amendment Act* 27 of 1907 was in terms of s 25 of the 1919 Alluvial Amendment Act repealed.

⁹⁴³ Section 6(1) of the 1919 Alluvial Amendment Act. A maximum of six claims could be authorised. During the first seven days, from the date of proclamation of an alluvial digging, each person could only peg one claim. The size of a claim was in terms of s 7(1) of the 1919 Alluvial Amendment Act not more than 45 feet (English) and licence money was payable at the rate of five shillings per month per claim or portion thereof. Licence monies was in terms of s 7(2) of the 1919 Alluvial Amendment Act payable in advance and all claim licences had to be registered by the Mining Commissioner. Claim licences expired on the last day of the month in which it was issued. Section 9(1) of the 1919 Alluvial Amendment Act provided that where practicable, all claims had to be pegged in rectangular shape and if required by the Mining Commissioner, trenched. Every claimholder was in terms of s 9(2) of the 1919 Alluvial Amendment Act required to maintain his pegs and trenching in good order and all data required by regulation to be written on the pegs had to be maintained in legible condition. If the claimholder in the opinion of the Mining Commissioner failed to comply with the provisions of s 9 of the 1919 Alluvial Amendment Act, the Mining

reserved under the 1903 Tvl Precious Stones Ordinance from pegging, or in any place where pegging, prospecting or digging was forbidden or which was not open to pegging.⁹⁴⁴

A white male person who wanted to have a claim licence renewed or to obtain a new claim licence in respect of any proclaimed alluvial digging or to be employed by any holder of a claim licence, had to obtain a digger's certificate from the Mining Commissioner.⁹⁴⁵ An applicant for a digger's certificate could apply to the relevant Diggers' Committee for a digger's certificate. The applicant had to satisfy the Diggers' Committee that he was of good character and a fit and proper person to hold a claim licence.⁹⁴⁶ A digger's certificate had to be registered at the office of the Mining Commissioner and had to be renewed annually upon payment of the prescribed registration fee.⁹⁴⁷ Any holder of discoverer's or owner's claims was *ipso facto* entitled to a digger's certificate.⁹⁴⁸ The holder of a registered claim licence, discoverer's certificate or owner's certificate was deemed to be a registered claimholder.⁹⁴⁹ The holder of any claim could apply to the Claim Inspector or to the Mining Commissioner

Commissioner could in terms of s 9(3) of the 1919 Alluvial Amendment Act declare the relevant claim to have lapsed and available for pegging by other persons.

⁹⁴⁴ Section 6(3) of the 1919 Alluvial Amendment Act.

⁹⁴⁵ Section 11(1) of the 1919 Alluvial Amendment Act.

⁹⁴⁶ Section 11(1)(a) of the 1919 Alluvial Amendment Act. The decision of the Diggers' Committee had to be taken by the majority of the members present at a meeting called to consider the application. Section 11(1)(g) of the 1919 Alluvial Amendment Act provided that at least seven days' notice of an application for a digger's certificate had to be given to the senior officer of police nearest to the relevant alluvial digging and the name and description of the applicant had to be posted for at least seven days in a conspicuous place. Section 11(1)(b) of the 1919 Alluvial Amendment Act provided that if the Diggers' Committee failed to take a decision within one month or if there was no Diggers' Committee for the alluvial digging, the application had to be made to the Mining Commissioner. The Mining Commissioner had to make enquiries regarding the application and thereafter summon two claimholders or holders of diggers' certificates residing within the digging to assist him in deciding the application. The decision had to be taken by the majority of those three persons, who then constituted a Diggers' Committee and had to be given within ten days of the application to the Mining Commissioner. In the case of a newly-proclaimed digging, the Mining Commissioner was in terms of s 11(1)(c) of the 1919 Alluvial Amendment Act required to exercise all the powers of the Diggers' Committee until the alluvial digging had been placed under the jurisdiction of a Diggers' Committee.

⁹⁴⁷ Section 11(2) of the 1919 Alluvial Amendment Act. If a digger's certificate had not been renewed within thirty days of the due date, the digger's certificate lapsed.

⁹⁴⁸ Section 11(6) of the 1919 Alluvial Amendment Act.

⁹⁴⁹ Section 8 of the 1919 Alluvial Amendment Act.

to transfer his claim to another holder of a digger's certificate.⁹⁵⁰ The holder of a digger's certificate could by transfer acquire not more than 12 claims from another holder.⁹⁵¹

In the event that any discoverer's claims were not being worked to the satisfaction of the Mining Commissioner, licence monies became payable thereon as in the case of ordinary claims. The Mining Commissioner first had to give written notice to that effect to the holder or his agent.⁹⁵² If the holder of the discoverer's claims failed to pay the licence money for a period of three months after notice had been given, the claims lapsed and if they were on proclaimed land, they were declared open to pegging by the mining commissioner or by notice posted at his office.⁹⁵³ The Mining Commissioner could by notice in the *Gazette* declare claims, where the diamonds in any such discoverer's claims became exhausted to have been abandoned and the rights of the discoverer in respect of such claims ceased.⁹⁵⁴

For a period of two years after a discovery of diamonds had been made on any farm or lot, the Governor-General could proclaim an alluvial digging on the whole or any portion of the farm, irrespective of whether the farm had been transferred or subdivided.⁹⁵⁵

The Mining Commissioner could at any time order any prospector or any owner prospecting on any land, to carry out washing operations thereon to his satisfaction,

⁹⁵⁰ Section 15 of the 1919 Alluvial Amendment Act. The transfer had to be registered and a fee of five shillings per claim or portion thereof had to be paid.

⁹⁵¹ Section 16 of the 1919 Alluvial Amendment Act.

⁹⁵² Section 17 of the 1919 Alluvial Amendment Act. In the case of discoverer's claims granted before the commencement of the 1919 Alluvial Amendment Act the licence money was calculated at the rate of five shillings for every 2025 feet in the block.

⁹⁵³ Section 17 of the 1919 Alluvial Amendment Act.

⁹⁵⁴ Section 18 of the 1919 Alluvial Amendment Act.

⁹⁵⁵ Section 21 of the 1919 Alluvial Amendment Act.

to ascertain whether the gravel or deposit which he had worked out, contained diamonds in sufficient quantities to justify proclamation of the ground.⁹⁵⁶

7.8 Summary and conclusion

In this chapter, the historical development of the right to mine diamonds in the former ZAR (later known as the Transvaal Colony and after unification as the Province of Transvaal) before the commencement of the 1927 Precious Stones Act was discussed. During this period the mining of diamonds in the ZAR was in essence regulated under three sets of legislation. The first was the suite of Gold Laws which developed mainly as a result of the discovery of gold in the ZAR. The second was *Law 22* of 1898 which was the first legislation that specifically and separately regulated the mining of precious stones in the ZAR. Thirdly, there was the 1903 Tvl Precious Stones Ordinance, which was enacted in the Transvaal Colony when second Anglo-Boer War ended.

A common feature in all three the abovementioned sets of legislation was that the right to mine diamonds in the ZAR (and later the Transvaal Colony) was reserved to the State or the Crown. In the first Gold Law that was enacted, *Law 1* of 1871, the right to mine precious stones in the ZAR was reserved to the State. Then again this reservation was subject to rights that had already been obtained by private persons. This reservation of the right to mine precious stones in favour of the State was repeated in the Gold Laws that followed. In 1883, with the commencement of *Law 1* of 1883, not only the right to mine precious stones, but also the property in the precious stones were reserved in favour of the State. Two years later, with the commencement of *Law 8* of 1885, the position was reverted to as under the first Gold Law.

This reservation was also repeated in section 1 of *Law 22* of 1898 which reserved the right to mine and to dispose of all precious stones, and to deal in precious stones in

⁹⁵⁶ Section 22 of the 1919 Alluvial Amendment Act. The 1919 Alluvial Amendment Act was repealed by the 1927 Precious Stones Act. See chapter 9 below.

the State. *Law* 22 of 1898 distinguished between private land and land owned by the State. The landowner of private land was in terms of *Law* 22 of 1898 entitled to prospect for diamonds on his own land without having to obtain a prospecting licence. The landowner of private land could also grant written permission to another person to prospect for diamonds on his land. Any person who wanted to prospect for diamonds on State owned land had to obtain a prospecting licence and pay a prescribed fee.⁹⁵⁷

The 1903 Tvl Precious Stones Ordinance distinguished between Crown land (which included alienated Crown land) and private land. Although the statutory reservation of the right to mine diamonds in what was then the Transvaal Colony, remained vested in the State the Roman Dutch law continued to apply in the Transvaal Colony. Subsequently the landowner of private land would in terms of the *cuius est solum* principle also have been the owner of the diamonds *in situ*. Under the 1903 Tvl Precious Stones Ordinance, only white male inhabitants of the Transvaal Colony, older than 18 years could obtain a prospecting licence to prospect on Crown land. There was no requirement that the holder of a prospecting licence had to obtain the consent of the owner of alienated Crown land to prospect on his land. The owner of private land could prospect on his own land without having to obtain a prospecting licence and he could also grant written consent to another person to prospect on his land.⁹⁵⁸

In both *Law* 22 of 1898 and the 1903 Tvl Precious Stones Ordinance, there was an obligation on the discoverer of diamonds to report the discovery to the relevant authority.⁹⁵⁹ The discoverer of diamonds was in terms of *Law* 22 of 1898 entitled to be awarded 30 discoverers' claims if he discovered diamonds whilst prospecting under a prospecting licence or if he was also the owner of the relevant private land and had given the required notice of the discovery. In all other circumstances, the discoverer

⁹⁵⁷ See para 7.5.2 above.

⁹⁵⁸ See paras 7.7.1-7.7.2 above.

⁹⁵⁹ See para 7.5.2 in respect of *Law* 22 of 1898 and para 7.7.4 in respect of the 1903 Tvl Precious Stones Ordinance.

was only entitled to ten discoverer's claims. The landowner was entitled to be awarded at least 90 claims if a public digging was proclaimed on his land.⁹⁶⁰

The 1903 Tvl Precious Stones Ordinance rewarded the discoverer of diamonds on Crown land with a certain percentage in the mine proclaimed on the land where the diamonds had been discovered. If the extent of the mine exceeded 270 000 square feet, the discoverer of diamonds on Crown land was entitled to an undivided ten per cent share of the proclaimed mine. The owner of private land on which a mine or a portion thereof had been proclaimed was entitled to an undivided 40 per cent share in such a mine. The rights accrued to the owner of the private land as holder of the rights to precious stones. The Crown was entitled to the remaining undivided 60 cent share in the mine proclaimed on private land. In the case of Crown land (which included alienated Crown land) the Crown was entitled to an undivided 90 per cent share in the mine and the discoverer was entitled to the remaining undivided ten per cent share in the mine.

The 1903 Tvl Precious Stones Ordinance further provided for the proclamation of an additional area that was not diamondiferous as a mining area. The mining area had to be used for depositing floors, machinery and tipping sites and for purposes connected with the proper and efficient working of the mine. A mining area could only be proclaimed on private land with the owner's consent, except if the mining area was proclaimed for the purpose of working a mine that had already been proclaimed on the private land.⁹⁶¹ The proclamation of a mine and a mining area had a drastic impact on the rights of a landowner. The surface rights of the owner of the land that was included in the proclamation of a mine and a mining area were immediately on the publication of the proclamation, suspended until such time as the proclamation was revoked or cancelled.⁹⁶²

⁹⁶⁰ See para 7.4.3 above.

⁹⁶¹ See para 7.7.5 above.

⁹⁶² See para 7.7.5 above.

The proclamation and working of alluvial diggings were separately regulated in the 1903 Tvl Precious Stones Ordinance. In the case of the discovery of alluvial diggings on private land, the discoverer was entitled to select 50 claims and the owner of the private land was thereafter entitled to select 100 claims or a number of claims equal to three-tenths of the extent of the land proclaimed, whichever of the two was the greater.⁹⁶³ The provisions of the 1903 Tvl Precious Stones Ordinance relating to alluvial digging were later amended in terms of the 1919 Alluvial Amendment Act. There was from the very first Gold Law which the Government of the ZAR adopted, a statutory reservation of the right to mine precious stones in favour of the State, that continued in *Law* 22 of 1898 and in the Transvaal Colony in terms of the 1903 Tvl Precious Stones Ordinance. The 1903 Tvl Precious Stones Ordinance was similar to the 1899 Cape Precious Stones Act (as amended in terms of the 1907 Cape Precious Stones Amendment Act) and the 1904 OFS Precious Stones Ordinance in that provision was made for the State to share in the profits derived from the working of the diamond mines. In the Province of the Cape of Good Hope, the State did, with certain exceptions, not share in the profits derived from the working of mines on unreserved private land. It, however, appears from the 1903 Tvl Precious Stones Ordinance, that despite the reservation of the right to mine precious stones, the person who was entitled to elect to work the mine or to prospect for diamonds, depended on the form of land tenure.

In the next chapter, the development of the right to mine diamonds in the former Natal is discussed.

⁹⁶³ See para 7.7.8.2 above.

Chapter 8 Natal before 1927

8.1 Introduction

The development of the right to mine diamonds in Natal before the enactment of the 1927 Precious Stones Act is discussed in this chapter. Natal is not known for the discovery of diamonds and as far as could be determined no diamond mines had been discovered in Natal. The early diamond mining legislation in Natal before the commencement of the 1927 Precious Stones Act developed mostly as a result of the discovery of coal and gold.⁹⁶⁴

The *Voortrekkers* proclaimed the Republic of *Natalia* in 1839. After that, from 1844 until 1856 the British Government annexed Natal as part of the Cape Colony. In 1856 Natal became a separate Colony. In 1893 a responsible government was appointed in Natal. In 1910 the Union of South Africa was established, and with it the Colony became a province known as the Province of Natal.⁹⁶⁵

⁹⁶⁴ According to Davenport the first traces of coal of a superior quality were discovered by a party of *Voortrekkers* led by Andries Pretorius in 1838 while they *outspanned* at one of the streams near the area which is today known as the town of Dundee. They used these small bits of coal for their campfires. These *Voortrekkers* did not know that they had discovered the south-eastern section of South Africa's richest coalfields. The discovery of coal in Natal at least indirectly impacted on the diamond mining industry in South Africa, in that with the conversion of the method of diamond mining to mechanised mining, coal became an important source of fuel. Davenport *Digging Deep* 186-189. Bulpin *Natal and the Zulu Country* 348 records that from 1888 traces of gold were found by individual miners on the farm Nyangalezi in Natal and with the gold a few small diamonds were also found. It was recorded in the *Natal almanac and yearly register* of 1897 that specimens of gold, silver, copper, iron, mica and asbestos, nitrate, gypsum, lime and marble had been found in Natal but there was no reference to the discovery of diamonds. See *Natal almanac and yearly register* 684-689; Henderson "Colonial Coalopolis" 14.

⁹⁶⁵ Bird *Annals of Natal* 323-324; Tatlow *Natal Province* 6-7; Eybers *Constitutional Documents* xlv-xlvii; Brookes and Webb *History of Natal* 42-43; Changuion and Steenkamp *Omstrede land* 51; Visagie "Uittog en vestiging van die Voortrekkers in die binneland" 139-145; Bosman "Die Groot Trek tot 1838" 218-233; Du Plessis *Inleiding tot die Reg* 49; Roberts "Natal 1830-1909" 79; Welsh *A History of South Africa* 169-175; Davenport *South Africa A Modern History* 4th ed 70-72; Davenport *South Africa A Modern History* 3rd ed 78-80; Davenport *South Africa A Modern History* 2nd ed 57-60; Davenport and Saunders *South Africa A Modern History* 80-81; Giliomee *Die Afrikaners 'n Biografie* 124, 127; Van Zyl "Natal" 213-232; Walker *A History of South Africa* 215-219, 277-278; Lacour-Gayet *A History of South Africa* 99-118; Van Jaarsveld *From Van Riebeeck to Vorster* 127-129; Steyn *Afrikaner-Joernaal* 118-119; Kiewiet *A History of South Africa* 62-63, 71-72.

This chapter commences with a discussion of the early land tenure conditions associated with Natal. This is necessary as the form of land tenure in Natal also impacted on the development of diamond mining legislation. The Roman Dutch law as it applied in the Cape Colony was in 1845 established in Natal and this included the *cuius est solum* principle.⁹⁶⁶ The main purpose of the first mining legislation, which was enacted in Natal, was to encourage the search for minerals, including diamonds. A brief discussion regarding this early mining legislation follows as the second section.⁹⁶⁷

During the period between 1887 and 1889 mining legislation was enacted mainly to consolidate the mining laws in what was then known as the Colony of Natal. Thirdly, the consolidating mining legislation is considered and includes the legislation that was enacted in the former Zululand. The former Zululand was with effect from 29 December 1897 annexed as part of the Colony of Natal.⁹⁶⁸ This chapter concludes with a review of the *Natal Mines Act* 43 of 1899 (hereafter the 1899 Natal Mines Act), which repealed and consolidated the different mining laws in the Natal Colony and the Province of Zululand and continued in force in Natal until it was repealed by the 1927 Precious Stones Act.⁹⁶⁹

⁹⁶⁶ See para 8.2 below. Du Plessis *Inleiding tot die Reg* 49; Van Zyl *Beginsels van Regsvergelyking* 289.

⁹⁶⁷ *Law* 23 of 1882 and *Law* 26 of 1885. See para 8.3 below.

⁹⁶⁸ Zululand was initially in May 1887 annexed by the British Government as a British territory. It was in 1897 in terms of *Act* 37 of 1897 which was titled: "To provide for the annexation to the Colony of Natal of the territory of Zululand" annexed as part of the Cape Colony. Section 4 of *Act* 37 of 1897 provided that the laws which were in force in the territory of Zululand before the commencement of *Act* 37 of 1897 continued to apply in what became known as the "Province of Zululand." Eybers *Constitutional Documents* 216; *Attorney-General, Natal v Mngandi* 1989 2 SA 13 (A) 16A-C (hereafter the *Attorney-General Natal* case). Brookes and Webb *History of Natal* 154; Gibson *Story of the Zulus* 286; Eybers *Constitutional Documents* 215-216; Du Plessis *Inleiding tot die Reg* 49; Roberts "Natal 1830-1909" 79. See para 8.4 below.

⁹⁶⁹ See para 8.5 below.

8.2 Early land tenure conditions in Natal

The *Voortrekkers* did not draft a specific written constitution when they proclaimed the Republic of *Natalia* in 1839.⁹⁷⁰ The law which the *Voortrekkers* adopted was in the form of "Instructions for the Council of Representatives of the People" (hereafter referred to as the *Council Instructions*).⁹⁷¹ The *Volksraad* resolved to enact legislation which provided for freehold as the only form of land tenure in Natal. On 14 April 1841, the *Volksraad* enacted the *Burghership Law and the Possession of Fixed Property* 108 of 1841 (hereafter the 1841 Natal Fixed Property Law). The 1841 Natal Fixed Property Law provided that so-called "Dutch South Africans" residing in the Republic of *Natalia* after 31 December 1841, who were born in the Colony of the Cape of Good Hope and who desired to become *burghers*⁹⁷² of the Republic of *Natalia* had to apply to the *Volksraad* to become citizens. A citizen was entitled to become a proprietor of fixed property and to receive a certificate of title.⁹⁷³ In return every citizen had to pay an annual amount of 12 rixdollars.⁹⁷⁴ No person other than a citizen of the Republic of

⁹⁷⁰ After the Battle of Blood River in 1838, the *Voortrekkers* formed their own settlement in what became known as the Republic of *Natalia*. The Government of the Cape Colony feared that any disturbance in Natal could impact negatively on its eastern border and it sent a small military force in December 1838 to occupy the Port of Natal. The Government of the Cape Colony withdrew its force at the end of 1838 and the *Voortrekkers* proclaimed the Republic of *Natalia*. Eybers questioned whether the Republic of *Natalia* lawfully existed. When the *Voortrekkers* left the Cape Colony the Colonial Government realised that it would be impossible to prevent the *Voortrekkers* (which it referred to as "emigrants") from leaving the Cape Colony. The Colonial Government adopted two policies, it firstly laid down the theory that the emigrants continued to be British subjects and liable to be dealt with according to British laws irrespective of where they went and it secondly acknowledged the authority of a native chief over tracts of territory in which the emigrants had settled. Eybers states that the Republic of *Natalia* was never recognised by any power and that international law demands that newly created states be recognised by other civilised states. Eybers *Constitutional Documents* xlv-xlvi; Hahlo and Kahn *The Union of South Africa* 60-61; Bulpin *Natal and the Zulu Country* 170-171; Van der Walt "Die Groot Trek tot 1838" 215-217; Visagie "Uittog en vestiging van die Voortrekkers in die binneland" 142-143; Bird *Annals of Natal* 323-324; Tatlow *Natal Province* 6-7.

⁹⁷¹ The legislative, executive and judicial powers of the Republic of *Natalia* vested in an elected *Volksraad* comprising of 24 members. Brookes and Webb *History of Natal* 35-36; Bulpin *Natal and the Zulu Country* 189; Roberts "Natal 1830-1909" 79; Davenport and Saunders *South Africa A Modern History* 80; Thompson "Co-operation and Conflict: The Zulu Kingdom and Natal" 364-365.

⁹⁷² Which translates to "citizens".

⁹⁷³ Section 2 of the 1841 Natal Fixed Property Law.

⁹⁷⁴ Section 6 of the 1841 Natal fixed Property Law. The sum of 12 rixdollars was not payable in respect of small lots. It was only payable by owners of land that was at least 1000 morgen and not more than 3000 morgen in extent. The *Volksraad* could draft and issue title deeds, and servitudes had

Natalia was in terms of section 4 of the 1841 Natal Fixed Property Law entitled to possess any land, a house or fixed property in the Republic of *Natalia*. Section 11 of the 1841 Natal Fixed Property Law reserved gold and silver mines for the benefit of the public and provided as follows:

Gold and silver mines and large forests shall be reserved for the benefit of the public, unless the Legislature shall grant the same to the owner of the property concerned by annual licence.

The British Government thereafter issued *Proclamation* 104 of 2 December 1841 in which it proclaimed that the *Voortrekkers* in Natal had no right to be recognised as an independent State and proclaimed its authority over the emigrants.⁹⁷⁵ Lieutenant-Colonel Cloete of the Cape Colony issued and ratified a number of articles relating to the future of Natal. These included that all private property in Natal would be respected and that the tenure of the farmers' lands would not be interfered with, but that it would be left to the final determination of the British Government.⁹⁷⁶

The Governor of the Cape Colony issued a further *Proclamation* on 12 May 1843 in which he stated that the British Government had decided to take the emigrant farmers in Natal "under the protection of the British Crown". Lieutenant-Colonel Henry Cloete was appointed as the Commissioner of the District of Port Natal.⁹⁷⁷ Commissioner Cloete recommended in his report to the Secretary of the Governor of the Cape Colony

to be specified in the title deeds. All land was in terms of ss 8 and 9 of the *1841 Natal Fixed Property Law* subject to a general servitude that roads that ran across any land were to remain open for traffic for driving sheep, goats and cattle and for outspans. Eybers *Constitutional Documents* 163; Bird *Annals of Natal* 324.

⁹⁷⁵ Holden *Colony of Natal* 104; Eybers *Constitutional Documents* 164-165.

⁹⁷⁶ The Colonial Government of the Cape Colony sent a military force to Natal and after a period of fighting and negotiations the "emigrant" community capitulated and many of them moved to the north. Bird *Annals of Natal* 167-168; Brookes and Webb *History of Natal* 48; Eybers *Constitutional Documents* xlvi; See also Tatlow *Natal Province* 8-9; Roberts "Natal 1830-1909" 79; Davenport and Saunders *South Africa A Modern History* 81-82, 113-114.

⁹⁷⁷ Sections 9 to 11 of the Proc of 12 May 1843 provided that all money payable in respect of land whether by sale, rent or *quitrent* vested in the British Crown and that farmers and others holding land within the District of Natal would, subject to the discretion of the British Crown, be protected in the "enjoyment" of their land. Farmers had to submit returns to the appointed Commissioner in which they indicated the extent of the land that they claimed and they had to confirm that they had *bona fide* occupied the land for a period of 12 months. Bird *Annals of Natal* 167-168; Brookes and Webb *History of Natal* 48.

dated 30 November 1843 regarding the land conditions in Natal, that the land tenure that existed in the Cape Colony under the Cradock Proclamation⁹⁷⁸ also be adopted in respect of Natal. Cloete pointed out in his report that all the grants that had been made or title deeds issued by the *Volksraad* in Natal recorded that the lands were given "in full and free property" but that they were subject to the 1841 Natal Fixed Property Law. Cloete recommended that the British Crown had to enact the Cradock Proclamation in respect of Natal, as according to him the land tenure in Natal had practically the same effect. Cloete equated the obligation of *burghers* to pay the sum of 12 rixdollars under the 1841 Natal Fixed Property Law with the obligation to pay *quitrent* under the Cradock Proclamation in the Cape Colony.⁹⁷⁹

The Cape Colony annexed Natal by *Letters Patent* dated 31 May 1844 annexed as part of the Cape Colony and it became known as the "District of Natal".⁹⁸⁰ The Legislature of the Cape Colony was authorised to establish laws for the Colony of Natal. The annexation of Natal was, however, subject to the specific condition that no law or customs that applied in the Cape Colony would by virtue of the annexation thereof, also apply in the Colony of Natal.⁹⁸¹ There was no specific legislation which enacted

⁹⁷⁸ See para 2.3 above.

⁹⁷⁹ Cloete *inter alia* stated the following in his report: "It will, therefore, be now for Her Majesty's Government to consider the expediency of adopting the tenure thus introduced, or to modify it in such manner as may appear most consistent with the general interests of the country; on this point I shall, however, take leave to remark that the present tenures of land as now generally observed within the colony of the Cape of Good Hope appeared to be so well adapted to the interests of the inhabitants here, as well as to ensure a future revenue of the country, that I cannot but represent the expediency of establishing the like tenures here ... And this is virtually the tenure now here established; for the annual payment of every burgher, in consideration of his holding farms, is actually a quitrent payable in proportion to the extent of the land owned; and the only reason why the name of 'quitrent' was studiously avoided appears clearly to have been not to revive the recollection of one of the many grievances which the emigrants brought with them to this colony; as both the expenses of the surveyors and, in many instances, the partial or heavy imposition of this tax was felt as a most onerous and oppressive tax". Bird *Annals of Natal* 324-325, 393; *Odendaal v Registrar of Deeds, Natal* 1939 NPD 327 at 348-350 (hereafter the *Odendaal* case).

⁹⁸⁰ Eybers *Constitutional Documents* 182-183; Brookes and Webb *History of Natal* 54-55; Roberts "Natal 1830-1909" 79; Davenport and Saunders *South Africa A Modern History* 114-115.

⁹⁸¹ The condition was worded as follows: "... no law, custom or usage now in force within our said Settlement of the Cape of Good Hope, shall by force and virtue hereof extend to and become in force within the said District of Natal, and that no Court or Magistrate of or within Our said Settlement of the Cape of Good Hope shall by force or virtue hereto acquire, hold or exercise any jurisdiction within the said Colony of Natal, but that it shall be competent to and for the Legislature

the Cradock Proclamation in respect of the District of Natal.⁹⁸² It is submitted that the Crown's prerogative did not apply in the Cape Colony⁹⁸³ but even if it did, the Crown's prerogative did not apply in Natal merely by virtue of the annexation thereof as part of the Cape Colony.

The Legislature of the Cape of Good Hope enacted *Ordinance* 12 of 1845 dated 27 August 1845 (hereafter the 1845 Natal Ordinance) in respect of the District of Natal. The Roman Dutch law as it was applied in the Cape Colony was also established as the law for the District of Natal.⁹⁸⁴ A separate Legislative Council was established for the District of Natal in 1847 with authority to make all laws and ordinances.⁹⁸⁵ It appears that Cloete's view that the land tenure in Natal provided for *quitrent* tenure was shared by the Legislative Council of Natal. On 1 May 1854 the Legislative Council of Natal issued a *Government Notice* in which provision was made that persons could convert their *quitrent* titles into freehold, provided that they pay 15 years' *quitrent*.⁹⁸⁶

of our said Settlement of the Cape of Good Hope, to make, ordain and establish all such laws and ordinances as to them shall seem meet, for the peace, order and good government of the said District of Natal ... ". Eybers *Constitutional Documents* 182-183.

⁹⁸² This was confirmed in *Union Government (Minister of Mines) v Dundee Coal Co Limited* 1911 AD 473 at 490 (hereafter the *Dundee Coal* case).

⁹⁸³ See para 2.3.2 above.

⁹⁸⁴ *Ordinance* 12 of 1845 was entitled "Ordinance for establishing the Roman-Dutch Law in and for the District of Natal" and read as follows: "... Be it therefore enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof, that the system, code, or body of law commonly called the Roman-Dutch Law, as the same has been and is accepted, and administered by the legal tribunals of the Colony of the Cape of Good Hope, shall be, and the same is hereby, established as the law, for the time being of the District of Natal ... and of Her Majesty's Subjects, and all others residing and being within the said District ...". Eybers *Constitutional Documents* 227-228; *Odendaal* case 327; Thomas *Fundamina* 139; Roberts "Natal 1830-1909" 79.

⁹⁸⁵ *Letters Patent* of 2 March 1847. Eybers *Constitutional Documents* 186-187; The Legislative Council consisted of the Lieutenant-Governor, the Colonial Secretary, the Surveyor-General and the Crown Prosecutor. Tatlow *Natal Province* 10. See Holden *Colony of Natal* 159-163.

⁹⁸⁶ The *Government Notice* was confirmed by *Law* 17 of 1861. Any *quitrent* payable in respect of land situated in Natal was later abolished by the *Abolition of Quit Rent Act* 54 of 1934, s 4 of which provided that the abolishment of *quitrent* did not alter the nature of the land in respect of which *quitrent* was payable prior to 31 December 1834; See the *Odendaal* case. According to Denoon 1948 *SALJ* 367, the payment of *quitrent* had to be paid from the profits of farming operations and failure to pay *quitrent* was an indication that the farming operations were not being conducted properly and justified Government intervention. The Department of Finance abolished the requirement to pay *quitrent* because it found it to be unprofitable to collect the rents.

In the *Odendaal* case the Natal Provincial Division had to decide whether a *quitrent* title originally granted in Natal in 1852 had the effect that the mineral rights in respect of the land in question had been reserved to the British Crown.⁹⁸⁷ After considering the history of land tenure in Natal and the provisions of the 1841 Natal Fixed Property Law and *Ordinance* 12 of 1845, Feetham J came to the conclusion that *quitrent* grants issued in Natal were intended to confer rights of the nature of freehold. This included the mineral rights with regard to the land by virtue of the *cuius est solum* principle.⁹⁸⁸ There was thus no general reservation of the rights to minerals in favour of the British Crown in Natal. Moreover, the Cradock Proclamation did not apply in Natal in the absence of specific legislation which provided for the contrary. Such legislation was as far as could be ascertained, not enacted.

8.3 Early mining laws to encourage prospecting for minerals

The District of Natal became a separate Colony by virtue of the *Charter of Natal* which was issued pursuant to *Letters Patent* of 15 July 1856. It was also no longer under the administrative authority of the Governor of the Cape.⁹⁸⁹

⁹⁸⁷ At 344. The wording in the original deed of grant provided as follows: "I do hereby grant on Perpetual Quitrent unto Jan Daniel van Coller a piece of land ...".

⁹⁸⁸ Feetham JP summarised the effect of *quitrent* grants in Natal at 355 as follows:

- "1. Grants issued to holders of earlier grants made under the Volksraad Law of April, 1841, were issued in substitution for grants purporting to confer a freehold tenure, in which it was recited that the lands were given 'in full and free property.'
2. In the light of the undertakings given, and the conditions existing in 1842-45, it appears, that the intention was, in the case of grants so issued in substitution of earlier grants, to give at least as good a tenure as had been conferred by the earlier grants.
3. The circumstances of the country rendered it necessary to raise revenue; the circumstances of the farmers rendered it impossible to obtain payment of substantial lump sums on the issue of their new titles. An annual quitrent which was small enough to be within the means of the farmers, but substantial enough to provide the State with what was regarded as a considerable contribution towards its necessary expenditure on administration, rendered the quitrent form of grant desirable ... "

See also *Natal Cambrian Collieries v Durban Navigation Collieries Limited* 1925 46 NPD 27 at 32 (hereafter the *Natal Cambrian* case).

⁹⁸⁹ The *Charter of Natal* provided for the continued existence of a Legislative Council and the appointment of a Local Governor or Lieutenant-Governor assisted by an Executive Council. The Legislative Council comprised of 16 members of which 12 had to be elected and the remaining four members were nominated by the Crown. Eybers *Constitutional Documents* li-iii. Brookes and Webb *History of Natal* 75-76; Davenport 1957 *SALJ* 84.

In February 1853 the Government of Natal offered rewards for people who discovered coal in Natal. Private firms offered £1000 to anybody who discovered gold in Natal which resulted in increased prospecting activities in Natal.⁹⁹⁰ On 24 September 1867, the Government of the Colony of Natal offered a reward of £1000 to anybody who discovered payable gold and in addition offered to assist in the form of loans of wagons and tools.⁹⁹¹ On 3 August 1868 a prospector George Robert Parsons reported that he had discovered gold in the Mthwalume River. A few days later, one of his partners reported a discovery of gold in the Mahlongwa River. These discoveries led to the south coast gold rush and shortly thereafter *Law 16* of 1869 was enacted.⁹⁹² According to Dale,⁹⁹³ *Law 16* of 1869 was the first law dealing with gold in the Colony of Natal and was designed to encourage the searching for gold within the Colony of Natal.

More than a decade later, the Government of the Colony of Natal enacted *Law 23* of 1883⁹⁹⁴ to encourage the search for minerals and precious stones in respect of Crown land within the Colony of Natal. Section 1 of *Law 23* of 1883 provided that any person who discovered minerals or precious stones on Crown land⁹⁹⁵ in any part of the Colony of Natal and who could produce proof of the discovery to the Resident Magistrate, was

⁹⁹⁰ These encouragements were necessary as a number of people had left Natal for Australia in the 1850s where gold had been discovered. According to Bulpin *Natal and the Zulu Country* 339-340, traces of gold were found all over the Colony of Natal resulting in the search for coal being overtaken by the search for gold, but the prospecting for gold soon fell into abeyance for a period of over ten years. Davenport *Digging Deep* 187, states that limited commercial mining of Natal's coal resources commenced in 1865 when Peter Smith, a farmer of Scottish origin, started to work the outcrop of coal on his farm Domain situated approximately 70 kilometres north-east of the town Ladysmith. Smith worked the coal on his land for a period of 17 years in an economical fashion and he extracted approximately 7000 tons. The town Dundee was later established around this coal mine. Henderson "Colonial Coalopolis" 15; Brookes and Webb *History of Natal* 162.

⁹⁹¹ Bulpin *Natal and the Zulu Country* 340, states that the excitement over gold and coal increased with the discovery of the ancient African smelting places at Mfume and the Mlazi River, but when news broke about the discoveries of gold at the Tati River in the ZAR, another exodus of prospectors hit the Colony of Natal.

⁹⁹² Bulpin *Natal and the Zulu Country* 340-341.

⁹⁹³ Dale *Mineral Rights* 209.

⁹⁹⁴ *Law 23* of 1883 was titled: "To encourage the search for gold and precious stones within the Colony of Natal."

⁹⁹⁵ The term "Crown Lands" was defined in s 2 of *Law 23* of 1883 to mean: " ... all unalienated lands of the Colony and all Native Trust lands on which the right in minerals is reserved to the Crown."

entitled to the rewards provided in *Law 23 of 1883*.⁹⁹⁶ Any person, who could produce proof that he was the first person to discover the precious stones or minerals, was entitled to select from the Crown land within the mining centre, a prospecting claim of 200 square yards. He was also entitled to hold the claim for a period of 12 months without having to pay any money. The claimholder was during the 12 months' period entitled to dig for and to remove any minerals from his prospecting claim.⁹⁹⁷ If the discoverer failed to work on his claim for a period of 14 consecutive days, his rights in respect of the claim reverted to the Crown.⁹⁹⁸ A landowner was entitled to search for precious stones on his own land without a prospecting licence.⁹⁹⁹

*Law 26 of 1885*¹⁰⁰⁰ came into effect on 20 October 1885 to encourage the search for gold and other minerals in the Colony of Natal and to extend in certain respects the provisions of *Law 23 of 1883*. The Resident Magistrate of any Division in which there was reason to believe that gold or precious stones existed in land that had been

⁹⁹⁶ Section 8 of *Law 23 of 1883* read with Schedule B to *Law 23 of 1883*. Any person who wanted to prospect for precious stones on Crown land had to obtain a prescribed prospecting licence which could be issued for a period of three months and be renewed for a further period of three months. The prescribed prospecting licence annexed as Schedule B to *Law 23 of 1883* also stated that: "Licence is hereby granted in accordance with Law No. ... in order that he and his servants may search for Coal or Minerals on a portion of Crown Lands situated ... This Licence to continue in force for three months from ...". Section 3 of *Law 23 of 1883* provided that in the event that proof of the discovery of minerals is submitted to the Resident Magistrate, he had to indicate the boundaries of the area within a radius of two miles from the point of the discovery, which area was referred to as a "mining centre."

⁹⁹⁷ Section 4 of *Law 23 of 1883*. After the expiry of the period of 12 months, the discoverer of precious stones was granted a mining right, but the area of his claim was reduced to 500 feet along the supposed line of reef or lode and 200 feet on each side. The discoverer was further in terms of s 6 of *Law 23 of 1883* entitled to certain rewards. The discoveries of gold and coal were separately dealt with but in the case of other minerals (which would include diamonds) the discoverer was entitled to a reward which had to be determined by three assessors appointed by the Governor, but not exceeding 1000 pounds. The assessors had to take into account any expenses incurred by the discoverer in the searching for the diamonds and any advantage to the Colony as a result of the discovery.

⁹⁹⁸ Section 4 of *Law 23 of 1883*. It was in terms of s 5 of *Law 23 of 1883* not permissible for more than one prospecting claim to be granted for the same mineral in respect of a declared mining centre.

⁹⁹⁹ Dale *Mineral Rights* 209-210. *Law 23 of 1883* was in 1887 repealed by the *Natal Mines Law 17 of 1887*, discussed in para 8.4 below. See Van der Schyff *Property in Minerals and Petroleum* 111-112.

¹⁰⁰⁰ *Law 26 of 1885* was titled: "To encourage the search for gold and other minerals." See also Dale *Mineral Rights* 210.

alienated from the Crown and held in freehold, *quitrent* or any other form of land tenure, was empowered to grant a licence to any person authorising him to dig and search for gold or precious stones or for both with regard to the land.¹⁰⁰¹ The licence could only be granted with the authority of the Governor in Council and was further subject to the consent of the owner of the land.¹⁰⁰² The Colonial Government who held land in trust for the then Natal "Native Trust" was entitled to grant to any person or company licences to search and dig for minerals or leases to mine any mineral in respect of the trust land. Licences and leases could only be granted with the prior consent of the Governor in Council.¹⁰⁰³

8.4 Diamond mining legislation during the period 1887 until 1899

During the period 1887 until 1899 mining legislation was enacted in the Colony of Natal to consolidate the mining laws and in some instances to re-enact provisions of repealed legislation. The *Natal Mines Law* 17 of 1887 (hereafter the 1887 Natal Mines Law) commenced on 8 February 1887 and repealed *Law* 23 of 1883 and *Law* 26 of 1885.¹⁰⁰⁴ One year later, the *Natal Mines Law* 34 of 1888 (hereafter the 1888 Natal Mines Law) was enacted to repeal the 1887 Natal Mines Law and to consolidate the mining laws

¹⁰⁰¹ Section 1 of *Law* 26 of 1885. Feetham JP held in the *Odendaal* case that s 1 of *Law* 26 of 1885 put the owner of *quitrent* land on the same "footing" as the owner of freehold land.

¹⁰⁰² Section 1 of *Law* 26 of 1885. An "owner" was defined in s 1 of *Law* 26 of 1885 to include and mean the "Natal Native Trust or any trustee or trustees in whom the legal estate in any such land is then vested." Section 3 of *Law* 25 of 1885 provided that any surveyor or other person appointed by the Governor for that purpose, was entitled to enter any land on giving 24 hours' notice to the registered owner or person occupying the land, for the purpose of "prospecting and of probing for the discovery of coal" provided that compensation be paid to the owner or occupier of the land for any damages caused. Dale *Mineral Rights* 210.

¹⁰⁰³ Section 5 of *Law* 26 of 1885. The leases had to be granted for such period and subject to such terms and conditions and further subject to the payment of rent and royalty, which were usually contained in mining leases and had to be approved by the Governor in Council. *Law* 26 of 1885 was in 1887 repealed by the *Natal Mines Law* 17 of 1887, discussed in para 8.4 below.

¹⁰⁰⁴ See para 8.3 above. Section 2(c) of the 1887 Natal Mines Law provided that any right, title, interests or privilege acquired or any liability incurred under such laws or regulations made thereunder, were not affected.

in the Colony of Natal.¹⁰⁰⁵ A number of the provisions of the 1887 Natal Mines Law was re-enacted in the 1888 Natal Mines Law.

The British Government annexed Zululand on 14 May 1887 as a British territory. The Governor of Natal, who was assigned the power to make laws for the governance of Zululand, administered Zululand. On 21 June 1887, the Governor of Natal issued *Zululand Proclamation 2* of 1887 which provided that the laws in force in the Colony of Natal in terms of the 1845 Natal Ordinance¹⁰⁰⁶ would be the law of Zululand, except where otherwise provided. The Roman Dutch law as it was applied in the Cape Colony was therefore also established as the law for Zululand.¹⁰⁰⁷

Zululand was only in 1897 in terms of *Act 37* of 1897 annexed as part of the Colony of Natal. Section 4 of *Act 37* of 1897 provided that the laws in force in the territory of Zululand before the commencement of *Act 37* of 1897 on 29 December 1897 continued to apply in what became known as the "Province of Zululand." From a mining perspective, the laws that were enacted in respect of Zululand, were firstly the *Zululand Proclamation II* of 1889 (hereafter the 1889 Zululand Proclamation) in which a number of the provisions of the 1888 Natal Mines Law were duplicated.¹⁰⁰⁸ The *Zululand Proclamation VII* of 1894 (hereafter the 1894 Zululand Proclamation) repealed the 1889 Zululand Proclamation and continued to apply in the Province of Zululand after the annexation thereof as part of the Colony of Natal.¹⁰⁰⁹

¹⁰⁰⁵ Section 2(b) and (c) of the 1888 Natal Mines Law provided that the repeal of the legislation would not affect anything that was lawfully done under or any right, title, interest or privilege acquired under *Law 23* of 1883, *Law 26* of 1885 or the 1887 Natal Mines Law. Dale *Mineral Rights* 213-214.

¹⁰⁰⁶ See para 8.2 above.

¹⁰⁰⁷ Van Niekerk 2009 *Fundamina* 212.

¹⁰⁰⁸ The 1889 Zululand Proclamation was enacted on 28 May 1889 to make better provision for mining in Zululand. Section 1 of the 1889 Zululand Proclamation repealed the 1887 Natal Mines Law insofar as it related to Zululand. The reference to the 1887 Natal Mines Law appears to be an error as the 1887 Natal Mines Law was repealed by the 1888 Natal Mines Law. Van Niekerk 2009 *Fundamina* 212; Brookes and Webb *History of Natal* 154; Gibson *Story of the Zulus* 286; Changuion and Steenkamp *Omstrede land* 52. See also the *Attorney-General Natal* case at 16A-C.

¹⁰⁰⁹ The 1894 Zululand Proclamation was enacted on 17 April 1894 to make provision for mining in Zululand. The 1889 Zululand Proclamation was repealed and re-enacted with certain amendments. Section 1 of the 1894 Zululand Proclamation further expressly stated that the repeal of the 1889 Zululand Proclamation did not affect anything lawfully done in respect thereof.

These mining laws which were enacted in Natal and in Zululand between 1887 and 1899 are discussed thematically below as there are a number of common features in these laws. There were no reports of the discovery of diamond mines. The main purpose of these laws enacted in Natal and Zululand, was aimed at the prospecting and mining of coal or gold. It is submitted that these laws had no substantial and practical impact on the development of the right to mine diamonds in South Africa. These laws are only briefly glanced over, in particular to determine who would have been entitled to prospect and mine for diamonds as well as the influence that the form of land tenure had on the prospecting and mining for diamonds. This is in particular relevant with reference to the general finding of the Supreme Court of Appeal in the *Agri SCA* case that states:¹⁰¹⁰

Thus from the outset the position in Natal was that the government controlled the right to mine and dispose of all minerals. This continued when the 1887 Act was replaced in 1888 and again in 1899.

There appears to be no basis for the Supreme Court of Appeal's finding that from the outset, the Government of Natal controlled the right to mine and dispose of diamonds. As discussed above, in the early mining legislation and in particular *Law 23* of 1883, prospectors only required a prospecting licence if they wanted to prospect on Crown land.¹⁰¹¹ There was also no statutory reservation of the right to mine diamonds in favour of the Crown in any of the earlier legislation in Natal.¹⁰¹²

8.4.1 Statutory reservation of the right to mine precious stones

Section 4 of the 1887 Natal Mines Law contained the first statutory reservation in Natal of the right to mine and dispose of precious stones in favour of the Crown and provided as follows:¹⁰¹³

¹⁰¹⁰ Para 44.

¹⁰¹¹ See para 8.3 above.

¹⁰¹² See paras 8.2 and 8.3 above.

¹⁰¹³ The 1888 Natal Mines Law re-enacted ss 4 and 24 of the 1887 Natal Mines Law and the 1889 Zululand Proclamation contained similar provisions. Section 4 of the 1888 Natal Mines Law provided as follows: "The right of mining for and disposing of all gold, precious stones and precious metals,

The right of mining of and disposing of all gold, precious stones and precious metals, and all other minerals in the Colony of Natal, is hereby vested in the Crown for the purposes and subject to the provisions of this Law.

Section 24 of the 1887 Natal Mines Law contained the following reference to the Crown's Prerogative:¹⁰¹⁴

Nothing in this Law contained, except as expressly enacted, shall be deemed to abridge or control the prerogative rights and powers of Her Majesty in respect of gold mines and silver mines, and any other mines and minerals.

It is submitted that these statutory reservations of the right to mine precious stones in favour of the Crown were not absolute reservations of all rights to precious stones in the Colony of Natal in favour of the Crown. The reservation of the right to mine and dispose of precious stones was in each instance stated to be "subject to the provisions" of the 1887 Natal Mines Law, the 1888 Natal Mines Law, the 1889 Zululand Proclamation and the 1894 Zululand Proclamation. In other words, the right to mine and dispose of precious stones was reserved to the Crown, unless the specific legislation provided otherwise. As will be discussed in the next section, there were indeed provisions in the mining laws enacted in Natal and Zululand between 1887 and

and all other minerals in the Colony of Natal, is vested in the Crown for the purposes and subject to the provisions of this Law." Section 3 of the 1889 Zululand Proclamation provided as follows: "The right of mining for and disposing of all gold, precious stones and precious metals, and all other minerals in the territory of Zululand, is vested in the Crown for the purposes and subject to the provisions of this Proclamation."

¹⁰¹⁴ Section 25 of the 1888 Natal Mines Law provided that: "Nothing in this Law contained, except as expressly enacted, shall be deemed to abridge or control the prerogative rights and powers of Her Majesty in respect of gold mines and silver mines, and any other mines and minerals." Section 25 of the 1889 Zululand Proclamation provided that: "Nothing in this Proclamation contained, except as expressly enacted, shall be deemed to abridge or control the prerogative rights and powers of Her Majesty in respect of gold mines and silver mines, and any other mines and minerals." In s 3 of the 1894 Zululand Proclamation, the statutory reservation and rights of the Crown were combined and provided as follows: "The right of mining for, and disposing of, all gold, silver, precious stones, ores, metals, coal and all other minerals on land situate in Zululand is vested in the Crown, and nothing in this Proclamation regarding the prospecting, mining, or disposing of gold, silver, precious stones, metals, coals and other minerals, shall abridge or control the rights and powers of Her Majesty in respect of gold, silver, precious stones, ores, metals, coals and other minerals whatsoever, otherwise than in this Proclamation is expressly provided."

1899. These provisions clearly qualified and limited the Crown's right to mine and dispose of precious stones.¹⁰¹⁵

It is further submitted that section 24 of the 1887 Natal Mines Law¹⁰¹⁶ cannot be used to support the view that the right to mine diamonds was in all instances reserved to the Crown. The Crown's prerogative provided that the Crown was entitled to enter land held in freehold by her subjects to search for gold and silver.¹⁰¹⁷ The reference in section 24 of the 1887 Natal Mines Law to "any other mines and minerals" should be interpreted to refer to instances where the Crown's prerogative had been specifically extended to other mines and minerals. Furthermore, the Cradock Proclamation which contained a statutory reservation in favour of the relevant Government of the rights on mines of precious stones, gold and silver to the Government, did not apply in respect of the Colony of Natal and also not in Zululand.¹⁰¹⁸ Even if this submission is incorrect and the correct interpretation of section 24 of the 1887 Natal Mines Law is that the reference to "any other mines and minerals" should be interpreted to mean that in the Natal Colony and in Zululand, the Crown's Prerogative included precious stones, the application of the Crown's Prerogative was qualified. The Queen's prerogative rights and powers should not be interpreted to be abridged or controlled "except as expressly enacted" in the relevant legislation.¹⁰¹⁹

¹⁰¹⁵ A contrary view was held in the *Agri SCA* case para 44. See also Van der Schyff *Constitutionality* 41-42 and Badenhorst 1991 *TSAR* 122; Badenhorst "Development of Mineral and Petroleum Law" 1-23; Van der Schyff *Property in Minerals and Petroleum* 111-112.

¹⁰¹⁶ Section 25 of the 1888 Natal Mines Law, s 25 of the 1889 Zululand Proclamation and s 3 of the 1894 Zululand Proclamation.

¹⁰¹⁷ *Northumberland* case 315-316. The Crown's Prerogative is discussed in para 2.3.2 above. For a discussion of this case see Badenhorst 2012 *De Jure* 605-623; See also Badenhorst and Mostert *Mineral and Petroleum Law* 1-16-1-16C.

¹⁰¹⁸ See para 8.3 above.

¹⁰¹⁹ It appears that the Appellate Division adopted a different interpretation in *Natal Navigation Collieries and Estate Co Limited v Minister of Mines* 1955 2 SA 698 (A) 704. Van den Heever JA summarised the legislative policy of Natal prior to 1910 as follows: "The legislative policy of Natal prior to Union was to vest *dominium* in minerals in the Crown, but in the public interest, to encourage prospecting by granting facilities to prospectors and by rewarding discoverers either by granting them preferent claims or rewards in money. The prerogative rights of the Crown in England in regard to mines of gold and silver ... were declared by statute to extend to Natal (sec. 25 of Law 34 of 1888) and several measures were enacted expressly 'to encourage the search for minerals and precious stones within the Colony of Natal' (sec 2(c) of Law 34 of 1888) ... Another

The right to mine for diamonds in the Colony of Natal and in Zululand depended on the form of land tenure. The 1887 Natal Mines Law distinguished between two forms of land tenure, namely Crown land and private land. The term "Crown land" was defined in the 1887 Natal Mines Law to mean:¹⁰²⁰

all unalienated lands of the Colony not dedicated to any public purpose.

The term "private land" was not defined in the 1887 Natal Mines Law, but an "owner" was defined to mean:¹⁰²¹

The registered proprietor of any land held under freehold, quitrent, leasehold, or any other tenure, the Natal Native Trust, and any trustees in whom the legal estate in any land is vested.

These definitions were re-enacted in the 1888 Natal Mines Law¹⁰²² and in the 1889 Zululand Proclamation.¹⁰²³ Land that had been alienated by the Crown was therefore

feature of legislative policy was that in the earlier measures there was little or no interference with private rights (cf, Law 23 of 1883). According to later measures the private owner had merely preferent rights to prospect and, if he failed to exercise them at all or adequately, the State could step in and cause adequate steps to be taken for the discovery and exploitation of the mineral resources of the Colony. That these policies were continued in the later consolidation and amending laws relating to mining, including Act 43 of 1899, clearly emerges from these measures themselves."

¹⁰²⁰ Section 3 of the 1887 Natal Mines Law. Crown land which had been reserved for any public use or public purpose were in terms of s 18 of the 1887 Natal Mines Law exempted from the provisions of the 1887 Natal Mines Law. The Governor was entitled by proclamation, to authorise the prospecting over any such exempted land, or the mining and working for and removal of gold and other minerals from such reserved land and the occupation thereof, either for mining purposes or for machines, business or residence sites. The prospecting and digging in public squares, streets, roads, railways, cemeteries and on other lands dedicated to the use of the public were in terms of s 18 of the 1887 Natal Mines Law prohibited. Section 20 of the 1888 Natal Mines Law contained a similar provision. In the territory of Zululand, s 20 of the 1889 Zululand Proclamation provided that all Crown land which had been or was reserved for any public use or purpose was exempted from the operation of the 1889 Zululand Proclamation.

¹⁰²¹ Section 3 of the 1887 Natal Mines Law.

¹⁰²² The term "Crown lands" was defined in s 3 of the 1888 Natal Mines Law to mean: "All unalienated lands of the Colony not dedicated to any public purpose." An "owner" was defined to mean: "The registered proprietor of any land held under freehold, quitrent, leasehold, or any other tenure, the Natal Native Trust, the Land and Immigration Board, and any trustees in whom the legal estate in any land is vested."

¹⁰²³ The term "Crown lands" was defined in s 2 of the 1889 Zululand Proclamation to mean: "All unalienated lands of the Territory not dedicated to any public purpose." An "owner" was defined to mean: "The registered proprietor of any land held under freehold, quitrent, leasehold, or any other tenure, the Natal Native Trust, the Land and Immigration Board, and any trustees in whom the legal estate in any land is vested."

not included in the definition of Crown land and was for purposes of the 1887 Natal Mines Law, the 1888 Natal Mines Law and the Zululand Proclamation private land.

There was no clear distinction in the 1894 Zululand Proclamation between Crown land and private land. The 1894 Zululand Proclamation applied to all land situated within the territory of Zululand. It, however, excluded land which had been or were reserved for any public use or purpose and that were proclaimed as being exempted.¹⁰²⁴ "Lands" were defined in section 2 of the 1894 Zululand Proclamation to mean:

- (a) All Lands in the Territory (unalienated by the Crown), excepting lands which may from time to time be dedicated to, and set apart for, any public purpose, and lands which shall be declared by the Governor by notice in the Zululand *Government Gazette* exempted from the operations of this Proclamation, or which may be specially exempted by virtue of any of the provisions of this Proclamation.¹⁰²⁵
- (b) All lands set apart from time to time as Native Reserves, or held in trust for Native purposes.¹⁰²⁶
- (c) All land alienated by the Crown in Zululand, upon any tenure whatsoever.

8.4.2 Prospecting on Crown lands

Any person who wanted to prospect for gold, precious stones or precious metals or other minerals on Crown land had to obtain a prospecting licence from the Resident Magistrate of the relevant division.¹⁰²⁷ The Resident Magistrate could grant a licence

¹⁰²⁴ Section 4 of the 1894 Zululand Proclamation. Prospecting, digging or mining were prohibited in public squares, streets, roads, railways, cemeteries or on stands declared to be exempted by the Governor.

¹⁰²⁵ This part of the definition referred to land that was owned by the Crown and which had not been allocated for public purpose or declared to be exempt from the 1894 Zululand Proclamation.

¹⁰²⁶ According to Bennett, the establishment of reserves was a regular feature of the British colonisation of Africa and that initially in Natal reserves were deemed to be Crown land on which Africans only had permissive rights of occupancy. Lieutenant Governor Scott proposed a trust to manage the land on behalf of the occupants and to secure its extent and proper administration. In 1864 the Natal Native Trust was established in Natal and when Zululand was annexed, reserves were established there in terms of *Zululand Proclamation* 2 of 1887. The reserves later vested in a Zululand Native Trust which was established by deed of grant by the Governor of Natal on 6 April 1909. The trustees of the Zululand Native Trust were prohibited from alienating any of the lands without the consent of the Secretary of State for the Colonies or the authority of a special act or parliament. Bennett "African land" 76.

¹⁰²⁷ Section 5 of the 1887 Natal Mines Law provided that a licence fee of one pound was payable for every six months for which the prospecting licence was to be in force. Section 5 of the 1888 Natal Mines Law and s 4 of the 1889 Zululand Proclamation contained similar provisions with the addition that the prospecting licence could also be issued by the Commissioner of Mines. Section 72 of the

to any person to enter upon any unalienated Crown land, to search for any metal or mineral other than gold.¹⁰²⁸ The 1888 Natal Mines Law provided that the holder of a prospecting licence could beacon off a prospecting area for himself and the prospector was only entitled to occupy one prospecting area at a time.¹⁰²⁹

A person who discovered any gold or precious stones while prospecting on Crown land under a prospecting licence had forthwith to submit a solemn declaration of the finding with the Resident Magistrate.¹⁰³⁰ After the declaration had been lodged, the Governor was entitled to take such steps as he deemed necessary for the purpose of testing the character and the payability of the place where the gold or precious stones had been declared to be found.¹⁰³¹ The Governor could grant to any person a lease of any unalienated Crown land for mining purposes or for purposes in connection with such mining.¹⁰³²

1889 Zululand Proclamation provided that no so-called "native" was entitled to hold any licence or was entitled to work on a public field other than in the service of so-called "white men." Section 6 of the 1894 Zululand Proclamation provided that any person of European birth or descent who wanted to prospect and search for precious stones, gold, ores, metals, coal and all other minerals on land situated within the Zululand, had to obtain a prospecting licence from the Commissioner of Mines or the Resident Magistrate of the relevant district. The holder of a prospecting licence was, however, not entitled to sell or otherwise dispose of any diamonds or any other minerals discovered. Dale *Mineral Rights* 211.

¹⁰²⁸ Section 20 of the 1887 Natal Mines Law. The reference to "unalienated Crown land" was unnecessary because land that had been alienated by the Crown was in any event excluded from the definition of "Crown lands".

¹⁰²⁹ Section 6 of the 1888 Natal Mines Law. No prospecting area could be beacons off within a distance of 880 yards of a public field. The definition of "prospecting area" in s 3 of the 1888 Natal Mines Law required that the prospecting area had to be rectangular in shape and that no side exceeded 600 yards in length. A similar provision was contained in s 6 of the 1889 Zululand Proclamation. The term "prospecting area" was defined in s 2 of the 1889 Zululand Proclamation to mean: "a rectangular four sided area, no side of which shall exceed six hundred yards in length." Section 10 of the 1894 Zululand Proclamation contained similar provisions.

¹⁰³⁰ Section 6 of the 1887 Natal Mines Law. This requirement was re-enacted in s 7 of the 1888 Natal Mines Law with the amendment that the discoverer was afforded a period of 30 days to report the discovery and he was obliged to attempt to turn the discovery to marketable account. Section 7 of the 1889 Zululand Proclamation provided that any person who turned or attempted to turn a discovery of precious stones into marketable account while prospecting under a prospecting licence, had to make a declaration of the finding of such precious stones within 30 days of the discovery.

¹⁰³¹ Section 9 of the 1887 Natal Mines Law; Dale *Mineral Rights* 211.

¹⁰³² Section 21 of the 1887 Natal Mines Law. Section 22 of the 1887 Natal Mines Law provided that all leases granted for the purpose of mining for gold or for any of the purposes connected with gold

8.4.3 Prospecting on private land

Any owner of land could in terms of the 1887 Natal Mines Law prospect for gold or other precious metals and minerals, which included diamonds, on his own land provided that he first obtained a prospecting licence. Third parties could in terms of the 1887 Natal Mines Law prospect for diamond on private land provided that they first obtained the written permission of the owner of the land and that they obtained a prospecting licence from the Resident Magistrate of the County or Division.¹⁰³³

The requirement that an owner had to obtain a prospecting licence to prospect on his own land was removed in the 1888 Natal Mines Law.¹⁰³⁴ The owner of private land

mining, were called "gold mining leases" and leases granted for any metal or mineral other than gold, or for any purpose connected therewith, were referred to as "mineral leases". In the case of a mineral lease, s 23 of the 1887 Natal Mines Law provided that the extent of the lease area could not exceed 320 acres and the duration of the lease could not exceed 30 years, subject to a right or renewal, at the option of the lessee. Dale *Mineral Rights* 211-212.

¹⁰³³ Sections 31 and 32 of the 1887 Natal Mines Law. Every person that obtained a prospecting licence in respect of private land, was in terms of s 32 of the 1887 Natal Mines Law obliged to enter into a bond for the sum of £200, with two sureties (in the sum of £100 each) in favour of the landowner for the due and proper repair of any surface damage done in respect of such land. Section 8 of the 1894 Zululand Proclamation contained similar provisions. The holder of a prospecting licence was further in terms of s 34 of the 1887 Natal Mines Law not entitled to enter the private land with draught cattle or horses or donkeys and had no rights of grazing or to wood, except dead wood for culinary purposes. This prohibition was continued in s 53 of the 1888 Natal Mines Law, with the exception that a prospector was not entitled to use dead wood for culinary purposes. Section 51 of the 1889 Zululand Proclamation provided that the holder of a prospecting licence was not entitled to enter private land with draught cattle nor horses or donkeys and was further not entitled to any rights of grazing or to wood. This was changed in the 1894 Zululand Proclamation. Section 7 of the 1894 Zululand Proclamation provided that every holder of a prospecting licence was entitled to the following ancillary rights, namely the right of grazing for six horses or mules or for 16 oxen and further to take wood and water for his domestic use. If the land was situated on Crown land, the holder of a prospecting licence was entitled to the ancillary rights free of charge. In the case of any other land, the holder of the prospecting licence had to pay to the owner, trustee, lessee or occupier of land, one shilling a day and he could further only exercise his ancillary rights at the places specified by the owner. There was no definition of "Crown land" in the 1894 Zululand Proclamation and it is submitted that it referred to land that falls within para (a) of the definition of "lands" as defined in s 2 of the 1894 Zululand Proclamation. See para 8.4.1 above.

¹⁰³⁴ Section 32 of the 1888 Natal Mines Law. Section 33 of the 1887 Natal Mines Law provided that a third party could not obtain a prospecting licence if the owner held a prospecting licence in respect of his own land. If the owner of any private land failed to obtain a prospecting licence and refused to grant written permission to any person, a prospective prospector could apply to the Resident Magistrate for a prospecting licence, provided that he notified the owner of his application. The Resident Magistrate had to determine whether the owner's grounds for refusing to grant permission were fair and reasonable and whether it would be in the public interest to uphold the owner's objections. The Resident Magistrate could in his discretion either withhold the prospecting licence

was in terms of the 1888 Natal Mines Law entitled to the undisturbed occupation of his land for as long as he continued to prospect on his land to the satisfaction of the Commissioner of Mines.¹⁰³⁵ No third party could obtain a prospecting licence with regard to private land, for as long as the owner of the private land prospected on his land.¹⁰³⁶ The 1888 Natal Mines Law made specific provision for the owner of private land to enter into a contract with another person to prospect on his land subject to the payment of such remuneration as the owner and prospector agreed upon.¹⁰³⁷ There was also no requirement in the 1889 Zululand Proclamation that an owner of private land had to obtain a prospecting licence. Section 30 of the 1889 Zululand Proclamation

or grant it. The decision of the Magistrate was in terms of s 33 of the 1887 Natal Mines Law subject to appeal or review. Section 33 of the 1887 Natal Mines Law only referred to gold, but it is submitted that it also referred to other minerals as stated in s 32 of the 1887 Natal Mines Law.

¹⁰³⁵ Section 33 of the 1888 Natal Mines Law. Section 31 of the 1889 Zululand Proclamation contained a similar provision in respect of the territory of Zululand.

¹⁰³⁶ Section 35 of the 1888 Natal Mines Law and s 37 of the 1889 Zululand Proclamation contained a similar provision. Section 39 of the 1888 Natal Mines Law provided that if the owner did not prospect on his land or grant permission to another person to prospect, a prospector could apply to the Commissioner of Mines for a prospecting licence, which included the right to dig or mine, provided that the applicant had notified the owner of the private land. Section 37 of the 1889 Zululand Proclamation contained a similar provision. Section 46 of the 1888 Natal Mines Law provided that the notice had to be given to the owner in writing and had to be served on him personally or at his residence or place of business within the Natal Colony. If the owner could not be found, the notice had to be published twice in the *Natal Government Gazette*. The notice had to specify a date, at least 30 days after the date of service or publication of the notice, on which the application would be made. Section 44 of the 1889 Zululand Proclamation contained similar provisions. The Commissioner of Mines was in terms of s 40 of the 1888 Natal Mines Law obliged to take any objections raised by the owner into account and had to decide whether the owner's objections were fair and reasonable and in the public interest. Section 38 of the 1889 Zululand Proclamation contained similar provisions. The Commissioner of Mines was in terms of s 41 of the 1888 Natal Mines Law required to determine whether the locality of the land, the geological features thereof or any other facts gave reasonable grounds to believe that gold or precious metals or minerals were to be found in the land of such owner. Section 39 of the 1889 Zululand Proclamation contained similar provisions. Section 42 of the 1888 Natal Mines Law provided that the Commissioner of Mines had a discretion to refuse to issue any prospecting licence in respect of the land or to declare the land to be open for prospecting and a similar provision was contained in s 40 of the 1889 Zululand Proclamation.

¹⁰³⁷ Section 36 of the 1888 Natal Mines Law. Section 34 of the 1889 Zululand Proclamation contained a similar provision. Section 50 of the 1888 Natal Mines Law provided that the owner had to keep an account with details of all gold or precious stones or mineral extracted from the land by himself, servants and other persons prospecting, digging and mining upon his land under agreement. The account had to be available for inspection by the Commissioner of Mines at all times. The Commissioner of Mines could in terms of s 51 of the 1888 Natal Mines Law call for the production of returns which had to be verified by affidavit, indicating the gross output of gold or precious stones or minerals from such land.

provided that any owner of private land was entitled to prospect for precious stones on his own land.¹⁰³⁸ This was continued in the 1894 Zululand Proclamation. Section 30 of the 1894 Zululand Proclamation provided that every owner of land was entitled to prospect on his own land without obtaining a prospecting licence, provided that he had given notice to the Commissioner of Mines.

The 1888 Natal Mines Law provided that if the owner did not prospect on his land or grant permission to another person to prospect, a prospector could apply to the Commissioner of Mines for a prospecting licence. This included the right to dig or mine, provided that the applicant had notified the owner of the private land.¹⁰³⁹

It is submitted that the entitlement of the landowner of private land to prospect for diamonds on his own land, was a limitation on the Crown's right to mine and dispose of precious stones as reserved in the 1887 Natal Mines Law,¹⁰⁴⁰ the 1888 Natal Mines Law¹⁰⁴¹ the 1889 Zululand Proclamation¹⁰⁴² and the 1894 Zululand Proclamation.¹⁰⁴³ It was only when the landowner unreasonably objected to the granting of a prospecting licence to a third party prospector and where the landowner himself failed to prospect, that the Resident Magistrate or Commissioner of Mines could decide to declare the land open for prospecting.¹⁰⁴⁴ The statutory reservation of the right to mine precious stones and to dispose thereof in favour of the Crown did not apply in respect of private

¹⁰³⁸ Sections 28 and 29 of the 1889 Zululand Proclamation contained specific provisions for the prospecting, digging and mining for coal on private land in the territory of Zululand.

¹⁰³⁹ Section 39 of the 1888 Natal Mines Law. Section 37 of the 1889 Zululand Proclamation contained a similar provision. Section 46 of the 1888 Natal Mines Law provided that the notice had to be given to the owner in writing and had to be served on him personally or at his residence or place of business within the Natal Colony. If the owner could not be found, the notice had to be published twice in the *Natal Government Gazette*. The notice had to specify a date, at least 30 days after the date of service or publication of the notice, on which the application would be made. Section 44 of the 1889 Zululand Proclamation contained similar provisions.

¹⁰⁴⁰ Section 4 of the 1887 Natal Mines Law. See para 8.4.1 above.

¹⁰⁴¹ Section 4 of the 1888 Natal Mines Law. See para 8.4.1 above.

¹⁰⁴² Section 3 of the 1889 Zululand Proclamation. See para 8.4.1 above.

¹⁰⁴³ Section 3 of the 1894 Zululand Proclamation.

¹⁰⁴⁴ Under the 1888 Natal Mines Law and the 1889 Zululand Proclamation the Commissioner of Mines had to take certain additional information into account, namely the locality of the land, the geological features thereof and whether there were any other facts that indicated that there were reasonable grounds to believe that gold or precious metals or minerals were to be found in the land.

land, unless the owner thereof either failed to prospect himself or failed to allow others to obtain a prospecting licence in respect of his land, where the owner's grounds of objection were unfair or unreasonable and not in the public interest.

8.4.4 Rights and obligations of a discoverer

The 1887 Natal Mines Law provided that the holder of a prospecting licence who could prove to the satisfaction of the Resident Magistrate that he had found any gold or precious stones under a prospecting licence, was entitled to receive a discoverer's certificate and to select four claims at the place where the gold or precious stones had been found.¹⁰⁴⁵ The claims selected by the discoverer had to be beacons off and had to be registered as prospector's claims.¹⁰⁴⁶ The holder of a discoverer's certificate was with reference to both Crown land and private land entitled to work, dig or mine for precious stones for as long as he remained the owner of the four prospector's claims, without having to obtain a prospector's or digger's licence.¹⁰⁴⁷

8.4.5 Proclamation of public fields or mining centres

If the Governor was satisfied that gold or precious stones existed in payable quantities, he was under the 1887 Natal Mines Law entitled to constitute and appoint any portion

¹⁰⁴⁵ Section 7 of the 1887 Natal Mines Law. Dale *Mineral Rights* 211. These rights of the discoverer were re-enacted in s 8 the 1888 Natal Mines Law and also applied in the territory of Zululand in terms of s 8 of the 1889 Zululand Proclamation and was re-enacted in s 17 of the 1894 Zululand Proclamation.

¹⁰⁴⁶ Section 8 of the 1888 Natal Mines Law.

¹⁰⁴⁷ Section 8 read with s 54 of the 1888 Natal Mines Law. Section 54 of the 1888 Natal Mines Law referred only to gold, but it is submitted that it should be interpreted to include precious stones. If the Commissioner of Mines was satisfied, after having inspected the prospecting area, that gold existed in payable quantities on any prospecting area he could in terms of s 9 of the 1888 Natal Mines Law call upon the holder of the relevant prospecting licence in respect of the prospecting area, to relinquish his prospecting licence and to take out a digger's licence. Similar provisions were contained in s 52 of the 1889 Zululand Proclamation and in s 17 of the 1894 Zululand Proclamation.

of the Colony of Natal to be a mining centre or a public gold field¹⁰⁴⁸ and to determine the boundaries thereof.¹⁰⁴⁹

Section 35 of the 1887 Natal Mines Law provided that the Governor in Council could proclaim the land of any person where gold had been discovered in payable quantity to be a public gold field or mining centre and that the consent of the owner was not necessary or a requisite.¹⁰⁵⁰ The effect of this section is unclear as it only referred to gold and not precious stones. The question that arises is whether a public gold field or mining centre for the digging or mining of precious stones could in terms of the 1887 Natal Mines Law be proclaimed on private land without the consent of the owner of private land. A possible argument in support of the view that the legislature intended that section 35 of the 1887 Natal Mines Law only applied to gold, is that the position of the owner of private land on which coal had been discovered was also separately regulated the 1887 Natal Mines Law. Section 30 of the 1887 Natal Mines Law provided that the owner of land on which coal had been discovered could dig or mine for and dispose of coal on his own land and that he could grant one or more mineral leases to other persons.¹⁰⁵¹ There was, however, no separate provision dealing with the digging or mining of precious stones in the 1887 Natal Mines Law, most probably because

¹⁰⁴⁸ A "public gold field" or "mining centre" was defined in s 3 of the 1887 Natal Mines Law to mean: "The proclaimed area thrown open by lawful authority for digging and mining."

¹⁰⁴⁹ This provision was re-enacted in s 13 of the 1888 Natal Mines Law, but reference was made to a public field or mining centre and similar provisions applied in Zululand in terms of s 13 of the 1889 Zululand Proclamation and were re-enacted in s 15 of the 1894 Zululand Proclamation. Dale *Mineral Rights* 212.

¹⁰⁵⁰ Section 12 of the 1887 Natal Mines Law provided that: "... Such mining centre or fields may, under the provisions of this Law, comprise privately owned lands as well as Crown Lands, as is hereinafter provided."

¹⁰⁵¹ It is submitted that the rights of the owner of private land in respect of coal as provided for in s 30 of the 1887 Natal Mines Law are another clear example of the limitation of the statutory reservation of the rights of the Crown in s 4 of the 1887 Natal Mines Law. See the *Dundee Coal* case at 477-478. The rights of an owner of private land in respect of coal were re-enacted in s 31 of the 1888 Natal Mines Law which stated that: "The owner of any land upon which coal has been or may be discovered may dig for, mine for, and dispose of such coal; and may grant one or more mineral leases to any person or persons for the purpose of mining for and disposal of coal found under such land." It is submitted that the finding by Bale CJ in *Minister of Agriculture v Elandslaagte Collieries Limited* 1905 26 NLR 475 at 480 that the Crown had the power to mine for and to dispose of coal is incorrect insofar as it related to private land.

there were no reports of the discovery of any diamonds in Natal. Section 12 of the 1887 Natal Mines Law which empowered the Governor to proclaim a mining centre or public gold field specifically referred to gold and precious stones. A further possible interpretation could be that a public gold field could only be proclaimed on private land, if the owner of the land did not hold a prospecting licence with regard to his land. Section 31 of the 1887 Natal Mines Law provided that an owner of land could not throw open his land to the public as a public gold field for such a period as he continued to hold a prospecting licence to prospect for gold or other precious metals and minerals and provided that he obtained a prospecting licence within six months of the commencement of the 1887 Natal Mines Law.¹⁰⁵² A contrary argument could be raised that the Legislature only intended that section 31 of the 1887 Natal Mines Law should apply to unproclaimed public gold fields, but the term "public gold field" was defined in the 1887 Natal Mines Law to only refer to a proclaimed area that was thrown open by a lawful authority for digging and mining.¹⁰⁵³

The 1888 Natal Mines Law provided that a mining centre or public field could be constituted on private land as well as Crown land.¹⁰⁵⁴ The owner of land and his servants were entitled to dig and mine for gold or other precious metals or minerals on his own land. The owner could also grant permission to another person to dig and mine on his land.¹⁰⁵⁵ If the owner of any land refused or neglected to prospect for gold or precious stones or to dig or mine therefor to the satisfaction of the Commissioner of Mines, the Governor could with the advice of the Executive Council, proclaim the land a public field or include the land in the proclamation of a public field, without the

¹⁰⁵² Section 31 of the 1887 Natal Mines Law provided that: "Any owner of land shall, on taking out a prospecting license, be at liberty to prospect for gold or other precious metals and minerals within the limits of his own property; and in all cases where such license has been taken out within the period of six months from the coming into effect of this Law to prevent the issue of prospecting licenses for his land for such period as he shall continue to hold such license, he shall not be allowed to throw open his land to the public as a public gold field."

¹⁰⁵³ Section 3 of the 1887 Natal Mines Law.

¹⁰⁵⁴ Section 13 of the 1888 Natal Mines Law.

¹⁰⁵⁵ Section 38 of the 1888 Natal Mines Law.

consent of the owner.¹⁰⁵⁶ In the case of private land where the owner of the private land or his servants or other persons prospected or dug and mined for precious stones on the private land, such land could not be proclaimed or included in a proclaimed public field, as long as the Commissioner of Mines was satisfied that the owner was prospecting or digging and mining for precious stones in a manner proportionate to the extent of the land and the quantity, quality and character of precious stones to be found thereon.¹⁰⁵⁷ It is submitted that this is a limitation of the Crown's right to mine precious stones and to dispose thereof as provided for in section 4 of the 1888 Natal Mines Law.¹⁰⁵⁸

8.4.6 Landowner's rights

Before a public field could be proclaimed on private land the owner of the private land was afforded certain rights. The 1887 Natal Mines Law provided that the owner of any land which had been proclaimed a public gold field was entitled to "owner's claims," calculated in accordance with the extent of the land. An owner was entitled to at least five, and not more than 15 owners' claims. The owner could only beacon off his owner's claims after the prospector had first beacons off his prospector's and digger's claims.¹⁰⁵⁹ The water rights of the owner of any land proclaimed as a public field were reserved so that he would retain sufficient water for his household, his stock and for any water-mill already erected and the irrigation of such gardens and land as were under cultivation at the time of the proclamation of such land as a public field.¹⁰⁶⁰

¹⁰⁵⁶ Section 48 of the 1888 Natal Mines Law.

¹⁰⁵⁷ Section 47 of the 1888 Natal Mines Law.

¹⁰⁵⁸ Similar provisions applied in Zululand in terms of ss 14, 36-49 of the 1889 Zululand Proclamation.

¹⁰⁵⁹ Section 39 of the 1887 Natal Mines Law. These provisions were re-enacted in s 56 of the 1888 Natal Mines Law which provided further that the owner had a period of one month within which he could mark off his owner's claims before the land was proclaimed a public field and thrown open to the public. In Zululand, s 54 of the 1889 Zululand Proclamation also afforded the owner of private land a period of one month to mark off his owner's claims before the land was proclaimed a public field and thrown open to the public.

¹⁰⁶⁰ Section 57 of the 1888 Natal Mines Law.

In Zululand, the owner of private land proclaimed as a public field, was after the prospector had beaconed off his prospector's and digger's claims, entitled to beacon off his "owner's claims" in accordance with the extent of the land. The owner was entitled to one claim for each 100 acres.¹⁰⁶¹ The holder of the prospector's claims had a preferential right first to select and beacon off his claims. Thereafter, the holder of the owner's claims could do the same. After the holder of the owner's claims had selected and beaconed off his claims, the holders of diggers' licences could beacon off their claims.¹⁰⁶²

Owners of land which had been proclaimed as public fields were further entitled to receive a portion of the licence fees paid by the diggers.¹⁰⁶³ The 1887 Natal Mines Law provided that at the end of each quarter, one-half of the amount received by the Resident Magistrate in respect of diggers' licences had to be paid over and accounted for to the owner of the land.¹⁰⁶⁴ This requirement was re-enacted in the 1888 Natal Mines Law¹⁰⁶⁵ and the same applied in Zululand.¹⁰⁶⁶

8.4.7 Diggers' licences

The 1887 Natal Mines Law provided that a person who wanted to dig for gold or precious stones on any public gold field had to obtain a digger's licence. The holder of

¹⁰⁶¹ An owner was in terms of s 54 of the 1889 Zululand Proclamation entitled to be awarded at least five claims and not more than fifteen. An owner was in terms of s 32 of the 1894 Zululand Proclamation entitled to select one claim for every 100 acres provided that the number of owner's claims had to be at least two and could not exceed 12.

¹⁰⁶² Section 54 of the 1889 Zululand Proclamation.

¹⁰⁶³ See para 8.4.8 below.

¹⁰⁶⁴ Section 39 of the 1887 Natal Mines Law.

¹⁰⁶⁵ Section 56 of the 1888 Natal Mines Law.

¹⁰⁶⁶ Section 54 of the 1889 Zululand Proclamation and s 29 of the 1894 Zululand Proclamation. Section 55 of the 1889 Zululand Proclamation provided that all land upon which any house or buildings had been erected and the land immediately adjacent thereto, including all water furrows, gardens, orchards or cultivated lands or plantations, were exempted from the operation of the 1889 Zululand Proclamation, unless the owner of such land waived his claim to exemption, in consideration for the payment of compensation. The water rights of the owner of any land proclaimed as a public field or mining centre, were reserved. The owner was entitled to retain sufficient water rights for his household, his stock and for any water-mill already erected and the irrigation of such gardens and land as were under cultivation at the time of proclamation of such land as a public field. Section 33 of the 1894 Zululand Proclamation contained similar provisions.

a digger's licence was entitled to beacon off a claim on any public gold field.¹⁰⁶⁷ A licensed digger was further entitled to take out two licences on each public gold field and to hold such licences in his own name. Licensed diggers could also purchase claims from other claimholders.¹⁰⁶⁸

Under the 1888 Natal Mines Law, the Commissioner of Mines could issue a digger's licence to any person authorising him to dig for gold or precious stones on any land on any public field not previously occupied under the 1888 Natal Mines Law. The holder of a digger's licence was entitled to beacon off a claim on the public field specified in the licence.¹⁰⁶⁹ Any person was entitled to hold two digger's licences in his own name on each public field and could also purchase or sell his claims.¹⁰⁷⁰ The Commissioner of Mines had to register the transfer of claims from one licence holder to another.¹⁰⁷¹

Any person who wanted to dig for gold or precious stones on any land within a proclaimed public field, had to apply to the Commissioner of Mines to obtain a digger's licence.¹⁰⁷² The holder of a digger's licence in respect of a public field was entitled to beacon off a claim on the public field named in the digger's licence.¹⁰⁷³ Any person was entitled to take out two licences on each public field and to hold the licences in

¹⁰⁶⁷ Section 13 of the 1887 Natal Mines Law.

¹⁰⁶⁸ Section 14 of the 1887 Natal Mines Law. Diggers who held adjoining claims of not less than six and not more than 12, could in terms of s 15 of the 1887 Natal Mines Law apply to the Resident Magistrate to amalgamate their claims.

¹⁰⁶⁹ Section 14 of the 1888 Natal Mines Law. Section 70 of the 1888 Natal Mines Law provided that the extent of a claim was 150 feet by 150 feet and each claim had to be properly beacons off at its four corners with pegs not less than two inches in diameter and standing not less than three feet above the ground.

¹⁰⁷⁰ Section 15 of the 1888 Natal Mines Law. Diggers of adjoining claims could in terms of s 16 of the 1888 Natal Mines Law amalgamate their claims.

¹⁰⁷¹ Section 17 of the 1888 Natal Mines Law. A licensed digger who had transferred his claims was entitled to take out new digger's licences. An amalgamation of claims was in terms of s 18 of the 1888 Natal Mines Law considered to be a transfer.

¹⁰⁷² Section 14 of the 1889 Zululand Proclamation. The applicant for a digger's licence in respect of a public field, had to pay in advance an amount of ten shillings for each month or portion of a month.

¹⁰⁷³ Section 14 of the 1889 Zululand Proclamation. Section 68 of the 1889 Zululand Proclamation provided that the extent of a prospector's or digger's alluvial claim was 150 feet and each claim had to be beacons off at the four corners with pegs not less than two inches in diameter and standing not less than three feet above the ground.

his own name. He was furthermore entitled to purchase claims from other claimholders.¹⁰⁷⁴

8.4.8 Mining leases

The 1888 Natal Mines Law provided that the Governor could grant to any licensed person who had prospected to the satisfaction of the Commissioner of Mines a lease of any unalienated Crown land which had not been occupied under the 1888 Natal Mines Law for mining purposes¹⁰⁷⁵ The unalienated Crown land could also be used for cutting and constructing, drains, dams, reservoirs, roads or tramways thereon to be used with regard to such mining or for erecting any buildings or machinery to be used for mining purposes or for pumping or raising water from any land mined or intended to be mined.¹⁰⁷⁶

¹⁰⁷⁴ Section 15 of the 1889 Zululand Proclamation. Diggers who held adjoining claims of not less than three and not more than sixteen, could in terms of s 16 of the 1889 Zululand Proclamation amalgamate their claims. Claimholders could in terms of s 17 of the 1889 Zululand Proclamation transfer their claims to the holder of a digger's licence. The transfer of claims only became effective upon the registration thereof.

¹⁰⁷⁵ The term "mining purposes" was defined in s 3 of the 1888 Natal Mines Law to mean: "the purpose of searching for or obtaining gold or minerals by any mode or method of mining."

¹⁰⁷⁶ Section 22 of the 1888 Natal Mines Law. Section 23 of the 1888 Natal Mines Law provided that leases that were granted for the purpose of mining for gold or for any other purpose, were referred to as "gold mining leases" and leases granted for the purpose of mining for any metal or mineral other than gold, were referred to as "mineral leases." Section 23 of the 1887 Natal Mines Law contained a similar provision. Section 22 of the 1889 Zululand Proclamation contained similar provisions. The term "mining purposes" was defined in s 2 of the 1889 Zululand Proclamation to mean: "the purpose of searching for or obtaining gold or minerals by any mode or method of mining." Section 23 of the 1889 Zululand Proclamation provided that mining leases that were granted for the purpose for mining for gold were referred to as "gold mining leases" and leases granted for the purpose of mining for any meal or mineral other than gold, were referred to as "mineral leases." Lessees of mining leases in force in respect of Zululand prior to the enactment of the 1889 Zululand Proclamation, were in terms of s 24 of the 1889 Zululand Proclamation, entitled to claim a cancellation of such lease and the issue of a new lease under the 1889 Zululand Proclamation. A mining lease could in terms of s 22 of the 1889 Zululand Proclamation be granted for a maximum period of 21 years, which was terminable on six months' notice by the lessee and was subject to a right of renewal at the option of the lessee.

8.5 1899 Natal Mines Act

The 1899 Natal Mines Act was enacted to consolidate and amend the laws relating to mining in the Natal Colony.¹⁰⁷⁷ The 1888 Natal Mines Law and the 1894 Zululand Proclamation were repealed. No right, title, interest or privilege acquired or any liability incurred under the repealed legislation and proclamation was affected, provided that they were not inconsistent with the 1899 Natal Mines Act.¹⁰⁷⁸

8.5.1 Statutory reservation of the right to mine precious stones

Section 9 of the 1899 Natal Mines Act reserved the right of mining for and disposing of all minerals in the Crown and provided as follows:

The right of mining for and disposing of all minerals on lands situated in the Colony of Natal is vested in the Crown, subject to the provisions of this Act, and nothing in this Act regarding the prospecting, mining, or disposal of minerals shall abridge or control the rights and powers of Her Majesty in respect of such minerals, otherwise than is expressly provided in this Act.

It is again submitted that the reservation of the right of mining for and disposing of all minerals¹⁰⁷⁹ in favour of the Crown was not an absolute vesting of such rights. It was

¹⁰⁷⁷ In the Dundee Coal case, Innes JA described the 1899 Natal Mines Act as an: "...entirely new code intended to secure among other things more effective supervision of all mining operations and revenue from them."

¹⁰⁷⁸ Sections 2(b) and 2(c) of the 1899 Natal Mines Act. Section 3 of the 1899 Natal Mines Act provided that the holder of the right, title and interests in any prospecting area, claim, lease, provisional application for lease, water right, claim, machine site, mill site or other licensed holding that was granted, held or occupied under any repealed law or proclamation before the commencement of the 1899 Natal Mines Act, could at any time surrender his rights. Upon payment of all rents, licence fees and other monies due in respect thereof and upon compliance with all applicable conditions, such person was entitled to obtain a title under the 1899 Natal Mines Act. The Commissioner of Mines had a discretion in the case of mining or minerals leases that were held under previous repealed laws or proclamation, to permit such leases to be converted and registered as mining claims under the 1899 Natal Mines Act. The leases converted to mining claims could remain in the same form, dimensions and area as originally beaconed. Land upon which any public squares, streets, roads, railways, burial grounds, graves or gardens existed and all other land which had been reserved for public use of a public purpose, was in terms of s 92(a) of the 1899 Natal Mines Act exempted from the operation of the 1899 Natal Mines Act unless the Governor in Council declared such land to be subject to the provisions thereof.

¹⁰⁷⁹ "Minerals" were defined in s 4 of the 1899 Natal Mines Act to mean: "All substances which can be extracted from the earth by mining operations for the purpose of profit: Provided that the term mineral shall not apply to any stone or clay for use for building, road-making, or kindred purposes, except such as are mentioned in this Act, nor to any minerals which, not being so mentioned, may

expressly stated that the rights vested in the Crown is "subject to the provisions of this Act." It is therefore necessary to analyse the structure of the 1899 Natal Mines Law to determine the content of the right to mine diamonds.

The 1899 Natal Mines Act distinguished between prospecting and mining on Crown land and on private land.

8.5.2 Crown land

Crown land was defined in the 1899 Natal Mines Act to refer to unoccupied unalienated land of the Crown.¹⁰⁸⁰

Any male or female person could prospect or search for minerals on any Crown land without having to obtain a licence. This was on condition that his prospecting was limited to a general examination of the surface and that no excavations were made, in other words that it was non-evasive.¹⁰⁸¹ A prospector who wanted to proceed with excavations could peg off not more than four claims, provided that he obtain what was referred to as a "prospecting claim licence" within 14 days from the date of pegging. If he failed to obtain a prospecting claim licence within the stated period, it was deemed that he had abandoned his pegged claims.¹⁰⁸² A person could only hold a

be excepted from the operation of this Act by Government Notice by order of the Governor in Council." *Bazley v Bongwon Gas Springs (Pty) Limited* 1935 NPD 247 at 259-260.

¹⁰⁸⁰ Section 4 of the 1899 Natal Mines Act. The following were specifically excluded from the definition of "Crown lands":

"(a) Lands dedicated to or reserved for any public purpose

(b) Ordinance lands or other lands of any department of the Imperial Government

(c) Lands specifically exempted from the operation of this Act, either by the term of the Act itself or by Notice in the *Natal Government Gazette* by order of the Governor in Council."

Section 61 of the 1899 Natal Mines Act provided that the Natal Native Trust and the appointed trustees of Mission reserve lands or the trustees of any public trust, could on application grant to any person permission to enter and prospect for minerals in and under any portion of the Trust Land. The provisions of the 1899 Natal Mines Act was in terms of s 62 of the 1899 Natal Mines Act also applicable to Trust Land. The Trustees of Trust Land was in terms of s 63 of the 1899 Natal Mines Act entitled to receive one-half of the amount received by the Government for licence fees, royalties or penalties.

¹⁰⁸¹ Section 10 of the 1899 Natal Mines Act.

¹⁰⁸² Section 10 of the 1899 Natal Mines Act. Section 11 of the 1899 Natal Mines Act provided that prospecting claim licences could only be issued to persons over the age of 16 years who were of European birth or descent.

maximum of four prospecting claim licences. An applicant for a prospecting claim licence had to apply in person unless the applicant already held a claim licence.¹⁰⁸³

The holder of a prospecting claim licence was entitled to peg one prospecting claim¹⁰⁸⁴ on any Crown land in the Natal Colony.¹⁰⁸⁵ The registered holder of a prospecting claim was entitled to prospect his claim and to carry out such work and to erect such buildings, machinery and such other acts on the claims as was necessary for the *bona fide* prospecting and development thereof.¹⁰⁸⁶ In the case of Crown land, the sale or other disposal of any mineral extracted from a prospecting claim in the course of prospecting or the development and the extraction of any metal from its ore or the mineral containing it by any mechanical or chemical or other process for purposes of profit was prohibited unless the special written permission of the Commissioner of Mines had been obtained.¹⁰⁸⁷ If the Commissioner of Mines was of the view that it was in the public interest, he could give notice to the claimholder to convert his prospecting claim into a mining claim and to make the necessary application within a specified date.¹⁰⁸⁸

¹⁰⁸³ Section 11 of the 1899 Natal Mines Act. A person could hold more than four licences by taking transfer of licences. A fee of one shilling was payable in advance for every prospecting claim licence for every period of three months for which the licence was to be in force.

¹⁰⁸⁴ The term "prospecting claim" was defined in s 4 of the 1899 Natal Mines Act to mean: "a portion of ground of a size fixed by this Act assigned for the purpose of searching for minerals in accordance with the provisions of this Act."

¹⁰⁸⁵ Section 12 of the 1899 Natal Mines Act. Section 13 of the 1899 Natal Mines Act provided that a prospecting claim licence had to be registered within a specified time at the Mines Office of the District in which the claim was situated. On payment of the renewal fee for a prospecting claim licence, a new licence was in terms of s 15 of the 1899 Natal Mines Act issued to the claimholder. Prospecting claims could in terms of s 21 of the 1899 Natal Mines Act be amalgamated.

¹⁰⁸⁶ Section 20 of the 1899 Natal Mines Act.

¹⁰⁸⁷ Section 20 of the 1899 Natal Mines Act.

¹⁰⁸⁸ Section 24 of the 1899 Natal Mines Act. The holder of the prospecting claim could object to the conversion of his prospecting claim. The Commissioner of Mines could either accept the objections or reject them. If the claimholder failed to comply with the notice to convert his prospecting claim, the Commissioner of Mines could in terms of s 24 of the 1899 Natal Mines Act declare the prospecting claim to be abandoned and all licences granted in respect thereof to be cancelled.

A person could only mine,¹⁰⁸⁹ extract and dispose of any mineral for the purposes of profit on or from any Crown land if the ground was duly registered as a mining claim¹⁰⁹⁰ in terms of the 1899 Natal Mines Act or if the land was lawfully held for such purposes under the provisions of any previous laws or proclamations.¹⁰⁹¹ A person first had to obtain a mining claim licence before he could beacon off a mining claim.¹⁰⁹² The holder of a prospecting claim had a preferential right to register a mining claim in respect of the land held under the prospecting claim.¹⁰⁹³ The holder of a mining claim licence was entitled to peg one mining claim on any Crown land.¹⁰⁹⁴ The registered holder of a mining claim was entitled to carry on mining operations and to erect such machinery, buildings, plant and to generally do all such acts and things in and upon such claim for the purpose of working the mining claim, to extract minerals therefrom and to turn such minerals to profitable account.¹⁰⁹⁵

8.5.3 Private land

The provisions of the 1899 Natal Mines Act relating to Crown land also applied to private land with certain exceptions.¹⁰⁹⁶ Any owner¹⁰⁹⁷ of land or any person *bona fide* appointed by him was entitled to prospect for minerals on his land without having to

¹⁰⁸⁹ "Mine" was defined in section 4 of the 1899 Natal Mines Act to mean: "all workings of minerals, including quarrying and other methods of excavation on the surface and from the surface downwards, and underground, together with all erections and appliances, matters, or things of what nature so ever connected therewith or belonging thereto, above and below ground for the purpose of prospecting for or winning minerals."

¹⁰⁹⁰ The term "mining claim" was defined in s 4 of the 1899 Natal Mines Act to mean: "a portion of ground of a size fixed by this Act assigned for the purpose of mining for and disposing of minerals in accordance with the provisions of this Act."

¹⁰⁹¹ Section 25 of the 1899 Natal Mines Act.

¹⁰⁹² Section 26 of the 1899 Natal Mines Act.

¹⁰⁹³ Section 27 of the 1899 Natal Mines Act.

¹⁰⁹⁴ Section 30 of the 1899 Natal Mines Act. Section 31 of the 1899 Natal Mines Act provided that mining claims had to be registered at the Mines Office of the District in which such claim was situated.

¹⁰⁹⁵ Section 39 of the 1899 Natal Mines Act.

¹⁰⁹⁶ Section 42 of the 1899 Natal Mines Act.

¹⁰⁹⁷ An "owner" was defined in section 4 of the 1899 Natal Mines Act to mean: "the registered owner of any lands held under freehold or quitrent tenure, the Natal Native Trust and any trustees in whom the registered ownership of any land is vested. A person holding lands under a contract of purchase from the Crown shall be deemed the owner, notwithstanding that transfer has not yet been made."

obtain a prospecting claim licence.¹⁰⁹⁸ Such owner or person could, however, only peg off a claim after taking out the necessary claim licence.¹⁰⁹⁹ In *Natal Navigation Collieries and Estate Co Limited v Minister of Mines*¹¹⁰⁰ the Appellate Division had to decide whether the landowner of private land was entitled to obtain prospecting claim licences in terms of the 1899 Natal Mines Act in respect of his two farms. The following two conditions were registered against the title deeds of the farms:¹¹⁰¹

The Government reserves to itself the dominium of all minerals found, or being in, upon or under the said land.

The Government reserves to itself the right, by itself, or by any person authorised for such purpose, to enter upon the said lands for the purpose of prospecting for, mining or removing therefrom and such minerals, and for the carry-out thereon or therein of such workings as may be required for the utilisation or removal of any such minerals: Provided, however, that reasonable compensation shall be made to the owner of the said lands for any damage caused thereto by reason of the exercise by the said Government, or by any person authorised by the said Government, of the mineral rights hereby reserved.

Hoexter JA held that the rights that were afforded to the owner of private land in terms of sections 44 and 45 of the 1899 Natal Mines Act were not afforded to him as the owner of the mineral rights, but because he was the owner of the surface rights. The court held that section 44 of the 1899 Natal Mines Act conferred on the owner of private land the right of prospecting and the condition in the title deed meant no more

¹⁰⁹⁸ *SA Permanent Building Society v Liquidator Isipingo Beach Homes (Pty) Limited* 1961 1 SA 305 D; See also Fisher 1961 *Annual Survey of South African Law* 242-245.

¹⁰⁹⁹ An owner could in terms of s 44 of the 1899 Natal Mines Act take out as many licences in respect of his own land as he required. Section 94 of the 1899 Natal Mines Act provided that no person who was not of European birth or descent was entitled to hold any licence or to peg out or to be engaged in work on any licensed holding, other than in the service and under the supervision of a duly licensed person, except where otherwise provided under the 1899 Natal Mines Act.

¹¹⁰⁰ 1955 2 SA 698 (A).

¹¹⁰¹ At 710-711.

than that the Government need not obtain the consent of the owner to prospect.¹¹⁰²
The court held that:¹¹⁰³

In my opinion, therefore, the quasi-servitude of mineral rights registered in favour of the Government against the title deeds of... does not deprive the appellant of the rights or of prospecting conferred upon the owners of private lands by the Natal Act.

No person other than the owner was allowed to prospect on private land unless the owner of the land consented thereto.¹¹⁰⁴ Within the first 12 months from the commencement of the 1899 Natal Mines Act, no person could obtain a claim licence in respect of private land, except with the written permission of the owner of the private land.¹¹⁰⁵ After the expiry of the 12 months, (or otherwise with the owner's consent) a person could apply for a prospecting claim licence in respect of private land which entitled him to prospect any part of the land which was not subject to prospecting activities by the owner of the land or in respect of which a prospecting claim licence had not already been held by a third party and provided that such person could not hold more than four licences. A prospector on private land could not peg off more than two claims in the same line.¹¹⁰⁶ It was further not lawful, without the consent of the owner of the land, to issue more than four prospecting claim licences to any person other than the owner within the first three months after the owner had received notice of the issue of the first licences. During the period of three months the owner had the exclusive right of taking out licences and could take out as many such licences as he

¹¹⁰² Hoexter JA held at 712 that: "The second condition provides merely that the Government reserves to itself the right of prospecting. In my opinion that means no more than that the Government need not obtain the consent of the owner to prospect. It cannot be read to mean that the owner is thereby ceding, or, if that be the correct approach, that the government is thereby excluding from its grant of ownership of the land, the rights of prospecting conferred upon owners by the Natal Act."

¹¹⁰³ At 712. Hoexter JA further held that the *Natal Cambrian* case decided no more than that the Crown did not have to obtain the consent of the owner of private land when it exercised the right of prospecting which it reserved to itself in the relevant title deed and that it did not decide that the terms of such a reservation amounted to a cession by the owner of the prospecting rights conferred upon the owner by the 1899 Natal Mines Act.

¹¹⁰⁴ Section 45 of the 1899 Natal Mines Act.

¹¹⁰⁵ Section 46 of the 1899 Natal Mines Act.

¹¹⁰⁶ Section 47 of the 1899 Natal Mines Act.

required.¹¹⁰⁷ At the expiry of such three months the issue of licences to others could resume but without prejudice to the right of the owner to take out licences in the same way as others could do.¹¹⁰⁸

Before the Deputy Commissioner of Mines could issue a prospecting claim licence to a third party to prospect on private land, he had to notify the owner. The owner was entitled to object to the granting of a prospecting claim licence in respect of his land. The Deputy Commissioner of Mines had to consider the objections and his decision was subject to an appeal to the Minister whose decision was final.¹¹⁰⁹ Any person entering the land of any owner after having obtained a prospecting claim licence had to give the prescribed written notice to the owner.¹¹¹⁰

Any person who wanted to obtain a mining claim in respect of private land had to be the registered holder of a prospecting claim on such land, which he was entitled to convert into a mining claim. The owner of private land was not obliged to first register a prospecting claim before applying for a mining claim in respect of his own land.¹¹¹¹ The owner was further entitled to receive one-half of all money which the Government received from any person as licence fees, royalties, or penalties¹¹¹² in respect of any

¹¹⁰⁷ Section 48 of the 1899 Natal Mines Act.

¹¹⁰⁸ Section 48 of the 1899 Natal Mines Act.

¹¹⁰⁹ Section 48 of the 1899 Natal Mines Act. Every applicant for a prospecting claim licence was in terms of s 49 of the 1899 Natal Mines Act obliged to pay to the Deputy Commissioner of Mines the sum of two pounds ten shillings for every prospecting claim licence issued to him by way of security for the due and proper repair of any surface damage done by him on the land of any owner.

¹¹¹⁰ Section 50 of the 1899 Natal Mines Act. The Deputy Commissioner of Mines was in terms of s 51 of the 1899 Natal Mines Act obliged to notify the owner of the land in the prescribed manner of any applications for the registration of prospecting claims and the owner was afforded a period of at least 14 days to lodge his written objection to the registration of the prospecting claims. An objection to the registration of a prospecting claim together with the report of the Deputy Commissioner of Mines had to be forwarded to the Minister through the Commissioner of Mines. The Minister had to decide whether such objection was fair and reasonable and such as in his opinion had to be considered having regard to the agricultural, industrial or other operations of the said owner. The Minister had in terms of s 52 of the 1899 Natal Mines Act, if he deemed it necessary, to ascertain and determine whether the locality of the land, the geological features thereof or any other facts gave reasonable belief that minerals were to be found on such land.

¹¹¹¹ Section 56 of the 1899 Natal Mines Act.

¹¹¹² Except penalties imposed for contraventions of the 1899 Natal Mines Act. Section 57 of the 1899 Natal Mines Act.

licences, claims or other licensed holdings granted with regard to private lands.¹¹¹³ The owner of private land only had to pay one-half of the licence fees and royalties concerning claims or other licensed holdings situated on his own land and held by him.¹¹¹⁴

8.6 Summary and conclusion

In this chapter the development of diamond mining legislation in Natal before the enactment of the 1927 Precious Stones was discussed. There were no reports of the discovery of any diamond mines in Natal during this period. The mining legislation in Natal developed mainly as a result of the discovery of coal and gold. There was no specific legislation regulating the mining of precious stones in Natal during this period.

The Roman Dutch law as it was applied in the Cape Colony was established in the District of Natal in 1845. Although Natal was annexed as part of the Cape Colony, the Cradock Proclamation and the Crown's prerogative did not apply in Natal merely by virtue of the annexation thereof as part of the Cape Colony. The form of land tenure in Natal impacted on the development of mining legislation in Natal, and in particular determined the right to mine for precious stones. From as early as 1885 a person who wanted to dig and search for precious stones on private land not only had to obtain a licence, but also had to obtain the consent of the owner of the land.¹¹¹⁵

During the period 1887 until 1899 a number of mining laws was enacted to consolidate and in some instances to re-enact provisions of repealed legislation in Natal and in Zululand, which was annexed as part of the Colony of Natal with effect from 29 December 1897.¹¹¹⁶ A common feature in all these laws was that the right to mine for and dispose of *inter alia* precious stones was reserved to the Crown. Still, in every

¹¹¹³ Section 57 of the 1899 Natal Mines Act.

¹¹¹⁴ Section 58 of the 1899 Natal Mines Act. Section 8 of the 1899 Natal Mines Act made provision for the granting of alluvial claims.

¹¹¹⁵ Law 26 of 1885.

¹¹¹⁶ These were the 1887 Natal Mines Law, the 1888 Natal Mines Law, the 1889 Zululand Proclamation, the 1894 Zululand Proclamation and the 1899 Natal Mines Act. See para 8.4 above.

instance such reservation was expressly stated to be subject to the provisions of the relevant legislation.¹¹¹⁷ It is submitted that there was no absolute reservation of the right to mine diamonds in Natal in favour of the Crown. The right to mine diamonds would have depended on the form of land tenure provided for in the specific legislation.

In the case of Crown land, a prospective prospector had to obtain a prospecting licence from either the Resident Magistrate or the Commissioner of Mines. The owner of private land was entitled to prospect for precious stones on his own land. Under the 1887 Natal Mines Law, the owner also had to obtain a prospecting licence, but this requirement was not re-enacted in the 1888 Natal Mines Law or in the subsequent legislation.¹¹¹⁸ The owner of private land was in terms of the 1888 Natal Mines Law entitled to the undisturbed occupation of his land for as long as he continued to prospect on his land to the satisfaction of the Commissioner and no third party could obtain a prospecting licence in respect of private land, for as long as the owner of the land prospected on his own land.¹¹¹⁹ It was only if the owner of private land did not prospect on his land or grant permission to another person to prospect, that a prospecting licence could be granted to a third party in respect of private land.¹¹²⁰ The owner of private land was afforded an opportunity to object to the granting of a prospecting licence with regard to the land. The Resident Magistrate had a discretion to refuse to grant the prospecting licence if he found that the owner's grounds for refusing to grant the permission was fair, reasonable and further had to take the public interest into account.¹¹²¹

Under the 1899 Natal Mines Act, the owner of private land had the exclusive right for the first 12 months from the commencement of the 1899 Natal Mines Act to prospect

¹¹¹⁷ Section 4 of the 1887 Natal Mines Law, s 4 of the 1888 Natal Mines Law, s 3 of the 1889 Zululand Proclamation and s 3 of the 1894 Zululand Proclamation discussed in para 8.4.1 above and s 9 of the 1899 Natal Mines Act discussed in para 8.5 above.

¹¹¹⁸ See para 8.4.4 above.

¹¹¹⁹ Section 35 of the 1888 Natal Mines Law. See para 8.4.4 above.

¹¹²⁰ Section 39 of the 1888 Natal Mines Law, s 37 of the 1889 Zululand Proclamation, s 30 of the 1894 Zululand Proclamation and s 45 of the 1899 Natal Mines Act.

¹¹²¹ Section 33 of the 1887 Natal Mines Law, s 40 of the 1888 Natal Mines Law and s 38 of the 1889 Zululand Proclamation.

on his land or to grant permission to others to prospect on his land. After the expiry of the 12 months anyone could apply for a prospecting claim licence in respect of private land which entitled him to prospect on any part of the land of the owner which was not subject to prospecting by the owner or to another prospecting claim licence.¹¹²² The owner of private land was also afforded an opportunity under the 1899 Natal Mines Act to object to the granting of a prospecting claim licence in respect of his land.¹¹²³

The discoverer of precious stones was entitled to certain rights. Under the 1887 Natal Mines Law, the 1888 Natal Mines Law, the 1889 Zululand Proclamation and the 1894 Zululand Proclamation, the holder of a prospecting licence who discovered precious stones, was entitled to a discoverer's certificate. In addition, he was awarded four prospector's claims, which entitled him to work, dig or mine for precious stones for as long as he remained the owner of the four prospector's claims, without having to obtain a prospector's or digger's licence.¹¹²⁴ In the case of the discovery of diamonds on a proclaimed public field on private land, the owner would have been awarded "owner's claims."¹¹²⁵ The owner of private land was further entitled to receive a portion of licence fees collected in respect of prospecting licences and diggers' licences.¹¹²⁶

Under the 1899 Natal Mines Act a person could only mine, extract and dispose of any mineral on Crown land if the person held a mining claim and if the land was registered as a mining claim.¹¹²⁷ With the exception of an owner, only holders of prospecting

¹¹²² Section 47 of the 1899 Natal Mines Act. See para 8.5 above.

¹¹²³ Section 48 of the 1899 Natal Mines Act. See para 8.5.3 above.

¹¹²⁴ Section 7 of the 1887 Natal Mines Law, s 8 of the 1888 Natal Mines Law, s 8 of the 1889 Zululand Proclamation and s 17 of the 1894 Zululand Proclamation. See paras 8.4.5 and 8.5.3 above.

¹¹²⁵ Section 39 of the 1887 Natal Mines Law, s 56 of the 1888 Natal Mines Law and s 54 of the 1889 Zululand Proclamation discussed in para 8.4.7 above. Section 32 of the 1894 Zululand Proclamation discussed in para 8.5.6 above.

¹¹²⁶ Section 32 of the 1887 Natal Mines Law, s 49 of the 1888 Natal Mines Law discussed in para 8.4.3 above. Section 39 of the 1887 Natal Mines Law, s 56 of the 1888 Natal Mines Law and s 54 of the 1889 Zululand Proclamation discussed in para 8.4.6 above. Section 47 of the 1889 Zululand Proclamation. Section 29 of the 1894 Zululand Proclamation discussed in para 8.4.6 above. Sections 57 and 58 of the 1899 Natal Mines Act discussed in para 8.5.3 above.

¹¹²⁷ Section 26 of the 1899 Natal Mines Act.

claims could obtain a mining claim. The owner of private land was under the 1888 Natal Mines Law and the 1889 Zululand Proclamation entitled to dig and mine for precious stones on his own land and could also grant permission to another person to dig and mine on his land.¹¹²⁸

After unification, the Natal Colony became a province in the Union of South Africa, known as the Province of Natal. The 1899 Natal Mines Act continued to apply in respect of the prospecting and mining of precious stones in the Province of Natal until the enactment of the 1927 Precious Stones Act. There was unlike the diamond mining legislation in the other provinces, no provision for the Crown or the Government to share in the profits of any diamond mining, most probably because there were no reports of the discovery of any diamond mines in Natal. The mining legislation in Natal had no practical impact on the development of the right to mine diamonds in South Africa.

In part 3 of this thesis, the development of the right to mine diamonds in the Union of South Africa after 1927 is discussed.

¹¹²⁸ Section 38 of the 1888 Natal Mines Law and s 36 of the 1889 Zululand Proclamation. See para 8.4.6 above.

Part 3: The Union of South Africa after 1927

Chapter 9 The 1927 Precious Stones Act

Chapter 9 The 1927 Precious Stones Act

9.1 Introduction

This chapter deals with the development of the right to mine diamonds under the 1927 Precious Stones Act. The 1927 Precious Stones Act was enacted to consolidate the diamond mining legislation that applied in the former colonies and after unification in the four provinces.

A contributing factor to the enactment of the 1927 Precious Stones Act was the discovery of alluvial diamonds in the 1920s at Lichtenburg in the Transvaal Province and at Kleinsee and Alexander Bay in Namaqualand in the Province of the Cape of Good Hope. These discoveries almost led to a collapse in the world diamond market.¹¹²⁹ Prior to these discoveries, big diamond producers held the view that mines were the real source of diamonds and that alluvial diamonds were so poor and limited that there was no need to control production from alluvial sources.¹¹³⁰ This chapter

¹¹²⁹ *Richtersveld CC* case at par 85; Sander *Development, Diamonds, Gold and Platinum* 270 describes the discovery by Hans Merensky of the so-called "Aladdin's Cave" near Alexander Bay as sensational and states that: "In a single year, alluvial output jumped from a value of some £1.8 million to £6.3 million and there were serious apprehensions about the future of the industry. What people feared was not so much the fact of the deposits themselves, but the dangers to the market posed by their irrational and uncontrolled exploitation." The discovery of diamonds at Namaqualand also led to an oversupply in diamonds. This was further complicated by the world depression in 1929. Chilvers *Story of De Beers* 188-189, describes the impact that the oversupply had on the diamond trade, by referring to the following statement by S Joel, speaking at the Annual Meeting of the Johannesburg Consolidated Investment Company on 5 December 1928: "S. Joel referred to the crisis caused by the alluvial discoveries. He declared that the abnormal production from the Lichtenburg fields had caused grave anxiety to the diamond trade, and that protective action was essential if the diamond trade, including that from Lichtenburg, was not to be ruined. The Government had introduced a bill giving wide powers of control. The powers were not exercisable until the bill became law: but the position called for immediate action. That was the position at the beginning of 1927. The Diamond Syndicate decided to purchase the surplus production in order to prevent the collapse of the market. This had resulted in heroic measures and had caused the Syndicate to accumulate £8,000,000 of diamonds at the end of 1927. By November 16, 1927, the Lichtenburg menace had been successfully dealt with by the Diamond Syndicate. Production showed a definite decline. The action taken by the Syndicate owing to the enormous production at Lichtenburg had saved the diamond industry." See also Krüger *The Making of a Nation* 143; See Viljoen *Die Diamantrywerheid van Suid-Afrika* 209; Weidner *Pigs in Diamonds and Debates of the House of Assembly* 7-12. See paras 9.2-9.3 below.

¹¹³⁰ This was confirmed by Sir Ernest Oppenheimer during his first appearance as Chairman of De Beers Consolidated Mines Limited at its annual general meeting held on 15 December 1930. Chilvers

therefore commences with a brief overview of the history of the discovery of the alluvial diamonds in the 1920s. The 1927 Precious Stones Act is thereafter discussed insofar as it regulated the right to mine diamonds in the Union of South Africa.

9.2 Discovery of diamonds in the district of Lichtenburg

Alluvial diamonds were discovered in 1926 in the district of Lichtenburg situated in the western part of the Province of Transvaal.¹¹³¹ Krüger¹¹³² describes the Lichtenburg area where alluvial diamonds were discovered, as an "arid and dust-swept region" where many farmers struggled to make a living. In December 1924 the son of John Voorendyk, the postmaster of Lichtenburg, discovered a diamond of approximately three carats, when he and other workers dug a cattle dip on his farm *Elandsputte*.¹¹³³ Voorendyk, who before the discovery of the diamond, battled to sell his farm, contacted the state geologist (a certain Dr Harger) to inspect his property. Harger¹¹³⁴ visited the farm *Elandsputte* but his reaction was that there were no diamonds on the farm and that it must have been a bird dropping.¹¹³⁵ Harger himself, however,

Story of De Beers 241-242, states that this view was also shared by the Government of the Union of South Africa, as alluvial diamonds were expressly excluded from the operation of the *Diamond Control Act* 39 of 1925 (hereafter the 1925 Diamond Control Act). The *1925 Diamond Control Act* was enacted to control the sale and export of diamonds and provided for the establishment of a Diamond Control Board for the Union. Section 20 of the 1925 Diamond Control Act provided that: "Nothing contained in this Act shall apply to the sale, disposal or export of alluvial diamonds but the provisions of this section shall not prevent the Board from exercising the powers conferred upon it under paragraphs (a) and (c) of subsection (2) of section six of this Act in respect of such diamonds." Sections 6(2)(a) and (c) of the 1925 Diamond Control Act empowered the Diamond Control Board to purchase and receive diamonds from diamond producers. Sander *Development, Diamonds, Gold and Platinum* 272.

¹¹³¹ Chilvers *Story of De Beers* 188; Kruger "Die Bondgenootskap tussen Nasionalisme en Arbeid" 513; Wilson, McKenna and Lynn *Occurrence of Diamonds* 83; Hahn *Diamond* 141; The town Lichtenburg currently forms part of the North-West Province.

¹¹³² Krüger *The Making of a Nation* 142.

¹¹³³ Kaye and Kaye *Tempered Steel* 39; See also Chilvers *Story of De Beers* 234.

¹¹³⁴ Harger was earlier in 1905 the consulting engineer of the New Randfontein Reefs Limited and conducted prospecting activities on the farm Voorspoed in the Orange River Colony, which resulted in the discovery of the Voorspoed Mine. Birkholtz *The story of Voorspoed* 3. See fn 654 above.

¹¹³⁵ Kaye and Kaye *Tempered Steel* 39; Harger's reaction was surprising as he had according to Chilvers already on 20 January 1913 in his presidential address to the Geological Society of South Africa, stated that "enormous wealth in the form of rich diamond mines awaits discovery in the Western Transvaal."

proceeded to explore the area. Chilvers¹¹³⁶ reports that in his first test wash, Harger found 50 diamonds and was given a discoverer's certificate. Soon thereafter more diamonds were discovered on some of the surrounding farms. Thousands of diamond diggers and fortune seekers rushed to Lichtenburg.¹¹³⁷ According to Kaye and Kaye¹¹³⁸ the biggest diamond rushes in the world took place on the farms in the Lichtenburg district in 1926 and 1927 with the biggest gathering of diggers in history.¹¹³⁹ The discovery of diamonds at Lichtenburg led to the uncontrolled and unlimited supply of diamonds.¹¹⁴⁰ It is reported that between 1926 and 1945, more than 7 million carats of diamonds were found near the town of Lichtenburg with a value of approximately

¹¹³⁶ Chilvers *Story of De Beers* 232.

¹¹³⁷ Chilvers *Story of De Beers* 232.

¹¹³⁸ Kaye and Kaye *Tempered Steel* 39. See also Kidd *Cast in Namaqualand* 14.

¹¹³⁹ The diggers literally rushed on the farms to peg their claims. Chilvers *Story of De Beers* 232-233, describes these events as follows: "The rushes at Elandsputte near Lichtenburg on August 20, 1926, when 6,000 diggers (the figure has been put as high as 10,000) raced off in response to the starter's signal to peg claims in alluvial soil, and at Grasfontein on March 4, 1927, when well over 20,000 runners participated, were historic spectacles. At Elandsputte shortly before noon, under a hot sun, a crowd of 20,000 whites and 7,000 blacks watched the great line-up. It stretched like a dark thread nearly two miles across the huge brown 'farm.' The runners were massed from ten to twenty deep. Many wore sketchy costumes and shorts, others ordinary dress. There were athletes too, and some women and three lame men, one with crutches. An official appeared and read a proclamation, raised his hand, the Union Jack fluttered down, and with a roar the line moved forward. It blurred and broke into scurrying little black dots. After a few minutes the runners all came to a stop somewhere, thousands of little pegs demarcated many a man's hope of treasure, only the lame men hobbled on to a gravel ridge on the far horizon where they too stopped and pegged, and the rush was over. Seven months later at Grasfontein, which is not far from Elandsputte, a mighty line of 20,000 runners, startled by a springbok, got away to a false start, and the pegs were subsequently uprooted by the police. A week later, another line-up took place. No mistake was made this time. At seven in the morning the Union Jack was planted 200 yards from the line, at a place where it could be seen clearly by everyone. Mounted police helped the line-up ... They were to gallop at once to the scene of any disorder ... Then the Mining Commissioner appeared ... The proclamation was read, the flag dropped and the rush began in a cloud of fiery yellow dust. In a few minutes all was over. Many of the claims changed hands for hundreds of pounds soon after the pegs had been driven in." See also Wheeler 1927 *Popular Science* 11-12.

¹¹⁴⁰ Chilvers *Story of De Beers* 242. It was often stated that "At Lichtenburg you do not need a shovel and sieve to dig. No man, you just pull a shrub from the soil, and the diamonds will hang from its roots!"; Sander *Development, Diamonds, Gold and Platinum* 272; See Wilson, McKenna and Lynn *Occurrence of Diamonds* 88-91 for details of the following runs-

- (a) The Monana run;
- (b) The Wilverdiend-Ruigtelaagte run;
- (c) The Vlakplaats-Uitgevonden run;
- (d) The Grasfontein-La Reys Stryd run;
- (e) The Elizabeth-Grasfontein run;
- (f) The Witstinkhoutboom, Schilpad Verdriet, Townlands, Grootfontein and Mooifontein runs; and
- (g) The Twee Buffels Geschië run.

£14,6 million.¹¹⁴¹ The diggers sold these diamonds without taking the market conditions into account. This resulted in the larger companies buying up large numbers of these diamonds to prevent a collapse in the world diamond market.¹¹⁴²

There were also alluvial discoveries at Marico, Schweizer-Reineke, Vereeniging, Christiana, Ventersdorp, Potchefstroom, Wolmaransstad and Klerksdorp.¹¹⁴³

¹¹⁴¹ It was estimated that in 1927, the alluvial diggings at Lichtenburg, delivered 79% of the Transvaal Province's alluvial diamond production and that the Transvaal delivered 94,41% of the Union of South Africa's production. According to Chilvers *Story of De Beers* 188, the Lichtenburg diamond fields had produced £10,500,000 worth of diamonds over a period of three years up to the end of September 1929.

¹¹⁴² Krüger *The Making of a Nation* 143; See Viljoen *Die Diamantnywerheid van Suid-Afrika* 209; Weidner *Pigs in Diamonds and Debates of the House of Assembly* 7-12.

¹¹⁴³ Chilvers *Story of De Beers* 235. According to Wilson, McKenna and Lynn *Occurrence of Diamonds* 85-91, there is no doubt that not all of the diamondiferous alluvial deposits which existed in the Ventersdorp and Lichtenburg districts, had been discovered.

9.3 Discovery of diamonds in Namaqualand

Diamonds were first discovered in Namaqualand on the farm Oubeep in August 1925, south of the town Port Nolloth.¹¹⁴⁴ Carstens¹¹⁴⁵ describes the discovery of diamonds in Namaqualand as less dramatic than the discovery of the Kimberley Mine or the Premier Mine. According to Carstens,¹¹⁴⁶ his father, Jack Carstens, was the first discoverer of

¹¹⁴⁴ Carstens *In the Company of Diamonds* 16. Although the focus of this study is to research the historical development of the right to mine diamonds in South Africa, it should also be mentioned that during the period 1813 and 1866 the discovery of copper in an area or land which became known as Namaqualand, resulted in the enactment of the first regulations on 13 September 1853 relating to the searching for minerals in Namaqualand which was annexed as part of the Cape Colony. In these regulations, provision was made for the granting of leases to search for minerals on what was referred to as Crown land in Namaqualand. The regulations provided that each lease was granted for a period of not more than 15 years and for an area of land not less than ten and not more than 40 *morgen*. The lessee was in terms of regs 4 and 10, entitled to grazing rights and water rights. According to Davenport *Colonial Mining Policy* 7-33, these regulations failed to recognise the rights of the local Khoi and Nama people who led a semi-nomadic existence in Namaqualand. The regulations denied the Khoi and Nama people access to certain areas where good water and grazing conditions existed, if the land was required for prospecting purposes. The Government of the Cape Colony did not have the resources to control the flood of requests for licences to exploit the copper potential of Namaqualand and withdrew its mineral regulations in 1855 in terms of GN 37 of 23 February 1855. A year later, in 1856, a number of leaseholders in Namaqualand submitted a petition to the House of Assembly wherein they requested a re-evaluation of the mineral leasing system in the Cape Colony. See "Report from the Select Committee of the House of Assembly on the Petition of Leaseholders of land in Namaqualand" iii. They further requested that the duration of the leases be extended from 15 to 30 years, with the right of further renewals and that the payment of rental be substituted with the payment of royalties or export duty. The Select Committee concluded that the requests were reasonable and recommended that the Governor of the Cape implement them. The Governor at the time, George Grey ignored the recommendations from the Select Committee and the issue of mineral leasing was left for at least a decade. On 10 October 1865, the *Mining Leases Act* 12 of 1865 (hereafter the 1865 NM Mining Leases Act) came into effect and applied in respect of land that belonged to the Crown in Namaqualand. It applied to all minerals and would have applied to diamonds if they had been discovered in Namaqualand at that stage. The 1865 NM Mining Leases Act provided that Crown land in Namaqualand which contained minerals, could be leased for mining purposes for a period of 31 years. Minerals emanating from land that was privately owned, were exempted from the payment of any charges. The landowner had to sign a sworn declaration before the export of each shipment of ore, in which he declared under oath, that the ore had not been extracted from Crown land. Although the Government of the Cape Colony did not at that stage know that Namaqualand contained diamonds, diamonds were not excluded from the application of the *1865 NM Mining Leases Act*, which was only repealed on 1 October 1967, in terms of s 188(1) read with Schedule 3 of the Mining Rights Act. Davenport *Digging Deep* 20-21; Smalberger *Copper Mining* 55-59; Dale *Mineral Rights* 217-218; Carstens *Port Nolloth: The making of a South African seaport* 24-35; Van der Schyff *Property in Minerals and Petroleum* 106.

¹¹⁴⁵ Carstens *In the Company of Diamonds* 16.

¹¹⁴⁶ Carstens *In the Company of Diamonds* xiii and 16; Krüger *The Making of a Nation* 143.

diamonds in Namaqualand.¹¹⁴⁷ News of the discovery attracted a number of prospectors to Namaqualand.¹¹⁴⁸

9.3.1 Discovery of diamonds at Kleinsee

Carstens¹¹⁴⁹ states that his father Jack Carstens and his grandfather William Carstens, concluded an oral agreement with a certain George Scott Ronaldson, who was regarded as a well-respected businessman from Kimberley. The material terms of the agreement provided that Jack Carstens would conduct prospecting operations on behalf of their venture or syndicate and that Ronaldson would finance the venture. They further agreed that the business partners would try to take options to buy all the coastal farms from Oubeep to Hondeklip Bay. The agreement was never recorded in writing. It was merely sealed by a handshake.¹¹⁵⁰ Ronaldson made funds available and Jack Carstens, with a lawyer that Ronaldson nominated as well as a Kimberley digger (which Ronaldson had sent to assist with the supervision at the claims) set off to obtain options to purchase all the farms between Port Nolloth and Hondeklip Bay.¹¹⁵¹ Ronaldson employed an attorney from the town Springbok, who had to record the

¹¹⁴⁷ Carstens *In the Company of Diamonds* 16, describes the first diamond discovered in Namaqualand as weighing only one-half of a carat, but a "near perfect, blue-white gemstone" discovered by Jack Carstens, using very primitive equipment comprising picks and shovels, a small sieve and half an oil drum filled with water. Machens *Platinum, Gold and Diamonds* 146-147.

¹¹⁴⁸ According to Machens *Platinum, Gold and Diamonds* 147, Carstens was not experienced as a prospector and he failed to keep his discovery a secret and as a result, news of the discovery soon spread.

¹¹⁴⁹ Carstens *In the Company of Diamonds* 18.

¹¹⁵⁰ Carstens *In the Company of Diamonds* 19, states that when their discussions turned towards the issue of the drafting of a formal written contract, Ronaldson declared that it was unnecessary to conclude a written contract, as: he stated: "My word is my bond" and was adamant that the services of a lawyer was not necessary.

¹¹⁵¹ Carstens *In the Company of Diamonds* 19. The farmers were mostly poor and gladly granted options to purchase their farms. According to Carstens, the option agreements provided that the farmers would be paid four shillings and sixpence for each morgen in the case of the discovery of diamonds on their farms. The farmers could stay on their farms and continue farming but they were required to act as caretakers for the syndicate and to monitor any illegal diamond activities on the farms.

option agreements. He, however, only recorded the option agreements in the name of Ronaldson.¹¹⁵²

In 1926, alluvial diamonds were discovered near the settlement of Grootmis. Carstens telegraphed Ronaldson with news of the discovery at Grootmis. Carstens hired a truck and set off for the farm Kleinzee with his equipment. Jack Carstens was of the view that if alluvial diamonds occurred at Grootmis on the Buffels River they would also occur on the farm Kleinzee which was approximately four kilometres closer to the sea.¹¹⁵³ Carstens first investigated the specific area where diamonds were said to have been discovered on the farm Grootmis. After the services of a surveyor had been employed, it turned out that the discovery was not at Grootmis, but on the farm known as Annex Kleinzee. The farm, Annex Kleinzee, was held under option by the purported syndicate of Carstens and Ronaldson.¹¹⁵⁴ Carstens proceeded to prospect on the farm Kleinzee¹¹⁵⁵ and with the assistance of the landowner, Jan Kotze, who was keen to obtain employment on the prospective diamond diggings, discovered diamonds.¹¹⁵⁶ In November 1927, Jack Carstens learned that Ronaldson had sold the farm Kleinzee and all the other properties over which options had been held for £30,000 to a company,

¹¹⁵² Carstens *In the Company of Diamonds* 19-20; Kidd *Cast in Namaqualand* 10-12.

¹¹⁵³ Carstens *In the Company of Diamonds* 20.

¹¹⁵⁴ Carstens *In the Company of Diamonds* 21. Meister 1928 *The Mining and Industrial Magazine* 350-351.

¹¹⁵⁵ The farm Kleinzee was first granted as a perpetual *quitrent* to the estate of Robert Ripp, for seven shillings and sixpence, which had to be paid annually. The farm Kleinzee was converted to a freehold tenure on 7 December 1853. Deeds Office Cape Town, file 724/1851; Carstens *In the Company of Diamonds* 23-24.

¹¹⁵⁶ Carstens *In the Company of Diamonds* 21, describes the discovery by his father as follows: "Meanwhile, Oom Jan had been combing the surface of his property for diamond indicators, which had been explained to him. One evening, he reported that at a dried-up pan at the southwest corner of his farm he had seen some large, surface garnets, but no boulders. It did not take Carstens more than a superficial examination of the site to make a confident decision to test the pan. The next day, they inspanned four donkeys to Oom Jan's little cart, filled a half drum with water from a well in the riverbed, and set off to the southwest corner of Kleinzee Farm. On arrival, a sieve was filled with gravels and conglomerate, and with the professional expertise of gravitating he had learned from Kennedy, Carstens was soon ready to turn over the first sieve, which displayed 'a lovely wash.' The second sieve was even better, and in the centre of the third was a beautiful, blue-white, 2^{1/2}-carat diamond. 'My God!' said Oom Jan. 'Ek het nou net die stukkie grond vir twee-honderd-en-vyftig pond verkoop' ('I have just sold this bit of my farm for £250'). And so he had, for he needed cash urgently and, after all, what good was a dried mud pan to him where neither sheep nor goats would graze?" See also Carstens *The Carstens Family in South Africa* 99-101.

the Cape Coast Company of Sir Ernest Oppenheimer. Furthermore, Carstens learned that Ronaldson had not honoured their oral agreement.¹¹⁵⁷ When Ronaldson was confronted, his response according to Carstens¹¹⁵⁸ was that he had given Carstens a good bonus of £750 for two years of work and he thereafter asked the new company to grant Carstens a job.¹¹⁵⁹

9.3.2 *Discovery of diamonds at Alexander Bay*

Shortly after the discovery of the first diamonds on the farm Oubeep diamonds were also discovered at Alexander Bay, north of the town Port Nolloth.¹¹⁶⁰ The Government of the Union of South Africa owned the land and it was regarded as Crown land. A number of syndicates were formed and diamond diggers took up claims and secured options.¹¹⁶¹ A geologist, Dr Hans Merensky arrived in Namaqualand in December 1926 in search of what he described as "the Oyster Line."¹¹⁶² After discussions with a certain Rabinowitz, a digger who discovered diamonds between oyster shells, Merensky decided to search the dune areas higher up and closer to the sea at Alexander Bay.¹¹⁶³

¹¹⁵⁷ Ronaldson had entered into partnerships with other businessmen and excluded Jack Carstens completely. Carstens *In the Company of Diamonds* 25-28.

¹¹⁵⁸ Carstens *In the Company of Diamonds* 29.

¹¹⁵⁹ Ronaldson and his partner, a certain Van Praagh were given directorships in the new company, while Carstens was appointed as the mine pit superintendent. Carstens *In the Company of Diamonds* 29.

¹¹⁶⁰ Carstens *In the Company of Diamonds* 16. Diamonds may already have been discovered in Namaqualand and at Alexander Bay during the early 1900s when a well-respected prospector, Fred Cornell conducted prospecting activities in the areas. Jack Carstens' discovery of diamonds at Kleinsee drew attention to Namaqualand and some viewed the discovery as a confirmation of Cornell's views that there were diamonds in Namaqualand. Machens *Platinum, Gold and Diamonds* 147-148; Hahn *Diamond* 141; *Richtersveld Community v Alexkor Limited* 2003 6 SA 104 (SCA) para 2 (hereafter the *Richtersveld SCA* case).

¹¹⁶¹ In terms of the 1899 Cape Precious Stones Act as amended in terms of the 1907 Cape Precious Stones Amendment Act. See para 4.4 above.

¹¹⁶² According to Machens *Platinum, Gold and Diamonds* 144-150, Merensky developed the theory that years ago when the African continent's configuration was different, the diamonds had been brought there by a warm ocean current and had been cast up on the coast with the oyster shells, forming 'mussel beds'. Later the beaches rose and were covered by wandering dunes and in the process the oyster shells were completely crushed and worn away by the movement of the grains of sand, leaving the hard diamonds and oyster shell fragments. Bruton *Diamonds* 60-61.

¹¹⁶³ Salomon Rabinowitz from Steinkopf, had dug a trench on the Buchuberg, approximately eight kilometres south of Alexander Bay. Merensky on his arrival in Namaqualand visited a number of syndicates, including a syndicate of which Rabinowitz formed part. The meeting between Rabinowitz and Merensky was described by Machens *Platinum, Gold and Diamonds* 151 as follows:

At the area which Merensky targeted, a syndicate under Caplan and his workers had already been digging near the waterline. The Caplan syndicate owned options for a number of areas and Merensky asked the syndicate permission to inspect their claims. He took samples and observed traces of crushed oyster shells in the sand. Merensky thereafter concluded an agreement to buy the syndicate for £17 500 which included all the options. Machens¹¹⁶⁴ states that after the agreement had been concluded and signed, the parties noted that one option on a river terrace had been excluded. Caplan was very relaxed after the agreement had been concluded and gave Merensky the additional claim for free. Later on, this latter piece of land turned out to be one of the richest diamond claims in Africa.¹¹⁶⁵ Merensky left for Johannesburg to make arrangements to secure funding for the payment of the purchase price and left a geologist which he employed, Dr Reuning, with instructions where to prospect. Before Merensky left for Johannesburg, he pegged out a line to mark out the zone in which oyster fragments were to be found and where he wanted the trenches to be dug.¹¹⁶⁶

"Rabinowitz was an effervescent, chatty man who loved to tell anyone who would listen every detail of his diamond find. Merensky let him talk; and he was surprised and suddenly very alert when Rabinowitz mentioned that he had found oyster shells in his trenches. Merensky did not show his excitement, but insisted that Rabinowitz climb down into the trenches with him and show him, to the nearest centimetre, where he had found the diamonds. It was a layer consisting of coarse gravel and broken oyster shells right on top of the bedrock at the bottom of the trench. Merensky found many more of these oyster shells-they were the shells of *Ostrea prismatical*! In such situations Merensky stayed extremely calm and allowed no emotion to show. Neither Rabinowitz nor Merensky's assistants noticed that this was the deciding minute in the prospecting campaign. But that moment had arrived ... Merensky knew two things: first, that they were alluvial deposits combining oyster shells and diamonds and that this proved his diamond theory, and, second, that he would find diamonds in Namaqualand." See Hocking *Oppenheimer and Son* 126-127; Bruton *Diamonds* 60-62.

¹¹⁶⁴ Machens *Platinum, Gold and Diamonds* 154; See Hocking *Oppenheimer and Son* 126-127.

¹¹⁶⁵ Machens *Platinum, Gold and Diamonds* 154; See Hocking *Oppenheimer and Son* 126-127; Kidd *Cast in Namaqualand* 15.

¹¹⁶⁶ Merensky formed a syndicate, the HM Association with two other partners, Sir Julius Jeppe and Gustav Bekker, who each contributed £12500. Merensky took 20 000 shares in the syndicate as discoverer of the diamonds and paid a further £5000 cash. According to Machens *Platinum, Gold and Diamonds* 156-158, Merensky learned about the discovery of the "oyster line" too late, after he had already concluded agreements with his two partners. Dr Reuning, the geologist, wrote to Merensky to inform him about the discovery and that it was so rich in diamonds that it would be certain that Merensky would be able to pay the agreed purchase price to the Caplans. Reuning sent the letter in a double envelope as he arranged previously with Merensky. The outside envelope was addressed to one of Merensky's office assistants, who was away on business at the time and the letter lay unopened on the wrong desk in Merensky's office for two weeks.

The Oyster Line was discovered in 1927 and the highlight according to Machens,¹¹⁶⁷ was the discovery of approximately 487 diamonds lumped together on the small area given to Merensky for free.¹¹⁶⁸ Merensky realised that they would not be able to keep the discovery a secret and a number of diggers rushed to Alexander Bay. In an attempt to avoid another diamond rush such as occurred in Lichtenburg, Merensky drove to Cape Town to persuade the Government to intervene.¹¹⁶⁹

The Union Government issued *Proclamation* 50 of 1927 on 21 February 1927 in terms of which it placed a moratorium on the prospecting for diamonds on Crown land in the Province of the Cape of Good Hope.¹¹⁷⁰ The moratorium stated that it would take effect

¹¹⁶⁷ Machens *Platinum, Gold and Diamonds* 159.

¹¹⁶⁸ According to Machens *Platinum, Gold and Diamonds* 159, Merensky's geologist and his workers were able to collect a total of 2762 diamonds, weighing a total of 4309,9 carats of the highest quality, in a period of only four weeks. Kids *Cast in Namaqualand* 15. The discovery of the diamonds at Alexander Bay is described in detail in Meister 1928 *The Mining and Industrial Magazine* 341-342, 347.

¹¹⁶⁹ Machens *Platinum, Gold and Diamonds* 164-165 describes these events as follows: "Merensky arrived in Cape Town in the early afternoon and drove directly to Parliament. Prime Minister General James Barry Hertzog was in a meeting with Frederick William Beyers, Minister of Mines and Industries, and the Minister of Finance, Nicolaas Christiaan Havenga. Hastily Merensky pencilled a brief note on a piece of paper: 'May I see you please. I have something of importance to tell you.' ... Merensky had become such a well known personality after his platinum discoveries that, when it came to any matter of geological interest or importance, he could get access to almost any politician in the country at practically any time and place. A parliamentary secretary took the note into the meeting room. General Hertzog soon came out into the lobby, smiling and friendly, but visibly surprised and intrigued at what could be so important. Merensky sketched the situation in Namaqualand in a few words and cautioned against the threatening catastrophe. The Prime Minister understood at once, and acted swiftly. The leader of the opposition, General Jan Christiaan Smuts, was informed and a meeting was arranged with the Minister of Mines and Industry, Beyers and the relevant government geologist, Dr Hans Pirow. Merensky repeated his fears. He supported his argument by referring to the events in Lichtenburg and Ventersdorp ... Merensky's warning was soon to prove justified. By the middle of February the powerful mining companies got involved in Namaqualand on a large scale. Within a few days, numerous farms between the Orange River and Port Nolloth changed hands. ... These massive purchases alerted even the most hesitant – for them, it was now clear that there were treasures to be had in Namaqualand." Hocking *Oppenheimer and Son* 127-129.

¹¹⁷⁰ The moratorium was issued in terms of s 5 of the 1907 Cape Precious Stones Amendment Act. See para 5.4 above. Proc 50 of 1927 was later repealed by Proc 311 of 1927 dated 21 November 1927, which was issued in terms of s 7(2) of the 1927 Precious Stones Act in which the prospecting for precious stones on all Crown land and any other land situated within the division of Namaqualand and certain parts of the Province of the Cape of Good Hope was prohibited. Proc 311 of 1927 was later repealed by Proc 325 of 1927 dated 12 December 1927 in which the prospecting for precious stones on all Crown land and on all other land situated within the Union of South Africa was prohibited for a period of one year from 16 December 1927. The farms Kleinzee and Annex Kleinzee were privately owned and were not subject to the prohibition on prospecting in terms of Proc 311

after three days. Diamond diggers were afforded a period of eight days in which they could sift and pan the sand and pebbles that they had already dug out of their trenches, but thereafter all work had to stop. According to Machens,¹¹⁷¹ the moratorium caused a huge uproar in Namaqualand. The small individual diggers had given up everything they owned to get to Namaqualand and to buy options. The big mining syndicates had spent large sums of money to acquire their options and to buy land. The diggers and syndicates worked until the last possible moment. Machens¹¹⁷² states that everyone continued secretly to dig up more gravel and sand out of the trenches at night and in the day, they tried to sift and pan the material.

The Union Government announced that they would publish a new law on the prospecting and mining of diamonds within two months which would consolidate the different diamond mining legislation that applied in the different provinces.¹¹⁷³ On 16 November 1927, the Union Government enacted the 1927 Precious Stones Act.¹¹⁷⁴

The alluvial diggings at Alexander Bay were proclaimed as state alluvial diggings in 1928 and 1929 in terms of the 1927 Precious Stones Act.¹¹⁷⁵

of 1927. Carstens *In the Company of Diamonds* 24, states that the owners of the farm *Kleinzee* had the unfettered right to search for and exploit diamonds on the farm without interference from the Government. See *Rossouw v Minister of Mines and Minister of Justice* 1928 (TPD) 741; *Rex v Nolte* 1928 AD 377.

¹¹⁷¹ Machens *Platinum, Gold and Diamonds* 165-166.

¹¹⁷² Machens *Platinum, Gold and Diamonds* 165.

¹¹⁷³ Machens *Platinum, Gold and Diamonds* 166.

¹¹⁷⁴ Proc 303 of 12 November 1927 published in *Gazette Extraordinary* 1669 15 November 1927. The term "precious stones" was defined in s 116 of the 1927 Precious Stones Act to mean: "diamonds, rubies, sapphires, and any other substances which the Governor-General may declare by proclamation in the *Gazette* to be precious stones for the purposes of this Act." The 1927 Precious Stones Act was also enacted to amend in certain respects the law relating to the diamond trade. See the preamble and ss 88-90 of the 1927 Precious Stones Act.

¹¹⁷⁵ Sections 26 and 75 of the 1927 Precious Stones Act. According to Martinson 1989 *Annual Survey of South African Law* 204, the main purpose of the proposed development was to alleviate the chronic unemployment in the region.

9.4 The 1927 Precious Stones Act

The 1927 Precious Stones Act repealed the diamond mining laws listed in the First Schedule thereto, that were in force in the different provinces.¹¹⁷⁶ It was specifically stated that the 1927 Precious Stones Act also applied to private land situated in the Province of the Cape of Good Hope in respect of which the title deeds did not contain a reservation of precious stones in favour of the Crown.¹¹⁷⁷ This, however, excluded unreserved private land on which diamonds had already been discovered and mining or digging operations had been carried on prior to 1 April 1927 in a manner satisfactory to the Minister.¹¹⁷⁸ Where mining or digging operations had already been carried on prior to 1 April 1927 and provided that such mining or digging operations had been carried on to the satisfaction of the Minister, such operations would continue to be regulated by the previous diamond mining legislation that applied in the Cape Colony. Mines and alluvial diggings that had already been proclaimed as such on 6 October 1899 were regulated by the 1883 Cape Precious Stones Act. The mining of diamonds on the remaining unreserved private land, was regulated by the 1894 Cape Private Mines Inspection Act.¹¹⁷⁹ Section 2(1) of the 1927 Precious Stones Act provided that the Minister had to issue a certificate confirming that diamonds had been discovered and that mining or digging operations had been carried on prior to 1 April 1927 in a manner satisfactory to the Minister.¹¹⁸⁰

¹¹⁷⁶ Section 3 read with the first schedule of the 1927 Precious Stones Act repealed the 1899 Cape Precious Stones Act (see para 4.3 above), the 1907 Cape Precious Stones Amendment Act (see para 5.4 above), the 1904 OFS Precious Stones Act (see para 6.5 above), the 1906 OFS Precious Stones Amendment Ordinance, the 1907 OFS Precious Stones Amendment Ordinance, the 1903 Tvl Precious Stones Ordinance (see para 7.7 above), the 1908 Tvl Precious Stones Amendment Act, the 1919 Alluvial Amendment Act (see para 7.7.9 above), the 1899 Natal Mines Act insofar as it related to precious stones (see para 8.5 above) and the *Discoverer's Claims (Licences) Act* 9 of 1908 insofar as it related to precious stones.

¹¹⁷⁷ Referred to in this chapter as unreserved private land.

¹¹⁷⁸ Section 2(1) of the 1927 Precious Stones Act. Section 115 of the 1927 Precious Stones Act which entitled the Governor-General to limit the maximum quantity in value of precious stones which could be recovered, applied to such unreserved private land.

¹¹⁷⁹ See figure 5.2 in para 5.3.1 above.

¹¹⁸⁰ Section 2(1) of the 1927 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 464.

The 1927 Precious Stones Act did also not apply to existing mines as referred to in Part 8 of the 1904 OFS Precious Stones Ordinance or to any other mines discovered in terms of any prior law¹¹⁸¹ and existing at the commencement of the 1927 Precious Stones Act. All the provisions of the laws in force on 16 November 1927 relating to the said mines that were discovered in terms of any prior laws, would notwithstanding the repeal of those laws, continue to be in force in so far as they were not repugnant to Part II of Chapter V of the 1927 Precious Stones Act, which provided for certain administrative provisions relating to the working of new and existing mines.¹¹⁸² With the exception of certain administrative provisions, the 1927 Precious Stones Act therefore only applied to mines discovered after the commencement of the 1927 Precious Stones Act on 16 November 1927. It is unclear why the Legislature referred specifically to mines already proclaimed in the Cape of Good Hope and in the Orange Free State as they were included in the reference to "any other mine as discovered in terms of any prior law". It appears that mines that were already proclaimed in the Province of the Cape of Good Hope, would only be excluded if the Minister had issued a certificate in terms of section 2(1) of the 1927 Precious Stones Act.¹¹⁸³

¹¹⁸¹ The term "prior law" was defined in s 116 of the 1927 Precious Stones Act to mean: "any law relating to precious stones in force at the commencement of this Act." Franklin and Kaplan *Mining and Minerals* 464.

¹¹⁸² Section 2(2) of the *1927 Precious Stones Act*. Section 38 of the 1927 Precious Stones Act, which entitled the Governor-General where a small mine not exceeding 150 000 square feet was proclaimed, to lease the Crown's interest in the mine to the mineholder, subject to the terms agreed to in the lease agreement, applied to mines discovered in terms of prior laws.

¹¹⁸³ In the *Mondira Pula* case para 19, the Court held that the effect of the 1927 Precious Stones Act was that the rights of De Beers Consolidated Mines Limited to the De Beers Mine and the Kimberley Mine and the soil and material emanating therefrom as acquired in terms of the 1880 GW Fixity of Tenure in Mines Ordinance were preserved, because the 1880 GW Fixity of Tenure in Mines Ordinance was not repealed by the 1927 Precious Stones Act and further because s 2 of the 1927 Precious Stones Act did not apply to land in the Province of the Cape of Good Hope on which diamonds had been discovered prior to 1 April 1927. The laws applicable to such land therefore continued in force insofar as they were not in conflict with the 1927 Precious Stones Act. The 1880 GW Fixity of Tenure in Mines Ordinance is discussed in para 4.4.1 above. There is, however, no reference in the *Mondira Pula* case to a certificate issued by the Minister in terms of s 2(1) of the 1927 Precious Stones Act.

9.4.1 Statutory reservation of the right to mine diamonds

The right to mine precious stones was in terms of section 1 of the 1927 Precious Stones Act reserved to the Crown and provided as follows:

Subject to the provisions of this Act, the right of mining for and disposing of all precious stones is vested in the Crown.

The reservation of the right of mining for and disposing of precious stones in favour of the Crown was not absolute. It was explicitly stated to be subject to the provisions of the 1927 Precious Stones Act.¹¹⁸⁴ Unless the 1927 Precious Stones Act provided otherwise, the right to mine and dispose of precious stones in the Union vested in the Crown.¹¹⁸⁵ As will be discussed in more detail below, the right to mine for and dispose of diamonds in terms of the 1927 Precious Stones Act depended on the specific form of land tenure. The 1927 Precious Stones Act distinguished between three different types of land tenure, namely unalienated Crown land, alienated Crown land and private land.¹¹⁸⁶

¹¹⁸⁴ The reservation of the right to mine precious stones in favour of the Crown would also include the ancillary act of prospecting for diamonds. This view is supported by the judgment of the Transvaal Provincial Division in *Elandskloof Trust v EMJEFF (Pty) Limited* 1988 4 All SA 84 (T) at 86 (hereafter the *Elandskloof* case).

¹¹⁸⁵ In the *Elandskloof* case at 86, Goldstein J stated the following with reference to s 2 of the 1964 Precious Stones Act, which contained a similar statutory reservation: "In my view this section lays down simply that the State controls all mining for and disposing of precious stones save where the provisions of the Act dictate otherwise." Hahlo and Kahn *The Union of South Africa* 768-769, however, merely equates s 1 of the 1927 Precious Stones Act with the Gold Laws in the former ZAR.

¹¹⁸⁶ The terms "unalienated Crown land" and "alienated Crown land" were not defined in the 1927 Precious Stones Act. The term "Crown land" was defined in s 116 of the 1927 Precious Stones Act to mean: "all land in respect of which the Crown is the holder of the rights to precious stones." It is submitted that the term "unalienated Crown land" should be interpreted to refer to Crown land where the surface rights and the rights to precious stones were owned by the Crown and that the term "alienated Crown land" should be interpreted to refer to Crown land where the surface rights were not owned by the Crown, but the rights to precious stones vested with the Crown. The term "private land" was defined in s 116 of the 1927 Precious Stones Act to mean: "any area of land which is not Crown land." In the *Richtersveld CC* case, the Constitutional Court held that the land which formed the subject of the application, was incorrectly classified as unalienated Crown land in terms of the 1927 Precious Stones Act and ignored the fact that the Richtersveld Community was the indigenous law owners of the land. See Badenhorst "Development of Mineral and Petroleum Law" 1-20-1-21.

9.4.2 The right to prospect for diamonds on unalienated Crown land

In the case of unoccupied¹¹⁸⁷ unalienated Crown land the right to prospect¹¹⁸⁸ for diamonds vested in the Crown. A person who wanted to prospect on unoccupied

¹¹⁸⁷ Prospecting was in terms of s 9(1) of the 1927 Precious Stones Act forbidden or restricted in the following areas:

- (a) Surveyed erven or stands in any town, village or township or on any public square, street, road, cemetery or in a municipal location or on any open spaces in any township or on any land reserved for or declared by the Minister to be required for public purposes.
- (b) Any railway, as defined in the *Railways and Harbours Regulation, Control and Management Act* 22 of 1916, public works, tram line, stand, tailings, *bewaarplaats*, surface right or water right granted under the 1927 Precious Stones Act or any other law relating to mining.
- (c) Any mine, mining area or residential area, or on any alluvial digging or on any land held under any licence or other mining title held by any other person under the 1927 Precious Stones Act or any prior law relating to mining, or on any prospecting area held by any other person.
- (d) Any other place reserved under the 1927 Precious Stones Act or a prior law relating to precious stones or under any law relating to mining or on any place pointed out by the Mining Commissioner by notice posted at his office as reserved from prospecting or pegging.
- (e) Crown land occupied under lease or licence under any law dealing with the disposal of Crown land without the consent in writing of the Minister.
- (f) Crown land advertised for disposal by notice in the Gazette, except with the written consent of the Minister.
- (g) Any land used as a garden, orchard, vineyard, nursery, plantation, or on land under cultivation or within 300 feet of any spring, well, water borehole, reservoir, dam, artificial water-course or water-works or within 600 feet of any house, homestead, or building, except with the written permission of the surface owner.
- (h) Land which was either used or had formally been reserved in connection with any scheme of irrigation, or in any Government plantation, demarcated forest or forest reserve without the written permission of the Minister.
- (i) A so-called native location or native reserve or trust land, which was Crown land, except with the written permission of the Minister of Native Affairs.
- (j) A so-called native location, native reserve or native trust land where a chief or tribe was the owner, except if the written consent of such chief and tribe had been obtained as well as the written consent of the Minister of Native Affairs.

Any person who carried on prospecting on land unlawfully, was in terms of s 9(2) of the 1927 Precious Stones Act guilty of an offence and liable on conviction to a fine not exceeding £100. All diamonds found by him during such illegal prospecting operations could also be confiscated. See *Rex v Boshoff* 1938 AD 468; *Morrison v The Mining Commissioner* 1935 (GWLD) 13.

¹¹⁸⁸ The word "prospecting" was defined in s 116 of the 1927 Precious Stones Act to mean and include: "all work which in the opinion of the mining commissioner is necessary for or incidental to the search for precious stones or which is required for the purpose of deciding whether precious stones exist in sufficient quantities to justify the mining commissioner in issuing a certificate of discovery under Chapter II; and shall include trial-washing to such extent as may be permitted or determined by the mining commissioner." In *S v Zabibo* 1965 2 SA 873 (C), the Cape Provincial Division held that it was necessary for the State to provide evidence from the Mining Commissioner to establish that what the accused had done, amounted to prospecting for purposes of the 1927 Precious Stones Act. Welsh 1965 *Annual Survey of South African Law* 248.

unalienated Crown land had to obtain a prospecting permit.¹¹⁸⁹ A prospecting permit could only be issued in the name of a natural person who first had to obtain a digger's certificate.¹¹⁹⁰ The prospecting permit was not transferable.¹¹⁹¹

A prospector¹¹⁹² could peg an area on unalienated Crown land, which was referred to as a prospecting area.¹¹⁹³ A prospector had the exclusive right of prospecting in the prospecting area during the currency of the prospecting permit. Every prospector was obliged to prospect on the prospecting area he had pegged, to the satisfaction of the Mining Commissioner. The prospector also had to then comply with all the conditions prescribed by regulation.¹¹⁹⁴ A prospector was further obliged to attend in person at his prospecting area during prospecting.¹¹⁹⁵ A prospector could at any time abandon his prospecting area, provided that he had prior to the abandonment filled the area

¹¹⁸⁹ Section 4(1) of the 1927 Precious Stones Act. The *Precious Stones Amendment Act* 12 of 1960 provided for the granting of prospecting leases in respect of unalienated Crown land. Hahlo and Kahn *The Union of South Africa* 768.

¹¹⁹⁰ Section 73(1) of the 1927 Precious Stones Act provided that no corporate body of association of two or more persons could hold a claim licence or digger's certificate or any right or interest in or in connection with any claim. The Appellate Division held in *Rabinowitz v De Beers Consolidated Mines Limited* 1958 3 All SA 455 (A) at 460-461 (hereafter the *Rabinowitz* case) that the purpose of the 1927 Precious Stones Act was *inter alia* to: "protect the individual digger against the encroachments of accumulated capital in the hands, *inter alia* of companies ... " See *Cape Coast Exploration Limited v Registrar of Deeds* 1935 CPD 200 at 207-208 (hereafter the *Cape Coast Exploration Limited* case).

¹¹⁹¹ Section 8(1) of the 1927 Precious Stones Act.

¹¹⁹² A prospector was in terms of s 116 of the 1927 Precious Stones Act, with reference to Crown land defined to mean: "any person lawfully prospecting under a prospecting permit."

¹¹⁹³ Section 4(4) of the 1927 Precious Stones Act provided that a prospecting area, as far as possible, had to be rectangular in shape and could not exceed 2 000 feet in length and 2 000 feet in breadth. No prospecting area could in terms of s 4(5) of the 1927 Precious Stones Act be pegged between sunset and sunrise or on a Sunday or on any public holiday. A prospector could in terms of s 4(8) of the 1927 Precious Stones Act not peg or hold more than one prospecting area at the same time in any one mining district.

¹¹⁹⁴ Section 4(6) of the 1927 Precious Stones Act.

¹¹⁹⁵ Section 4(10) of the 1927 Precious Stones Act. If the prospector failed to comply with his obligations, the Mining Commissioner could notify him in writing that all rights under his prospecting permit in respect of the prospecting area pegged by him were forfeited. The prospector was then in terms of s 4(10) of the 1927 Precious Stones Act not entitled to peg another prospecting area in the same mining district for a period of six months.

with ground, rock or debris and levelled the surface and all dangerous excavations and shafts he had made.¹¹⁹⁶

9.4.3 *The right to prospect for diamonds on alienated Crown land*

In the case of alienated Crown land, the surface owner¹¹⁹⁷ of the alienated Crown land which was subject to a reservation of the rights to precious stones¹¹⁹⁸ in favour of the Crown, had the exclusive right to prospect for diamonds in respect of his land, which he could exercise provided that he first obtained a prospecting permit.¹¹⁹⁹ The surface owner or lessee could also nominate another person to prospect on such land.¹²⁰⁰ A

¹¹⁹⁶ Section 4(7) read with s 4(9) of the 1927 Precious Stones Act. The Mining Commissioner could, however, authorise the erecting of a fence or other suitable protection approved by him, *in lieu* of the filling up of the excavations. If the prospector failed to comply with the requirements of s 4(9) of the 1927 Precious Stones Act, he was in terms of s 4(9) guilty of an offence and liable on conviction to a fine not exceeding 50 pounds. The Mining Commissioner could cause such excavations and shafts to be fenced or filled up at the expense of the prospector. Section 4(3) of the 1927 Precious Stones Act provided that a prospector on Crown land was in addition, for the purposes of and while he was lawfully prospecting, entitled to graze free of cost on such land four draught animals. The prospector was also entitled to take on such unalienated Crown land, water which was not artificially conserved for his personal requirements and for prospecting purposes. He could also take wood for his personal use from such land. The quantity of water and wood taken by the prospector and the conditions under which they had to be taken, had to be prescribed by the Mining Commissioner.

¹¹⁹⁷ The term "surface owner" was defined in s 116 of the 1927 Precious Stones Act to mean: "in relation to any land, the person who is registered in a deeds registry as the owner of the land, whether or not he holds the rights to precious stones thereon."

¹¹⁹⁸ The term "reservation of precious stones to the Crown" was defined in s 116 of the 1927 Precious Stones Act to mean: "reservation of any precious stones whether express or implied or right of mining or prospecting therefor but does not include the reservation of an undivided share thereof."

¹¹⁹⁹ Section 5(1) of the 1927 Precious Stones Act. In the case of unalienated Crown land, the lessee of the unalienated Crown land was entitled to prospect on the land provided that he obtained a prospecting permit. The prospecting permit could in terms of s 5(1) of the 1927 Precious Stones Act only be granted for the duration of the lease and was *ipso facto* cancelled on the termination or cancellation of the lease. *Cape Coast Exploration* case at 207.

¹²⁰⁰ A lessee of unalienated Crown land was, in addition, in terms of s 5(1) of the 1927 Precious Stones Act, required to obtain the written consent of the Minister of Mines and Industry. In *Boshoff v Rex* 1938 (AD) 468, the appellants appealed to the Appellate Division against their conviction by a Magistrate in *Rex v Boshoff* 1928 (CPD) 113 of the contravention of the provisions of s 5(1) of the 1927 Precious Stones Act. The appellant, Boshoff, with the permission of the landowner of certain alienated Crown land, obtained a prospecting permit to prospect for diamonds on the surface owner's land. The prospecting permit was not taken out in the name of the surface owner, but in the name of Boshoff. The Magistrate in the court *a quo*, convicted Boshoff and the other appellants. They were reprimanded and discharged, but an order was also made under s 9(2) of the 1927 Precious Stones Act, that certain diamonds found in their possession should be confiscated as diamonds found by the appellants during illegal prospecting. On appeal, the prosecutor argued that one of the objects of the 1927 Precious Stones Act was to limit the output of diamonds and that it

surface owner of alienated Crown land, who prospected on alienated Crown land, or through his servants acting under his authority, was not obliged to hold a digger's certificate.¹²⁰¹ In the event that a prospecting permit was issued to the surface owner or lessee, the surface owner or lessee had to waive the right to claim compensation from the Government for any loss, damage or encroachment which they might sustain as a result of the prospecting or mining for, and the exploitation of precious stones on such land or of any act incidental to such prospecting, mining or exploitation.¹²⁰²

The right of the surface owner of alienated Crown land to prospect on his own land was, however, qualified in that the Crown was entitled to take or "expropriate" such land for public or for mining purposes.¹²⁰³ The Crown could further, by proclamation in the *Gazette* permit, prohibit or restrict prospecting on any Crown land and could prohibit or restrict it on any other land.¹²⁰⁴ These provisions appear to be in accordance with the judgment in the *Elandskloof* case¹²⁰⁵ that the Crown controls the prospecting and mining of precious stones and that the rights that vested in the Crown were qualified in the 1927 Precious Stones Act.

9.4.4 The right to prospect for diamonds on private land

In the case of private land the right to prospect for diamonds vested in the owner of the private land or the holder of the rights to precious stones (where such rights had

had become a matter of public policy to limit the output. The court held on appeal that s 5(1) of the 1927 Precious Stones Act did not expressly state that the right conferred on the surface owner was a right which could only be exercised for the benefit of the surface owner himself, nor did it in express terms prohibit the surface owner from assigning his right. In the absence of any limitation, express or implied, it was held that a right conferred on any person by statute, was an assignable right which could be assigned to some other person to be exercised by the assignee for his own benefit.

¹²⁰¹ Section 8(1) of the 1927 Precious Stones Act.

¹²⁰² Section 5(2) of the 1927 Precious Stones Act. The waiver had to be in the form prescribed in the second Schedule to the 1927 Precious Stones Act. Section 5(3) of the 1927 Precious Stones Act provided that the waiver had to be endorsed against the title deed of the land. The provisions of ss 5(2) and 5(3) of the 1927 Precious Stones Act did not apply to surface owners of land in the Province of the Cape of Good Hope in whose title there was a reservation of precious stones to the Crown unless such land was held under the *Land Settlement Act* 12 of 1912.

¹²⁰³ Section 7(1) of the 1927 Precious Stones Act.

¹²⁰⁴ Section 7(2) of the 1927 Precious Stones Act.

¹²⁰⁵ See fn 1185 above.

been severed from the land ownership). The owner¹²⁰⁶ of private land could either himself or through his servants acting under his authority and on his behalf, prospect for diamonds on his private land without a prospecting permit.¹²⁰⁷ The owner of private land could also permit not more than five persons to prospect for precious stones on his land on such terms and conditions as he could determine in writing, provided that such persons were holders of diggers' certificates.¹²⁰⁸ The owner had to give written notice to the Mining Commissioner if he intended to prospect for diamonds and if he granted permission to another person or persons to prospect on his private land, he had to provide the Mining Commissioner with details of the names and addresses of the persons permitted to prospect on his land.¹²⁰⁹

9.4.5 Discovery of diamonds

A prospector was entitled to all the diamonds he had found during the course of his *bona fide* prospecting.¹²¹⁰ The Mining Commissioner could at any time, by written notice served upon any person carrying out any operations purporting to be

¹²⁰⁶ An "owner" was defined in s 116 of the 1927 Precious Stones Act to mean "in relation to private land, the person registered in a deeds registry as the holder of the precious stones rights on such land, or the person who is registered in such registry as the owner of land where there is no reservation in or entry against his title deeds so registered whereby any other persons holds the precious stones rights on such land."

¹²⁰⁷ Section 6(1)(a) of the 1927 Precious Stones Act.

¹²⁰⁸ Section 6(1)(b) of the 1927 Precious Stones Act. See para 9.4.8.4 below.

¹²⁰⁹ Section 6(2) of the 1927 Precious Stones Act.

¹²¹⁰ Section 10 of the 1927 Precious Stones Act. The Transvaal Provincial Division held in *Ex Parte Pretorius* 1934 (TPD) 287 at 289 (hereafter the *Pretorius* case) that s 10 of the 1927 Precious Stones Act only referred to prospecting on Crown land and that it could not override the specific terms and conditions contained in a prospecting contract concluded between a prospector and the owner of private land. This view was criticised by the Transvaal Provincial Division in the *Elandskloof* case at 86 with reference to similar provisions in the 1964 Precious Stones Act and Goldstein J held that the *Pretorius* case was wrongly decided and that the relevant provisions applied to private land as well. The Governor-General could, however, in terms of s 10 of the 1927 Precious Stones Act make regulations prescribing that any prospector had to pay a share of the proceeds of any diamonds into the Consolidated Revenue Fund or prescribing the share of the proceeds to which the Crown and the prospector were entitled respectively.

prospecting operations, declare that such operations constituted digging¹²¹¹ and prohibit the continuance of such operations.¹²¹²

Every prospector who discovered diamonds forthwith had to give written notice of the discovery to the Mining Commissioner. In addition, the discoverer had to then, within 15 days after the discovery, submit a declaration in the prescribed form indicating the weight and value of the diamonds found, as well as the extent of the ground and the number of persons he employed.¹²¹³ The discoverer¹²¹⁴ further had to submit a copy of the declaration in person to the chief of the diamond detective department or to the Magistrate of the district in which the prospecting was being carried out. The prospector also had to produce the diamonds referred to in the declaration to such officer for inspection.¹²¹⁵ The Mining Commissioner could at any time order any prospector to carry out any washing operations with such plant as he had at his disposal to the satisfaction of the Mining Commissioner and under his supervision or that of any other appointed person, to determine whether the material he had excavated contained diamonds in sufficient quantities to justify proclamation.¹²¹⁶ When a prospector discovered diamonds and the Mining Commissioner was satisfied that there were reasonable grounds for believing that the discovery of the diamonds was

¹²¹¹ The word "dig" was defined in s 116 of the 1927 Precious Stones Act to mean: "intentionally to win precious stones from the soil, rock or ground in which the same occur, and shall include all excavating necessary for the purpose, whether by underground or open working, boring, or otherwise, as well as all operations incidental thereto."

¹²¹² Section 8(4) of the 1927 Precious Stones Act.

¹²¹³ Section 11(1) of the 1927 Precious Stones Act. Hahlo and Kahn *The Union of South Africa* 768.

¹²¹⁴ A "discoverer" was defined in s 116 of the 1927 Precious Stones Act to mean: "a person who holds a discoverer's certificate which has been issued under Chapter II or under any law repealed by this Act, and which is current at the commencement of this Act."

¹²¹⁵ Section 11(1) of the 1927 Precious Stones Act. Section 11(2) of the 1927 Precious Stones Act provided that the prospector had to submit within one week after the last day of every calendar month, a similar declaration in respect of the prospecting operations conducted during a particular month. A copy of the declaration also had to be submitted to the chief of the diamond detective department or the relevant Magistrate. If the prospector failed to comply with the provisions of s 11 or if he made a false declaration, knowing that the declaration was false, he was guilty of an offence and liable on conviction to a fine not exceeding £50. The Minister could also on conviction of such an offence, declare any rights which might have accrued to the prospector under the 1927 Precious Stones Act to be forfeited in respect of the said discovery.

¹²¹⁶ If the prospector refused to comply with such an order he was in terms of s 12 of the 1927 Precious Stones Act, guilty of an offence and liable on conviction to a fine not exceeding £100.

genuine and that there were reasonable grounds for believing that they existed in payable quantities, he had to issue a discoverer's certificate to the prospector in the prescribed form.¹²¹⁷

9.4.6 Proclamation of a mine or an alluvial digging

After the discovery of diamonds the Minister was entitled at any time, to take such steps as he deemed appropriate for purpose of testing or determining the character, payability and extent of the place where the diamonds had been discovered. The Minister could request the prospector to make his plant available for this purpose and to furnish such information relating to the discovery as required.¹²¹⁸ If the Governor-General was satisfied that there were reasonable grounds for believing that diamonds existed in payable quantities, on any Crown land or on private land, he could at his discretion, cause the whole or such portion of the land that according to him contained diamonds, to be beaconed off and surveyed. Thereafter he proclaimed the area a mine or an alluvial digging, or portion of a previously proclaimed mine or alluvial digging.¹²¹⁹

¹²¹⁷ Section 13(1) of the 1927 Precious Stones Act. In the case of Crown land held under lease, s 13(1)(b) of the 1927 Precious Stones Act provided that no discoverer's certificate would be issued unless and until a Crown Grant had been issued in respect of such land. The word "land" in relation to private land used in s 13 of the 1927 Precious Stones Act was specifically defined to mean: "any area of ground in respect of which the rights to precious stones are registered separately in any deeds registry or any area of ground registered in any deeds registry without separate registration of the rights to precious stones."

¹²¹⁸ Section 25 of the 1927 Precious Stones Act. The costs of the work done to test or ascertain the payability and extent of the place where the precious stones had been discovered, was paid from the Consolidated Revenue Fund and if the prospector failed to comply with the requests from the Minister, he was guilty of an offence.

¹²¹⁹ Section 26(1) of the 1927 Precious Stones Act. See the *Richtersveld SCA* case at para 92 and the *Richtersveld CC* case at par 85 in respect of the State alluvial diggings proclaimed in the district of Alexander Bay. Section 26(3) of the 1927 Precious Stones Act exempted the Governor-General from any liability if any mine or alluvial digging had been proclaimed by him but later proved to be or became unpayable. The Governor-General could, however, in terms of s 74(1) (a) of the 1927 Precious Stones Act decide not to open a proclaimed alluvial digging to the public, but instead to deal with the land on which the alluvial digging had been proclaimed in a different manner. The Governor-General could lease the right to win diamonds from the alluvial digging or any part thereof to the discoverer or to the holder of an owner's certificate or to any company on such terms and regulations as he deemed fit and subject to the payment to the Crown or a royalty or a share of the profits as he decided, in addition to the payment of a monthly licence fee. The Governor-General could in terms of s 74(1)(b) of the 1927 Precious Stones Act also decide to sell the right to win diamonds from the whole or any part of the alluvial digging to the discoverer or to the holder of an owner's certificate or to any company and the purchaser had to continue paying the monthly

The Governor-General could further proclaim an additional area as a mining area, which was believed not to contain diamonds. A mining area had to be of sufficient extent to be used as depositing floors, machinery and tipping sites, residential and trading sites and all other matters relating to the proper and efficient working of the mine.¹²²⁰ The Mining Commissioner had to notify the Registrar of Deeds of the proclamation of a mine or alluvial digging, who in turn had to register the notice against the title deeds of the relevant land.¹²²¹ The interests of the owner of private land¹²²² who had not prospected or allowed prospecting to take place on the private land or who had not consented to prospecting on the land, was protected in that his land could not be proclaimed a mine or an alluvial digging.¹²²³ No mining area could be proclaimed on private land without the written consent of the holder of the rights to precious stones, unless the mining area was required for the working of a mine already proclaimed on such private land.¹²²⁴

licence fees. The surface owner of land which was disposed of by lease or by sale, was in terms of s 74(2) of the 1927 Precious Stones Act entitled to receive one-half of the licence money paid in respect of the land. A further alternative method of the disposal of alluvial diggings was that the Governor-General could in terms of s 76(2) of the 1927 Precious Stones Act, by proclamation in the *Gazette* declare any proclaimable or proclaimed land or any unalienated Crown land to be a State Mine or alluvial digging and deal with the land in the prescribed manner.

¹²²⁰ Section 27(1) of the 1927 Precious Stones Act. The area surveyed and proclaimed as a mining area, could in terms of s 27(2) of the Precious Stones Act be reduced or enlarged at the discretion of the Governor-General. The Governor-General could further make regulations for the proper laying out of depositing floors, machinery and tipping sites, trading sites, residential sites and other areas required for the proper protection of the mine and works and to prevent access or communication by unauthorised persons.

¹²²¹ Section 26(4) of the 1927 Precious Stones Act. The Mining Commissioner was in terms of s 96(1) of the 1927 Precious Stones Act entitled at any time after the issue of a notice of the intention to proclaim an alluvial digging, to select and reserve from pegging on the land and without payment, sites required for public buildings, schools, places of worship, hospitals, police barracks, Government offices, native locations or compounds, residential, trading, recreation or sanitary purposes, burial grounds or for any purpose connected with the digging. The Mining Commissioner's discretion was limited in that the site selected could not interfere with the proper and efficient working of any claims or with any cultivated lands, buildings, kraals and permanent improvements of the landowner. Once the sites selected by the Mining Commissioner were no longer required for the purposes for which they were reserved, they were declared open to pegging or available for allotment for digging purposes.

¹²²² As defined in s 13 of the 1927 Precious Stones Act.

¹²²³ Section 26(2) of the 1927 Precious Stones Act.

¹²²⁴ Section 27(3) of the 1927 Precious Stones Act. Section 29 of the 1927 Precious Stones Act provided that unless it was expressly stated otherwise, the rights of the surface owner in respect of the

The Governor-General could deproclaim any alluvial digging or mine or any part thereof, including the mining area, if it appeared to the satisfaction of the Minister that diamonds were not being found in payable quantities.¹²²⁵ The deproclamation of a mining area did not affect claims that existed in the relevant alluvial digging at the time of the deproclamation. Once the claims had lapsed, they were no longer available for pegging and were deemed to be deproclaimed.¹²²⁶

9.4.7 *Diamond mines*

The 1927 Precious Stones regulated the rights of the discoverer of diamonds, the owner and the working of a mine and alluvial diggings separately. In the case of the discovery of a diamond mine, the discoverer of the mine and the surface owner¹²²⁷ and holder of the rights to diamonds in the case of private land, were entitled to certain rights which are discussed in the next section.¹²²⁸

9.4.7.1 Rights of the discoverer of a diamond mine

On proclamation of the diamond mine,¹²²⁹ the discoverer of a diamond mine was entitled to a 30% undivided share in such a mine if it was discovered on unalienated Crown land. The Crown was entitled to the remaining 70% thereof.¹²³⁰

surface of his land included in any proclamation issued in terms of chapter IV of the 1927 Precious Stones Act or a prior law, would in no way be affected.

¹²²⁵ Section 30 of the 1927 Precious Stones Act. In the deproclamation, the Governor-General could make such provision as he deemed necessary (a) for the prevention or control of further prospecting and digging for precious stones on the deproclaimed land (b) for the protection of any public buildings or places of worship lawfully erected on the land; and (c) for such other reasonable purposes as appeared to be necessary in the circumstances. The Mining Commissioner had to notify the Registrar of Deeds of the deproclamation of a mine, alluvial digging or mining area and the deproclamation had to be registered against the relevant title deeds.

¹²²⁶ Section 31 of the 1927 Precious Stones Act.

¹²²⁷ In the case of alienated Crown land or the surface owner of private land where the rights to precious stones had not been severed.

¹²²⁸ See para 9.4.7.1-9.4.7.2 below. Dale *Mineral Rights* 261; *Rex v Thom* 1927 TPD 930.

¹²²⁹ A "mine" when used as a substantive, was defined in s 116 of the 1927 Precious Stones Act to mean: "an area of ground bearing precious stones, which is continuous in its formation and is contained within a pipe or similar geological formation, together with any directly connected overflow or extension of the same."

¹²³⁰ Section 32 read with s 34(2) of the 1927 Precious Stones Act.

If the mine was discovered on private land or on alienated Crown land, the discoverer was entitled to a one-fifth share in such mine to which the owner or surface owner was entitled under chapter 3 of the 1927 Precious Stones Act.¹²³¹ A discoverer could transfer or hypothecate his interest in a mine provided that he first obtained the written consent of the Minister. The transferee obtained all the rights and obligations of the discoverer on transfer of the discoverer's certificate.¹²³²

9.4.7.2 Rights of the owner in the case of the discovery of diamonds in a mine

In the case of the discovery of diamonds in a mine on private land, the holder of the rights to diamonds was entitled to receive an owner's certificate from the Mining Commissioner¹²³³ confirming that on the proclamation of a mine, the holder of the rights to diamonds was entitled to an undivided 50% share in such mine or portion thereof, which included the rights of the discoverer, if any.¹²³⁴ If the holder of the rights to precious stones in respect of private land was not the discoverer of the precious stones, the holder of the rights to precious stones would therefore be entitled to 40%, the discoverer to 10% and the Crown to the remaining 50%.¹²³⁵

In the case of the discovery of diamonds in a mine on alienated Crown land the surface owner was entitled to an undivided 30% share in such mine or portion thereof which included the rights of the discoverer, if any.¹²³⁶ If the person who was entitled to the rights of an "owner" was also the discoverer of precious stones on his land, he was only entitled to the owner's rights.¹²³⁷ If the surface owner of alienated Crown land

¹²³¹ See paras 9.4.7.2 and 9.4.7.3 below.

¹²³² Section 15(2) of the 1927 Precious Stones Act provided that the discoverer's certificate of diamonds in a mine and any transfer or hypothecation thereof had to be registered in the Transvaal as a mining title by the Registrar of Mining Titles under the *Registration of Deeds and Titles Act* 25 of 1909 and in the other provinces by the Registrar of Deeds. See *Rex v Raath* 1951 1 SA 600 (T) (hereafter the *Raath* case).

¹²³³ The form of the certificate had to be prescribed by regulation. Section 19(1) of the 1927 Precious Stones Act.

¹²³⁴ Section 19(1)(b) read with s 13(1) of the 1927 Precious Stones Act.

¹²³⁵ Section 34(1) of the 1927 Precious Stones Act. See figure 9.3 below.

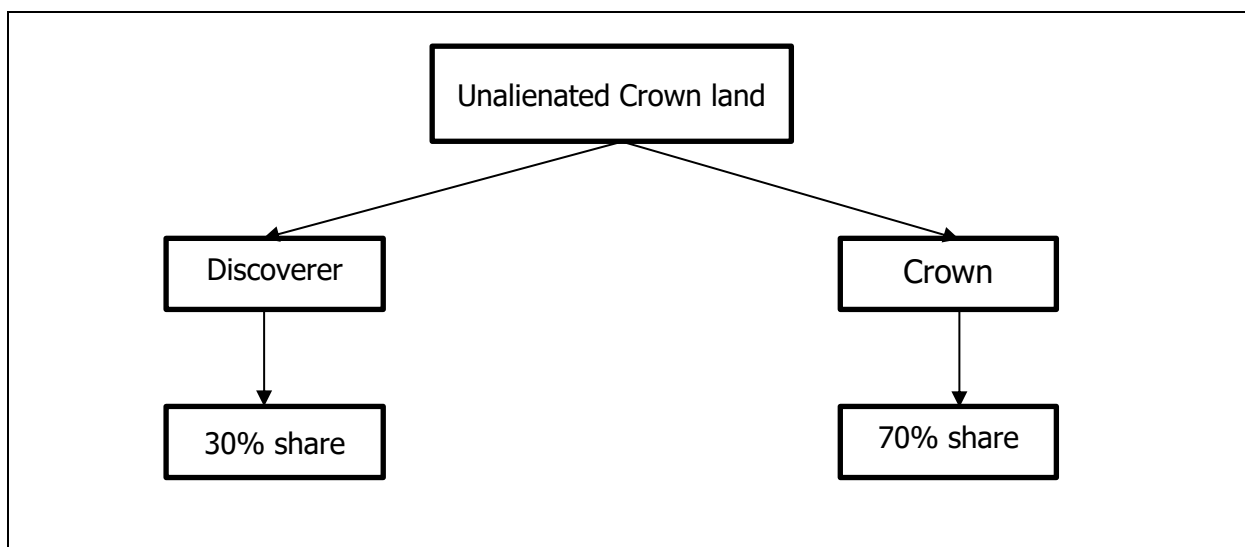
¹²³⁶ Section 19(1)(b) of the 1927 Precious Stones Act.

¹²³⁷ Section 19(3) of the 1927 Precious Stones Act. Where prospecting operations had before the commencement of the 1927 Precious Stones Act on 16 November 1927 taken place on land which

was not the discoverer of diamonds on his land, the surface owner was entitled to 24%, the discoverer was entitled to 6% and the Crown was entitled to the remaining 70%.¹²³⁸

The different undivided shares in a diamond mine proclaimed on unalienated Crown land in terms of the 1927 Precious Stones Act, are schematically summarised in Figure 9.1 below.

Figure 9.1: Undivided shares in a diamond mine proclaimed on unalienated Crown land.



The undivided shares to which the discoverer, surface owner and the Crown were in terms of the 1927 Precious Stones Act entitled to with regard to alienated Crown land, are illustrated in Figure 9.2 below.

was subject to a reservation of precious stones in favour of the Crown and had resulted in the discovery of diamonds and where discoverer's rights had accrued or been granted to any person under any law, no surface owner of such alienated Crown land which was alienated by the Crown by Crown Grant or title deed, was entitled to the rights of the owner as set out in s 19 of the 1927 Precious Stones Act. The granting of the owner's rights to the surface owner, was subject to the condition that he signed the waiver provided for in s 5 of the 1927 Precious Stones Act.

¹²³⁸ Section 34(1) of the 1927 Precious Stones Act. See figure 9.2 below.

Figure 9.2: Undivided shares in a diamond mine discovered on alienated Crown land.

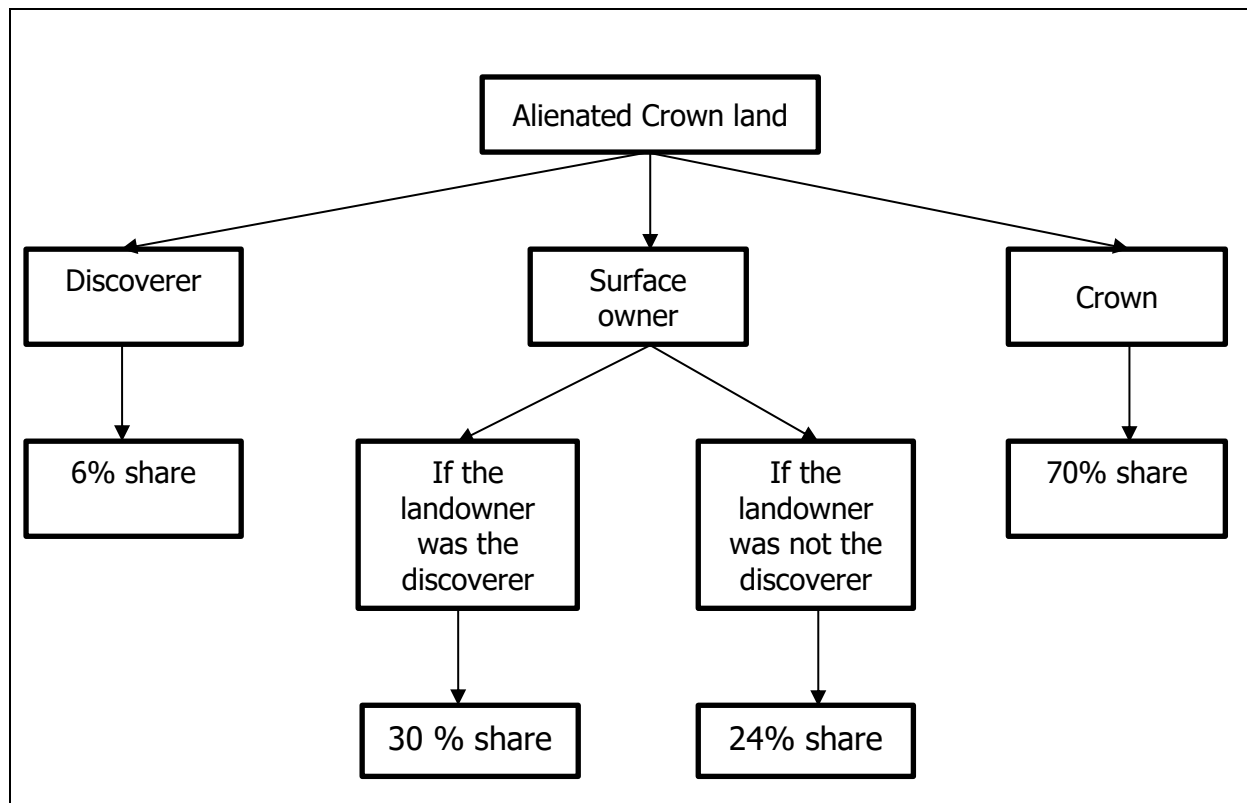
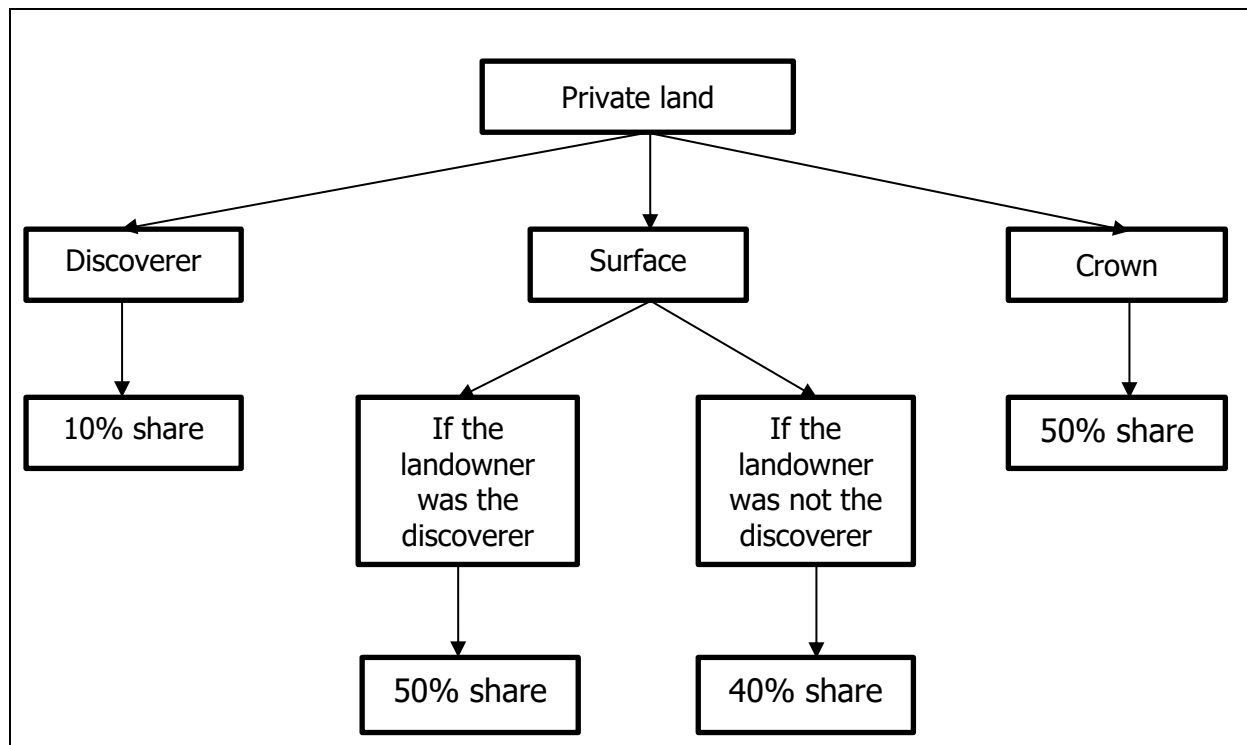


Figure 9.3 below is a schematic summary of the undivided shares which the discoverer, owner and the Crown were in terms of the 1927 Precious Stones Act entitled to in respect of private land.

Figure 9.3: Undivided shares in a diamond mine discovered on private land.



9.4.7.3 The right to work a proclaimed mine

Chapter V of the 1927 Precious Stones Act contained the provisions that regulated the working of a mine. It was divided in two parts. The first part regulated the working of a mine, while the second part contained the administrative provisions applicable to the working of new and existing mines.¹²³⁹ The person who was entitled to work a diamond mine in terms of the 1927 Precious Stones Act depended on the form of land tenure.

¹²³⁹ Section 2(2) of the 1927 Precious Stones Act. See para 9.2 above. The mineholder was in terms of s 39(1) of the 1927 Precious Stones Act required to keep all necessary books, accounts, plans and records of his operations which had to be open for inspection by the Minister. Section 41(1) of the 1927 Precious Stones Act provided that accounts had to be prepared annually and had to be inspected by an official appointed by the Minister, who had to collect all amounts due to the Crown. The mineholder was in terms of s 42 of the 1927 Precious Stones Act required to render annual accounts to the appointed officer, indicating the profits realised by the mine. Section 43(1) of the 1927 Precious Stones Act provided that the accounts had to be rendered within three months after the date up to which they were prepared and the Crown's share of the realised profits had to

In the case of unalienated Crown land, the discoverer of the mine who obtained a discoverer's certificate in terms of section 13(1)(b) of the 1927 Precious Stones Act was entitled to elect to work the mine he was entitled to 30% of the realised profit derived from the working of the mine.¹²⁴⁰

In the case of alienated Crown land, the surface owner who was the holder of an owner's certificate granted in terms of section 19(1)(b) of the 1927 Precious Stones Act, was entitled to elect to work the mine and he was entitled to an undivided 30% share in the mine.¹²⁴¹

In the case of private land, where the surface rights and the rights to precious stones were not owned by the Crown, the holder of the rights to precious stones who was the holder of an owner's certificate granted in terms of section 19(1)(b) of the 1927 Precious Stones Act was entitled to elect to work the mine.¹²⁴²

Within nine months after the publication of the proclamation of a mine, the person who was entitled to work the mine had to notify the Minister in writing whether he intended to work the mine. The owner, surface owner and discoverer of the mine were entitled to receive from the profits derived from the working of the mine such shares as they were entitled to in terms of the 1927 Precious Stones Act.¹²⁴³

Where a small mine was proclaimed which did not exceed 135 square feet in extent, the Governor-General could lease the Crown's interest in the mine to the mineholder¹²⁴⁴ on such special terms as could be agreed upon and the provisions of

be paid simultaneously with the rendering of the accounts. Whenever the mineholder distributed profits he was in terms of s 45 of the 1927 Precious Stones Act obliged simultaneously to pay to the Crown its proportion of the profits, which had to be treated as a deposit with the Crown pending the rendering of the annual account.

¹²⁴⁰ Section 13(1)(b) read with s 2 of the 1927 Precious Stones Act.

¹²⁴¹ Section 32 read with s 19(1)(b) of the 1927 Precious Stones Act. This certificate is in this chapter referred to as the owner's certificate.

¹²⁴² Section 32 read with s 19(1)(b) of the 1927 Precious Stones Act.

¹²⁴³ Section 32 of the 1927 Precious Stones Act. See paras 9.4.7.1-9.4.7.3 above.

¹²⁴⁴ A "mineholder" was defined in s 116 of the 1927 Precious Stones Act to mean: "the person working a mine under this Act or a prior law."

the 1927 Precious Stones Act relating to the working of a mine and the division of profits applied in such a case.¹²⁴⁵

9.4.7.4 Obligations of the operator of a mine

The owner, surface owner or discoverer elected to work the mine (hereafter respectively referred to as the operator) had within 12 months after the publication of the proclamation of the mine, to provide the working capital which according to the Minister was necessary for the effective working of the mine.¹²⁴⁶ The realised profits derived from the working of the mine had to be divided between the Crown, the owner (the holder of the rights to precious stones in the case of private land), the surface owner (in the case of alienated Crown land) and the discoverer in the proportions of their respective shares in the mine. The Crown was not entitled to receive any share of the profits until the owner, surface owner, or discoverer recovered from the profits such part of any capital expenditure¹²⁴⁷ with interest he incurred for purposes of the mine in proportion to the Crown's share in the mine.¹²⁴⁸

The operator had to commence with its operations within 15 months after the publication of the proclamation, unless circumstances beyond his control prevented him or unless the Minister consented to a postponement for any other reason. The operator had to mine¹²⁴⁹ and carry on mining operations and operations necessary for

¹²⁴⁵ Section 38 of the 1927 Precious Stones Act. The provisions of s 38 of the 1927 Precious Stones Act also applied in terms of s 2(2) of the 1927 Precious Stones Act to mines that existed on 16 November 1927, the date on which the 1927 Precious Stones Act took effect.

¹²⁴⁶ Section 33(1) of the 1927 Precious Stones Act.

¹²⁴⁷ The term "capital expenditure" was defined in s 116 of the 1927 Precious Stones Act to mean in respect of any mine: "any monies actually expended in connection with the working of the mine prior to proclamation less the revenue derived therefrom together with such further expenditure as may from time to time be sanctioned by the Minister under this Act."

¹²⁴⁸ Section 33(1) of the 1927 Precious Stones Act.

¹²⁴⁹ The word "mine" or "dig" when used as a verb, was defined in s 116 of the 1927 Precious Stones Act to mean: "intentionally to win precious stones from the soil, rock or ground in which the same occur, and shall include all excavation necessary for the purpose, whether by underground or open working, boring, or otherwise, as well as all operations incidental thereto".

the winning and disposal of the precious on a scale and in a manner satisfactory to the Minister.¹²⁵⁰

Assets that were held in joint ownership were the property of the Crown and the mineholder in the proportions of their respective shares in the mine. In the case of immovable property, it had to be transferred to and vested in the Crown and the mineholder in their respective proportions. This was on condition, that the full and free use of such assets in and for the purposes of working the mine was not affected.¹²⁵¹

It is submitted that this relates to assets which the Crown and the mineholder purchased or acquired from the profits of the mine. This did not mean that the Crown had an interest in the mine itself or co-ownership in the mine. The Crown only had an interest in the profits derived from the working of the mine and co-owned assets which were acquired from the profits to which the Crown and the mineholder were entitled.

An important diamond mine, the Finsch Mine, was discovered in 1960. The Finsch Mine was proclaimed as a mine on 24 May 1963 in terms of sections 26 and 27 of the 1927 Precious Stones Act.¹²⁵² Section 38 of the 1927 Precious Stones Act entitled the

¹²⁵⁰ Section 33(2) of the 1927 Precious Stones Act. Section 33(3) of the 1927 Precious Stones Act provided that the operator had to provide additional working capital if required by the Minister. The Minister could in terms of s 33(4) of the 1927 Precious Stones Act also request the operator to submit written reports on the policy and programme of development and exploitation, including the washing and extraction and disposal programme to be followed at the mine or such other information as the Minister might require. If the owner, surface owner or discoverer failed to notify the Minister in writing within the 12 month period whether or not he intended to work the mine or failed to find the necessary capital for the working of the mine, or if he failed to work the mine to the satisfaction of the Minister or to carry out any instruction or requirement of the Minister, the Minister could in terms of s 33 of the 1927 Precious Stones Act, after giving the owner, surface owner or discoverer three months' written notice to rectify the failure, invite tenders for the working of the mine or any debris heap or depositing floors under a contract. Section 36 of the 1927 Precious Stones Act provided that any share of the profits derived from the working of the mine by the successful tenderer, had to be divided between the Crown and the owner, surface owner or discoverer in proportion to their respective shares.

¹²⁵¹ Section 46 of the 1927 Precious Stones Act. Section 48 of the 1927 Precious Stones Act provided that disputes between the mineholder and the Crown in respect of the carrying out of the provisions of Chapter V dealing with the working of a mine or in any matter regarding their respective interests in the mine, had to be referred for final decision to arbitration.

¹²⁵² The Finsch Mine was discovered in the Province of the Orange Free State on the farm Brits, which was unalienated Crown land. It was named after its two discoverers, Alistair Fincham and Wilhelm Schwabel who discovered the mine while they were prospecting for asbestos. Wilson, McKenna and Lynn *Occurrence of Diamonds* 39; Janse 1995 *Gems & Gemology* 242.

Governor-General where a small mine not exceeding 150 000 square feet was proclaimed, to lease the Crown's interest in the mine to the mineholder, subject to the terms agreed to in the lease agreement.¹²⁵³

9.4.8 Alluvial diggings

The 1927 Precious Stones Act also regulated the working of alluvial diggings and provided for certain rights of the discoverer of alluvial diamonds and the owner of the land (or holder of the rights to diamonds) on which alluvial diggings were proclaimed, depending on the form of land tenure.

9.4.8.1 Discovery of alluvial diggings

The discoverer of alluvial diamonds was in the case of the proclamation of an alluvial digging on unalienated Crown land entitled to select 20 claims and in the case of alienated Crown land to select 30 claims. In the case of the discovery of alluvial diamonds on private land in the Transvaal, the discoverer was entitled to select 60 claims and in the remaining provinces, to select 200 claims.¹²⁵⁴

The discoverer of diamonds in alluvial was exempted from the payment of licence monies in respect of the claims awarded to him for as long as the claims were worked to the satisfaction of the Mining Commissioner and held by the discoverer in his own

¹²⁵³ A discoverer's certificate was issued to the discoverers of the Finsch Mine in terms of s 13 of the 1927 Precious Stones Act on 15 October 1962. The discoverer's certificate was transferred to Finsch Diamonds (Pty) Ltd in 1962, a subsidiary company of De Beers Consolidated Mines Limited. The Government of the Union of South Africa thereafter entered into a lease agreement with De Beers Consolidated Mines Limited in terms of s 38 of the 1927 Precious Stones Act, to lease its undivided 70% share in the Finsch Mines to De Beers Consolidated Mines Limited. Hocking *Kaia & Cocopans* 117-118, 137-139, 151, 155. See also Roberts *Kimberley* 387.

¹²⁵⁴ Section 13(1)(a) of the 1927 Precious Stones Act. Section 13(2) of the 1927 Precious Stones Act provided that the claims selected in respect of precious stones in alluvial had within a time specified by the Mining Commissioner in writing, to be defined by a sketch plan and pegged on the workings where the discovery was made in one block. If the prospector failed to select and peg in one block the claims awarded to him in accordance with s 13(1)(a) of the 1927 Precious Stones Act within the period prescribed by the Mining Commissioner or if the discoverer failed to select the claims within the further period specified by the Mining Commissioner, the discoverer forfeited his rights to select such claims and all his rights under his discoverer's certificate lapsed in terms of s 14 of the 1927 Precious Stones Act.

name.¹²⁵⁵ Once the discoverer's claims were transferred to another person the holder of the claims became liable for the payment of licence monies in terms of the 1927 Precious Stones Act. Furthermore, all other conditions with regard to ordinary claims on an alluvial digging applied to such former discoverer's claims.¹²⁵⁶ Licence fees also became payable, if the discoverer failed to work the claims to the satisfaction of the Mining Commissioner.¹²⁵⁷

9.4.8.2 Rights of the owner in the case of the discovery of alluvial diggings

If alluvial diamonds had been discovered on alienated Crown land, the surface owner was entitled to receive an owner's certificate from the Mining Commissioner confirming that he was entitled to 50 claims.¹²⁵⁸ The rights of the surface owner were subject to the rights of the discoverer. In the case of the discovery of alluvial diamonds on private land in the Province of Transvaal, the holder of the rights to diamonds was entitled to 235 claims. In the case of the discovery of alluvial diamonds in the remaining three provinces, the holder of the rights to diamonds was entitled to 400 claims.¹²⁵⁹

The holder of the rights to diamonds in respect of private land and the surface owner of alienated Crown land on which diamonds in alluvial had been discovered, was

¹²⁵⁵ The Appellate Division held in the *Rabinowitz* case that a discoverer's certificate could be held by a company and that the phrase "a right in connection with a claim" in s 73(1) of the 1927 Precious Stones Act should be afforded a narrow interpretation.

¹²⁵⁶ Section 16(1) of the 1927 Precious Stones Act. Section 15(1) of the 1927 Precious Stones Act provided that any discoverer's certificate of precious stones in alluvial, whether granted under the 1927 Precious Stones Act or a prior law, or any transfer thereof had to be registered at the office of the Mining Commissioner together with the sketch plan of the pegged claims.

¹²⁵⁷ Section 16(2) of the 1927 Precious Stones Act. The Mining Commissioner had to give the holder of the discoverer's claim one month's written notice to the effect that licence money would become payable and in the case of discoverer's claims granted before the commencement of the 1927 Precious Stones Act, the licence money was calculated at the rate of five shillings per month for every 2025 square feet or portion thereof in the block. If the licence money remained unpaid at the expiry of three months after the notice had been given by the Mining Commissioner, the claims lapsed and if they were on proclaimed ground, they could in terms of s 16(3) of the 1927 Precious Stones Act be declared open to pegging by the Mining Commissioner by notice published at this office. There were no similar provisions in respect of an owner's claims. *Edeling v Nooitgedacht Diamonds Limited* 1953 1 All SA 240 (A) at 244.

¹²⁵⁸ The form of the certificate had to be prescribed by regulation. Section 19(1) of the 1927 Precious Stones Act.

¹²⁵⁹ Section 19(1)(a) of the 1927 Precious Stones Act.

entitled to work such claims without having to pay any licence monies. This was on condition that when the claims had been transferred to any other person, licence monies became payable in respect of such claims.¹²⁶⁰ If the holder of the rights to diamonds or surface owner as the case may be, was also the discoverer of the alluvial diamonds on his own land, he was in addition, entitled to the rights of the discoverer.¹²⁶¹ The surface owner of any land on which an alluvial digging was proclaimed was entitled to one-half of all the claim licence monies collected in respect of such alluvial digging.¹²⁶² The Mining Commissioner had to give the surface owner written notice of his intention to proclaim an alluvial digging on his land and the surface owner had forthwith to submit a sketch plan to the Mining Commissioner, in which he depicted all portions of ground reserved in terms of section 23(1) of the 1927 Precious Stones Act.¹²⁶³

¹²⁶⁰ Section 19(1)(a) of the 1927 Precious Stones Act.

¹²⁶¹ Section 19(3) read with s 13 of the 1927 Precious Stones Act.

¹²⁶² Section 22 of the 1927 Precious Stones Act. The Mining Commissioner had to keep the necessary books showing the amount of money received and at the end of every month, had to account and pay all money due to the landowner. Section 23(1) of the 1927 Precious Stones Act provided that the surface owner of land that was proclaimed an alluvial digging, was entitled to the free and undisturbed use of:

- (a) any homestead on his land together with so much land surrounding it as the Mining Commissioner deemed to be reasonable and necessary,
- (b) all buildings, cemeteries and kraals situated outside such homestead and surrounding land,
- (c) all ground which had been under *bona fide* cultivation immediately prior to the date of the notice of the discovery, and
- (d) such portions of the water to which the landowner was entitled under s 8 of the *Irrigation and Conservation of Waters Act* 8 of 1912 as he required for domestic purposes, for watering his stock and for irrigating the ground which had been under *bona fide* cultivation.

Section 23(2) of the 1927 Precious Stones Act provided that the Mining Commissioner had to determine the quantity of water reserved before the land was proclaimed, after consultation with the landowner and subject to confirmation by the Minister. The Mining Commissioner had to take the quantity of water from a public stream to which the landowner was entitled under the *Irrigation and Conservation of Waters Act* 8 of 1912.

¹²⁶³ Section 23(3) of the 1927 Precious Stones Act.

9.4.8.3 Working of claims

Only registered claimholders could work claims in a proclaimed alluvial digging.¹²⁶⁴ After the proclamation of an alluvial digging¹²⁶⁵ and after the claims¹²⁶⁶ to which the discoverer and the owner were entitled had been reserved, the remaining claims were available for disposal of, or for distribution to the public.¹²⁶⁷ The proclamation of the alluvial digging had to specify the date and hour by when the alluvial digging would be open for pegging by the public. The Mining Commissioner or his designate had to read out the proclamation in public on or near the area proclaimed as an alluvial digging. He also had to give a signal in the prescribed manner that holders of claim licences could proceed to peg claims on the proclaimed area.¹²⁶⁸

9.4.8.4 Digger's certificate

Before a person could apply for a claim licence, he first had to obtain a digger's certificate.¹²⁶⁹ In order to obtain a digger's certificate, an applicant had to apply to the relevant Diggers' Committee¹²⁷⁰ or if no Diggers' Committee existed, to the

¹²⁶⁴ Any holder of a claim licence, a discoverer's certificate or an owner's certificate that were duly registered, were in terms of s 53 of the 1927 Precious Stones Act, regarded to be a registered claimholder.

¹²⁶⁵ The term "alluvial digging" was defined in s 116 of the 1927 Precious Stones Act to mean: "any area proclaimed as such under this Act or a prior law, provided the area has not been lawfully deproclaimed or proclaimed a mine."

¹²⁶⁶ A "claim" was defined in s 116 of the 1927 Precious Stones Act to mean: "the area of ground on an alluvial digging which, in accordance with this Act or a prior law, has been lawfully pegged or allotted as a claim and in respect of which there exists a lawful right to dig for precious stones and shall for the purposes of this Act not exceed forty-five feet in length and forth-five feet in breadth."

¹²⁶⁷ Section 49(1) of the 1927 Precious Stones Act.

¹²⁶⁸ Section 49(2) of the 1927 Precious Stones Act.

¹²⁶⁹ Section 57(1) of the 1927 Precious Stones Act.

¹²⁷⁰ Section 82(1) of the 1927 Precious Stones Act provided that the Governor-General was empowered to make regulations to establish a Diggers' Committee for alluvial diggings or districts. Section 82(3) of the 1927 Precious Stones Act provided that Diggers' Committees that were established under any prior law continued to exist and had to carry out the duties, powers and functions that they carried out immediately before the commencement of the 1927 Precious Stones Act on 16 November 1927, until the relevant regulations made pursuant to the 1927 Precious Stones Act had been brought into operation in respect of the relevant district. Section 86 of the 1927 Precious Stones Act provided that all assets which were immediately before the commencement of the 1927 Precious Stones Act under the control of or at the disposal of any Diggers' Committee became the property of the Union Government and any land held by the Diggers' Committee had to be registered in the name of the Government. Any funds held by a Diggers' Committee at the date of

Magistrate of the relevant district.¹²⁷¹ The digger's certificate was only valid in the province in which it was issued.¹²⁷² The holder of a digger's certificate had to produce the certificate to obtain or to renew a claim licence or to obtain a prospecting permit. Unless a digger's certificate had been cancelled, every digger's certificate had to be renewed annually by the Mining Commissioner. The holder of the digger's certificate had to apply personally or through his duly authorised representative for the renewal of the digger's certificate and had to pay an annual registration fee. If a digger's certificate was not renewed within 30 days of its due date, it *ipso facto* lapsed.¹²⁷³ No

its abolition or dissolution had to be paid in to the Consolidated Revenue Fund. The Minister was also in terms of s 78(1) read with s 79 of the 1927 Precious Stones Act empowered to establish an Alluvial Diamond Board, to supervise and co-ordinate the work of the Diggers' Committees and to advise the Government in regard to all matters affecting the administration of alluvial diggings.

¹²⁷¹ Section 57(1) of the 1927 Precious Stones Act provided that before granting the digger's certificate, the Diggers' Committee or Magistrate first had to determine whether the applicant was of good character, over the age of 18, a fit and proper person to hold a digger's certificate and whether the applicant was entitled to be enrolled as a voter at an election of members of the House of Assembly, if he was not disqualified because of his age.

¹²⁷² Section 57(6) of the 1927 Precious Stones Act. The holder of the digger's certificate was in terms of s 57(7) of the 1927 Precious Stones Act required immediately upon the issue of the certificate, to register the digger's certificate at the office of the Mining Commissioner and to pay the required registration fee of five shillings.

¹²⁷³ Section 57(7) of the 1927 Precious Stones Act. A digger's certificate could in terms of s 59 of the 1927 Cape Precious Stones Act be refused or cancelled by a diggers' committee or prescribed authority, if it was satisfied that the applicant or the holder of the digger's certificate –

"

- (a) was or had been engaged in illicit trade in diamonds;
- (b) has contravened any law relating to the possession or disposal of diamonds;
- (c) is or has been engaged in illicit liquor trade;
- (d) associates with undesirable persons;
- (e) has visited a native labour location or compound on any alluvial digging without the authority of the Mining Commissioner or diggers' committee;
- (f) has been convicted of any criminal offence and sentenced to any term of imprisonment without the option of a fine or to a fine exceeding thirty pounds;
- (g) has failed or is unable to comply with the mining or diggers' committee's regulations;
- (h) was unable personally to keep the registers required by law;
- (i) has done or omitted anything to the prejudice of good order and morality of the diamond digging industry."

A person whose application for a digger's certificate had been refused or whose digger's certificate had been cancelled could in terms of s 62 of the 1927 Precious Stones Act not be employed by any holder of a prospecting permit, claim licence or discoverer's certificate or owner's certificate to work on the prospecting area or claim.

corporate body or association of two or more persons could hold a claim licence or digger's certificate or any right or interest in or relating to any claim.¹²⁷⁴

9.4.8.5 Rights and obligations of the holder of a claim licence

The holder of a digger's certificate could obtain a claim licence¹²⁷⁵ from the Mining Commissioner on payment of the prescribed licence money.¹²⁷⁶ A claimholder¹²⁷⁷ was entitled during the duration of the claim licence, to peg claims in the prescribed manner on any portion of the alluvial digging as indicated in his claim licence. The number of claims that a claimholder could peg had to be specified in the claim licence, but could not exceed six claims.¹²⁷⁸ No person could peg any claim unless he was the holder of a digger's certificate and of a claim licence issued in his own name and in his possession. No person could peg a claim on behalf of any other person.¹²⁷⁹

¹²⁷⁴ Section 73(1) of the 1927 Precious Stones Act. See the *Raath* case. Section 73(1) was, however subject to s 74 of the 1927 Precious Stones Act which entitled the Governor-General to sell or lease the right to win precious stones from a proclaimed alluvial digging to a company. The chairman or secretary of such company was then in terms of s 74(4) of the 1927 Precious Stones Act entitled to obtain a digger's certificate and a claim licence.

¹²⁷⁵ The term "claim licence" was defined in s 116 of the 1927 Precious Stones Act to include: "a claim licence issued or renewed under any law repealed by and current at the commencement of this Act."

¹²⁷⁶ Section 50(1) of the 1927 Precious Stones Act. Section 52(1) of the 1927 Precious Stones Act provided that the licence money payable for a claim was five shillings.

¹²⁷⁷ A "claimholder" was defined in s 116 of the 1927 Precious Stones Act to mean: "the holder of a claim licence who at the same time holds in accordance with this Act or prior law any claim or any portion of a claim; or the registered holder of discoverer's or owner's claims granted under this Act or a prior law."

¹²⁷⁸ Section 50(1) of the 1927 Precious Stones Act. During the first seven days from the date on which the alluvial digging was declared to be open, claimholders could only peg one claim, subject to certain exceptions.

¹²⁷⁹ Section 50(3) of the 1927 Precious Stones Act. Claims could in terms of s 50(4) of the 1927 Precious Stones Act not be pegged between sunset and sunrise or on a Sunday, Christmas Day or Good Friday. If a person (a) pegged or worked an area greater than he was entitled to peg under his claim licence, discoverer's certificate or owner certificate, or (b) pegged or worked a claim in excess of the size prescribed in the 1927 Precious Stones Act, or (c) pegged or worked any ground without the required authority, he was in terms of s 56 of the 1927 Precious Stones Act guilty of an offence and liable on conviction to a fine not exceeding £100 and the pegging or working had to be declared unlawful and any precious stones won by him from any land unlawfully pegged or worked, could be confiscated.

All claim licences had to be registered by the Mining Commissioner and expired one month from the date of the issue thereof.¹²⁸⁰ If any claim licence in respect of any claim was not renewed within seven days after it had expired the claim lapsed and the ground was thereafter available to other persons for pegging.¹²⁸¹ Claimholders had to maintain their pegs and trenching in a good order.¹²⁸² Every claimholder in a proclaimed alluvial digging was, while he was working his claim, entitled to use and occupy without any additional payment, a piece of land within the proclaimed alluvial digging, for the purpose of a residence for himself and his family on an area reserved for that purpose by the Mining Commissioner.¹²⁸³ A claimholder could not cut, take or use any tree, bush or wood which was not impeding his digging operations on his claim. Any tree, bush or wood standing on any alluvial digging remained the property of the surface owner.¹²⁸⁴

¹²⁸⁰ Section 52(2) of the 1927 Precious Stones Act.

¹²⁸¹ Section 52(3) of the 1927 Precious Stones Act. Section 52(3) of the 1927 Precious Stones Act was amended by s 1 of the *Precious Stones Amendment Act* 28 of 1945 to provide that where a claimholder died or where his estate was placed under sequestration or where the claimholder was a company which was being liquidated, the claim did not lapse if the executor, trustee or liquidator within 30 days of his appointment renewed the claim licence. Section 54(1) of the 1927 Precious Stones Act provided that claimholders had where practicable, to peg their claims in a rectangular shape and if required by the Mining Commissioner the claims had to be trenched. The pegs to be used and the trenching had to be in accordance with the relevant prescribed regulations.

¹²⁸² Section 54(2) of the 1927 Precious Stones Act. Claims could in terms of s 55 of the 1927 Precious Stones Act not be pegged in proclaimed or public roads on any proclaimed alluvial digging and within an area of 30 feet on either side thereof. Where there was reason to believe that precious stones existed in or under any such road or area on either side thereof under the control of a provincial or divisional council, any duly licensed digger could with the consent of the relevant provincial or divisional council or other body concerned, peg a claim or claims on such road or area. The provincial or divisional council could in the consent impose such terms and conditions as it considered to be necessary for the due repair or proper deviation or protection of such road. Section 55 of the 1927 Precious Stones Act.

¹²⁸³ Section 61(1) of the 1927 Precious Stones Act. If the alluvial digging was situated within the jurisdiction of a local authority, the Mining Commissioner first had to consult with the relevant local authority. When an area of land had been selected by the Mining Commissioner to be used as a residence, it could not be pegged by claimholders for as long as it was used for residential purposes.

¹²⁸⁴ Section 65 of the 1927 Precious Stones Act. Every registered claimholder was in terms of s 23(1) read with s 91(2) of the 1927 Precious Stones Act, entitled to access any vlei or abandoned claims within the alluvial digging for the purpose of taking water for domestic purposes, which was not reserved for his own digging operations and for domestic purposes. The claimholder was in terms of s 91(2) of the 1927 Precious Stones Act prohibited from selling or disposing of this water. The Mining Commissioner was entitled after consultation with the surface owner and subject to the *Irrigation and Conservation of Waters Act* 8 of 1912, to grant temporary water rights on an alluvial

A claimholder could on application to the Mining Commissioner, transfer his claim, but only to the holder of a digger's certificate.¹²⁸⁵ The holder of a digger's certificate could not acquire more than 12 claims by transfer. In the case of claims situated in a river bed, the Mining Commissioner could grant to such holder written consent to acquire a greater number of claims.¹²⁸⁶ Any natural person could take transfer of all the claims held under a discoverer's certificate or an owner's certificate.¹²⁸⁷

If any claimholder was not working his claims to the satisfaction of the Mining Commissioner, the Mining Commissioner could give such claimholder written notice to work his claims properly within one month after the date specified in the notice. If the claimholder failed to comply with the terms of the notice to the satisfaction of the Mining Commissioner, the claimholder had to pay double licence monies in respect of all the claims the claimholder held, until he complied with the notice.¹²⁸⁸

digging for the purpose of supplying water to claimholders and residents on any alluvial digging. The holder of a temporary water right was in terms of s 92(1) of the 1927 Precious Stones Act entitled to take water up to such amount and under such terms and conditions as determined by the Mining Commissioner and further to supply water to claimholders, water carriers or residents on the digging at such rates as determined by the Mining Commissioner. The Appellate Division held in *Pienaar v Treasure Trove Diamonds Limited* 1931 (AD) 354 that a claimholder was not in terms of chapter 10 of the 1927 Precious Stones Act entitled to sink a well on his claim for the purpose of finding water. Section 92(2) of the 1927 Precious Stones Act provided that the surface owner of the land on which any alluvial digging was situated, had the first right to obtain a temporary water right from the Mining Commissioner. If the Mining Commissioner had granted the landowner a temporary water right, no other temporary water rights were granted in respect of the relevant private land. The Minister was in terms of s 93 of the 1927 Precious Stones Act entitled after consultation with the landowner and subject to the *Irrigation and Conservation of Waters Act* 8 of 1912, to sink boreholes or wells on any alluvial digging and to erect appliances necessary for the supply of waters to the diggers thereon. Section 95 of the 1927 Precious Stones Act provided that all water rights that were granted under the 1927 Precious Stones Act, terminated when the relevant alluvial digging was deproclaimed.

¹²⁸⁵ Section 66 of the 1927 Precious Stones Act. The transfer had to be registered by the Mining Commissioner on payment by revenue stamps of a fee of five shillings for every transfer. No further transfer duty or stamp duty was payable.

¹²⁸⁶ Section 67 of the 1927 Precious Stones Act.

¹²⁸⁷ Section 67 of the 1927 Precious Stones Act. See paras 9.4.8.1 and 9.4.8.2 above.

¹²⁸⁸ Section 68(1) of the 1927 Precious Stones Act. Claimholders were in terms of s 70(1) of the 1927 Precious Stones Act protected in the event that their claims became submerged by any river, water course or pan. If their claims became practically unworkable as a result of the submersion, the registered claimholder was exempted from the obligation to pay the prescribed licence money for the month or any portion thereof exceeding 15 days during which period the claim was unworkable. Section 70(2) of the 1927 Precious Stones Act provided that the Mining Commissioner had to issue

A claimholder who wanted to sink a shaft on any of his claims to a depth of more than 15 feet, had to notify the Mining Commissioner. The claimholder was then immediately upon giving notice, entitled to mark out an area of ground which was open to pegging, not exceeding 100 yards in radius, marked by a centre peg and adjoining the claims. For as long as the mineholder continued to sink the shaft, no person was entitled to peg or to dig or search for precious stones on the specified area.¹²⁸⁹ If the claimholder found any diamonds within the marked out area at a depth of more than 15 feet from the surface, he had within a period of seven days after the first finding, to submit a written report of the finding to the Mining Commissioner.¹²⁹⁰

9.5 Summary and conclusion

In this chapter the development of the right to mine diamonds under the 1927 Precious Stones Act was discussed. The 1927 Precious Stones Act was enacted to consolidate the different laws relating to the prospecting and mining for diamonds that applied in the different provinces of the Union of South Africa.

The 1927 Precious Stones Act did not apply to unreserved private land in the province of the Cape of Good Hope on diamonds that had already been discovered and on digging or mining operations that had already been carried out prior to 1 April 1927. The 1927 Precious Stones Act furthermore did not apply to existing mines as referred to in Part 8 of the 1904 OFS Precious Stones Ordinance or to any other mines that had been discovered under any prior law. The different legislation that applied in the provinces of the Union therefore continued to apply with regard to such mines, with the exception of certain administrative provisions of the 1927 Precious Stones Act.

to the claimholder whose claims became submerged, a certificate of protection for the next ensuing calendar month and for every month thereafter for as long as his claim was submerged.

¹²⁸⁹ Section 71 of the 1927 Precious Stones Act. A similar provision applied in the Cape in terms of s 2 of the 1886 Cape Precious Stones Amendment Act. See para 5.3 above.

¹²⁹⁰ Section 72(1) of the 1927 Precious Stones Act. A claimholder who failed to submit the report, was guilty of an offence and liable on conviction to a fine not exceeding fifty pounds and had to forfeit all rights to every claim held by him.

Section 1 of the 1927 Precious Stones Act contained a statutory reservation of the right to mine for precious stones in favour of the Crown. This reservation of the right to mine for precious stones in favour of the Crown was qualified. It was specifically stated to be subject to the 1927 Precious Stones Act. Under the 1927 Precious Stones Act, the right to mine diamonds in the Union depended on the specific form of land tenure. The 1927 Precious Stones Act distinguished between three different types of land tenure, namely unalienated Crown land, alienated Crown land, and private land.¹²⁹¹ In the case of unoccupied unalienated Crown land, the right to prospect for diamonds vested in the Crown. This means that a person who wanted to prospect on unoccupied unalienated Crown land had to obtain a prospecting permit.¹²⁹² In the case of alienated Crown land the right to prospect for diamonds vested in the surface owner of the land provided that he obtained a prospecting permit. The surface owner could also nominate another person to prospect on such land. The right of the surface owner of alienated Crown land to prospect on his own land was, however, qualified in that the Crown was entitled to take or "expropriate" such land for public or for mining purposes. The Crown could also by proclamation in the *Gazette* permit, prohibit or restrict prospecting on any Crown land and could prohibit or restrict it on any other land.¹²⁹³ In the case of private land, the holder of the rights to diamonds in respect of the land was entitled to prospect for diamonds with regard to the land without a prospecting permit. The holder of the rights to diamonds could also grant permission to not more than five persons to prospect for diamonds on the relevant private land.¹²⁹⁴ There was thus no general reservation of the right to prospect for diamonds in favour of the Crown relating to all land situated in the Union of South Africa.

Once a prospector discovered diamonds and received a discoverer's certificate, he was entitled on proclamation of an alluvial digging, to select 20 claims on unalienated Crown land and 30 claims on alienated Crown land. In respect of private land situated

¹²⁹¹ See para 9.4.1 above.

¹²⁹² See para 9.4.2.1 above.

¹²⁹³ See para 9.4.2.2 above.

¹²⁹⁴ See para 9.4.2.3 above.

in the province of Transvaal, a prospector in such a case was entitled to 60 claims and in the case of private land situated in the remaining three provinces, to 200 claims.¹²⁹⁵ Where alluvial diamonds had been discovered on alienated Crown land, the surface owner was entitled to 50 claims and in the case of private land in the Province of Transvaal, the holder of the rights to diamonds was entitled to 235 claims. In the remaining three provinces, the holder of the rights to diamonds was entitled to 400 claims.¹²⁹⁶

In the case of the discovery of a diamond mine, the discoverer was on proclamation of a diamond mine on unalienated Crown land entitled to an undivided 30% share in the mine and the Crown was entitled to the remaining 70% share in the mine. In the case of the proclamation of a diamond mine on private land or on alienated Crown land, the discoverer was entitled to an undivided one-fifth share in such mine to which the owner (the holder of the rights to precious stones in the case of private land or the surface owner in the case of alienated Crown land) was entitled. In the case of private land, the owner was entitled to an undivided 50% share in the proclaimed mine. The discoverer of diamonds on private land was thus entitled to an undivided 10% share in the mine (being 20% of the owner's 50% share) and the owner was entitled to an undivided 40% share in the diamond mine and the Crown was entitled to the remaining 50% share in the mine. In the case of the discovery of diamonds on alienated Crown land, the surface owner was entitled to an undivided 30% share in the proclaimed mine. The discoverer of diamonds in respect of alienated Crown land was therefore entitled to an undivided 6% share in the mine (being 20% of the surface owner's 30% share). If the surface owner was not the discoverer of the diamonds on his land, the discoverer was entitled to an undivided 6% share, the surface owner to an undivided 24% share and the Crown to the remaining 70% share in the mine.¹²⁹⁷

¹²⁹⁵ See para 9.4.8.1 above.

¹²⁹⁶ See para 9.4.8.2 above.

¹²⁹⁷ See paras 9.4.7.1 and 9.4.7.2 and figures 9.1-8.3 in para 9.4.7.2 above.

The rights of the discoverer, surface owner, holder of the rights to precious stones and the Crown to shares in the mine should be distinguished from the right to work the mine. The right of the Crown to a share in a proclaimed mine, was a right to receive a share of the profits derived from the working of the mine. The 1927 Precious Stones Act specified who was entitled to work a proclaimed mine or alluvial digging, depending on the form of land tenure. In the case of unalienated Crown land, the holder of a discoverer's certificate was entitled to work the mine. In the case of alienated Crown land the surface owner who held an owner's certificate was entitled to work the mine and in the case of the discovery of diamonds on private land, the holder of the right to precious stones, who held an owner's certificate, was entitled to work the mine.

The 1927 Precious Stones Act continued to regulate the prospecting and mining of diamonds in South Africa for a period of almost four decades, until the Union of South Africa became a Republic in 1961. The then Government of the Republic of South Africa enacted the 1964 Precious Stones Act through which the principle continued that the State was entitled to share in the profits derived from the working of a diamond mine was. The development of the right to mine diamonds under the 1964 Precious Stones Act is discussed in the first chapter of Part 4 of this thesis. It also deals with the development of the right to mine diamonds in the Republic of South Africa before the commencement of the MPRDA.

Part 4: The Republic of South Africa prior to the MPRDA

Chapter 10 The 1964 Precious Stones Act

Chapter 11 The 1991 Minerals Act

Chapter 10 The 1964 Precious Stones Act

10.1 Introduction

On 1 March 1965, the 1964 Precious Stones Act commenced shortly after the establishment of the Republic of South Africa on 31 May 1961.¹²⁹⁸ The purpose of the 1964 Precious Stones Act was to regulate and control the prospecting for, the mining of and the dealing in precious stones.¹²⁹⁹ The 1964 Precious Stones Act regulated the prospecting and mining of diamonds for almost three decades and is one of the main laws in the chain of diamond mining legislation that impacted on the development of the right to mine diamonds in South Africa.

In this chapter, the application of the 1964 Precious Stones Act and the laws it had repealed are firstly discussed.¹³⁰⁰ The 1964 Precious Stones Act repealed the whole of the 1927 Precious Stones Act and various other laws which mainly regulated the diamond trade in the different provinces in South Africa.¹³⁰¹ The statutory reservation

¹²⁹⁸ Section 3 of the *Republic of South Africa Constitution Act* 32 of 1961 (hereafter the 1961 Constitution) provided that references in statutes to the Union or the State be interpreted as a reference to the Republic of South Africa and references to the Crown, King, Queen or Governor-General be interpreted as a reference to the State President. Section 7(3) of the 1961 Constitution contained a list of competencies of the State President. According to Viljoen "History, Conventions and Prerogatives" 42, these competencies are typical royal prerogatives, which were exercised by the king of Great Britain (and in the case of the Union of South Africa, it was exercised by the king's representative, the Governor-General.) Viljoen states that "Just to make doubly sure that not one of these prerogatives would get lost in the process of changing to a republic, the following subsection was also included: '7(4) The State President shall in addition as head of the State have such powers and functions as were immediately before the commencement of this Act possessed by the Queen by way of prerogative'." See Cockram *The Interpretation of Statutes* x; Kahn 1961 *Annual Survey of South African Law* 3; Dugard "Die Suid-Afrikaanse Konstitusie 1910-1980" 111; Giliomee *Die Afrikaners 'n Biografie* 470-483; Carpenter "Public Law: Constitutional Law" 953-959; Rautenbach *Rautenbach-Malherbe Staatsreg* 15-16.

¹²⁹⁹ Proc R31 in GG 1034 of 19 February 1965. The term "precious stones" was defined in s 1 of the 1964 Precious Stones Act to mean: "diamonds, rubies, sapphires, and any other substances which the State President may by proclamation in the *Gazette* declare to be precious stones for the purposes of this Act." No other substances had been proclaimed as precious stones in terms of the 1964 Precious Stones Act. Schoeman *Silberberg and Schoeman's The Law of Property* 422; See Franklin and Kaplan *Mining and Minerals* 31, 461-521 for a comprehensive discussion of the 1964 Precious Stones Act; Van der Merwe *Sakereg* 408.

¹³⁰⁰ See para 10.2 below.

¹³⁰¹ Section 126(1) read with the schedule to the 1964 Precious Stones Act. Any proclamation, notice, prohibition, regulation, licence, lease or permit which was issued, under and anything else done

of the right to mine diamonds in favour of the State under the 1964 Precious Stones Act is secondly discussed.¹³⁰² The right to prospect and mine for diamonds and the influence of the form of land tenure thereon are thirdly discussed.¹³⁰³ Fourthly, follows a discussion of the proclamation and the working of alluvial diggings, which were also regulated separately from the working of diamond mines.¹³⁰⁴ Although one of the richest diamond mines in South Africa, the Venetia Mine¹³⁰⁵ was discovered during the period that the 1964 Precious Stones Act was in force, this period is better known for its political developments.

From a political perspective, the period during which the 1964 Precious Stones Act was in force, can be regarded as a period during which the Government's policy of "apartheid" or racial discriminatory laws was at its peak.¹³⁰⁶ A key component of the racial discrimination was the Government's homeland policy with its main purpose to create independent homelands for black people in South Africa, which would either be independent states or self-governing territories.¹³⁰⁷ A detailed discussion of the diamond mining legislation in the former independent states¹³⁰⁸ and self-governing

under any of the repealed legislation, was in terms of s 126(2) of the 1964 Precious Stones Act deemed to have been issued, imposed, made, granted, entered into, granted or conferred under the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 463; Van der Merwe *Sakereg* 407.

¹³⁰² See para 10.3 below.

¹³⁰³ See paras 10.4-9.6 below.

¹³⁰⁴ See para 10.7 below.

¹³⁰⁵ See para 10.6 below.

¹³⁰⁶ Giliomee *Die Afrikaners 'n Biografie* 487-597. The Land Claims Court held in *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 para 122 that although the 1964 Precious Stones Act did not form part of the primary legislation which gave effect to "spatial apartheid" the impact thereof was to deprive the Richtersveld Community of its indigenous law right in land and emphasised or recognised the rights of registered land owners. Lodge *et al* "The Afrikaner nationalists in power" 343 describes the year 1966 as the "heyday of apartheid". Davenport and Saunders *South Africa A Modern History* 425-431; Davenport *South Africa A Modern History* 3rd ed 406-464; Lacour-Gayet *A History of South Africa* 293-312; Welsh *A History of South Africa* 444-514; Van Jaarsveld *From Van Riebeeck to Vorster* 380-484; Muller "The Republic of South Africa" 455-468; Dugard "Die Suid-Afrikaanse Konstitusie 1910-1980" 111-116.

¹³⁰⁷ Pienaar *Land Reform* 113-124; Franklin and Kaplan *Mining and Minerals* 791. Du Pisani "BJ Vorster en afsonderlike ontwikkeling" 345-347; Davenport and Saunders *South Africa A Modern History* 432-436; Venter "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei" 5-19.

¹³⁰⁸ Transkei, which initially formed part of the Cape Colony, was the first territory to receive independence on 26 October 1976 in terms of the *Status of the Transkei Act* 100 of 1976. Vorster

territories¹³⁰⁹ falls outside the scope of this study for the reason that there was no separate legislation adopted in the independent states and self-governing territories to separately regulate the prospecting and mining for diamonds. In many instances, the independent states and self-governing territories adopted legislation to control the possession and cutting of and dealing in diamonds.¹³¹⁰ Furthermore, other scholars researched and discussed the legal position regarding mining legislation in the TBVC-states and the self-governing territories and will only be briefly summarised.¹³¹¹

10.2 Application of the 1964 Precious Stones Act

With the exception of certain provisions, the 1964 Precious Stones Act did not apply to private land in the province of the Cape of Good Hope, the title deeds of which did not contain a reservation of the rights to precious stones in favour of the Crown and in respect of which a certificate in terms of section 2(1) of the 1927 Precious Stones Act had been issued.¹³¹² As discussed above,¹³¹³ these unreserved private land in the

"The Constitution of the Republic of the Transkei" 21-29. Bophuthatswana received its independence on 6 December 1977 in terms of the *Status of Bophuthatswana Act* 89 of 1977. Devenish "The Constitution of the Republic of Bophuthatswana" 83-87. Venda was the third territory to receive its independence on 13 September 1979 in terms of the *Status of Venda Act* 107 of 1979. Barrie "The Constitution of the Republic of Venda" 149-156. Ciskei was on 4 December 1981 declared as an independent state in terms of the *Status of Ciskei Act* 110 of 1981. Cilliers "The Constitution of the Republic of Ciskei" 197-200. Pienaar *Land Reform* 119-120; Franklin and Kaplan *Mining and Minerals* 791. These four independent states are hereafter referred to as the TBVC-states.

¹³⁰⁹ The following self-governing territories existed by the end of 1976, namely KwaZulu, Lebowa, Gazankulu and QwaQwa. KwaNdebele became a self-governing territory in 1981 and KaNgwane in 1984. Pienaar *Land Reform* 118-119.

¹³¹⁰ The *Diamond Control Act* 11 of 1981 in respect of Transkei; The *Precious Stones Amendment Act* 45 of 1992 in respect of Bophuthatswana (hereafter the Bophuthatswana Precious Stones Amendment Act); The *Diamond Cutting Act* 9 of 1985 in respect of Ciskei.

¹³¹¹ Franklin and Kaplan *Mining and Minerals* 791-792; Kaplan and Dale *Minerals Act* 42-43; Mostert *Mineral Law* 51-53; Badenhorst, Mostert and Dendy "Minerals and Petroleum" 3; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 5th ed 667-669; See also the *Trojan* case and *Vansa Vanadium SA Limited v Registrar of Deeds* 1997 2 SA 784 (T); Van der Schyff *Property in Minerals and Petroleum* 131-132. See para 10.9 below.

¹³¹² Referred to in this chapter as unreserved private land. Section 3(1)(a) of the 1964 Precious Stones Act read with s 2(1) of the 1927 Precious Stones Act. Chapter 9 of the 1964 Precious Stones Act which regulated the dealing and trading in rough or uncut diamonds applied to such unreserved private land situated in the Province of the Cape of Good Hope. Franklin and Kaplan *Mining and Minerals* 464.

¹³¹³ See para 9.4 and figure 5.2 in para 5.3.1 above.

Cape of Good Hope with regard to certificates that the Minister had issued (confirming diamonds had been discovered and that mining or digging operations had been carried out prior to 1 April 1927 in a manner satisfactory to the Minister), were continued to be regulated by the 1883 Cape Precious Stones Act until 19 March 1976. Then the 1976 Pre-Union Revision Act repealed the 1883 Cape Precious Stones Act.¹³¹⁴ There was no savings clause in the 1976 Pre-Union Revision Act. It could thus be argued that unreserved private land in the province of the Cape of Good Hope, in respect of which a certificate in terms of section 2(1) of the 1927 Cape Precious Stones Act had been issued, was with effect from 19 March 1976 not regulated.¹³¹⁵

Also the 1964 Precious Stones Act did not regulate the prospecting and mining for diamonds in any mine referred to in Part 8 of the 1904 OFS Precious Stones Ordinance which existed on 16 November 1927 or in relation to any other mine, wherever situated, discovered under any law repealed by the 1927 Precious Stones Act.¹³¹⁶ Laws that were immediately before 16 November 1927 in force in relation to any such mine continued to apply in relation to such mines in so far as they were not inconsistent with Part 3 of chapter 8 of the 1964 Precious Stones Act, which provided for administrative provisions applicable to the working of new and existing mines.¹³¹⁷ Mines that were discovered and in operation before 16 November 1927 were therefore with the exception of certain provisions still regulated by the mining laws under which they were discovered. Yet, any licence, lease or permit issued under such prior repealed laws was deemed to be issued under the 1964 Precious Stones Act.¹³¹⁸

¹³¹⁴ Section 1 read with the schedule to the 1976 Pre-Union Revision Act. Franklin and Kaplan *Mining and Minerals* 464.

¹³¹⁵ This position changed with the commencement of the 1991 Minerals Act. See para 11.3.2.1 below.

¹³¹⁶ Section 3(1)(b) of the 1964 Precious Stones Act. Chapter 9 of the 1964 Precious Stones Act, however, applied to such mines.

¹³¹⁷ Section 3(1)(b) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 464.

¹³¹⁸ Section 126(2) of the 1964 Precious Stones Act.

10.3 Statutory reservation of the right to mine diamonds

Section 2 of the 1964 Precious Stones Act reserved the right of mining for and disposing of diamonds to the State.¹³¹⁹ This statutory reservation of the right to mine and dispose of diamonds was specifically stated to be subject to the 1964 Precious Stones Act and provided as follows: ¹³²⁰

Subject to the provisions of this Act, the right of mining for and disposing of precious stones is vested in the State.

It is submitted that the legal position regarding the right to mine diamonds under the 1964 Precious Stones Act was similar to the 1927 Precious Stones Act¹³²¹ in that there was no absolute statutory reservation of the right to mine diamonds in favour of the State. Such reservation was expressly stated to be subject to the 1964 Precious Stones Act. It is necessary to consider the specific provisions in the 1964 Precious Stones Act to determine in which instances the right to mine diamonds did not vest in the State and the influence of the form of land tenure on the right to mine diamonds. Franklin and Kaplan¹³²² emphasise that although section 2 of the 1964 Precious Stones Act vested the right of mining for and disposing of precious stones in the State:

¹³¹⁹ See the *Agri SCA* case 35C; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 4th ed 667; Mostert *et al Law of Property* 268; Van der Merwe *Sakereg* 569-569; Badenhorst 1990 *TSAR* 465-466; Franklin and Kaplan *Mining and Minerals* 469; Dale *et al Mineral and Petroleum Law* SchII172-SchII173; Van der Schyff *Property in Minerals and Petroleum* 339.

¹³²⁰ See Franklin and Kaplan *Mining and Minerals* 469; Mostert *Mineral Law* 49. Section 2 of the 1964 Precious Stones Act did not refer to the vesting of the right to prospect to the State. According to Badenhorst 1991 *TSAR* 121, s 2 of the 1964 Precious Stones Act constitutes a reversioning of the entitlement to prospect in the owner or his nominee. It was, however, held in the *Elandsloof* case at 53 that there was no significance in the fact that the word "prospecting" was omitted from s 2 of the 1964 Precious Stones Act. Goldstein J held that: "In my view the section is intended to govern mining for precious stones including the ancillary activity of prospecting for such stones. It would be startling indeed if the Legislature intended vesting mining for and disposing of precious stones in the State, but excluding from such vesting the important activity of prospecting and matters relating thereto." Lewis 1988 *Annual Survey of South African Law* 243-245; See *West Witwatersrand Areas Limited v Roos* 1936 (AD) 62 with reference to precious metals. Schoeman points out that although the rights to precious stones may in certain instances be retained to the owner of the land or the holder of the rights to precious stones under a separate title, the prospecting, mining and disposal of precious stones were controlled by the State. Schoeman *Silberberg and Schoeman's The Law of Property* 419-420.

¹³²¹ See para 9.4.1 above.

¹³²² Franklin and Kaplan *Mining and Minerals* 464; Van der Merwe *Sakereg* 408.

... this does not vest in the State the rights to precious stones. Private rights in respect of precious stones are not taken away by the State; it is the exercise of rights of exploitation that is strictly controlled, and the State participates significantly in the proceeds derived from such exploitation.

It is submitted that the right to mine for and dispose of precious stones in terms of the 1964 Precious Stones Act depended on the specific form of land tenure. The 1964 Precious Stones Act distinguished between three different types of land tenure, namely State land, alienated State land and private land and each of these terms were defined. The term "State land" was defined in the 1964 Precious Stones Act to mean:¹³²³

... land not held by a lessee, the ownership of which is vested in the State and in respect of which the State is also the holder of the right to precious stones.

The term "alienated State land" was defined to mean:¹³²⁴

... land which is not owned by the State or is held by a lessee and in the title deed or lease of which there is a reservation to the State of the right to precious stones.

The term "private land" was defined to mean "land in respect of which the State is not the holder of the right to precious stones."¹³²⁵ The term "holder of the right to precious stones" was in turn in relation to land defined to mean:¹³²⁶

the owner of that land or, if the right to precious stones in respect of the land is severed from the ownership of the land, the person registered in the appropriate deeds office as the holder of the right to precious stones in respect of the land.

10.4 Prospecting for diamonds

Before discussing the right to prospect with reference to the different forms of land tenure, a few general remarks are made regarding prospecting under the 1964

¹³²³ Section 1 of the 1964 Precious Stones Act. This form of land tenure was under the 1927 Precious Stones Act referred to as unalienated Crown land. See para 9.4.1 above.

¹³²⁴ Section 1 of the 1964 Precious Stones Act. This form of land tenure was under the 1927 Precious Stones Act referred to as alienated Crown land. See para 9.4.1 above. A "lessee" was defined in s 1 of the 1964 Precious Stones Act in relation to land, to mean: "a person to whom, that land has been allotted under any law relating to land settlement and who has or is deemed to have exercised the right to purchase that land."

¹³²⁵ Section 1 of the 1964 Precious Stones Act.

¹³²⁶ Section 1 of the 1964 Precious Stones Act.

Precious Stones Act.¹³²⁷ Although the right or entitlement to prospect under the 1964 Precious Stones Act was regulated with reference to the different forms of land tenure, a prospector had to obtain either a prospecting lease or a prospecting permit to commence with prospecting. In other words, to exercise the right to prospect.¹³²⁸ The

¹³²⁷ "Prospecting" was defined in s 1 of the 1964 Precious Stones Act to include: "all work (other than work connected with surface observations) which in the opinion of the mining commissioner, but subject to the provisions of any regulations made under paragraph (g) of sub-section (1) of section one hundred and twenty-five, is necessary for or incidental to the search for precious stones or required for the purpose of ascertaining whether precious stones exist in sufficient quantities to warrant the grant of a discoverer's certificate."

¹³²⁸ A "prospector" was defined in s1(xxxvii) of the 1964 Precious Stones Act to mean: "a person who holds a prospecting lease or prospecting permit." The relevant provisions of the 1964 Precious Stones Act regulating the right to prospect for diamonds in the case of State land, alienated State land and private land, are discussed in paras 10.4.1-10.4.3 below. See also the *Monastery* case 387-388. Section 7(1) of the 1964 Precious Stones Act provided that no person could prospect on the following land:

- (a) Any land comprising an alluvial digging, mine or mining area proclaimed as such under any law relating to mining for precious stones or land over which a right to dig or mine for precious stones was held by any other person.
- (b) Any lawfully established "location for coloured persons or Bantu". This provision was in terms of s 3 of the *Precious Stones Amendment Act* 15 of 1982 with effect from 5 March 1982 substituted with a prohibition that prospecting could not be conducted on any lawfully established township or residential area, except with the consent of the Minister and subject to the *Mines and Works Act* 27 of 1956 (hereafter the 1956 Mines and Works Act).
- (c) Any land comprising or forming part of any outspan, public road, railway or cemetery, except with the Minister's consent and subject to the 1956 Mines and Works Act.
- (d) Any land used or reserved under the 1964 Precious Stones Act or any other law for any Government or public purpose, except with the consent of the Minister and subject to the 1956 Mines and Works Act.
- (e) Any land over which a right to the use of the surface or water was held by any other person under the 1964 Precious Stones Act or by virtue of the provisions of any other law relating to minerals, except with the consent of the Minister and subject to the 1956 Mines and Works Act.
- (f) Land on which prospecting had been prohibited by the State President. The State President was in terms of s 9(1) of the 1964 Precious Stones Act entitled by proclamation in the *Gazette*, to prohibit or restrict prospecting on any land from the date specified in the proclamation.
- (g) Land used as a garden, orchard, vineyard, nursery or plantation or which was otherwise under cultivation or under or within a horizontal distance of 300 feet of any spring, well, borehole, reservoir, dam, watercourse, waterworks or dipping-tank, except with the consent of the owner thereof or the consent of the Minister. The Minister could in terms of s 7(2) of the 1964 Precious Stones Act only give consent after considering any written representations submitted by the owner and the Minister's consent further had to be subject to the payment of compensation by the prospector to the owner for any loss or damage caused by or as a result of the prospecting operations and such further conditions as the Minister could impose. The distance of 300 feet was later in terms of s 3 of the *Precious Stones Amendment Act* 41 of 1981 with effect from 27 March 1981 amended to 100 metres.
- (h) Land over which a right to dig or mine for precious metals or base minerals was held by any other person, except with the written consent of that other person or if such consent was withheld, the written consent of the Minister. The Minister had a discretion to grant permission

holder of a prospecting permit was entitled to the proceeds of any diamonds he had found during *bona fide* prospecting operations conducted under the prospecting permit.¹³²⁹ The State President was, however, entitled according to the recommendation of the Mining Leases Board,¹³³⁰ to make regulations prescribing the share of the proceeds of any diamonds that were found in the course of prospecting operations by holders of prospecting permits to which the State was entitled.¹³³¹ All prospecting operations conducted under a prospecting lease or a prospecting permit had to be carried out under the direct control of the holder of the prospecting lease or prospecting permit.¹³³²

which he had to exercise after considering any representations by such other person. This provision was in terms of s 1 of the *Precious Stones Amendment Act* 61 of 1980 with effect from 23 May 1980 amended to also exclude land in respect of which a right to prospect was granted.

- (i) Land in respect of which the right to precious stones was held by or in trust for a so-called "Bantu or a Bantu tribe or a community or aggregation of Bantu" except with the written consent of the Minister or the Bantu Administration and Development. This provision was in terms of section 3(b) of the *Precious Stones Amendment Act* 62 of 1986 (hereafter the 1986 Precious Stones Amendment Act) repealed.
- (j) Private land in respect of which the right to precious stones was held by a local authority or any alienated State land of which a local authority was the owner, except with the written consent of the Administrator of the relevant province.
- (k) In any public stream if the Mining Commissioner had in writing informed such holder that such prospecting would in his opinion disturb the flow or interfere with the use of or pollute the water in the stream.
- (l) Under any public road, railway or any structure or within such horizontal distance therefrom as prescribed in the *1956 Mines and Works Act*.

An additional prohibition was in terms of s 3(c) of the *Precious Stones Amendment Act* 62 of 1986 added, namely land within any board area defined in s 1 of the *Rural Coloured Areas Law* 1 of 1979 of the Coloured Persons Representative Council of the Republic of South Africa, except with the written consent of the Minister of Local Government, Housing and Agriculture: Administration: House of Representatives.

¹³²⁸ Section 9(7) of the 1964 Precious Stones Act.

¹³²⁹ Section 9(5) of the 1964 Precious Stones Act. Section 10 of the 1927 Precious Stones Act contained a similar provision. See para 9.4.5 above. It was held in *Elandskloof* case 52, that s 9(5) of the 1964 Precious Stones Act also governed prospecting for diamonds on private land and not only prospecting on alienated State land. It was held further at 53, that s 9(5) of the 1964 Precious Stones Act regulated the relationship between the State and the prospector and that it had nothing to do with any contractual relationship between the holder of a prospecting permit and any other person.

¹³³⁰ The Mining Leases Board was established in terms of s 5 of the 1967 Mining Rights Act.

¹³³¹ Section 9(6)(a) of the 1964 Precious Stones Act.

¹³³² Section 9(7) of the 1964 Precious Stones Act.

10.4.1 The right to prospect on State land

Any person who wanted to prospect for diamonds on State land, had to obtain a prospecting lease from the then Minister of Minerals and Energy.¹³³³ The prospecting lease could be granted subject to such terms and conditions as the Minister deemed fit but the prospecting lease had to include certain specific provisions prescribed in section 4(2) of the 1964 Precious Stones Act.¹³³⁴ The duration of the prospecting lease had to be determined in the prospecting lease.¹³³⁵ Provision was also made for the establishment of a diamond development advisory committee. The committee had to promote prospecting for diamonds and assist in establishing companies for the purpose of carrying on prospecting operations on State land. The committee also had to make recommendations to the Minister regarding the granting of prospecting leases.¹³³⁶ The

¹³³³ Section 4(1) of the 1964 Precious Stones Act.

¹³³⁴ Section 4(2)(a) of the 1964 Precious Stones Act prescribed that a prospecting lease had to provide for the following-

- (a) the scale on which and the manner in which the prospecting operations had to be carried on;
- (b) the furnishing by the holder of the prospecting lease to the Minister at such times as specified in the lease, full statements describing the nature of the prospecting operations carried out and such further information required by the Minister;
- (c) the keeping of records by the holder relating to the prospecting operations as required by the Minister;
- (d) the examination of such records and the inspection of the lease area by an authorised person;
- (e) the payment of compensation by the holder of the prospecting lease to any person entitled to use the surface of the land, who suffered any damage or any damage to crops or improvements on the land caused by the exercise by the holder of the prospecting lease of his rights under the lease or any act or omission incidental thereto;
- (f) the payment by the holder of the prospecting lease to the Mining Commissioner of a rent determined by the Minister after consultation with the Mining Leases Board.

The prospecting lease could in terms of s 4(2)(b) of the 1964 Precious Stones Act also include a provision that the holder of the prospecting lease had to pay to the Mining Commissioner such share of the proceeds of any diamonds found by him in the course of prospecting operations on the land. The Appellate Division held in *Ondombo Beleggings (Pty) Limited v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) (hereafter the *Ondombo Beleggings* case) that a prospecting lease concluded in terms of the 1964 Precious Stones Act, had to be seen as a consensual agreement between the Minister and the leaseholder, which in terms of s 4(2)(a) of the 1964 Precious Stones Act, had to provide for certain prescribed matters. A failure to deal with these prescribed matters would render the lease invalid and unenforceable. For a discussion of this case see Badenhorst and Van Heerden 1993 *TSAR* 159-168; Martinson 1989 *Annual Survey of South African Law* 209-210; See also *Minister of Mineral Resources v Mawetse (SA) Mining Corporation* 2016 1 SA 306 (SCA) para 27; Van der Merwe *Sakereg* 409.

¹³³⁵ Section 4(4) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 469-470; Mostert *Mineral Law* 49; Van der Merwe *Sakereg* 568-569.

¹³³⁶ Section 4(5) of the 1964 Precious Stones Act.

Minister was entitled to grant a prospecting lease on State land to any person who applied therefor, without having to first call for tenders.¹³³⁷ Franklin and Kaplan¹³³⁸ point out that the grantee of a prospecting lease was *per se* entitled to prospect for diamonds by virtue of the prospecting lease. As the Minister granted it directly, it was not necessary for the grantee of a prospecting lease, in respect of State land, to obtain a prospecting permit as was required in the case of alienated State land¹³³⁹ and private land.¹³⁴⁰

In the case of State land, the right to prospect thus vested in the State which could grant a prospecting lease to a person authorising him to prospect for diamonds on State land.¹³⁴¹

10.4.2 The right to prospect on alienated State land

In the case of alienated State land, the surface owner¹³⁴² or lessee of the land which was not the subject of a prospecting and digging agreement¹³⁴³ had the exclusive right

¹³³⁷ Section 4(1)(b) of the 1964 Precious Stones Act. The Minister was, however, also in terms of s 4(1)(a) of the 1964 Precious Stones Act, entitled by notice in the Government *Gazette*, and in one or more newspapers that circulated in the relevant area, to call for tenders or the granting of a prospecting lease in respect of the State land.

¹³³⁸ Franklin and Kaplan *Mining and Minerals* 470.

¹³³⁹ See para 9.4.2 below.

¹³⁴⁰ See para 9.4.3 below.

¹³⁴¹ Franklin and Kaplan *Mining and Minerals* 469-470. In the *Ondombo Beleggings* case 724D-E the Court confirmed that what is let is not corporeal property but an incorporeal right, namely a right to prospect. Badenhorst and Van Heerden 1993 *TSAR* 163 criticise this *dictum* on the basis that rights are by their nature incorporeal and that the reference to incorporeal rights might create the impression that rights might also be corporeal.

¹³⁴² An "owner" in relation to land was defined in s 1 of the 1964 Precious Stones Act to mean: "the person in whose name the land is registered in the appropriate deeds office."

¹³⁴³ The Minister was in terms of s 20 of the 1964 Precious Stones Act entitled to enter into a prospecting and digging agreement with the following persons, namely (a) the owner of alienated State land, (b) the holder of the right to precious stones in respect of private land, or (c) any other person who could prove to the satisfaction of the Minister that he had either acquired from the owner of the alienated State land or the holder of the right to precious stones in respect of private land, the exclusive right to prospect together with the rights which the owner would have become entitled to in respect of precious stones in alluvial in terms of s 17(1)(a) of the 1964 Precious Stones Act, or that such owner or holder had given him permission to enter into a prospecting and digging agreement with the Minister. A prospecting and digging agreement concluded with the Minister was in terms of s 20(3)(a) of the 1964 Precious Stones Act subject to such terms and conditions as the Minister deemed fit and had to provide for the payment by the person with whom it was entered into: (a) payment to the State of a royalty, share of profits or other consideration

to prospect for diamonds on that land. He could either himself exercise the right, or in writing authorise any one person through nomination to prospect on such alienated State land.¹³⁴⁴ The surface owner, lessee or nominee could only commence to prospect on the alienated State land once he obtained a prospecting permit which the Mining Commissioner issued.¹³⁴⁵ Kaplan and Dale¹³⁴⁶ correctly describe the rights of the surface owner of alienated State land as follows:

The absence of a prospecting permit did not deprive him of the exclusive right to prospect, it merely suspended the exercise of the right to do so.

In order to obtain a prospecting permit, the surface owner or lessee had to produce the title deed or lease of the land. A monthly fee had to be paid for the period according to the required prospecting permit, which could not exceed 12 months.¹³⁴⁷ If the applicant for a prospecting permit was the nominee of a surface owner or lessee, the

as agreed to with the Minister and (b) payment to the owner of private land, if he was not the holder of the rights to precious stones and to any other person entitled to use the surface of the land who suffered any surface damage or loss of or damage to crops or improvements on the land caused by the exercise by the person with whom the prospecting and digging agreement was entered into of his rights under such agreements or by any act or omission incidental thereto. A prospecting and digging agreement entered into with the Minister, could in terms of s 20(3)(b) also provide for the payment by the person with whom it was entered into, for the benefit of the owner of the land or of any person entitled to use the surface, such surface rent as the Minister deemed necessary after considering any representations in writing by such owner or person entitled thereto. In the case that a prospecting and digging agreement was entered into in respect of alienated State land, the owner of such alienated State land or his successors in title would in terms of s 20(4) of the 1964 Precious Stones Act not have a claim for compensation against the Government for any loss or damage. Franklin and Kaplan *Mining and Minerals* 470-472.

¹³⁴⁴ Section 5(1) of the 1964 Precious Stones Act. See Badenhorst 2004 *Journal of Energy and Natural Resources* Law 224. The content of the nomination agreement in terms of which the surface owner or lessee of alienated State land granted his nominee the right to prospect was prescribed in s 8 of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 469-472. This privilege was later with the commencement of the 1991 Minerals Act reduced to five years. Kaplan and Dale *Minerals Act* 121.

¹³⁴⁵ Section 5(1) of the 1964 Precious Stones Act. Franklin and Kaplan state that the effect of the decision in *R v Boshoff* 1938 AD 464, which was decided with reference to the 1927 Precious Stones Act, but had been embodied in the 1964 Precious Stones Act, was that it was the nominee (who in fact prospected) and not the surface owner of the alienated State land, who was required to obtain and hold the necessary prospecting permit. Franklin and Kaplan *Mining and Minerals* 471-472; Mostert *Mineral Law* 49; Van der Merwe *Sakereg* 2nd ed 568-569; Van der Merwe *Sakereg* 409.

¹³⁴⁶ Kaplan and Dale *A Guide to the Minerals Act 1991* 123.

¹³⁴⁷ Section 5(2) of the 1964 Precious Stones Act. A prospecting permit could in terms of s 5(5) of the 1964 Precious Stones Act be renewed before the lapsing thereof, for further periods not exceeding 12 months at a time.

nominee further had to be the holder of a current digger's certificate.¹³⁴⁸ If the applicant was a person other than a natural person, the consent of the Minister was required for the issue of the prospecting permit.¹³⁴⁹

In the case of alienated State land, the right to prospect for diamonds vested in the relevant surface owner who had the exclusive right to prospect on his land, provided that he obtained a prospecting permit to exercise the right.¹³⁵⁰

10.4.3 The right to prospect on private land

The holder of the rights to diamonds with regard to private land that was not the subject of a prospecting or digging agreement, had the right to prospect on such land. The holder of the rights to diamonds could also grant written permission to any one person to prospect on the private land on such terms and conditions as specified in the written permission.¹³⁵¹ The holder of the rights to diamonds or the person who

¹³⁴⁸ Section 5(3)(b) of the 1964 Precious Stones Act. See para 10.7.4 below.

¹³⁴⁹ Section 5(3)(a) of the 1964 Precious Stones Act. See also Franklin and Kaplan *Mining and Minerals* 70-471. Section 5(6) of the 1964 Precious Stones Act provided that a prospecting permit granted in respect of alienated State land, lapsed in the following circumstances:

- (a) in the case of a prospecting permit issued in respect of land held by a lessee, upon the cancellation or termination of the lease for any reason, except the issue to the lessee of a grant or a deed of transfer in respect of the land;
- (b) in the case of a prospecting permit issued to a person who was required to hold a digger's certificate, if such digger's certificate was cancelled or was allowed to lapse; or
- (c) in the case of a prospecting permit issued pursuant to the Minister's consent, if such consent had been withdrawn.

¹³⁵⁰ See Fanklin and Kaplan *Mining and Minerals* 469 and Badenhorst 1991 *TSAR* 123.

¹³⁵¹ Section 6(1) of the 1964 Precious Stones Act. This permission was according to Franklin and Kaplan *Mining and Minerals* 473, usually in the form of a prospecting contract which was registered in a Deeds Office. The prospecting contract could only include a written permission to prospect for diamonds and could according to Franklin and Kaplan not include an option for the prospector to obtain from the holder of the rights to precious stones a lease of the right to mine for precious stones, because the right of mining for precious stones vested in the State and could only be acquired from the State. They point out further that a prospecting contract concluded in respect of private land could validly include a permission or authority in terms of s 20 of the 1964 Precious Stones Act, which contemplated such a right. In the *Elandsbloof* case, the court had to decide whether the applicant was entitled to an order ejecting the respondent from his property. The respondent argued that he was granted a prospecting contract by the holder of the rights to precious stones in respect of the relevant property. Goldstein J held that it was clear from the wording of the agreement, that what the parties in fact intended, was a lease of minerals and not a prospecting contract and that it was void for non-compliance with s 3 of the *General Law Amendment Act* 50 of 1956, which required the attestation of a lease of minerals by a notary public.

obtained the written permission from such holder could, however, not commence with prospecting on such private land unless he obtained a prospecting permit which the Mining Commissioner had to issue.¹³⁵² In order to obtain a prospecting permit in respect of private land, the applicant had to submit proof that he was the holder of the rights to diamonds in respect of the land or that he had obtained the written permission of such holder to prospect for diamonds for the period specified in the permission.¹³⁵³ If the applicant was not the holder of the rights to diamonds in respect of the private land but had obtained the written permission of such holder, the applicant in addition, had to obtain the consent of the Minister to the issue of the prospecting permit, if the applicant was not a natural person. If the applicant was a natural person, he only had to obtain the written permission of the holder of the rights to diamonds and had to be the holder of a current digger's certificate.¹³⁵⁴ A prospecting permit issued in respect of private land could be renewed before the lapsing thereof. Renewal was for a period not exceeding 12 months at a time and subject to the payment of a prescribed renewal fee.¹³⁵⁵

In the case of private land, the right to prospect for diamonds under the 1964 Precious Stones Act vested in the holder of the rights to diamonds who was in terms of the

The court held that a mineral lease gave the lessee the right for a specified period of time, to extract the mineral concerned from the relevant land and to retain such mineral as his own. See also *Drymiotis v Du Toit* 1969 1 SA 631 (T) at 632D-F; Mostert *Mineral Law* 49. Van der Merwe *Sakereg* 2nd ed 569; Van der Merwe *Sakereg* 409. The holder of the rights to precious stones could, under the 1927 Precious Stones Act grant permission to five persons to prospect on the private land.

¹³⁵² Section 6(2) of the 1964 Precious Stones Act. See also Van der Merwe *Sakereg* 569.

¹³⁵³ Section 6(3) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 473.

¹³⁵⁴ Section 6(3) read with s 5(3) of the 1964 Precious Stones Act. An applicant who was not a natural person, did not require a digger's certificate. See Franklin and Kaplan *Mining and Minerals* 473.

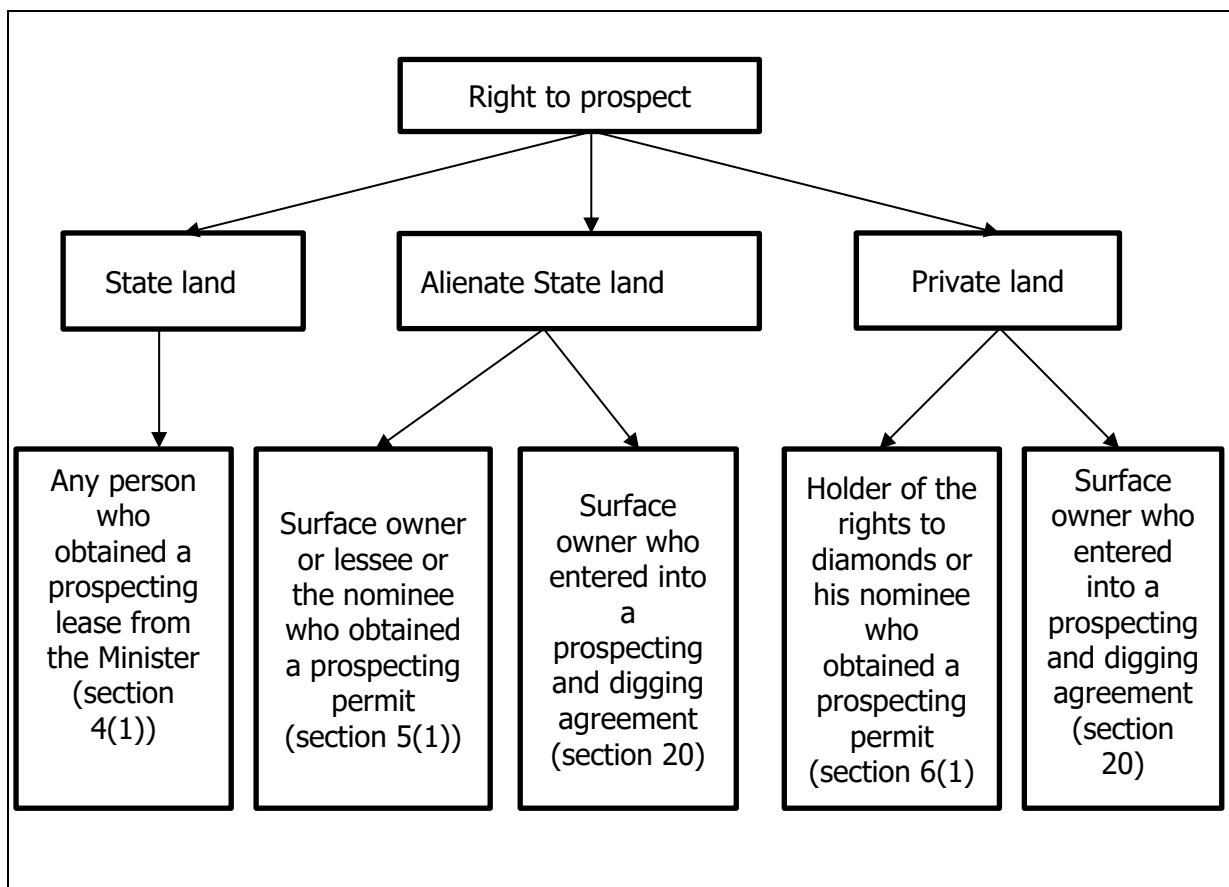
¹³⁵⁵ Section 6(4) of the 1964 Precious Stones Act. Section 6(5) of the 1964 Precious Stones Act provided that a prospecting permit issued in respect of private land, lapsed in the following circumstances:

- (a) in the case of a prospecting permit issued to a person who was required to hold a digger's certificate, if such digger's certificate was cancelled or allowed to lapse;
- (b) if the prospecting permit was not renewed within one month after the end of the period for which it had been granted; or
- (c) in the case of any prospecting permit issued pursuant to the Minister's consent, if such consent had been withdrawn.

cuius est solum principle the surface owner (if the rights to diamonds had not been severed from the title of the land).

Figure 10.1 below, is a schematic summary of the different persons who were entitled to prospect for diamonds under the 1964 Precious Stones Act concerning the different forms of land tenure.

Figure 10.1: the right to prospect for diamonds in terms of the 1964 Precious Stones Act.



10.5 Discovery of diamonds

A prospector who discovered diamonds had forthwith to notify the Mining Commissioner in writing of the discovery. Thereafter he had to submit the prescribed

monthly reports.¹³⁵⁶ The Mining Commissioner was entitled to order the prospector to carry out washing or other operations with the plant at his disposal or as the Mining Commissioner provided, if the Mining Commissioner deemed it necessary to determine whether the material excavated by the prospector contained a sufficient number of diamonds to justify proclamation it as an alluvial digging.¹³⁵⁷ If the Mining Commissioner was satisfied that a prospector had discovered diamonds occurring naturally in a specific place and that there were reasonable grounds for believing that such diamonds existed at the said place in payable quantities, section 13 of the 1964 Precious Stones Act provided that he had to issue the prospector with a prescribed discoverer's certificate.¹³⁵⁸ The discoverer of diamonds was not necessarily the surface owner (in the case of alienated State land) or the holder of the rights to precious stones (in the case of private land).

The term "private land" was in terms of section 13(1) of the 1964 Precious Stones Act, for purposes of section 13(1) defined to mean:

Any area of land in respect of which the right to precious stones is registered separately in the appropriate deeds registry, or at any piece of land registered in such deeds registry without separate registration of the right to precious stones.

¹³⁵⁶ Section 11(1) of the 1964 Precious Stones Act required that the reports had to be submitted within seven days of the last day of every month and had to include details of the weight and estimated value of the diamonds found, the extent of the ground worked and the number of persons employed by the discoverer during that month. If the prospector failed to comply with the provisions of s 11(1) he was in terms of s 11(3) of the 1964 Precious Stones Act guilty of an offence and on conviction liable to a fine. The Minister could further in terms of s 11(4) of the 1964 Precious Stones Act declare any rights which may have accrued to the prospector in terms of the 1964 Precious Stones Act to be forfeited. See also Franklin and Kaplan *Mining and Minerals* 477-478; Mostert *Mineral Law* 49; Van der Merwe *Sakereg* 2nd ed 569; Van der Merwe *Sakereg* 409.

¹³⁵⁷ Section 12(1) of the 1964 Precious Stones Act; Van der Merwe *Sakereg* 569.

¹³⁵⁸ See Van der Merwe *Sakereg* 2nd ed 569; Van der Merwe *Sakereg* 409. Section 13A of the 1964 Precious Stones Act was inserted in terms of s 8 of the *Precious Stones Amendment Act* 15 of 1982 and provided that if the Mining Commissioner was not satisfied that there were reasonable grounds for believing that diamonds existed in payable quantities to warrant the grant of a discoverer's certificate or if the Government Mining Engineer was of the opinion that diamonds occurred in a deposit which was too small to proclaim a mine on the land, the Mining Commissioner could upon application by the prospector and with the approval of the Minister grant written permission to the prospector to dig for diamonds in respect of the specific land.

The reference to an "owner" for purposes of determining the share of the discoverer of precious stones in a mine on private land, was therefore a reference to the holder of the rights to precious stones where the rights have been registered separately. In instances where there was no separate registration of the rights to precious stones, it was in accordance with the *cuius est solum* principle, the surface owner of the land.¹³⁵⁹

The 1964 Precious Stones Act regulated the rights of the discoverer and owner (in respect of alienated state land, the surface owner and in respect of private land, the holder of the rights to precious stones) which are examined below.¹³⁶⁰

10.5.1 Rights of the discoverer

In the case of the discovery of a diamond mine on State land, the discoverer was entitled to an undivided 40% share in the profits derived from the working of the mine and the State was entitled to the remaining 60% share.¹³⁶¹ In the case of the discovery of a diamond mine on alienated State land or on private land, the discoverer was

¹³⁵⁹ See fn 11 above.

¹³⁶⁰ See paras 10.5.1-10.5.3 below. Provision was made for the issue of a discoverer's certificate and an owner's certificate which had to be registered by the Registrar of Mining Titles in terms of s 18(1) of the 1964 Precious Stones Act. The mine had to be depicted on a diagram which had to be endorsed by the Registrar on the relevant certificate. The holder of a discoverer's certificate or owner's certificate could in terms of s 18(2) of the 1964 Precious Stones Act subject to the approval of the Minister, cede, transport or mortgage his rights and obligations under such certificates to any person. No stamp duty or transfer duty was in terms of s 18(3) of the 1964 Precious Stones Act payable in respect of any such transfer of cession if the specific mine had not been proclaimed in terms of the 1964 Precious Stones Act. Section 18(4) of the 1964 Precious Stones Act provided that any transfer or mortgage of a discoverer's certificate or an owner's certificate had to be registered by the Registrar of Mining Titles. Franklin and Kaplan *Mining and Minerals* 477-478.

¹³⁶¹ Section 13(1)(b) of the 1964 Precious Stones Act. "Mine" when used as a substantive, was defined in s 1 of the 1964 Precious Stones Act to mean: "an area of ground bearing precious stones which is continuous in its formation and is contained within a pipe or similar geological formation, together with any directly connected overflow or extension of the same, but does not include any such area which has not been proclaimed a mine under this Act and in respect of which the State President has by writing under his hand determined that the precious stones occurring therein shall for the purposes of this Act be deemed to occur in alluvial." See Franklin and Kaplan *Mining and Minerals* 478.

entitled to an undivided 20% share in such mine to which the owner or lessee of the land or the holder of the rights to precious stones was entitled.¹³⁶²

10.5.2 Rights of the owner

In the case of the discovery of a diamond mine on alienated State land, the surface owner was entitled to receive an owner's certificate from the Mining Commissioner. This confirmed that the holder of the owner's certificate was entitled to an undivided 40% share in the profits derived from the working of the mine, which included the discoverer's share.¹³⁶³ If the discoverer of the diamond mine was not the surface owner, the discoverer was thus entitled to undivided eight per cent share in the diamond mine, the surface owner to an undivided 32% share and the State to the remaining undivided 60% share in the mine.

In the case of the discovery of a diamond mine on private land, the holder of the rights to diamonds in respect of such land was entitled to receive an owner's certificate from the Mining Commissioner confirming that the holder of the owner's certificate was entitled to an undivided 50% share in the mine, which also included the discoverer's share.¹³⁶⁴ If the discoverer of a diamond mine on private land was therefore not also the holder of the rights to diamonds in respect of such land, the discoverer was entitled

¹³⁶² Section 13(1)(c) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 478. See para 10.5.2 below. The discoverer was in terms of s 14(1) of the 1964 Precious Stones Act exempted from the requirement to pay licence money in respect of his discoverer's claims provided that he worked the claims to the satisfaction of the Mining Commissioner and for as long as the claims were held in the name of the discoverer. Any discoverer's claims which were not being worked and in respect of which the holder failed to comply with a written notice served on him by the Mining Commissioner requesting him to resume digging operations within a specified period or which were transferred to any other person, would in terms of s 14(2) of the 1964 Precious Stones Act be subject to the provisions of the 1964 Precious Stones Act applicable to ordinary claims. If the discoverer failed to comply with the Mining Commissioner's notice or failed to pay the initial licence money within the period specified in the notice, the claims lapsed. The lapsed claims could in terms of s 14(3) of the 1964 Precious Stones Act, if they were on proclaimed land, be declared open to pegging by the Mining Commissioner by posting a notice up in a conspicuous place at this office.

¹³⁶³ Section 18(1) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 478-479, 481.

¹³⁶⁴ Section 17(1)(b)(ii) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 478, 481.

to an undivided 10% share, while the holder of the owner's certificate was entitled to an undivided 40% share and the State to the remaining undivided 50% share in the mine.

Figure 10.2 illustrates the shares of the discoverer and the State in a diamond mine proclaimed on State land.

Figure 10.2: Undivided shares in a diamond mine proclaimed on State land.

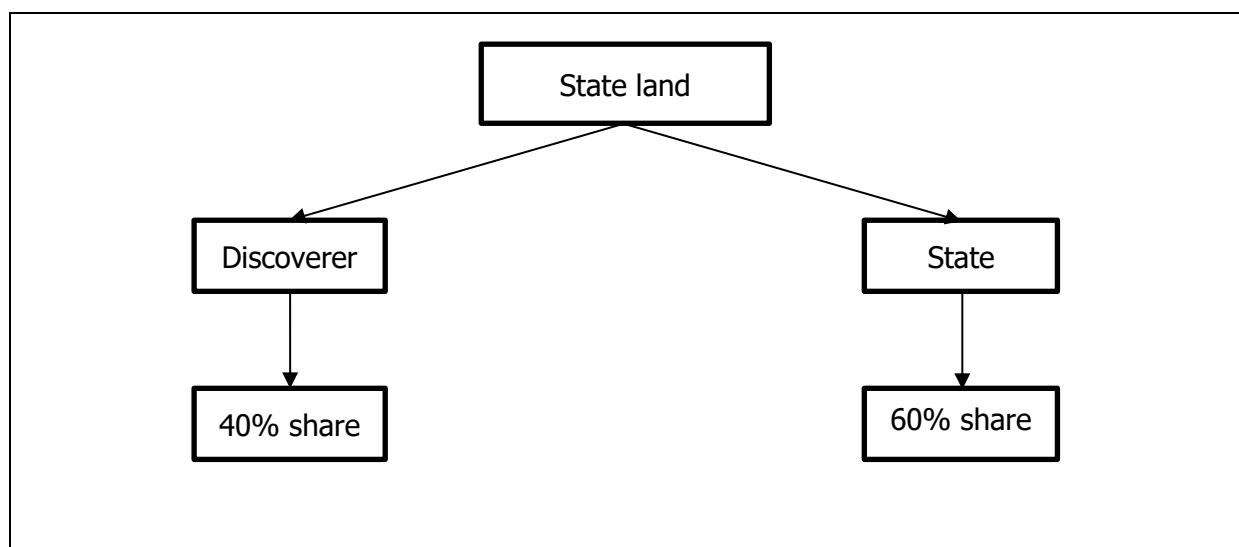


Figure 10.3 below, outlines the percentage holding of the shares of the discoverer, owner and the State in a diamond mine proclaimed on alienated State land.

Figure 10.3: Undivided shares in a diamond mine proclaimed on alienated State land.

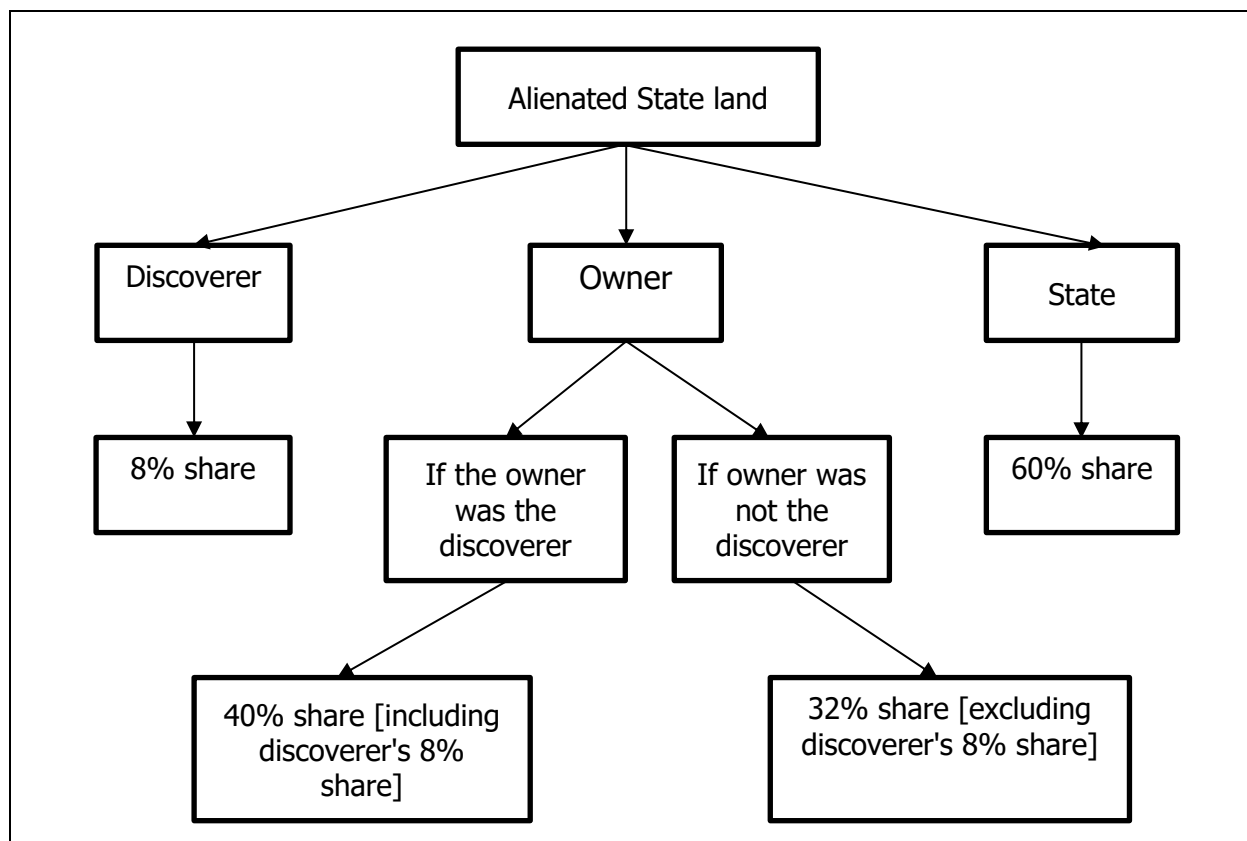
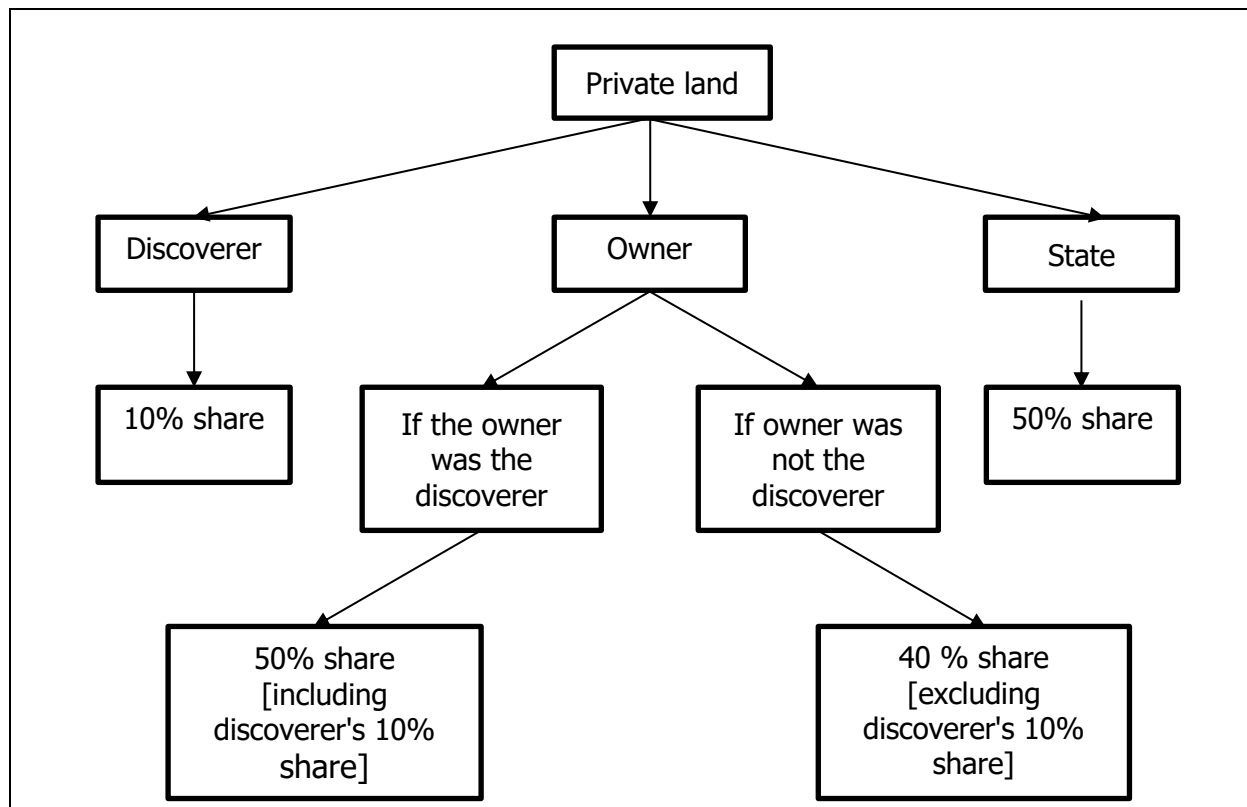


Figure 10.4 below, schematically summarises the shares of the discoverer, owner and the State in a diamond mine proclaimed on private land.

Figure 10.4: Undivided shares in a diamond mine proclaimed on private land.



10.6 Proclamation of mines and mining areas

The State President could, in terms of the 1964 Precious Stones Act proclaim an area as a mine if he was satisfied that there were reasonable grounds for believing that diamonds existed in payable quantities on the land.¹³⁶⁵ The discoverer's and/or owner's certificate in respect of the relevant land had to be issued first before the land could be proclaimed as a mine.

¹³⁶⁵ Section 63 of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 501. The State President could cause the land to be beacons off and surveyed and thereafter by proclamation in the *Gazette* proclaim the surveyed area to be a mine. See *Monastery Diamond Mining Corporation (Pty) Limited v Schimper* 1983 3 SA 538 (O) at 549 (hereafter the *Monastery case*). In the *Monastery case* the Orange Free State Division held that the granting by the Minister of a 'extra-statutory permission' to the holder of a prospecting permit to conduct mining operations in respect of an area which had not been proclaimed for mining and in the absence of any mining title, was unlawful. The position was amended by the *Precious Stones Amendment Act* 15 of 1982. Dale 1983 *Annual Survey of South African Law* 251-252; Van der Merwe *Sakereg* 410.

The State President could further proclaim a mining area, which was an area believed not to contain diamonds and to be used for purposes of working a proclaimed mine.¹³⁶⁶ A mining area had to be of sufficient extent to be used for depositing floors, machinery and tipping sites, residential and trading sites and all matters connected with the proper and efficient working of the mine.¹³⁶⁷ The State President could not proclaim land which was not owned by the State as a mining area without the written permission of the surface owner thereof, unless a mining area had to be proclaimed on the land for the purpose of working a mine that had already been proclaimed on such land.¹³⁶⁸ The State President could by proclamation in the *Gazette*, deproclaim a mine or mining area if it appeared to the Minister that diamonds in payable quantities were not being found or if there were other grounds which, in the Minister's view, made it necessary for the mine or mining area to be deproclaimed.¹³⁶⁹

If a prospector had discovered diamonds in a mine which occurred naturally in the land and the Mining Commissioner was not satisfied that there were reasonable grounds to believe that the diamonds existed in payable quantities to justify the issue of a discoverer's certificate, or if the Government Mining Engineer was of the view that the diamonds occurred in a deposit which was too small to justify the proclamation of the land as a mine, the Mining Commissioner could upon application by the prospector and subject to the consent of the Minister, grant permission to the prospector to dig for diamonds.¹³⁷⁰

An important diamond mine, the Venetia Mine, was discovered in the northern part of what was then the Province of Transvaal, under the 1964 Precious Stones Act. In

¹³⁶⁶ Section 64(1) of the 1964 Precious Stones Act provided that as in the case of the proclamation of a mine, a mining area had to be beaconed off and surveyed; Van der Merwe *Sakereg* 411-412.

¹³⁶⁷ Section 64(2) of the 1964 Precious Stones Act. Mining areas could be used and occupied subject to payment of the amounts prescribed by regulation.

¹³⁶⁸ Section 64(4) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 501.

¹³⁶⁹ Section 66(1) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 501. Section 67 read with s 26 of the 1964 Precious Stones Act required that the proclamation and deproclamation of a mine and a mining area had to be registered in the relevant deeds registry. Van der Merwe *Sakereg* 412.

¹³⁷⁰ Section 13A of the 1964 Precious Stones Act.

approximately 1969, De Beers Consolidated Mines Limited initiated an exploration sampling programme to locate the sources of diamond bearing gravel that was discovered near the Limpopo River as early as 1903. According to Davenport,¹³⁷¹ it took geologists approximately ten years to trace the diamond bearing gravel to its original source, "a treasure trove beyond their wildest imagination." The geologists discovered 12 kimberlite pipes over an area spanning approximately three kilometres on the farm Venetia, which is situated approximately 25 kilometres south of the joint border between South Africa, Botswana and Zimbabwe. A discoverer's certificate¹³⁷² and an owner's certificate were issued to De Beers Consolidated Mines Limited in respect of the Venetia Mine.¹³⁷³

10.6.1 Working of a mine

The person or entity entitled to work a mine under the 1964 Precious Stones Act depended on the specific form of land tenure. In the case of State land, the right to work the proclaimed mine vested in the holder of a discoverer's certificate in that he could elect to work the mine.¹³⁷⁴ In the case of alienated State land or private land, the right to work the mine vested in the holder of an owner's certificate. The holder of an owner's certificate was entitled to elect to work the relevant mine.¹³⁷⁵ Franklin and Kaplan¹³⁷⁶ emphasise that:

¹³⁷¹ Davenport *Digging Deep* 283-284. The Venetia Mine was in terms of s 63 of the 1964 Precious Stones Act proclaimed a mine by virtue of a publication in the Government *Gazette* on 22 June 1990. A mining area (measuring approximately 3602, 7246 hectares) was in terms of s 64(1) of the 1964 Precious Stones Act proclaimed on an area surrounding the Venetia Mine. De Beers Consolidated Mines Limited obtained a discoverer's certificate and an owner's certificate and concluded a lease of the State's interest in the mine with the State in terms of s 74 of the 1964 Precious Stones Act. The Venetia Mine became a flagship diamond mine, which was in 2015, South Africa's largest diamond producer. The Venetia Mine was officially opened by the then retired Chairman of De Beers Consolidated Mines Limited, Harry Oppenheimer on 14 August 1992.

¹³⁷² Section 13 of the 1964 Precious Stones Act.

¹³⁷³ Section 17 of the 1964 Precious Stones Act.

¹³⁷⁴ Section 68(1)(a) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 501.

¹³⁷⁵ Section 68(1)(b) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 501-502.

¹³⁷⁶ Franklin and Kaplan *Mining and Minerals* 502.

... although the right to mine for and dispose of precious stones is vested in the State (sec 2) an authority to mine must be obtained from the State, in practice this right is made available to the person originally holding or entitled to the right, subject to the State's participation in the monetary benefits by way of rentals, licence fees, or share of profits apart from taxation on profits, and subject to the supervision and control by the State.

It is submitted that the right to mine for and dispose of diamonds in respect of alienated State land and private land is not vested in the State, not merely in practice but it is also in accordance with section 2 of the 1964 Precious Stones Act which reserved the rights of the State, subject to the provisions of the 1964 Precious Stones Act. The State was, under the 1964 Precious Stones Act, not entitled to afford anyone else the right to work a diamond mine on alienated State land or on private land unless the holders of the relevant owner's certificates elected not to work the diamond mines. The persons, who were entitled to work a mine, had to notify the Minister in writing within nine months from the date of proclamation of the mine, whether or not they intended to work the mine.¹³⁷⁷ The holders of discoverer's and owner's certificates were entitled to receive out of the profits derived from the working of the mine their respective shares or interests in the mine.¹³⁷⁸

If the person who was entitled to work a mine gave notice of his intention to work the mine, he had within 12 months of the proclamation of the mine to provide the necessary working capital, that was in the opinion of the Minister necessary for the effective working of the mine¹³⁷⁹ and had to commence with mining operations within 15 months after the proclamation. The person entitled to work the mine had to continue conducting mining operations necessary for the winning and disposal of precious stones on a scale and in a manner to the satisfaction of the Minister.¹³⁸⁰ If the person who was entitled to work a mine, notified the State of his or its intention

¹³⁷⁷ Section 68(2) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 502.

¹³⁷⁸ Section 68(3) of the 1964 Precious Stones Act.

¹³⁷⁹ Section 69(1) of the 1964 Precious Stones Act.

¹³⁸⁰ Section 69(2) of the 1964 Precious Stones Act. The person entitled to work the mine was in terms of s 69(4) of the 1964 Precious Stones Act also required to if requested by the Minister, in writing specify the policy and programme of development and exploitation, including the programme of washing and extraction and disposal of precious stones he followed.

to work the mine, the State was in the case of a mine situated on private land, entitled to a 50% share of the profits derived from the working of the mine. In the case of a diamond mine situated on State land or on alienated State land, the State was entitled to a 60% share of the profits.¹³⁸¹

Furthermore, the Minister could only in certain specific circumstances terminate any person or entity's right to work a diamond mine or any debris heaps or depositing floors connected with the mine.¹³⁸² The Minister could then by notice in the *Gazette* call for tenders for the working of the mine and any debris heap or depositing floors relating to the mine. The Minister could grant a mining lease in respect of the mine and such debris heaps or depositing floors to any tenderer on such terms and conditions as the Minister determined after consultation with the Mining Leases Board. Any share of the profits payable under the mining lease, had to be divided between the State and the holder of any discoverer's certificate or owner's certificate in proportion to their respective shares in the mine.¹³⁸³

A mineholder¹³⁸⁴ had to comply with certain administrative requirements, such as keeping books, accounts, plans and records necessary to convey a full record of his

¹³⁸¹ See figures 10.2-10.4 in para 10.5.2 above.

¹³⁸² Section 70 of the 1964 Precious Stones Act provided that the Minister could terminate a right to work a diamond mine or debris heaps or depositing floors, if the person or entity entitled to work the mine:

- (a) failed to notify the Minister within nine months of this intention to work the mine; or
- (b) failed to find the necessary capital for the working of the mine; or
- (c) discontinued or failed to work the mine to the satisfaction of the Minister; or
- (d) failed to realise the produce to the satisfaction of the Minister; or
- (e) failed to pay any share of the profits payable; or
- (f) failed to carry out an instruction or requirement of the Minister.

If in any accounting year a mine was worked at a loss, s 71(1) of the 1964 Precious Stones Act provided that the realised loss in that year had to be carried forward and set off against the profit of succeeding accounting years. The Minister was in terms of s 72(1) of the 1964 Precious Stones Act required to give such person three months written notice to rectify his default.

¹³⁸³ Section 72(1) of the 1964 Precious Stones Act. If the right to work a mine was terminated by the Minister in terms of s 72(1) of the 1964 Precious Stones Act, s 73(1) of the 1964 Precious Stones Act provided that no plant, machinery or equipment could be removed and no material could be destroyed that was used for supporting the sides or walls of the mine or underground workings.

¹³⁸⁴ A "mineholder" was defined in s 1 of the 1964 Precious Stones Act to mean: "a person working a mine under this Act."

operations, which had at all reasonable times to be available for inspection by the Minister or his authorised delegate.¹³⁸⁵ The State President was empowered, whenever he deemed it necessary to do so in the public interest or for public purposes or in the interest of mining, to expropriate wholly or in part any right granted under the 1964 Precious Stones Act subject to the payment of compensation, which in the absence of agreement had to be determined by arbitration.¹³⁸⁶

10.6.2 Lease of the State's interest

Section 74 of the 1964 Precious Stones Act provided that the Minister was entitled if he deemed it expedient and after consultation with the Mining Leases Board, to lease the State's interest in any mine to the person entitled to work the mine on such terms and conditions as agreed to with such person. The provisions of the 1964 Precious Stones Act thereafter applied in respect of such mine, but subject to the conditions contained in the lease agreement.¹³⁸⁷ Any assets that were held in joint ownership by the State and any mineholder in respect of any mine were the property of the State and the mineholder in proportion to their respective shares in the mine. Any such property which was immovable property had to be transferred to and vested in the State and the mineholder in accordance with their respective shares in the mine.¹³⁸⁸ Section 79(2) of the 1964 Precious Stones Act provided that the joint ownership of assets would in no way affect the full and free use of such assets in and for the

¹³⁸⁵ Section 75(1)(a) of the 1964 Precious Stones Act. The mineholder was in terms of s 77(2) of the 1964 Precious Stones Act required to render annual accounts to the Secretary for Inland Revenue indicating the realised profits and how they were determined. The mineholder was also in terms of s 77(7) of the 1964 Precious Stones Act required to pay the State's share to the Secretary for Inland Revenue when he distributed the profits derived from the working of the mine. The Secretary of Inland Revenue was in terms of s 78(1) of the 1964 Precious Stones Act required to examine the account rendered by the mineholder and assess his liability. Section 78(2) of the 1964 Precious Stones Act provided that the Secretary had full access to the use of all books, accounts, contracts and other documents relating to the working of the mine for purposes of determining the liability of the mineholder. The Minister could in terms of s 76 of the 1964 Precious Stones Act appoint officers to inspect any mine or any place where diamonds were extracted, sorted or classified and any books (including minute books) accounts, plans, contracts, records and other documents kept in connection with the mine.

¹³⁸⁶ Section 120 of the 1964 Precious Stones Act.

¹³⁸⁷ Section 74 of the 1964 Precious Stones Act.

¹³⁸⁸ Section 79(1) of the 1964 Precious Stones Act.

purposes of working the mine. The State's interest that was leased in terms of section 74 of the 1964 Precious Stones Act was the right to share in the profits derived from the working of the mine. It is submitted that it was only assets that "were held in joint ownership" by the State and mineholder, in that the assets were either jointly acquired or acquired from the profits derived from the working of the mine that the State and the mineholder co-owned. The lease agreements concluded in terms of section 38 of the 1927 Precious Stones Act in respect of small mines in terms of which the former Governor-General leased the Crown's interest in the relevant mine to the mineholder,¹³⁸⁹ were in terms of section 126(2) of the 1964 Precious Stones Act deemed to be issued in terms of the 1964 Precious Stones Act.

10.6.3 Permit to wash debris

Debris or dumps that emanated from diamond mining operations could still contain diamonds. The 1964 Precious Stones Act provided that a person could only wash, treat or sought any debris which was bought or otherwise lawfully acquired for the purpose of recovering rough or uncut diamonds, if he was the holder of a prescribed washing permit which the Mining Commissioner had issued.¹³⁹⁰ A washing permit could not be issued for a period longer than 12 months and the Mining Commissioner had to be satisfied that the applicant for a washing permit was of good character.¹³⁹¹ The holder of a washing permit was entitled to the proceeds of any diamonds which he found in the course of *bona fide* washing operations.¹³⁹²

¹³⁸⁹ See para 9.4.7.3 above.

¹³⁹⁰ Section 89(1) of the 1964 Precious Stones Act.

¹³⁹¹ Section 89(2) of the 1964 Precious Stones Act.

¹³⁹² Section 89(4) of the 1964 Precious Stones Act. Section 89(5) of the 1964 Precious Stones Act provided that all washing operations had to be carried on under the control of the holder of the washing permit or duly authorised representative appointed in writing, who had to be the holder of a current digger's certificate or of a residential and work permit.

10.7 Alluvial diggings

Similar to the 1927 Precious Stones Act, the working of alluvial diggings was separately regulated in the 1964 Precious Stones Act and also depended on the form of land tenure.¹³⁹³

10.7.1 Rights of the discoverer of alluvial diggings

In the case of the discovery of alluvial diamonds on State land or on alienated State land, the discoverer was entitled to select 50 claims¹³⁹⁴ and in the case of private land, the discoverer was entitled to select 200 claims.¹³⁹⁵

10.7.2 Rights of the owner

In the case of the discovery of alluvial diamonds on alienated State land, the surface owner was entitled to receive an owner's certificate from the Mining Commissioner, confirming that the surface owner was entitled to select 50 claims.¹³⁹⁶

¹³⁹³ See para 9.4.8 above.

¹³⁹⁴ Section 13(1)(a)(i) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 478.

¹³⁹⁵ Section 13(1)(a)(ii) of the 1964 Precious Stones Act. Section 13(3) of the 1964 Precious Stones Act provided that the claims to which the holder of the discoverer's certificate was entitled, had to be pegged where the discovery was made within the period specified by the Mining Commissioner. The claims had to be pegged in one block, the length of which could not exceed twice the breadth thereof and the discoverer had to furnish the Mining Commissioner with a sketch plan of the claims he selected. Section 13(5) of the 1964 Precious Stones Act provided that if the holder of a discoverer's certificate complied with the prescribed requirements and upon the approval of his sketch plan by the Mining Commissioner, he was entitled to dig for diamonds on his claims. If the discoverer failed to select and peg his claims in one block or to submit a sketch plan to the Mining Commissioner within the prescribed period to the Mining Commissioner, s 13(6) of the 1964 Precious Stones Act provided that the discoverer forfeited his right to select such claims and all his rights as discoverer under the discoverer's certificate lapsed. See Franklin and Kaplan *Mining and Minerals* 478.

¹³⁹⁶ Sections 17(3) and 17(4) read with s 13(5) of the 1964 Precious Stones Act provided that the holder of an owner's certificate also had to peg the claims to which he was entitled within the period specified by the Mining Commissioner. The claims had to be pegged in no more than four blocks the length of each could not exceed twice the breadth thereof. The holder of the owner's certificate had to furnish the Mining Commissioner with a sketch plan of claims and was entitled to dig for precious stones once he had received written approval of the sketch plan from the Mining Commissioner. The holder of an owner's certificate was in terms of s 17(5) of the 1964 Precious Stones Act exempted from paying licence fees in respect of the owner's claims, for as long as such claims were held in his name. If the holder of an owner's certificate transferred his owner's claims

The holder of an owner's certificate in respect of private land was in the case of the discovery of alluvial diamonds entitled to select 400 claims.¹³⁹⁷

10.7.3 Proclamation of alluvial diggings

If the State President was satisfied that there were reasonable grounds for believing that precious stones in alluvial existed in payable quantities on any State land, alienated State land or on private land,¹³⁹⁸ he could in his discretion cause such land or any portion thereof to be beaconed off. This would also be done, in accord of the State President's discretion that it contained precious stones or would be needed for purposes incidental to the winning of such precious stones. The State President could thereafter by proclamation in the *Gazette* proclaim the area an alluvial digging.¹³⁹⁹

An alluvial digging could only be declared after the relevant discoverer's certificate¹⁴⁰⁰ and owner's certificate¹⁴⁰¹ had been issued in respect of the specific land.¹⁴⁰² An alluvial digging could not be proclaimed on private land, unless the holder of the rights to precious stones in respect of such private land, had prospected or allowed

to any other person (except in terms of s 39 of the 1964 Precious Stones Act) the provisions of the 1964 Precious Stones Act relating to licence monies and all other conditions relating ordinary claims, applied in respect of the former owner's claims. See Franklin and Kaplan *Mining and Minerals* 478-479, 481-482.

¹³⁹⁷ Section 17(1)(a)(ii) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 478.

¹³⁹⁸ The term "private land" was defined with reference to the definition thereof in s 13(2) of the 1964 Precious Stones Act to mean "any area of land in respect of which the right to precious stones is registered separately in the appropriate deeds registry, or any piece of land registered in such deeds registry without separate registration of the right to precious stones."

¹³⁹⁹ The Mining Commissioner was in terms of s 26 of the 1964 Precious Stones Act required to notify the relevant Registrar of Deeds of the proclamation or de-proclamation of an alluvial digging, who in turn had to make the necessary entries in the appropriate registers to correctly reflect the status of the specific land. The term "alluvial digging" was defined in s 1 of the 1964 Precious Stones Act to mean: "any area which has by proclamation in the *Gazette* been declared to be an alluvial digging for precious stones."

¹⁴⁰⁰ Section 13(1)(a) of the 1964 Precious Stones Act. See para 10.7.1 above.

¹⁴⁰¹ Section 17(1)(a) of the 1964 Precious Stones Act. See para 10.7.2 above.

¹⁴⁰² Section 23(1) of the 1964 Precious Stones Act.

prospecting to take place or had consented to the proclamation of an alluvial digging on the specific land.¹⁴⁰³

The State President could by proclamation in the *Gazette* deproclaim any alluvial digging or any part thereof. This would be done, if it appeared to him that precious stones were not being found on the specific land in payable quantities or if there were other grounds which in the opinion of the Minister rendered it expedient or desirable that the digging or part thereof be deproclaimed.¹⁴⁰⁴

10.7.4 Diggers' certificates

A natural person, who wanted to prospect for precious stones or to dig on an alluvial digging, had to obtain a digger's certificate from the Mining Commissioner of the relevant district.¹⁴⁰⁵ The Mining Commissioner had to cause a notice of the application for a digger's certificate to be posted up in a conspicuous place at the Mining Commissioner's office for a period of at least seven days.¹⁴⁰⁶ The Mining Commissioner had to satisfy himself that the applicant for a digger's certificate was of good character

¹⁴⁰³ Section 23(2) of the 1964 Precious Stones Act. Provision was made for the protection of the interests of the surface owner of land. Before the State could proclaim an alluvial digging, s 24(1) of the 1964 Precious Stones Act provided that the following had to be reserved for the free and undisturbed use of the surface owner of the specific land:

- (a) any homestead on the land and its curtilage;
- (b) all buildings capable of beneficial use, cemeteries, silos, threshing sites, dipping-tanks, reservoirs, watering troughs and kraals situated outside such homestead and its curtilage;
- (c) all portions of the land which were under *bona fide* cultivation; and
- (d) all springs, wells, boreholes and dams on the land.

See Van der Merwe *Sakereg* 570. The Mining Commissioner was required to give written notice to the surface owner of the intention to proclaim an alluvial digging on his land. Section 24(2) of the 1964 Precious Stones Act provided that on receipt of the notice, the surface owner had forthwith to submit a sketch plan to the Mining Commissioner, depicting clearly all portions of the land which he desired to reserve. If land on which an alluvial digging had been proclaimed, was declared to be open to the pegging of claims, s 23(3) of the 1964 Precious Stones Act required that the date and time at which it would be open to the public for pegging had to be specified in the proclamation. The mining commissioner was in terms of s 23(4) of the 1964 Precious Stones Act required to cause a sketch plan of any area to be proclaimed as an alluvial digging and the sketch plan had to be open to inspection by members of the public at his office.

¹⁴⁰⁴ Section 25(1) of the 1964 Precious Stones Act.

¹⁴⁰⁵ Section 27(1) of the 1964 Precious Stones Act.

¹⁴⁰⁶ Section 27(2) of the 1964 Precious Stones Act. The notice had to reflect the name and description of the applicant for a digger's certificate.

and a fit and proper person to hold such a certificate.¹⁴⁰⁷ The consent of the Minister to the issue of the digger's certificate was also required, unless the digger's certificate was required solely for the purpose of enabling the holder to prospect for diamonds.¹⁴⁰⁸

A digger's certificate had to be issued in the prescribed form and was valid for a period of 12 months in respect of the relevant province in which it was issued.¹⁴⁰⁹ A person who was not in possession of a digger's certificate or residential and work permit could not reside or work on any alluvial digging or claim.¹⁴¹⁰ A Mining Commissioner could

¹⁴⁰⁷ Section 27(3)(b) of the 1964 Precious Stones Act. The Mining Commissioner was also in terms of s 27(3)(a) of the 1964 Precious Stones Act, required to consult with the chief of the diamond branch before deciding to grant a discoverer's certificate. This requirement was in terms of s 7(a) of the 1986 Precious Stones Amendment Act deleted. The Mining Commissioner could in terms of s 28 of the 1964 Precious Stones Act refuse to grant or cancel a digger's certificate, if he was satisfied that the applicant or holder of such digger's certificate –

- (a) was or had been engaged in illicit trade in diamonds;
- (b) had contravened any law relating to the possession or disposal of diamonds;
- (c) was or had been engaged in illicit liquor trade;
- (d) associated with undesirable or suspected persons;
- (e) had visited a so-called "Bantu location or compound" on any alluvial digging without the authority of the Mining Commissioner. This provision was in terms of s 8(a) of the 1986 Precious Stones Amendment Act deleted.
- (f) had been convicted of any criminal offence and sentenced to any term of imprisonment without the option of a fine or to a fine of or exceeding R100;
- (g) was unable personally to keep the registers which he was required to keep under Chapter 9 of the 1964 Precious Stones Act; and
- (h) had done or omitted anything to the prejudice of good order and morality in the diamond digging industry.

Section 27(3)(b) of the 1964 Precious Stones Act was amended in terms of s 1 of the *Precious Stones Amendment Act* 48 of 1969 to allow so-called "coloured" electors in the Province of the Cape of Good Hope to apply for diggers' certificates in respect of that province. Welsh 1969 *Annual Survey of South African Law* 197.

¹⁴⁰⁸ Section 27(3)(c) of the 1964 Precious Stones Act. Section 27(4) of the 1964 Precious Stones Act provided that a digger's certificate that was obtained solely for the purpose of enabling the holder thereof to prospect for precious stones, did not entitle the holder thereof to obtain a claim licence or to acquire any claims by transfer or to dig or work an alluvial digging, except on discoverer's claims held by such holder under a discoverer's certificate. The holder of such a discoverer's certificate was also not entitled to reside on an alluvial digging, except for the purpose of working his discoverer's claims.

¹⁴⁰⁹ Section 27(5) of the 1964 Precious Stones Act. A digger's certificate could in terms of s 27(6) of the 1964 Precious Stones Act be renewed annually. Application for the renewal of the digger's certificate had to be made not later than 30 days after expiry of the certificate. Section 27(8) of the 1964 Precious Stones Act provided that the holder of the right to work diamonds in respect of private land or the surface owner of alienated State land was not required to hold a digger's certificate while he was working his owner's or discoverer's claims.

¹⁴¹⁰ Section 30(1) of the 1964 Precious Stones Act. The prohibition did not apply in respect of the wife (including any woman permanently residing with the holder of a digger's certificate as his wife) or

also issue a residential and work permit, provided that he had satisfied himself that the applicant for such a permit was of good character and that the applicant genuinely intended to work or that it was necessary for him to reside on the alluvial digging or claim.¹⁴¹¹

10.7.5 Exploitation of diamonds on claims at alluvial diggings

In order to work a claim¹⁴¹² at an alluvial digging, the holder of a digger's certificate had to obtain a claim licence from the Mining Commissioner. A claim licence was granted for a period of one month and entitled the holder to peg the number of claims authorised in the claim licence.¹⁴¹³ A person could not at any time on any one digging hold more than six claims.¹⁴¹⁴ Claims could only be pegged in the presence of the holder of the relevant claim licence or his agent and provided that they had the claim

any dependant not over the age of 18 years of the holder of a digger's certificate or residential and work permit and who resided with him.

¹⁴¹¹ Sections 30(2) and 30(3) of the 1964 Precious Stones Act.

¹⁴¹² Section 37(1) of the 1964 Precious Stones Act provided that claims had, as far as possible to be pegged in a rectangular shape and the area pegged as a claim had to be demarcated by prescribed pegs and trenches. Claimholders were in terms of s 37(2) of the 1964 Precious Stones Act required to maintain their pegs and trenching in good order and data required to be written on the pegs had to be maintained in legible condition. Section 39(1) of the 1964 Precious Stones Act provided that any claim, including a discoverer's claim or an owner's claim, could be transferred by the holder thereof to the holder of a digger's certificate, except if the digger's certificate was limited for purpose of prospecting only. A claim could only with the consent of the Minister be transferred to a company, corporate body or association of persons. The holder of a digger's certificate could not without the written consent of the Minister, acquire by transfer more than 24 claims. In the case of claims situated in a river bed, s 41 of the 1964 Precious Stones Act provided that the Mining Commissioner could grant written permission to acquire a greater number of such claims. The holder of a discoverer's or an owner's certificate could transfer all the claims held under such discoverer's or owner's certificate.

¹⁴¹³ Section 35(1) of the 1964 Precious Stones Act.

¹⁴¹⁴ Section 35(4) of the 1964 Precious Stones Act. This was later in terms of s 13 of the 1986 Precious Stones Amendment Act increased to 12 claims. This prohibition was subject to the provisions of s 43 of the 1964 Precious Stones Act, which provided for the protection of a claimholder in the case of submerged claims and s 44 of the 1964 Precious stones Act, which dealt with circumstances under which the claimholder intended to sink a shaft to a depth of more than 15 feet.

licence present.¹⁴¹⁵ The holder of a claim licence could renew his claim licence for a period of one month.¹⁴¹⁶

The holder of a claim licence could at any time abandon any claim held under that licence, by removing the pegs which defined the claim. If the claim was on land proclaimed as an alluvial digging, it became open and available to others for pegging.¹⁴¹⁷ Claim licence money received by the Mining Commissioner in respect of land not owned by the State had to be paid to the owner of the land.¹⁴¹⁸

The Mining Commissioner was entitled without payment of any consideration, to select and reserve sites within the alluvial digging from pegging, for purposes of public buildings, schools, places of worship, hospitals, police barracks, Government offices, landing strips, trading, recreation, residential or sanitary purposes of burial grounds or for any purpose connected with the digging.¹⁴¹⁹ The sites which the Mining Commissioner reserved could, however, not interfere with the proper and efficient

¹⁴¹⁵ Section 36(1)(b) of the 1964 Precious Stones Act. Claims could in terms of s 36(1)(a) of the 1964 Precious Stones Act not be pegged between sunset and sunrise or on a Sunday or on any public holiday mentioned in the Second Schedule to the *Public Holidays Act* 5 of 1952. Claims could in terms of s 36(1)(c) of the 1964 Precious Stones Act also not be pegged on any land mentioned in s 7(1)(b)(i),(ii) or (iv), or on any land which had been reserved from pegging of claims, or where pegging or digging was prohibited or which was not open to pegging, or which had been reserved under s 24 for the use of the owner or lessee of the land. Claims could in terms of s 46(1) of the 1964 Precious Stones Act not be pegged in public roads situated on alluvial diggings including an area of ten metres on either side of any such road.

¹⁴¹⁶ The Mining Commissioner could in terms of s 38(1) of the 1964 Precious Stones Act renew a claim licence for a longer period, not exceeding 12 months, if the holder of the claim licence was carrying on digging operations at a depth of at least 50 feet on any claim and had submitted an accurate sketch plan of the claims held under the license to the Mining Commissioner. The claimholder was in terms of s 38(3) of the 1964 Precious Stones Act obliged to pay a monthly licence fee in respect of his claim licence. If the monthly licence money in respect of any claim became in arrears for a period of seven days, the claim lapsed and if the claim was on land proclaimed as an alluvial digging, the claims became open to pegging by others.

¹⁴¹⁷ Section 41 of the 1964 Precious Stones Act. If a claimholder was not working his claims to the satisfaction of the mining commissioner, he could in terms of s 42(1) of the 1964 Precious Stones Act serve a written notice on the holder, calling on him to take such steps as the mining commissioner deemed necessary within one month from the date of the notice, failing which the licence money payable in respect of the claims was doubled until the terms of the notice had been complied with. If the licence money payable in respect of the claim became in arrear for seven days, the claims lapsed in terms of section 38 read with s 42(2) of the 1964 Precious Stones Act.

¹⁴¹⁸ Section 45(1) of the 1964 Precious Stones Act.

¹⁴¹⁹ Section 56(1) of the 1964 Precious Stones Act.

working of any claims, or with any cultivated lands, buildings, kraals or permanent improvements of the owner of the land.¹⁴²⁰ Every claimholder on an alluvial digging was while he was working his claim, entitled to use and occupy without any additional payment, a piece of land within an area of the alluvial digging that the Mining Commissioner had reserved for the purpose of a residence for himself and his dependants.¹⁴²¹

A claimholder was further entitled, without any additional payment, to apply to the Mining Commissioner to obtain surface rights on an alluvial digging over any suitable unpegged land which may be available for the erection of machinery, depositing of tailings or waste rock or for any other purpose relating to the working of the claims held by the applicant.¹⁴²² The Mining Commissioner could also after consultation with the surface owner of the land on which an alluvial digging had been proclaimed, grant a right of way for a road, path, watercourse, pipe line, power line, ropeway, tramway or other haulage on, over or through any portion of an alluvial digging, whether other person held claims in respect of such land or not.¹⁴²³ The Mining Commissioner could

¹⁴²⁰ Section 56(1) of the 1964 Precious Stones Act. If the alluvial digging was situated within the jurisdiction of a local authority, the Mining Commissioner had to consult the local authority before selecting any site.

¹⁴²¹ Section 55(1) of the 1964 Precious Stones Act. Every person employed by a holder of a claim licence and the dependants of such person, was in terms of s 55(2) of the 1964 Precious Stones Act entitled to reside without payment, in the residential area selected by the claimholder.

¹⁴²² Section 57(1) of the 1964 Precious Stones Act. Every claimholder was in terms of s 24 read with s 59(2) of the 1964 Precious Stones Act entitled to access to any vlei or abandoned claims which were not situated within an area reserved to the surface owner for the purpose of taking water solely for his own digging operations or for domestic purposes. Section 59(1) of the 1964 Precious Stones Act provided that water required for purposes of the alluvial digging had to be taken in accordance with the provisions of the 1964 Precious Stones Act and subject to the *Water Act* 54 of 1956. The Mining Commissioner could in terms of s 60(1) of the 1964 Precious Stones Act and subject to the *Water Act* 54 of 1956 grant a temporary water right on any alluvial digging to the surface owner of the land or his nominee for the purpose of supplying water to claimholders and residents on the alluvial digging. The Minister could in terms of s 61 of the 1964 Precious Stones Act authorise the Mining Commissioner to grant a water right to any person in respect of any such borehole or well on terms and conditions to be determined by the Minister. Section 62 of the 1964 Precious Stones Act provided that any water rights granted in respect of an alluvial digging under the 1964 Precious Stones Act lapsed when the specific alluvial digging was deproclaimed. See Van der Merwe *Sakereg* 571.

¹⁴²³ Section 58(1) of the 1964 Precious Stones Act. Any person who obstructed or interfered with any other person in the exercise of such right of way was guilty of an offence and liable on conviction to a fine not exceeding R 250.

cancel the grant of the right of way if it was in his opinion improperly used or had ceased to be of use for the purpose for which it was granted.¹⁴²⁴

10.7.6 State alluvial diggings

The State President could by proclamation in the *Gazette* declare any alluvial digging to be a State alluvial digging, subject to the rights to the holder of a discoverer's certificate and an owner's certificate.¹⁴²⁵ Once an alluvial digging or portion thereof had been declared a State alluvial digging, the Minister had to pay rent to the surface owner of the specific land or the person entitled to use the surface. The Mining Leases Board was responsible to recommend such surface rent after considering any written representations by the owner or person entitled to use the surface.¹⁴²⁶ The Minister further had to pay to the owner or person entitled to use the surface of the land who suffered any damage or any loss or damage to crops or improvements on the land caused by the digging operations or any act or omission incidental thereto, compensation for such damage or loss.¹⁴²⁷

10.8 Mining leases over portions of the sea and certain State land

The 1964 Precious Stones Act was the first legislation in which specific reference was made to the discovery of diamonds in the sea. In the event of the discovery of diamonds in any part of the sea¹⁴²⁸ or in the case of the discovery of alluvial diamonds on State land that was situated in an area, which according to the Minister could not feasibly be worked and recovered by individual diggers, the Minister could enter into a mining lease with the holder of the prospecting lease or other person for the winning of diamonds from the part of the sea or the land. The Minister had to be satisfied that

¹⁴²⁴ Section 58(2) of the 1964 Precious Stones Act.

¹⁴²⁵ Section 53(1) of the 1964 Precious Stones Act. See Van der Merwe *Sakereg* 571.

¹⁴²⁶ Section 53(2)(a) of the 1964 Precious Stones Act.

¹⁴²⁷ Section 53(2)(b) of the 1964 Precious Stones Act.

¹⁴²⁸ The "sea" was defined in s 1 of the 1964 Precious Stones Act to have the meaning assigned thereto in s 1 of the *Sea-shore Act* 21 of 1935 and included the continental shelf referred to in s 7 of the *Territorial Waters Act* 87 of 1963.

diamonds occurred in payable quantities in such area.¹⁴²⁹ This mining lease should not be confused with a lease of the State's interest in a diamond mine provided for in section 74 of the 1964 Precious Stones Act.¹⁴³⁰ A mining lease referred to in section 21(1) of the 1964 Precious Stones Act could only be entered into in respect of State land and was a lease by the State of its right to win and dispose of diamonds in the sea or in respect of certain State land.¹⁴³¹

10.9 Right to mine diamonds in the independent states and self-governing territories

The TBVC-states and the self-governing territories were created as part of South Africa's policy of racial discrimination known as "apartheid."¹⁴³² The different diamond mining legislation that existed in the TBVC-states as they existed in the TBVC-states at the date on which the TBVC-states became independent states continued to apply in such states and territories.¹⁴³³ The self-governing territories obtained the power to enact law in regard to "land and minerals" with effect from 31 December 1986, provided that the legislation was not inconsistent with the *Self-Governing Territories Constitution Act* 21 of 1971.¹⁴³⁴ There was no separate legislation enacted in the TBVC-states and in the self-governing territories in which the prospecting for and the mining of diamonds were regulated. The 1964 Precious Stones Act therefore continued

¹⁴²⁹ Section 21(1) of the 1964 Precious Stones Act; See *Van den Heever v The Minister of Minerals and Energy* (NC) (unreported) case number 1252/2010 of 4 May 2012 para 8 (hereafter the *Van den Heever* case).

¹⁴³⁰ See para 10.6.2 above.

¹⁴³¹ See Franklin and Kaplan *Mining and Minerals* 483-486.

¹⁴³² See Pienaar *Land Reform* 96-136; Changuion and Steenkamp *Omstrede land* 216-271; Mostert *Mineral Law* 51-53; Miller and Pope *Land Title* 29-42.

¹⁴³³ Badenhorst, Mostert and Dendy "Minerals and Petroleum" 3; Pienaar *Land Reform* 119-120; Franklin and Kaplan *Mining and Minerals* 791; Badenhorst "Development of Mineral and Petroleum Law" 1-29; Kaplan and Dale *A Guide to the Minerals Act 1991*; Van der Schyff *Property in Minerals and Petroleum* 131.

¹⁴³⁴ Proc 141 in GG 10385 of 15 August 1986. Item 31(z) of Schedule 1 to the *Self-Governing Territories Constitution Act* 21 of 1971; Badenhorst, Mostert and Dendy "Minerals and Petroleum" 3; Mostert *Mineral Law* 52; Kaplan and Dale *A Guide to the Minerals Act 1991* 42; Badenhorst "Development of Mineral and Petroleum Law" 1-29- 1-30; Van der Schyff *Property in Minerals and Petroleum* 131; Du Plessis, Olivier and Pienaar 1990 *SAPL* 266-276; Du Plessis 1995 *SA Journal for Environmental Law and Policy* 23-36.

to apply in respect of the TBVC-states and the self-governing territories.¹⁴³⁵ Amendments to the 1964 Precious Stones Act enacted in the Republic of South-Africa after the dates on which the different TBVC-states became independent states and in the case of the self-governing territories after 31 December 1986 did not apply in respect of the TBVC-states and self-governing territories.

10.10 Summary and conclusions

In this chapter the development of the right to mine diamonds under the 1964 Precious Stones Act which was enacted in the Republic of South Africa, was discussed. The 1964 Precious Stones Act was similar to the 1927 Precious Stones Act in various respects. The 1964 Precious Stones Act did not apply to unreserved private land in the province of the Cape of Good Hope in respect of which a certificate in terms of section 2(1) of the 1927 Precious Stones Act had been issued. With the exception of certain provisions, the 1964 Precious Stones Act also did not apply in respect of so-called "existing mines" referred to in Part 8 of the 1904 OFS Precious Stones Ordinance or any other mines discovered under any law that was repealed by the 1927 Precious Stones Act.¹⁴³⁶

The 1964 Precious Stones Act contained a statutory reservation of the right to mine for diamonds in favour of the State, which reservation was also qualified and expressly stated to be subject to the 1964 Precious Stones Act. It is submitted that as in the case of the 1927 Precious Stones Act, the right to mine diamonds in the Republic of South Africa depended on the specific form of land tenure. The 1964 Precious Stones Act distinguished between three different types of land tenure, namely State land, alienated State land and private land.¹⁴³⁷

The right to prospect for diamonds on State land vested in the State, which could grant a prospecting lease to a person authorising him to prospect for diamonds on such State

¹⁴³⁵ See para 11.4 below.

¹⁴³⁶ See para 10.2 above.

¹⁴³⁷ See para 10.3 above.

land.¹⁴³⁸ In the case of alienated State land, the right to prospect for diamonds vested in the relevant surface owner who had to obtain a prospecting permit to exercise the right.¹⁴³⁹ In the case of private land, the right to prospect for diamonds under the 1964 Precious Stones Act vested in the holder of the rights to diamonds, who could also grant a written permission to one person to prospect on the private land in accordance with the terms and conditions specified in the written permission. The holder or his nominee could, however, only commence with prospecting on the private land if he obtained a prospecting permit from the Mining Commissioner.¹⁴⁴⁰ Put differently, in the case of alienated State land, the Mining Commissioner could only grant a prospecting permit to the surface owner or to a person nominated by the surface owner in writing. In the case of private land, the Mining Commissioner could only grant a prospecting permit to the relevant holder of the rights to diamonds or to the person whom he had given authorisation in writing.

If a prospector discovered a diamond mine on State land, the discoverer was entitled to a 40% share in the profits derived from the working of the mine and the State was entitled to the remaining 60%.¹⁴⁴¹ The discoverer of a mine on State land, who obtained a discoverer's certificate, was entitled to work the mine and had to notify the Minister within nine months from the proclamation of the mine whether he intended to work the mine.¹⁴⁴² In the case of the discovery of a mine on alienated State land, the surface owner was entitled to a 40% share in the profits derived from the working of the mine (which included the 8% share of the discoverer).¹⁴⁴³ The surface owner of alienated State land, who obtained an owner's certificate, was entitled to work the mine.¹⁴⁴⁴ In the case of the discovery of a mine on private land, the holder of the rights to diamonds in respect of the private land was entitled to a 50% share in the profits

¹⁴³⁸ See para 10.4.1 above.

¹⁴³⁹ See para 10.4.2 above.

¹⁴⁴⁰ See para 10.6.1 above.

¹⁴⁴¹ See para 10.5.1 and figure 10.2 in para 10.5.2 above.

¹⁴⁴² See para 10.6.1 above.

¹⁴⁴³ See figure 10.3 in para 10.5.2 above.

¹⁴⁴⁴ See para 10.6.1 above.

derived from the working of the mine, which included in the discoverer's 10% share. The State was entitled to the remaining 50% share.¹⁴⁴⁵ The holder of the rights to diamonds in respect of private land, who obtained a discoverer's certificate, was entitled to work the mine.¹⁴⁴⁶

The 1964 Precious Stones Act differed substantially from the 1927 Precious Stones Act, in that provision was made in section 74 of the 1964 Precious Stones Act for the State to lease its interest in the mine to the person entitled to work the mine. In other words, the State could lease its right to share in the profits derived from the working of the mine, in return for a lease consideration.¹⁴⁴⁷ If the State concluded a lease in terms of section 74 of the 1964 Precious Stones Act, assets that were held in joint ownership by the State and the mineholder in respect of a mine, were the property of the State and the mineholder in proportion to their respective shares.¹⁴⁴⁸ The 1964 Precious Stones Act furthermore differed from the 1927 Precious Stones Act in that it provided for the issue of a washing permit to persons who wanted to wash, treat or sought any debris emanating from diamond operations. It also provided for persons that, had bought or otherwise lawfully acquired the debris for purposes of recovery rough or uncut diamonds.¹⁴⁴⁹

The working of alluvial diggings was also regulated separately in the 1964 Precious Stones Act, which continued to regulate the prospecting and mining of diamonds in the Republic of South Africa until the commencement of the 1991 Minerals Act.

The Government of the Republic of South Africa's policy of "apartheid" or racial discrimination provided for the creation of independent homelands for black people in South Africa. This was either in the form of independent states or self-governing territories. The 1964 Precious Stones Act continued to apply in respect of each of the

¹⁴⁴⁵ See figure 10.4 in para 10.5.2 above.

¹⁴⁴⁶ See para 10.6.1 above.

¹⁴⁴⁷ See para 10.6.2 above.

¹⁴⁴⁸ See para 10.6.2 above.

¹⁴⁴⁹ See para 10.6.3 above.

independent states and self-governing territories, despite the commencement of the 1991 Minerals Act which is discussed in the next chapter.

Chapter 11 The 1991 Minerals Act

11.1 Introduction

In this chapter the development of the right to mine diamonds under the 1991 Minerals Act is discussed. The 1991 Minerals Act repealed the 1964 Precious Stones Act and a number of other mining legislation in the Republic of South Africa with effect from 1 January 1992.¹⁴⁵⁰ The 1991 Minerals Act only became applicable in the TBVC-states and in the self-governing territories on 7 December 1994.¹⁴⁵¹ The purpose of the 1991 Minerals Act, as expressed in its long title, was to regulate the prospecting for, the optimal exploration, the processing and the utilisation of minerals and to provide for the safety and health of persons concerned in mines and works.¹⁴⁵² There was no longer a distinction between the different forms of land tenure.¹⁴⁵³ The former

¹⁴⁵⁰ Section 68(1) read with schedule II of the 1991 Minerals Act. The 1919 Precious Stones Alluvial Amendment Act was also repealed by the 1991 Minerals Act. See para 7.7.9 above. Kaplan and Dale *A Guide to the Minerals Act 1*; For a discussion of the background to the adoption of the 1991 Minerals Act, see Badenhorst "Development of Mineral and Petroleum Law" 1-28-1-29.

¹⁴⁵¹ See para 11.4 above.

¹⁴⁵² See Kaplan and Dale *A Guide to the Minerals Act 1991* 3-4; Van der Schyff *Constitutionality* 51. Grobler and Gildenhuys *Heads of Argument* 44-45 emphasise that the 1991 Minerals Act was a regulatory act, its purpose was to regulate the exercise of mineral rights which were obtained by agreement or under the common law. In *Anglo Operations Limited v Sandhurst Estates (Pty) Limited* 2006 1 SA 350 (T) (hereafter the *Anglo Operations High Court* case). De Villiers J held at 388I-398A as follows: "It is thus clear that the provisions of the Minerals Act 50 of 1991 are designed to regulate mining, not to add to or subtract from common-law mineral rights. Those rights are treated by the Minerals Act as something previously established, only the exercise of which is regulated." The Supreme Court of Appeal agreed with this *dictum* in the *Anglo Operations SCA* case para 25. See also *Kameelfontein Boerdery CC v Worldwide Expo (Pty) Limited* 2002 3 SA 248(T). Dale 1994 *Journal of Energy and Natural Resources Law* 229-231 for a discussion of the objects of the 1991 Minerals Act. See the *Sishen* case para 15.

¹⁴⁵³ Except in respect of the transitional provisions. See para 11.3 below.

separate regulation of different classes of minerals under separate legislation was also terminated.¹⁴⁵⁴ Martinson¹⁴⁵⁵ describes the 1991 Minerals Act as:

... probably the most important single piece of legislation to affect mineral law since Sir John Cradock's seminal proclamation of 1813 in the Cape and the enactment of Law 1 of 1871 by the Volksraad of the former South African Republic (now the Transvaal).

The development of the right to mine diamonds under the 1991 Minerals Act is discussed in three parts. The first part covers the discussion regarding the provisions that regulated the prospecting and mining of diamonds (and in effect all minerals) with effect from 1 January 1992. This included provisions with regard to new applications to prospect or to mine diamonds under the 1991 Minerals Act as well.¹⁴⁵⁶ In the second part, the transitional provisions of the 1991 Minerals Act are discussed. The transitional provisions preserved and regulated in certain instances, the manner in which the rights to prospect and mine for diamonds acquired under previous diamond mining legislation

¹⁴⁵⁴ A "mineral" was defined in s 1 of the 1991 Minerals Act, to mean: "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and having been formed by or subjected to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil." The word "tailings" was defined in s 1 of the 1991 Minerals Act to mean: "any waste rock, slimes or residue derived from any mining operation or processing of any mineral." The different classes of minerals that were known, were:

- (a) precious stones as referred to s 1 of the 1964 Precious Stones Act;
- (b) precious metals, as referred to in s 1 of the Mining Rights Act;
- (c) base minerals, as referred to in s 1 of the Mining Rights Act;
- (d) natural oil, as referred to in s 1 of the Mining Rights;
- (e) tiger's-eye, as referred to in the *Tiger's-Eye Control Act* 77 of 1977;
- (f) source material, as referred to in s 1 of the *Nuclear Energy Act* 92 of 1982.

The *Ataqua* case para 55; Kaplan and Dale *A Guide to the Minerals Act 1991* 4, 30-33; For a discussion of the common law meaning of "mineral" and the meaning of "mineral" in different mining legislation, see Franklin and Kaplan *Mining and Minerals* 26-35; Dale *et al Mineral and Petroleum Law* MPRDA54; Badenhorst "Meaning of concept 'Mineral'" 6-1-6-23. Kleyne and Borain *Silberberg and Schoeman's The Law of Property* 408-411; Badenhorst *The Law of Mineral Rights* para 5; Van der Merwe *Sakereg* 2nd ed 554-556; Van der Merwe *Notarial Practice* 106-107; Van der Schyff *Constitutionality* 51; Badenhorst 1991 *TSAR* 116; Badenhorst 1990 *TSAR* 243-244; Martinson 1991 *Annual Survey of South African Law* 174; Van der Schyff *Property in Minerals and Petroleum* 132.

¹⁴⁵⁵ Martinson 1991 *Annual Survey of South African Law* 173. The same can be said for the MPRDA discussed in chapter 11 below.

¹⁴⁵⁶ See para 11.2 below.

had to be dealt with.¹⁴⁵⁷ Finally, the application of the 1991 Minerals Act in the independent states and self-governing territories is briefly discussed in part three. The 1991 Minerals Act only applied in the independent states and in the self-governing territories with effect from 7 December 1994.¹⁴⁵⁸

11.2 The right to prospect and mine for and to dispose of diamonds

The 1991 Minerals Act did not reserve the right to mine diamonds in favour of the State. The question as to who was entitled to prospect for or to mine diamonds under the 1991 Minerals Act depended on the holder¹⁴⁵⁹ of the rights to diamonds and indirectly on the form of land tenure. Section 5(1) of the 1991 Minerals Act provided that the holder of the rights to any mineral in respect of land or tailings or any person who acquired the consent of such holder, was entitled to:¹⁴⁶⁰

¹⁴⁵⁷ See para 11.3 below. Martinson 1989 *Annual Survey of South African Law* 208.

¹⁴⁵⁸ See para 11.4 below.

¹⁴⁵⁹ A "holder" was defined in s 1 of the 1991 Minerals Act -

- (a) in relation to a mineral in respect of land or undivided share therein, to mean: "the owner of such land: Provided that –
 - (i) if the right to such mineral or an undivided share therein has been severed from the ownership of the land concerned, the person in whose name such right or an undivided share therein is registered in the deeds office concerned, either by means of a separate deed or by means of a reservation in the title deed of the land concerned; or
 - (ii) if the right to such mineral or an undivided share therein vests in any other manner in a person, that person, shall be the holder;"
- (b) in relation to the right to a mineral which occurs in or on tailings, to mean: "the person who is the holder of the mining right (in respect of the land) from which such tailings have been produced: Provided that if such mining right has lapsed or did not exist or if such tailings or such mining right has been so alienated that the ownership thereof vests in different persons-
 - (i) the person who at common law has a claim to such tailings; or
 - (ii) if no such person as referred to in subparagraph (i) exists, or if he is unknown or cannot be readily traced, the owner of the land on which the tailings dump is situated, shall be the first-mentioned holder;" and
- (c) in relation to any permit, licence, permission, certificate, authorization or any other document issued, granted or in force in terms of the *Minerals Act*, to mean: "the person in whose name it has been issued, granted or is in force."

See Kaplan and Dale *A Guide to the Minerals Act 1991* 21-28. See also the *Agri CC* case paras 11,12. According to Badenhorst, the statutory mineral rights were terminated by the 1991 Minerals Act. Badenhorst 1999 *Stellenbosch Law Review* 103; Badenhorst and Van Heerden 2010 *Stellenbosch Law Review* 125.

¹⁴⁶⁰ Section 5(1) of the 1991 Minerals Act. See *Agri SCA* case paras 5, 64; *Sishen SCA* case para 22; Kaplan and Dale *A Guide to the Minerals Act 1991* 46-52.

- (a) Enter upon such land or the land on which the tailings were situated, together with such persons, plant or equipment required for purposes of prospecting or mining and
- (b) To prospect and mine for such mineral on or in such land tailings and to dispose thereof.

Section 5(2) of the 1991 Minerals Act prohibited the prospecting and mining for any mineral, without the necessary authorisation prescribed in the 1991 Minerals Act. Kaplan and Dale¹⁴⁶¹ state that the effect of section 5(1) of the 1991 Minerals Act was to revive the common law rights of the holder of the relevant mineral rights. Section 5(2) of the 1991 Minerals Act qualified the rights granted under section 5(1) of the 1991 Minerals Act. Kaplan and Dale¹⁴⁶² explain the effect thereof as follows:

This qualification refers to section 5(2), which institutes a system of authorisations which are necessary to enable the holder of common law rights to exercise them, much in the same way as does a driver's licence, namely the relevant person obtains his rights of ownership or use of the vehicle at common law, but then in order to exercise such common law rights must obtain a licence or authorisation entitling him to do so. The imposition of this system of licensing or authorisations is necessary as a regulatory measure in the implementation of the threefold principles of the Minerals Act, whereby the mineral resources of South Africa are to be utilised optimally, with due regard to safety and health, and subject to the requirement that rehabilitation of the surface occurs.

¹⁴⁶¹ Kaplan and Dale *A Guide to the Minerals Act 1991* 1,51-52. See also the *Anglo Operations High Court* case 389; *Albertonse Stadsraad v Briti CC* 2003 5 SA 157 (SCA) para 10. The Supreme Court of Appeal held in the *Holcim SA (Pty) Limited v Prudent Investors (Pty) Limited* 2011 1 All SA 364 (SCA) (hereafter the *Holcim* case) para 37 that: "Under the Minerals Act 1991 (and previous to that Act) it was the mining authorisation which conferred practical on the mineral rights by authorising the exercise of those rights." See also *Sishen SCA* case para 27.

¹⁴⁶² Kaplan and Dale *A Guide to the Minerals Act 1991* 11. This extract was also referred to in *Balmoral Investments (Edms) Beperk v Minister van Minerale en Energie* 1995 9 BCLR 1104 (NC). See also Dale 1994 *Journal of Energy and Natural Resources Law* 230. According to Grobler and Gildenhuys *Heads of Argument* 46-47, this analogy, accurately describes the difference between public law and private law in the 1991 Minerals Act. Grobler and Gildenhuys state that the private law, through the "traditional mineral right" regulated the relationship between the traditional mineral right holder (in the case where the mineral rights had been severed), the owner of the land and third parties. The public law, by means of the prospecting permit or mining authorisation, provided the regulatory instrument in terms of which the Minister controlled prospecting and mining activities. See also Van der Schyff *Property in Minerals and Petroleum* 132-133.

According to Badenhorst,¹⁴⁶³ the effect of section 5(1) of the 1991 Minerals Act was that the entitlements to enter upon land, to prospect for, to mine for and to dispose of the relevant minerals, no longer vested in the State, but that it would be "re-vested" in the holder of the relevant mineral rights.

In the case of diamonds, the holder of the rights to diamonds or any person who had obtained the consent from such holder could therefore only prospect or mine for diamonds, if he had obtained the necessary authorisation in terms of the 1991 Minerals Act.¹⁴⁶⁴ In the case of prospecting, a prospecting permit had to be obtained in terms of section 6 of the 1991 Minerals Act. In the case of mining, a mining authorisation (comprising either a mining permit or mining licence) had to be obtained in terms of section 9 of the 1991 Minerals Act.¹⁴⁶⁵

The person entitled to mine diamonds and who mined under a mining authorisation, was entitled also to mine and dispose of any other mineral in respect of which he was not the holder to the rights, but which had of necessity to be mined together with the diamonds. The person entitled to mine the diamonds, however, had to compensate the holder of the rights to such other mineral for his mineral to an amount agreed

¹⁴⁶³ Badenhorst 1991 *TSAR* 124; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 224; Badenhorst and Malherbe 2001 *TSAR* 466; Badenhorst "Development of Mineral and Petroleum Law" 1-24.

¹⁴⁶⁴ Section 5(2) of the 1991 Minerals Act. There were two exemptions to the requirement that an authorisation be obtained to prospect or mine. Section 5(2) of the 1991 Minerals Act provided, firstly, that the South African Roads Board established in terms of s 2 of the *South African Roads Board Act* 74 of 1988 and any provincial administration did not require any authorisation for the searching for and the taking of sand, stone, rock, gravel, clay and soil for road-building purposes under the laws applicable to them. The Roads Board or provincial administration were for purposes of the 1991 Minerals Act deemed to be the holder of or applicant for a prospecting permit or mining authorisation. Secondly, the occupier of land who lawfully took sand, stone, rock, gravel, clay or soil for farming purposes or for the effecting of improvements in connection with such purposes on such land, did not require any authorisation. Badenhorst and Mostert 2007 (2) *TSAR* 470; Badenhorst "Development of Mineral and Petroleum Law" 1.1.

¹⁴⁶⁵ See paras 11.2.1-11.2.2 below. *Agri SCA* case para 64; *Sishen SCA* case para 23; *Xstrata* case para 1.

upon by both parties. If they failed to reach an agreement, it had to be determined by arbitration or by a court.¹⁴⁶⁶

11.2.1 Issuing of a prospecting permit

In order to obtain a prospecting permit to prospect for diamonds, the holder of the rights to diamonds, or a person who obtained the written permission of such holder,¹⁴⁶⁷ had to apply in the prescribed form¹⁴⁶⁸ to the Director: Mineral Development and had to pay the prescribed application fee.¹⁴⁶⁹ The Director: Mineral Development had to issue a prospecting permit in the prescribed form authorising the applicant to prospect for diamonds in respect of the relevant land or tailings.¹⁴⁷⁰ Kaplan and Dale¹⁴⁷¹ emphasise that a prospecting permit issued in terms of section 6 of the 1991 Minerals Act did not confer any rights in themselves, they merely authorised the common law rights already held by the common law holder of the right to the relevant minerals, in

¹⁴⁶⁶ Section 5(3) of the 1991 Minerals Act. Section 15 of the 1991 Minerals Act provided that a prospecting permit or mining authorisation could not be issued in respect of any mineral in land or tailings, if a prospecting permit or mining authorisation had already been issued in respect of such mineral and land or tailings, unless the Director: Mineral Development was satisfied that the issuing of the prospecting permit or mining authorisation, would not detrimentally affect the object of the 1991 Minerals Act in relation to optimal exploitation of minerals or rehabilitation. See Kaplan and Dale *A Guide to the Minerals Act 1991* 52-53 and 149-150; Badenhorst *Juridiese Bevoegdheid* 305-308. See also the *Trojan* case 530. For a discussion of the *Trojan* case see Badenhorst 1998 *Stellenbosch Law Review* 143-164; *Mtunzini Conservancy v Tronox KZN Sands (Pty) Limited* 2013 4 BCLR 467 (KZD) paras 62, 63.

¹⁴⁶⁷ Section 5(1) of the 1991 Minerals Act.

¹⁴⁶⁸ Section 6(2) of the 1991 Minerals Act provided that an applicant for a prospecting permit had to lodge proof that he was the holder of the rights to diamonds in respect of the land or tailings and provide details of the manner in which he intended to prospect for diamonds and to rehabilitate surface disturbances caused by his prospecting operations. The applicant further had to submit details regarding his ability to make the necessary provision to rehabilitate the surface disturbances. The Director: Mineral Development could request the applicant to submit further information and documentation. See Badenhorst, Mostert and Dendy "Minerals and Petroleum" 54.

¹⁴⁶⁹ Section 6(1) of the 1991 Minerals Act. Prospecting was in terms of s 7 of the 1991 Minerals Act, except with the written consent of the Minister, prohibited in or on land which -

- (a) comprised a township or urban area;
- (b) comprised a public road, a railway or a cemetery;
- (c) had been reserved or was being used in terms of the 1991 Minerals Act or any other law, for government or public purposes; or
- (d) could be defined and so determined by the Minister by notice in the *Gazette*.

¹⁴⁷⁰ Section 6(1) of the 1991 Minerals Act.

¹⁴⁷¹ Kaplan and Dale *A Guide to the Minerals Act 1991* 48.

this instance, diamonds. Put differently and with reference to Kaplan and Dale's analogy, it is merely the "vehicle licence" authorising the use of the "vehicle".¹⁴⁷²

The written consent from the holder of the rights to diamonds, was usually in the form of a prospecting contract. Through this contract the holder of the rights to diamonds granted the right to prospect for diamonds on the prospector.¹⁴⁷³ If the State was the holder of the rights to diamonds in respect of the land or tailings, the written permission had to be obtained from the Minister, who could grant permission subject to terms and conditions.¹⁴⁷⁴

The holder of a prospecting permit could only remove samples of diamonds found in or on the land or tailings during the course of prospecting operations, for tests or identification or analysis. The permit holder required the written consent from the holder of the rights to diamonds. If the permit holder intended to remove the diamonds for any other purpose, the written permission from the Director: Mineral Development was required.¹⁴⁷⁵ If the State was the holder of the rights to diamonds, the Minister could grant the written permission, subject to terms and conditions.¹⁴⁷⁶ A permission for the removal of diamonds lapsed upon the lapsing of the relevant prospecting

¹⁴⁷² Kaplan and Dale *A Guide to the Minerals Act 1991* 11.

¹⁴⁷³ A prospecting contract in most instances also included a clause providing an option to the prospector, to purchase the rights to diamonds or to acquire a mineral lease in respect thereof. Kaplan and Dale *A Guide to the Minerals Act 1991* 48.

¹⁴⁷⁴ Section 6(3) of the 1991 Minerals Act. Section 6(4) of the 1991 Minerals Act provided that a prospecting permit could be granted for a period of 12 months or such longer period as determined by the Director: Mineral Development. A prospecting permit could be renewed, provided that the holder of the prospecting permit submitted a written application to the Director: Mineral Development at least one month prior to the expiry of the period for which the prospecting permit had been granted and paid the prescribed application fee.

¹⁴⁷⁵ Section 8(1) of the 1991 Minerals Act. An application in terms of s 8(1) of the 1991 Minerals Act had to be submitted in writing to the Director: Mineral Development, together with the prescribed application fee: s 8(3) of the 1991 Minerals Act.

¹⁴⁷⁶ Section 8(2) of the 1991 Minerals Act.

permit.¹⁴⁷⁷ A prospecting permit granted under the 1991 Minerals Act could not be transferred, alienated, ceded or encumbered by mortgage.¹⁴⁷⁸

11.2.2 Issuing of a mining authorisation

In order to obtain a mining authorisation to mine¹⁴⁷⁹ for and to dispose of diamonds, the holder of the rights to diamonds or the person who acquired the written consent of such holder to mine for diamonds for his own account, had to apply to the Director: Mineral Development for a mining authorisation.¹⁴⁸⁰ If the granting of the permission

¹⁴⁷⁷ Section 8(4) of the 1991 Minerals Act. Section 16 of the 1991 Minerals Act provided that a prospecting permit lapsed, when-

- (a) the period for which the prospecting permit was granted, expired;
- (b) the holder of the prospecting permit, who was also the holder of the right to diamonds, ceased to be the holder of the right to diamonds; or
- (c) the consent of the holder of the right to diamonds lapsed.

In instances where a prospecting permit had lapsed in respect of certain land and an application for a prospecting permit was pending, the Director: Mineral Development could in terms of section 10 of the 1991 Minerals Act issue a temporary prospecting permit, authorising the continuation of prospecting on the relevant land.

¹⁴⁷⁸ Section 13 of the 1991 Minerals Act. See also Badenhorst, Mostert and Dendy "Minerals and Petroleum" 54.

¹⁴⁷⁹ "Mine" was defined in s 1 of the 1991 Minerals Act to mean, when-

"(a) used as a noun –

- (i) any excavation in the earth, including the portion under the sea or under other water or in any tailings, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral; or
 - (ii) any other place where a mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or exploitation or for the processing of such mineral: Provided that if two or more such excavations, boreholes or places, or excavations, boreholes and places, are being worked in conjunction with one another, they shall be deemed to comprise one mine unless the regional director notifies the owner thereof in writing that such excavations, boreholes or places, or excavations, boreholes and places, comprise two or more mines; and
- (b) used as a verb, the making of any excavation or borehole referred to in paragraph (a)(i) or the exploitation of any mineral deposit in any other manner, for the purpose of winning a mineral, including any prospecting in connection with the winning of such mineral."

¹⁴⁸⁰ Section 9(1) of the 1991 Minerals Act. The applicant for a mining authorisation to mine and dispose of diamonds, was in terms of s 9(5) of the 1991 Minerals Act required to submit-

- (a) proof that he was the holder of the rights to diamonds in respect of the land or tailings;
- (b) a sketch plan indicating the location of the intended mining area, the land that formed the subject of the application, the lay-out of the intended mining operations and the location of surface structures connected therewith;
- (c) details of the manner in which and the scale on which the applicant intended to mine for diamonds and to rehabilitate surface disturbances caused by the mining operations;
- (d) details about the mineralisation of the land or tailings;

was for a consideration, it was in the form of a mineral lease, which had to be in writing and attested by a notary.¹⁴⁸¹ The application had to be made in the prescribed form and the prescribed application fee had to be paid.¹⁴⁸² If the State was the holder of the rights to diamonds in respect of the relevant land or tailings, the written consent of the Minister had to be obtained.¹⁴⁸³ The mining authorisation could either be in the form of a mining permit or a mining licence.¹⁴⁸⁴ A mining permit was required for mining operations of a limited scale and for a period not exceeding two years.¹⁴⁸⁵ A mining licence was required for mining operations of a larger scale and was granted for any period exceeding two years.¹⁴⁸⁶

The Director: Mineral Development, before granting a mining authorisation,¹⁴⁸⁷ had to be satisfied:

- (a) With the manner in which and the scale on which the applicant intended to mine the diamonds optimally under the mining authorisation;¹⁴⁸⁸

(e) details of the applicant's ability to make the necessary provision to mine diamonds optimally and to rehabilitate surfaces disturbances; and

(f) details of the applicant's ability to mine in a healthy and safe manner.

See Kaplan and Dale *A Guide to the Minerals Act 1991* 74-79.

¹⁴⁸¹ Kaplan and Dale *A Guide to the Minerals Act 1991* 75-76; Section 3 of the *General Law Amendment Act* 50 of 1956; *Wiseman v De Pinna* 1986 1 SA 38 (A) 47F-G.

¹⁴⁸² Section 9(1) of the 1991 Minerals Act.

¹⁴⁸³ Section 9(2) of the 1991 Minerals Act; Kaplan and Dale *A Guide to the Minerals Act 1991* 77.

¹⁴⁸⁴ A "mining authorisation" was defined in s 1 of the 1991 Minerals Act to mean: "any authorisation granted under a mining permit or a mining licence."

¹⁴⁸⁵ A "mining permit" was defined in s 1 of the 1991 Minerals Act to mean: "any authorisation issued in terms of s 9 for a period not exceeding two years." Kaplan and Dale *A Guide to the Minerals Act 1991* 78-79.

¹⁴⁸⁶ A "mining licence" was defined in s 1 of the 1991 Minerals Act to mean: "any authorisation issued in terms of section 9 for a period exceeding two years." Kaplan and Dale *A Guide to the Minerals Act 1991* 78-79.

¹⁴⁸⁷ No person could in terms of s 7 read with s 9(4) of the 1991 Minerals Act, except with the written consent of the Minister, mine in or on land which -

(a) comprised a township or urban area;

(b) comprised a public road, a railway or a cemetery;

(c) had been reserved or was being used in terms of the 1991 Minerals Act or any other law, for government or public purposes; or

(d) could be defined and so determined by the Minister by notice in the *Gazette*.

¹⁴⁸⁸ Section 9(3)(a) of the 1991 Minerals Act.

- (b) With the manner in which the applicant intended to rehabilitate surface disturbances caused by the mining operations;¹⁴⁸⁹
- (c) That the applicant had the ability and could make the necessary provision to mine diamonds optimally and safely to rehabilitate surface disturbances;¹⁴⁹⁰
- (d) That in the case of an application for a mining permit, that the diamonds occurred in limited quantities in or on the land or in tailings and that the diamonds would be mined on a limited scale on a temporary basis;¹⁴⁹¹ or
- (e) In the case of a mining licence, that there were reasonable grounds to believe that the diamonds occurred in more than limited quantities in or on the land or in the tailings and that they will be mined on a larger scale for a period longer than two years.¹⁴⁹²

A mining authorisation endured for the period determined therein¹⁴⁹³ and could not be alienated, transferred, ceded or encumbered by mortgage.¹⁴⁹⁴

11.3 Transitional provisions

In chapter 7 of the 1991 Minerals Act, certain rights that existed under previous mining legislation were preserved and in certain respects continued. These provisions are

¹⁴⁸⁹ Section 9(3)(b) of the 1991 Minerals Act.

¹⁴⁹⁰ Section 9(3)(c) of the 1991 Minerals Act.

¹⁴⁹¹ Section 9(3)(e) of the 1991 Minerals Act.

¹⁴⁹² Section 9(3)(f) of the 1991 Minerals Act.

¹⁴⁹³ Section 11 of the 1991 Minerals Act. Section 16 of the 1991 Minerals Act also applied to mining authorisations and provided that a mining authorisation lapsed, when-

- (a) the period for which the mining authorisation was granted, expired;
- (b) the holder of the mining authorisation, who was also the holder of the rights to diamonds, ceased to be the holder of the rights to diamonds; or
- (c) the consent of the holder of the rights to diamonds lapsed.

Where a mining authorisation had lapsed in respect of certain land and an application for a mining authorisation was pending, the Director: Mineral Development could in terms of s 10 of the 1991 Minerals Act issue a temporary mining authorisation, authorising the continuation of mining on the relevant land. The North Gauteng High Court held in *Norgold Investments (Pty) Limited v Minister of Minerals and Energy* (NGP) (unreported) case number 38033/07 of 4 February 2010 that a prospecting permit that was lodged for renewal well before the expiry date, could be validly renewed after the expiry date of the prospecting permit.

¹⁴⁹⁴ Section 13 of the 1991 Minerals Act.

discussed below insofar as they preserved any rights to prospect and mine for diamonds under the 1964 Precious Stones Act.

11.3.1 Rights to prospect

Certain rights and/or permissions to prospect for diamonds which were held under diamond mining legislation repealed under the 1991 Minerals Act, were preserved and continued for limited periods in terms of the 1991 Minerals Act.¹⁴⁹⁵

11.3.1.1 Alienated State land

Section 5 of the 1964 Precious Stones Act afforded the surface owner of alienated State land¹⁴⁹⁶ the exclusive right to prospect for diamonds in respect of such land, provided that the surface owner obtained a prospecting permit.¹⁴⁹⁷ Section 43(1) of the 1991 Minerals Act preserved the surface owner's exclusive right in respect of alienated State land, but limited this exclusive right to a period of five years from the commencement of the 1991 Minerals Act on 1 January 1992. The surface owner of alienated State land¹⁴⁹⁸ had to apply for a prospecting permit in terms of section 6 of the 1991 Minerals Act in order to exercise the right to prospect for diamonds and he, or his successors in title, was in terms of section 43(1) of the 1991 Minerals Act deemed to be the sole holder of the rights to diamonds.¹⁴⁹⁹ If a nomination agreement had been entered into in respect of diamonds on the relevant alienated State land, the person nominated in the nomination agreement, including his successors in title, was for purposes of obtaining a prospecting permit and for the duration of the nomination

¹⁴⁹⁵ Sections 43 and 44 of the 1991 Minerals Act.

¹⁴⁹⁶ The term "alienated State land" was defined in s 1 of the 1964 Precious Stones Act to refer to privately owned land or leased State land in respect of which the rights to diamonds were held by the State. See para 10.3 above.

¹⁴⁹⁷ See para 10.4.2 and figure 10.1 in para 10.4.3 above.

¹⁴⁹⁸ The term "alienated State land" was not referred to in the 1991 Minerals Act, s 43(1) of the 1991 Minerals Act simply referred to land in respect of which the right to the mineral was reserved to the State, which was similar to the definition of "alienated State land" in the 1964 Precious Stones Act. See para 10.3 above.

¹⁴⁹⁹ The surface owner could in terms of section 43(1) of the 1991 Minerals Act apply in writing to the Minister to extend the period of five years. See Kaplan and Dale *A Guide to the Minerals Act 1991* 121-122; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 224.

agreement, but limited to five years, deemed to be the sole holder of the rights to diamonds.¹⁵⁰⁰ For a period of five years from the commencement of the 1991 Minerals Act the surface owner of alienated State land, or the holder of a nomination agreement, was therefore deemed to be the sole holder of the rights to diamonds. He was also entitled to obtain a prospecting permit in terms of section 6(1) of the 1991 Minerals Act.¹⁵⁰¹ Section 43 of the 1991 Minerals Act only related to prospecting. If the surface owner or holder of a nomination agreement wanted to mine diamonds, he had to comply with the provisions of section 9 of the Minerals Act.¹⁵⁰²

Although the State was the common law holder of the rights to diamonds in respect of alienated State land, the State could not within the period of five years (until 31 December 1997) or such longer period as approved by the Minister, grant any rights to prospect or mine or alienate any rights to diamonds with regard to the alienated State land to any other person or entity.¹⁵⁰³ The State could during this period also not grant any consent to any other person or entity, to remove and dispose of diamonds found during the prospecting operations¹⁵⁰⁴ or to mine for own account for diamonds in respect of such land.¹⁵⁰⁵

If after the expiry of the five year period (or the extended period) the Minister either alienated the rights to diamonds or granted any of the consents in terms of sections 8(2) or 9(2) of the 1991 Minerals Act to a person other than to the surface owner or the holder of a nomination agreement, the Minister had to pay compensation to the surface owner or to the holder of the nomination agreement. This was for proven loss

¹⁵⁰⁰ Section 43(1) of the 1991 Minerals Act. This period could also with the approval of the Minister be extended.

¹⁵⁰¹ Kaplan and Dale *A Guide to the Minerals Act 1991* 122-123.

¹⁵⁰² See para 11.2.2 above. Kaplan and Dale *A Guide to the Minerals Act 1991* 125-126.

¹⁵⁰³ Section 43(2)(a) of the 1991 Minerals Act. Kaplan and Dale *A Guide to the Minerals Act 1991* 122-123. The Minister was in terms of s 64 of the 1991 Minerals Act entitled, subject to the approval of the Cabinet, to alienate a right to any mineral in respect of which the State was the holder, subject to terms and conditions as determined by the Minister.

¹⁵⁰⁴ Section 8(2) read with s 43(2)(a) of the 1991 Minerals Act. See Kaplan and Dale *A Guide to the Minerals Act 1991* 122-123.

¹⁵⁰⁵ Section 9(2) read with s 43(2)(a) of the 1991 Minerals Act. See Kaplan and Dale *A Guide to the Minerals Act 1991* 122-123.

or damage suffered as a result of the alienation or the granting of the consent. In order to claim compensation, the surface owner or holder of the nomination agreement had to prove that he suffered loss, which he could not reasonably prevent and that he would not have suffered if the 1991 Minerals Act had not been passed.¹⁵⁰⁶ The fact that the surface owner could have applied for a prospecting permit in terms of section 5 of the 1991 Minerals Act would be taken into account in determining whether the surface owner suffered any loss.

11.3.1.2 Prospecting leases in respect of State land and prospecting permits and permissions in respect of private land

As discussed above,¹⁵⁰⁷ a person who wanted to prospect for diamonds on State land or on a portion thereof under the 1964 Precious Stones Act, had to obtain a prospecting lease from the then Minister of Minerals and Energy.¹⁵⁰⁸ In the case of private land the holder of the rights to diamonds in respect of private land which was not the subject of a prospecting or diggings agreement, had the right to prospect on such land or grant written permission to any one person to prospect on such land on such terms and conditions as specified in the permission and he could exercise such right once he or the nominee obtained a prospecting permit.¹⁵⁰⁹

These prospecting leases, prospecting permits and prospecting permissions which were in force immediately before the commencement of the 1991 Minerals Act on 1 January 1992, were deemed to be prospecting permits issued in terms of section 6 of the 1991 Minerals Act. These also remained in force subject to the terms and conditions under which they were granted. All laws regarding the payment of surface rental also

¹⁵⁰⁶ Section 43(2)(b) of the 1991 Minerals Act. If no agreement could be reached on the amount of compensation or the extent of the loss or damage, s 43(2)(c) of the 1991 Minerals Act provided that it had to be determined by arbitration in terms of the *Arbitration Act* 42 of 1965 or by a competent court. See Kaplan and Dale *A Guide to the Minerals Act 1991* 122-123.

¹⁵⁰⁷ See para 10.4.1 and figure 10.1 in para 10.4.3 above.

¹⁵⁰⁸ Section 4(1) of the 1964 Precious Stones Act.

¹⁵⁰⁹ Section 6(1) of the 1964 Precious Stones Act. See para 10.4.3 and figure 10.1 in para 10.4.3 above.

remained in force.¹⁵¹⁰ The holders of such prospecting leases, prospecting permits and prospecting permissions could therefore continue to prospect on the relevant State land or private land. If an expiry date was specified in the prospecting lease, prospecting permit or prospecting permission, the prospecting lease, prospecting permit or prospecting permission remained in force until the stated expiry date, but not exceeding two years from the commencement of the 1991 Minerals Act. If no expiry date was stated, the prospecting lease, prospecting permit or prospecting permission continued in existence for a period of two years, until 31 December 1993.¹⁵¹¹

The State could, for the duration of the prospecting lease, prospecting permit or prospecting permission not alienate the rights to diamonds in respect of the State land which formed the subject of the lease, permit or permission, other than to the holder of the prospecting lease, prospecting permit or prospecting permission.¹⁵¹² The State could for the duration of the prospecting lease, prospecting permit or prospecting permission also not grant any consent for the removal of diamonds found during prospecting¹⁵¹³ or to mine and dispose of diamonds¹⁵¹⁴ other than to the holder of the relevant prospecting lease, prospecting permit or prospecting permission.¹⁵¹⁵

After the expiry of these periods, the prospector had to apply for a prospecting permit in terms of section 6 or for a mining authorisation in terms of section 9 of the 1991 Minerals Act to continue prospecting for or to mine diamonds.¹⁵¹⁶ There was no deeming provision in respect of the rights to diamonds and after the expiry of the prospecting lease, prospecting permit or prospecting permission, any other person or

¹⁵¹⁰ Section 44(1)(b) read with s 44(1)(a)(i) of the 1991 Minerals Act. Kaplan and Dale *A Guide to the Minerals Act 1991* 56-62.

¹⁵¹¹ Section 44(1)(b) of the 1991 Minerals Act. The Minister could not in terms of s 44(7) read with s 14 of the 1991 Minerals Act suspend or cancel such rights or permission for the duration of the two year period.

¹⁵¹² Section 44(2) of the 1991 Minerals Act.

¹⁵¹³ Section 8(2) of the 1991 Minerals Act.

¹⁵¹⁴ Section 9(2) of the 1991 Minerals Act.

¹⁵¹⁵ Section 44(2) of the 1991 Minerals Act.

¹⁵¹⁶ Section 44(6) of the 1991 Minerals Act.

entity who complied with the provisions of section 6 or section 9 of the 1991 Minerals Act could have obtained a prospecting permit or mining authorisation in respect of State land or private land. The holder of a prospecting lease, prospecting permit or prospecting permission would thus during the duration thereof had to obtain the written consent of the Minister¹⁵¹⁷ or the holder of the rights to diamonds in the case of private land.¹⁵¹⁸

11.3.1.3 Prospecting permit issued in terms of alienated State land

A prospecting permit that was issued in terms of section 5 of the 1964 Precious Stones Act in respect of alienated State land¹⁵¹⁹ and which was in force immediately before the commencement of the 1991 Minerals Act, was also deemed to be a prospecting permit issued in terms of section 6 of the 1991 Minerals Act, which remained in force subject to the terms and conditions in terms of which it was granted, for the period specified in the prospecting permit.¹⁵²⁰ The duration of a prospecting permit issued in terms of section 5 of the 1964 Precious Stones Act was limited to 12 months.¹⁵²¹ After the expiry of the period specified in the prospecting permit, the prospector had to apply for a prospecting permit in terms of section 6 of the 1991 Minerals Act to continue prospecting for diamonds.¹⁵²² Kaplan and Dale¹⁵²³ correctly state that the option to renew a prospecting permit granted in terms of section 5 of the 1964 Precious Stones Act, would not form part of the terms and conditions which continued in force in terms of section 44(3)(a) of the 1991 Minerals Act. The prospecting permit therefore continued in force for the period specified in the prospecting permit.

¹⁵¹⁷ Sections 6(3) and 8(2) of the 1991 Minerals Act. See paras 11.2 and 11.2.1 above.

¹⁵¹⁸ Sections 5(1) or 9 of the 1991 Minerals Act. See paras 11.2 and 11.2.2 above.

¹⁵¹⁹ See para 10.4.2 and figure 10.1 in para 10.4.3 above.

¹⁵²⁰ Section 44(3)(a) of the 1991 Minerals Act. The Minister could not in terms of s 44(7) read with s 14 of the 1991 Minerals Act suspend or cancel such rights or permission for the duration of the specified period.

¹⁵²¹ Kaplan and Dale *A Guide to the Minerals Act 1991* 126.

¹⁵²² Section 44(6) of the 1991 Minerals Act.

¹⁵²³ Kaplan and Dale *A Guide to the Minerals Act 1991* 126.

Any holder of a prospecting permit was in terms of section 9(5) of the 1964 Precious Stones Act, entitled to the proceeds of any diamonds he found in the course of *bona fide* prospecting operations under the permit. This permission was deemed to be a permission granted in terms of section 8(1) of the 1991 Minerals Act and remained in force subject to its terms and conditions.¹⁵²⁴

11.3.1.4 Certain private land in the Province of the Cape of Good Hope

Before the enactment of the 1991 Minerals Act, the prospecting on private land situated in the Province of the Cape of Good Hope, the title deeds of which did not contain a reservation of the rights to diamonds in favour of the State,¹⁵²⁵ and in respect of which a certificate in terms of section 2(1) of the 1927 Precious Stones Act had been issued, was regulated by the 1883 Cape Precious Stones Act.¹⁵²⁶ Any person who had the right to prospect for diamonds on private land in the Province of the Cape of Good Hope and in respect of which a certificate as referred to in section 3 of the 1964 Precious Stones Act had been issued in terms of section 2(1) of the 1927 Precious Stones Act. Such person's successor in title, who had the right immediately prior to the commencement of the 1991 Minerals Act, was deemed to be the holder of a prospecting permit issued in terms of section 6 of the 1991 Minerals Act for a period not exceeding one year.¹⁵²⁷ The holder of this right could therefore continue to prospect until 31 January 1993 and was for the duration of one year deemed to be the holder of a prospecting permit issued in terms of section 6 of the 1991 Minerals Act. After the expiry of the period of one year, the prospector had to obtain a prospecting permit in terms of section 6 of the 1991 Minerals Act.¹⁵²⁸ Such person would therefore

¹⁵²⁴ Section 44(5) of the 1991 Minerals Act.

¹⁵²⁵ Referred to in previous chapters and in this chapter as unreserved private land.

¹⁵²⁶ See paras 9.4 and 10.2 above.

¹⁵²⁷ Section 44(4) of the 1991 Minerals Act. The Minister could not in terms of s 44(7) read with s 14 of the 1991 Minerals Act suspend or cancel such rights or permission for the duration of the one year period.

¹⁵²⁸ Section 44(6) of the 1991 Minerals Act.

during the period of one year have had to apply for a prospecting permit or mining authorisation in terms of sections 6(1) or 9(1) of the Minerals Act.

11.3.2 Continuation of mining rights

Section 47 of the 1991 Minerals Act contained transitional provisions which applied to certain rights to dig or mine and which were in force in terms of the 1964 Precious Stones Act. Any right to dig or mine, that was granted or acquired or which continued in force in terms of certain provisions of the 1964 Precious Stones Act,¹⁵²⁹ or any share in such right, which was in force immediately before the commencement of the 1991 Minerals Act, remained in force subject to the terms and conditions under which they were granted or acquired or deemed to have been granted or acquired and which were contained in the relevant documents.¹⁵³⁰ If any mining right could be ceded, transferred, let, sublet, tribute, subdivided or mortgaged immediately before 1 January 1992, they could be so dealt with and registered in the Mining Titles Office.¹⁵³¹

Unless the holder of a mining right and the owner of the relevant land had agreed otherwise, after the expiry of two years from the commencement of the 1991 Minerals Act, the holder of any mining right or share therein, had to pay to the owner of the relevant land or to any other person to whom it may accrue, compensation comprising the amount which had accrued to such owner of other person by virtue of such mining right immediately before the expiration of the two years.¹⁵³² Any share of profits or royalties that was payable to the State in respect of any mining right, where the State was not the holder of the rights to the diamonds, was with effect from 1 January 1994 no longer payable.¹⁵³³ Conversely, any share of profits or royalties payable to the State

¹⁵²⁹ See paras 11.3.2.1-11.3.2.10 below.

¹⁵³⁰ Section 47(1)(a) of the 1991 Minerals Act. Kaplan and Dale *A Guide to the Minerals Act 1991* 80-89.

¹⁵³¹ Section 47(1)(b) of the 1991 Minerals Act. Kaplan and Dale *A Guide to the Minerals Act 1991* 81-82.

¹⁵³² Section 47(1)(c) of the 1991 Minerals Act.

¹⁵³³ Section 47(1)(d) of the 1991 Minerals Act.

where the State was the holder of the rights to diamonds, continued to be payable after 1 January 1994.

The holder of any mining right or share therein or his successor in title was until 31 December 1993 deemed to be the holder of a mining authorisation. The holder of such mining right could therefore continue mining for a period of two years from the commencement of the 1991 Minerals Act. In order to continue mining with effect from 1 January 1994, the holder had to obtain a mining authorisation in terms of section 9 from the Director: Mineral Development. The holder was then deemed to be the holder of the rights to diamonds in respect of the land or tailings for purpose of obtaining a mining authorisation.¹⁵³⁴

The holder of any mining right had the same rights to use the surface of the land to which the right related as that which the holder of the right to the relevant mineral had in terms of the common law.¹⁵³⁵

The relevant rights to dig or mine that continued to exist in terms of the transitional provisions are briefly discussed below.

11.3.2.1 Unreserved private land in the Cape of Good Hope

As stated in the previous section, before the enactment of the 1991 Minerals Act, the prospecting on unreserved private land in the Province of the Cape of Good Hope in respect of which a certificate in terms of section 2(1) of the 1927 Precious Stones Act had been issued, was regulated by the 1883 Cape Precious Stones Act until 19 March 1976.¹⁵³⁶ Any right to dig or mine that was acquired or granted, or which continued in

¹⁵³⁴ Section 47(1)(e) of the 1991 Minerals Act. The holder of any mining right could in terms of s 47(1)(f) of the 1991 Minerals Act abandon it wholly or in part by written notice to the Director: Mineral Development. The mining right was on the abandonment thereof deemed to have lapsed with effect from the date of such notice. Badenhorst and Mostert 2003 *Stellenbosch Law Review* 388.

¹⁵³⁵ Section 47(2) of the 1991 Minerals Act.

¹⁵³⁶ See paras 9.4.1 and 10.1 above. Section 2(1) of the 1927 Precious Stones Act provided for the issue of certificates by the Minister confirming that mining or digging operations had been carried

force in respect of the mining or digging operations that were in terms of section 3(1)(a) of the 1964 Precious Stones Act continued to be regulated by the 1883 Cape Precious Stones Act.¹⁵³⁷ Also these mining or digging operations had to be dealt with in terms of section 47 of the 1991 Minerals Act until 19 March 1976.¹⁵³⁸

11.3.2.2 Certain existing mines under the 1904 OFS Precious Stones Ordinance and old existing mines

The prospecting and mining for diamonds in certain mines referred to in Part 8 of the 1904 OFS Precious Stones Ordinance which existed on 16 November 1927 and any other mine, wherever situated, which were discovered under any law that was repealed by the 1927 Precious Stones Act, were not regulated by the 1964 Precious Stones Act. Laws that were immediately before 16 November 1927 in force in relation to any such mine, continued to apply in relation to such mine in so far as they were not inconsistent with Part 3 of chapter 8 of the 1964 Precious Stones Act. This provided for administrative provisions applicable to the working of new and existing mines.¹⁵³⁹

Any right to dig or mine these existing mines which was granted or acquired or which continued to exist or was in force, remained in force and had to be dealt with in terms of section 47 of the 1991 Minerals Act.¹⁵⁴⁰

11.3.2.3 Discoverer's certificate

The holder of a discoverer's certificate¹⁵⁴¹ was in terms of the 1964 Precious Stones Act entitled to elect to work the relevant diamond mine discovered on State land.¹⁵⁴²

on in respect of the relevant land prior to 1 April 1927 in a manner satisfactory to the Minister. Franklin and Kaplan *Mining and Minerals* 464.

¹⁵³⁷ Until the repeal of the 1883 Cape Precious Stones Act on 18 March 1976. See para 10.2 above.

¹⁵³⁸ Section 47(1)(a)(ii) of the 1991 Minerals Act.

¹⁵³⁹ Section 3(1)(b) of the 1964 Precious Stones Act. Franklin and Kaplan *Mining and Minerals* 464. See para 10.2 above.

¹⁵⁴⁰ Section 47(1)(a)(ii) of the 1991 Minerals Act.

¹⁵⁴¹ Issued in terms of s 13 of the 1964 Precious Stones Act.

¹⁵⁴² Section 68(1)(a) of the 1964 Precious Stones Act. See para 10.5.1 and figure 10.2 in para 10.5.2 above.

A right to mine contained in a discoverer's certificate, which was granted or acquired or which continued to exist, remained in force subject to the terms and conditions contained therein. This too, had to be dealt with in terms of section 47 of the 1991 Minerals Act.¹⁵⁴³

11.3.2.4 Permission to dig for diamonds

Section 13A of the 1964 Precious Stones Act provided for a prospector to in certain circumstances apply at the Mining Commissioner for permission to dig for diamonds where he had discovered diamonds. The Mining Commissioner could grant the permission if he was satisfied that there were no reasonable grounds to believe that the diamonds existed in payable quantities to justify the issue of a discoverer's certificate. The same could apply if the Government Mining Engineer was of the view that the diamonds occurred in a deposit which was too small to justify the proclamation of the land as a mine. A right to dig for diamonds contained in such permission remained in force subject to the terms and conditions contained therein and had to be dealt with in terms of section 47 of the 1991 Minerals Act.¹⁵⁴⁴

11.3.2.5 Owner's certificate

A right to mine that was contained in an owner's certificate in terms of the 1964 Precious Stones Act remained in force subject to the terms and conditions contained therein and had to be dealt with in terms of section 47 of the 1991 Minerals Act.¹⁵⁴⁵ As discussed above, where diamonds had been discovered under the 1964 Precious Stones Act and if there were reasonable grounds for believing that the diamonds existed in payable quantities, the surface owner or lessee of the alienated State land (in the case of alienated State land), or the holder of the rights to diamonds (in the case of private land) was entitled to receive an owner's certificate from the Mining

¹⁵⁴³ Section 47(1)(a)(iii) of the 1991 Minerals Act.

¹⁵⁴⁴ Section 47(1)(a)(iii) of the 1991 Minerals Act. See para 10.6 above.

¹⁵⁴⁵ Section 17 of the 1964 Precious Stones Act read with s 47(1)(a)(iii) of the 1991 Minerals Act.

Commissioner. The holder of the owner's certificate was entitled to elect to work the diamond situated on alienated State land and on private land.¹⁵⁴⁶

11.3.2.6 Mining leases

A right to dig or mine that was in force by virtue of mining leases that were entered into between the Minister and the holder of a prospecting lease in respect of portions of the sea and certain State land in terms of section 21 of the 1964 Precious Stones Act¹⁵⁴⁷ and mining leases granted by the Minister in terms of section 52 of the 1964 Precious Stones Act in respect of alluvial diggings continued to exist and had to be dealt with in terms of section 47 of the 1991 Minerals Act.¹⁵⁴⁸

11.3.2.7 Lease of the State's interest

Any right to dig or mine granted or acquired or deemed to have been granted or acquired or which continued to exist in terms of a lease of the State's interest in certain proclaimed mines in terms of section 74 of the 1964 Precious Stones Act remained in force subject to the terms and conditions contained therein.¹⁵⁴⁹ Section 74 of the 1964 Precious Stones Act provided that the Minister could lease the State's interest in any mine to the person entitled to work the mine. The nature of the lease concluded by the State was to lease the State's right to share in the profits of the mine to the person or entity entitled to work the mine. The State therefore relinquished its right to share in the profits of the mining operations, in return for the payment of a lease consideration.¹⁵⁵⁰

It is submitted that a lease of the State's interest in terms of section 74 of the 1964 Precious Stones Act was not *per se* a right to dig or mine, it was merely a lease of the State's interest or right to share in the profits derived from the working of the mine

¹⁵⁴⁶ See paras 10.5.2 and 10.6.1 above.

¹⁵⁴⁷ See para 10.8 above.

¹⁵⁴⁸ Section 47(1)(a)(iii) of the 1991 Minerals Act.

¹⁵⁴⁹ Section 47(1)(a)(iii) of the 1991 Minerals Act. See para 10.6.2 above.

¹⁵⁵⁰ Dale *et al Mineral and Petroleum Law* SCHII173.

and concluded by virtue of the State's rights to dispose of diamonds as contained in section 2 of the 1964 Precious Stones Act.¹⁵⁵¹ Dale *et al*¹⁵⁵² hold a different view and state that the lease of the State's interest in terms of section 74 of the 1964 Precious Stones Act in the case of:

- (a) Private land comprised firstly, of the State's share of the statutory vested right to mine and secondly, the State's right to receive a corresponding share of the profits.
- (b) State land or alienated State land, comprised firstly, of the State's share in the right to diamonds, secondly its share of the statutorily vested right to mine and thirdly, its right to receive a corresponding share of the profits.

It is submitted that it was not necessary for the legislature to include a lease of the State's interest in section 47(1)(a) of the 1991 Minerals Act. The purpose of section 47 of the 1991 Minerals Act was to provide for the continuation of certain existing mines and that such mines obtain mining authorisations in terms of section 9 of the 1991 Minerals Act. Section 47(1) of the 1991 Minerals Act provided that any right to mine or dig referred to in the relevant statutory provisions, remained in force:

subject to the terms and conditions under which it was granted or acquired or deemed to have been granted or acquired and which are contained in the document or documents concerned ...

The terms and conditions of the lease of the State's interest would therefore in any event have been preserved in terms of section 47 of the 1991 Minerals Act as part of the terms and conditions of the right to mine the relevant diamond mine, together with the statutory provisions in the 1964 Precious Stones Act under which a right to mine in terms of the 1964 Precious Stones Act was granted. Furthermore, section 47 of the 1991 Minerals Act referred to "any" right to dig or mine which continued to exist. In circumstances where a lease of the State's interest in terms of section 74 of the

¹⁵⁵¹ See para 10.3 above.

¹⁵⁵² Dale *et al Mineral and Petroleum Law* SCHII173.

1964 Precious Stones Act were concluded in respect of State land and alienated State Land, in other words where the rights to diamonds vested in the State, the lease agreement continued in force. This was not because it contained a right to dig or mine, but because it formed part of the terms and conditions contained in a document with regard to the right to dig or mine held by the holder of a discoverer's or owner's certificate. If the lease of the State's interest related to private land, in other words where the rights to diamonds did not vest in the State, the lease agreement remained in force. Yet, the obligation to pay a lease consideration to the State *in lieu* of the State's right to share in the profits, was in terms of section 47(1)(d) of the 1991 Minerals Act, with effect from 1 January 1994 no longer payable to the State. A further question that arises, is whether a lease of the State's interest concluded in terms of section 74 of the 1964 Precious Stones Act can continue to exist if the subject matter of the lease, namely the State's right to share in the profits derived from the working of the mine is destroyed.¹⁵⁵³ On Dale *et al*s¹⁵⁵⁴ interpretation, this question is also relevant with reference to private land, as the State's statutorily vested right to mine was also destroyed with the repeal of the 1964 Precious Stones Act when the 1991 Minerals Act was enacted. The State's right to share in the profits derived from the working of a mine was terminated with effect from 1 January 1994 and only in respect of private land, namely where the rights to diamonds did not vest in the State.¹⁵⁵⁵ It would depend on the provisions of each individual lease agreement in the case of private land to determine whether the whole of the subject matter was destroyed. A lease of the State's interest in terms of section 74 of the 1964 Precious Stones Act could also have included provisions regarding the use of assets held in joint co-ownership by the State and the mineholder. In this regard, section 79(2) of the 1964 Precious Stones Act provided that the joint ownership of assets would in no way affect the full and free use of surface assets and for the working of the mine.¹⁵⁵⁶ It is

¹⁵⁵³ Viljoen *The Law of Landlord and Tenant* 466; Cooper *The South African Law of Landlord and Tenant* 298.

¹⁵⁵⁴ Dale *et al Mineral and Petroleum Law* SCHII173.

¹⁵⁵⁵ Section 47(1)(d) of the 1991 Minerals Act.

¹⁵⁵⁶ See para 10.6.2 above.

submitted that if the lease agreement contained a further subject matter and only part of the subject matter of the lease agreement is destroyed, the lease agreement would continue in respect of the remaining subject matter with a proportional reduction in the rental, but in this instance, the lease would be a common law lease agreement and not a lease of the State's interest in terms of section 74 of the 1964 Precious Stones Act.

In the case of private land, a lease of the State's interest was therefore terminated with effect from 1 January 1994. In the case of State land and alienated State land, the lease agreement concluded in terms of section 74 of the 1964 Precious Stones Act continued to exist and the lease consideration continued to be payable.

11.3.2.8 Washing permit

As discussed above¹⁵⁵⁷ the 1964 Precious Stones Act provided that a person could only wash, treat or sort any debris which was bought or otherwise lawfully acquired for the purpose of recovering rough or uncut diamonds, if he was the holder of a prescribed washing permit issued by the Mining Commissioner.¹⁵⁵⁸ Any right to dig or mine that was granted or acquired or deemed to have been granted by virtue of a washing permit to wash, treat or sort any debris acquired in terms of section 89 of the 1964 Precious Stones Act, remained in force subject to the terms and conditions contained therein and had to be dealt with in accordance with section 47 of the 1991 Minerals Act.¹⁵⁵⁹

11.3.2.9 Previous rights

The 1964 Precious Stones Act repealed the 1927 Precious Stones Act and various other laws which mainly regulated the diamond trade in the different provinces in South

¹⁵⁵⁷ See para 10.6.3 above.

¹⁵⁵⁸ Section 89(1) of the 1964 Precious Stones Act.

¹⁵⁵⁹ Section 47(1)(a)(iii) of the 1991 Minerals Act.

Africa.¹⁵⁶⁰ Any proclamation, notice, prohibition, regulation, licence, lease or permit which was issued, under and anything else done under any of the repealed legislation, was in terms of s 126(2) of the 1964 Precious Stones Act deemed to have been issued, imposed, made, granted, entered into, granted or conferred under the 1964 Precious Stones Act. Any right to dig or mine that was granted, acquired or conferred under laws that were repealed in terms of section 126(1) of the 1964 Precious Stones Act, that were in terms of section 126(2) of the 1964 Precious Stones Act deemed to have been granted, acquired or conferred under the corresponding provisions of the 1991 Minerals Act remained in force subject to the terms and conditions contained therein and had to be dealt with in terms of section 47 of the 1991 Minerals Act.¹⁵⁶¹

11.3.2.10 Prospecting and digging agreements and claim licences

Any right to dig or mine contained in prospecting and digging agreements entered into in terms of section 20 of the 1964 Precious Stones Act and in claim licences obtained in terms of section 35 of the 1964 Precious Stones Act, which were in force immediately before the commencement of the 1991 Minerals Act continued in force subject to the terms and conditions under which they were granted.

Where the State was the holder of the rights to diamonds in respect of a prospecting or digging agreement, a right to dig or mine contained therein remained in force for a period of two years or such shorter period in respect of which it was granted or acquired. The holder of the right was for the duration of the existence of the right, deemed to be the holder of a mining authorisation in terms of the 1991 Minerals Act.

Any right to dig or mine contained in claim licences and in respect of which a locality plan to the satisfaction of the regional director had not been lodged with him, also remained in force for a period of two years or such shorter period for which it was

¹⁵⁶⁰ Section 126(1) read with the Schedule to the 1964 Precious Stones Act. See also Franklin and Kaplan *Mining and Minerals* 463.

¹⁵⁶¹ Section 47(1)(a)(iii) of the 1991 Minerals Act.

granted. This was on condition that the locality plan is lodged within the period of two years or shorter period.¹⁵⁶²

11.3.3 Alluvial diggings

All alluvial diggings¹⁵⁶³ that existed immediately before the commencement of the 1991 Minerals Act were de-proclaimed.¹⁵⁶⁴ The provisions of the 1964 Precious Stones Act relating to (a) the issuing and renewal of claim licences, (b) the pegging and transfer of claims on alluvial diggings, (c) the collection and payment by the Mining Commissioner of money to the owner of land comprising alluvial diggings and (d) the settlement of disputes also remained in force for a period of two years until 31 December 1993.¹⁵⁶⁵

After the expiry of the period of two years, the rights to diamonds in respect of land which previously comprised the alluvial diggings immediately before the commencement of the 1991 Minerals Act, including the right to use the surface of the land for purposes in connection with the mining and processing of diamonds, were deemed to vest in the State.¹⁵⁶⁶ Any person who wanted to prospect or mine for diamonds in respect of such land, had to obtain the written consent of the Minister in terms of sections 6(2) and 9(2) of the 1991 Minerals Act respectively. The compensation determined by the Minister to be payable in respect of the State's consent to prospect or mine for diamonds, had to be paid by the holder of the consent to the owner of the relevant land.¹⁵⁶⁷

¹⁵⁶² Section 47(5) of the 1991 Minerals Act.

¹⁵⁶³ See para 10.7 above.

¹⁵⁶⁴ Section 45(1) of the 1991 Minerals Act.

¹⁵⁶⁵ Section 45(2)(a) of the 1991 Minerals Act. See 10.7 above.

¹⁵⁶⁶ Section 46(1) of the 1964 Precious Stones Act. The Minister could in terms of s 46(2) of the 1991 Minerals Act by notice in the *Gazette*, abolish s 46(1) of the 1991 Minerals Act.

¹⁵⁶⁷ Section 46(3) of the 1991 Minerals Act. Section 48(1)(a) of the 1991 Minerals Act provided that certain reservations or permissions for or rights to the use of water or the surface of land that was granted or acquired or deemed to have been acquired under a number of provisions of the 1964 Precious Stones Act and which was in force immediately before the commencement of the 1991 Minerals Act, remained in force subject to the terms and conditions under which it was granted or

11.4 Independent states and the self-governing territories

The 1991 Minerals Act did not automatically apply in the former TBVC-states and in the self-governing territories when it commenced in the Republic of South Africa on 1 January 1992.¹⁵⁶⁸ The diamond mining legislation (and all other mining laws) therefore continued to apply in the TBVC states in the self-governing territories.¹⁵⁶⁹ This position endured until 1994 when the *Constitution of the Republic of South Africa* 200 of 1993 commenced. The former four provinces, the TBVC-states and the self-governing territories were replaced with nine new provinces.¹⁵⁷⁰ The different legislation that applied in respect of the TBVC-states and the self-governing territories, were rationalised in terms of the *Mineral and Energy Laws Rationalisation Act* 47 of 1994 (hereafter the 1994 Mineral Rationalisation Act) which commenced on 7 December

acquired or deemed to have been granted and which was contained in the relevant documents. These reservations or permissions or rights are briefly the following:

- (a) A reservation to the owner of land in terms of s 24 of the 1964 Precious Stones Act, which provided for the reservation in favour of the owner of land of the free and undisturbed use of any homestead on the land and its curtilage, all buildings capable of beneficial use, portions of land which were under *bona fide* cultivation and all springs, wells, boreholes and dams on the land.
- (b) A reservation by the Mining Commissioner of certain sites from pegging on any alluvial digging, which was necessary for public buildings, schools, places of worship, hospitals, police barracks, Government offices, landing strips, recreation, residential or sanitary purposes or burial grounds as contemplated in s 56 of the 1964 Precious Stones Act.
- (c) A reservation by a claimholder of surface rights for purposes incidental to digging in terms of s 57 of the 1964 Precious Stones Act. Section 57 of the 1964 Precious Stones Act provided that any claimholder was entitled to apply to the Mining Commissioner to without any payment, obtain surface rights in respect of the alluvial digging which was available and which was in the opinion of the Mining Commissioner necessary for the erection of machinery, depositing of tailings or waste rock or for any other purpose connected with the working of a claim.
- (d) Any right of way reserved in favour of a claimholder in terms of s 58 of the 1964 Precious Stones Act. The Mining Commissioner could in terms of s 58 of the 1964 Precious Stones Act, after consultation with the relevant surface owner of the land, grant a right of way for a road, path, watercourse, pipe line, power line, ropeway, tramway or other haulage on, over or through any portion of any alluvial digging.

Section 48(2)(a) of the 1991 Minerals Act provided that with effect from 1 January 1994, the holder or acquirer of these reservations, permissions or rights, had to pay the owner of the land compensation, which had to be the same amount which accrued periodically to such owner by virtue of the reservation permission or right, unless the parties agreed otherwise.

¹⁵⁶⁸ Badenhorst "Development of Mineral and Petroleum Law" 1-29 – 1-31.

¹⁵⁶⁹ For a detailed discussion see Badenhorst "Development of Mineral and Petroleum Law" 1-29-1-30.

¹⁵⁷⁰ Section 124(1) of the interim Constitution. Badenhorst "Development of Mineral and Petroleum Law" 1-30.

1994.¹⁵⁷¹ The 1994 Mineral Rationalisation Act repealed the laws that were in force in the former TBVC-states and in the self-governing territories on 27 April 1994. The 1991 Minerals Act and various other laws in force in the Republic of South Africa before 7 December 1994 were made applicable in respect of the TBVC-states and the self-governing territories.¹⁵⁷² The 1964 Precious Stones Act therefore no longer applied in respect of the TBVC-states and the self-governing territories.¹⁵⁷³

11.5 Summary and conclusion

In this chapter the development of the right to mine diamonds under the 1991 Minerals Act was discussed. The 1991 Minerals Act commenced in the Republic of South Africa on 1 January 1992 and with effect from 7 December 1994 in the former TBVC-states and the self-governing territories.¹⁵⁷⁴ The 1991 Minerals Act brought a substantial change not only to the diamond mining industry, but also to the mining industry as a whole. The prospecting for and the mining of different minerals were no longer separately regulated. There was also no longer a distinction between different forms of land tenure, although it is submitted that landownership continued to influence the right to prospect for or to mine diamonds (and other minerals) where the rights to minerals have not been severed from the title to the land. The question who was entitled to enter land to prospect for or to mine diamonds depended on the common law holder of the rights to diamonds. A person who wanted to prospect for or to mine diamonds required the written consent of the holder of the rights to diamonds and in order to execute the right to prospect or to mine, a prospecting permit or mining authorisation.¹⁵⁷⁵ There was no provision in the 1991 Minerals Act for the reservation

¹⁵⁷¹ Badenhorst, Mostert and Dendy "Minerals and Petroleum" 3.

¹⁵⁷² Schedule 2 of the 1994 Mineral Rationalisation Act. Badenhorst "Development of Mineral and Petroleum Law" 1-31.

¹⁵⁷³ Section 2(1) read with Schedule 1 of the 1994 Mineral Rationalisation Act. The different legislation listed in Schedule 2 of the 1994 Mineral Rationalisation Act that applied in respect of the TBVC-states and the self-governing territories were repealed in terms of s 3(1) of the 1994 Mineral Rationalisation Act. Dale 1995 *Annual Survey of South African Law* 327-328; Badenhorst 1999 *Stellenbosh Law Review* 103.

¹⁵⁷⁴ See para 11.4 above.

¹⁵⁷⁵ See para 11.2 above.

of the right to mine and to dispose of diamonds in favour of the State. There was also no provision for the State to share in the profits derived from the working of the mine. The State's former entitlement to, in certain instances, share in the profits should be distinguished from the lease consideration provided for in section 9(2) of the 1991 Minerals Act, where the rights to diamonds belonged to the State and an application was made for a mining authorisation.¹⁵⁷⁶

The rights that existed under previous diamond mining legislation and which were preserved in chapter 7 of the 1991 Minerals Act were perhaps the most important part of the 1991 Minerals Act for purposes of this study.¹⁵⁷⁷ Certain rights and/or permissions to prospect for diamonds that were held under diamond mining legislation which were repealed by the 1991 Minerals Act were in terms of sections 43 and 44 of the 1991 Minerals Act preserved. However, in order to exercise the rights or to continue to exercise such rights, the holders thereof had to apply for prospecting permits in terms of the 1991 Minerals Act. The holders of such rights were for certain limited periods deemed to be the holder of the rights to diamonds.¹⁵⁷⁸

Certain rights to dig or mine that were in force in terms of the 1964 Precious Stones Act, remained in force subject to the terms and conditions under which they were granted or acquired or deemed to have been granted or acquired and which were contained in the relevant documents.¹⁵⁷⁹ There was no express provision in the transitional provisions of the 1991 Minerals Act that the rights to dig or mine lapsed. Certain rights and/or obligations ceased to exist for example, any share of profits or royalties that was payable to the State in respect of any mining right, where the State was not the holder of the rights to the diamonds was with effect from 1 January 1994, no longer payable. Although the rights to dig or mine were preserved, the holders thereof had to obtain mining authorisations to be able to continue mining with effect

¹⁵⁷⁶ See para 11.2.2 above.

¹⁵⁷⁷ See para 11.3 above.

¹⁵⁷⁸ See para 11.3.1-11.3.1.4 above.

¹⁵⁷⁹ Section 47 of the 1991 Minerals Act. See paras 11.3.2 -11.3.2.10 above.

from 1 January 1994. Also for this purpose the holders of the rights to dig or mine were deemed to be the holders of the rights to diamonds.¹⁵⁸⁰ Another important change to the diamond mining industry brought about by the enactment of the 1991 Minerals Act was that all alluvial diggings were deproclaimed. With effect from 1 January 1994, the rights to diamonds in respect of the land on which the alluvial diggings were situated, including the right to use the surface of the land, were deemed to vest in the State.¹⁵⁸¹

The 1991 Minerals Act continued to apply with regard to the prospecting and mining of diamonds (and all other minerals) until it was repealed by the MPRDA on 1 May 2004, which is discussed in the final part of this thesis.

¹⁵⁸⁰ See para 11.3.2 above.

¹⁵⁸¹ See para 11.3.3 above.

PART 5: The Republic of South Africa under the MPRDA

Chapter 12 The MPRDA

Chapter 13 Summary and conclusion

Chapter 12 The MPRDA

12.1 Introduction

The *Constitution of the Republic of South Africa* 200 of 1993 commenced on 27 April 1994 and brought a whole new political dispensation to the Republic of South Africa.¹⁵⁸² The MPRDA repealed the 1991 Minerals Act on 1 May 2004 and fundamentally changed the legal basis upon which rights to prospect for and to mine diamonds (and all minerals)¹⁵⁸³ in South Africa are acquired and exercised.¹⁵⁸⁴ The new Government of the Republic of South Africa enacted the MPRDA to *inter alia* address the economic inequality brought about by South Africa's racial discriminatory system referred to as "apartheid". It was necessary to disconnect landownership from the entitlement to prospect for or to mine diamonds because of the landlessness of the majority of black South Africans.¹⁵⁸⁵ The MPRDA was enacted to give effect to the constitutional norm

¹⁵⁸² Rautenbach *Rautenbach-Malherbe Staatsreg* 16-18; Changuion and Steenkamp *Omstrede land* 272-286; Pienaar *Land Reform* 167-169; Davenport and Saunders *South Africa A Modern History* 569-579; Giliomee *Die Afrikaners 'n Biografie* 606-611; Brits "Suid-Afrika na apartheid" 549-580.

¹⁵⁸³ The position in the MPRDA was similar to the position under the 1991 Minerals Act in that there was no separate regulation of the different types of minerals in the MPRDA. A "mineral" is defined in s 1 of the MPRDA to mean: "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes-

(a) water, other than water taken from land or sea for the extraction of any mineral from such water;

(b) petroleum; or

(c) peat."

Dale *et al Mineral and Petroleum Law* MPRDA54-MPRDA58. In the *Ataqua* case para 68, the Orange Free State Provincial Division of the High Courts held that the diamonds in the tailings dumps emanating from the previous operation of the Jagersfontein Mine, did not occur "naturally in or on the earth" but that they were formed by the "placement of processed and partly processed materials, to be re-worked in future years when technology improves." The diamonds in the tailings emanating from the Jagersfontein Mine, were therefore not minerals for purposes of the MPRDA and not subject to the control of the MPRDA. Badenhorst and Mostert 2010 *Stellenbosch Law Review* 116-117. See para 12.6 below.

¹⁵⁸⁴ *Xstrata* case para 1.

¹⁵⁸⁵ *Agri CC* case para 1. Van der Schyff *Property in Minerals and Petroleum* 2-4. The objects of the MPRDA are described as follows in s 2 of the MPRDA, namely to:

"(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;

(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

of equality and in particular to redress the inequality in respect of access to natural resources.¹⁵⁸⁶ The form of land tenure is no longer relevant to determine who is entitled to prospect for or to mine diamonds and the concept of mineral rights or private ownership of mineral rights, with the exception of certain provisions in the transitional provisions contained in schedule II of the MPRDA, no longer applied. Ebrahim J held in the *De Beers prospecting* case as follows: (own underlining)¹⁵⁸⁷

Since 1 May 2004 a new Mineral Right's regime has been introduced. The underlining policy has shifted from privatisation of mineral rights to the State being in control of

-
- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
 - (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
 - (e) promote economic growth and mineral and petroleum resources development in the Republic;
 - (f) promote employment and advance the social and economic welfare of all South Africans;
 - (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
 - (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
 - (i) ensure that the holder of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

See the *De Beers prospecting right* case para 6; *Palala Resources (Pty) Limited v Minister of Mineral Resources and Energy* 2014 6 SA 403 (G) (hereafter the *Palala Resources* case). For a discussion of the *Palala Resources* case see Badenhorst 2016 *SALJ* 37-50. The judgment in the *Palala Resources* case was overturned by the Supreme Court of Appeal in *Palala Resources (Pty) Limited v Minister of Mineral Resources and Energy* (SCA) unreported case number 479/2015 of 30 May 2016; See also *Meepo v Kotze* 2008 1 SA (NC) para 81. For a discussion of this case see Badenhorst and Mostert 2008 *TSAR* 819-833; Van der Schyff *Property in Minerals and Petroleum* 161-172; Badenhorst "Fundamental Principles and Concepts" 13-1-13-3; Dale *et al Mineral and Petroleum Law* MPRDA107-MPRDA121.

¹⁵⁸⁶ The Constitutional Court held in *Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited* 2011 4 SA 113 (CC) para 3 (hereafter the *Bengwenyama 2011 CC* case) as follows: "To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Development Act ... was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources." See also the *Sishen* case paras 10-13.

¹⁵⁸⁷ Para 2.5; Badenhorst 2004 *Journal of Energy and Natural Resources* Law 224. See also the *Holcim* case para 25 and the *Sishen* case para 12. See Badenhorst 2014 *Journal of Energy and Natural Resources* Law 5-40.

the granting, exercising and retention of all rights to minerals and petroleum resources. The only relevance of previous mineral rights was that they constitute an element of the transitional arrangements in the MPRDA.

In general, the transitional provisions were enacted to protect the entitlement of holders of mineral rights and/or prospecting permits or mining authorisations granted in terms of the 1991 Minerals Act, to benefit from the exploitation of the relevant rights. This was done by creating three new types of rights, namely old order mining rights, old order prospecting rights and unused old order rights, each which comprise of a number of different categories.¹⁵⁸⁸

The MPRDA regulates the applications for and the granting of prospecting rights and mining rights.¹⁵⁸⁹ With effect from 1 May 2004, a person who wants to prospect or mine for diamonds on land that is not subject to any of the old order rights created in the transitional provisions, will have to obtain a prospecting right or a mining right respectively. The State is the custodian of the mineral resources, which are stated to be the common heritage of all South Africans.¹⁵⁹⁰ The State may in terms of section 3(2) of the MPRDA as the custodian of the nation's mineral resources, acting through

¹⁵⁸⁸ Agri CC case para 28; *Holcim* case; *Xstrata* case para 9. See para 12.5 below.

¹⁵⁸⁹ Sections 16-19 of the MPRDA relate to prospecting rights and ss 22-25 of the MPRDA relate to mining rights. The MPRDA also provides for reconnaissance permissions which are regulated in ss 13-15 of the MPRDA, mining permits are regulated in s 27 of the MPRDA. The MPRDA also applies to petroleum and regulates exploration rights in ss 80-82 of the MPRDA and production rights in ss 83-86 of the MPRDA. Section 5A of the MPRDA prohibits the prospecting for or mining of any mineral, without an environmental authorisation, (b) a prospecting right or a mining right as the case may be and (c) giving the landowner or lawful occupier of the land in question at least 21 days written notice. Section 5A of the MPRDA was inserted by the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 (hereafter the First MPRDA Amendment Act) on 7 June 2013. Prior to the commencement of s 5A, s 5(4) of the MPRDA prohibited the prospecting for or mining of any mineral, without (a) an approved environmental management plan (in the case of prospecting) or an approved environmental management programme (in the case of mining), (b) a prospecting right or a mining right and (c) notifying and consulting with the landowner or lawful occupier of the land in question. *Holcim* case para 23.

¹⁵⁹⁰ Section 3(1) of the MPRDA. *Agri CC* case para 25; See the *Ataqua* case para 67. Dale *et al Mineral and Petroleum Law* MPRDA122-MPRDA136; Badenhorst "Fundamental Principles and concepts" 13-4-13-11; Badenhorst and Van Heerden 2010 *Stellenbosch Law Review* 121-122; Van der Schyff *Property in Minerals and Petroleum* 229-234.

the Minister *inter alia* grant prospecting rights, mining permits and mining rights.¹⁵⁹¹

In this chapter the interpretation of the MPRDA and the concept of the State's custodianship of minerals are firstly briefly discussed.¹⁵⁹² The rights to prospect and mine for diamonds in respect of land which is not subject to any rights referred to in schedule II of the MPRDA, are thereafter discussed.¹⁵⁹³ This is followed by a discussion of the transitional provisions of the MPRDA, insofar as it relates to the right to prospect for or to mine diamonds¹⁵⁹⁴ The chapter concludes with a discussion of the status of historical mine dumps in terms of the MPRDA and the relevance of the prior diamond mining legislation to these old mine dumps or tailings.¹⁵⁹⁵

12.2 Interpretation of the MPRDA and the State's custodianship

Section 4(1) of the MPRDA provides that in the interpretation of the MPRDA, any reasonable interpretation which is consistent with the objects of the MPRDA must be preferred over any other interpretation which is inconsistent with such object. Section 4(2) of the MPRDA preserves the common law and provides that: "Insofar as the common law is inconsistent with this Act, this Act prevails." Conversely, where the common law is not inconsistent with the MPRDA, the common law must be applied. As discussed above, one of the fundamental principles of the common law of property in South Africa is the *cuius est solum* principle.¹⁵⁹⁶ The application of the *cuius est solum* principle as part of South Africa's common law, was confirmed by the Constitutional Court in the *Agri CC* case.¹⁵⁹⁷ It is submitted that the *cuius est solum* principle still applies in respect of unsevered minerals in South Africa and that the owner of the land

¹⁵⁹¹ *Agri CC* case para 71. Van der Schyff *Constitutionality* 237-271; Badenhorst and Mostert 2003 *Stellenbosh Law Review* 384; See also Badenhorst and Mostert 2004 *Stellenbosch Law Review* 47, where the authors state that: "Upon the introduction of the MPRD Act, the (unsevered) mineral resources of the country are vested in the people of South Africa (or the state)."

¹⁵⁹² See para 12.2 below.

¹⁵⁹³ See para 12.3 and 12.4 below.

¹⁵⁹⁴ See para 12.5 below.

¹⁵⁹⁵ See para 12.6 below.

¹⁵⁹⁶ See para 3.1 above.

¹⁵⁹⁷ Paras 7, 25. For a discussion of the *Agri CC* case see Badenhorst and Olivier 2014 *Australian Resources and Energy Law* 53-58; Van der Schyff and Olivier 2014 *Litnet* 2.

is still the owner of everything below the surface of the relevant land. Dale *et al*¹⁵⁹⁸ point out that there is no provision in the MPRDA which vests the ownership of minerals *in situ* in anyone else than the owner of the land. The authors emphasise that the MPRDA has destroyed the landowner's entitlement or right to exploit the minerals.¹⁵⁹⁹

The question that arises which, but, is not the focus of this thesis, is in reaction to the ownership of minerals which have been severed by someone who is not the holder of a prospecting right or mining permit or mining right.¹⁶⁰⁰ A further question which is more relevant is whether the fact that the State is appointed as the custodian of all mineral resources, means that the right to mine diamonds (and other minerals) now vests in the State.¹⁶⁰¹ It is submitted that the answer is negative. Whatever custodianship of the minerals means, it must be accepted that it does not mean ownership and the Constitutional Court has confirmed this in the *Agri CC* case.¹⁶⁰²

¹⁵⁹⁸ Dale *et al Mineral and Petroleum Law* MPRDA122-MPRDA125. For a different view see Van der Schyff *Property in Minerals and Petroleum* 255-256, who *inter alia* relies on s 5(1) of the MPRDA which provides that a prospecting right or a mining right granted in terms of the MPRDA is a limited real right in respect of the mineral and the land to which the right relates. According to Van der Schyff this implies that unsevered minerals are recognised as independent legal objects.

¹⁵⁹⁹ Dale *et al Mineral and Petroleum Law* MPRDA123; Badenhorst "Fundamental Principles and Concepts" 13-5 holds a different view. According to Badenhorst and Mostert 2007(2) *TSAR* 476, the ownership of minerals not yet severed from the land vests in the State. Badenhorst 2004 *Journal of Energy and Natural Resources Law* 223 states that: "The word 'custodianship' as used in the Act is a misnomer in that what the Act proposes is not mere custodianship, but an actual vesting in the State. See also Badenhorst and Malherbe 2001 *TSAR* 465. See Van der Schyff *Property in Minerals and Petroleum* 258-259.

¹⁶⁰⁰ It is submitted that "minerals" mined unlawfully without a mining right or mining permit constitute *res nullius*. Such "minerals" no longer occur naturally in and on the earth and the process thereof is therefore not regulated by the MPRDA. Such "minerals" no longer form part of the land and can therefore not belong to the landowner. The miner who unlawfully extracted the "minerals" from the surface of the earth will not be able to lawfully claim ownership. There can be no question of the "minerals" belonging to the nation because they do not constitute mineral resources and they can in any event not lawfully vest in the nation as the nation has no legal personality. See Dale *et al Mineral and Petroleum Law* MPRDA5. The person who lawfully exercises control over such "minerals" therefore becomes the owner thereof.

¹⁶⁰¹ Dale *et al Mineral and Petroleum Law* MPRDA124-MPRDA125.

¹⁶⁰² Para 71. Although there is not any case law yet on the proper interpretation of the concept of the "custodianship" of the State, the Constitutional Court held in the *Agri CC* case para 72 that: "For purposes of this case, it is not necessary to define the word 'custodian'. What is however clear is that, whatever 'custodian' means, it does not mean that the state has acquired and thus has become owner of the mineral rights concerned." According to Badenhorst and Mostert 2003 *Stellenbosch Law Review* 384, the right to prospect and mine minerals are no longer expressly reserved to the State, unlike the position in the legislation in force prior to the commencement of

Badenhorst¹⁶⁰³ states that although the rights to prospect and mine are not expressly reserved for the State, it is achieved by implication in that the Minister grants prospecting and mining rights on behalf of the State.¹⁶⁰⁴ The content of the State's custodianship is to be found in section 3(2) of the MPRDA, namely that the State, acting through the Minister may:

- (a) Grant, issue, refuse, control, administer and manage any ... prospecting right, permission to remove, mining right, mining permit ...; and
- (b) In consultation with the Minister of Finance, prescribe and levy any fee payable in terms of this Act.

The State, through the Minister, exercises a public power and merely regulates the prospecting and mining for diamonds by granting or refusing applications for such rights, administering and managing compliance with the rights and with the provisions of the MPRDA.¹⁶⁰⁵ The right to prospect for and to mine diamonds, however, does not vest in the State. The Minister has no discretion in the exercise of his or her duties in terms of section 3(2) of the MPRDA. Anyone who complies with the requirements for the granting of a prospecting right or a mining as prescribed in terms of the MPRDA, is entitled to be granted a prospecting right or a mining right.

the 1991 Minerals Act, but that such reservation was implicitly achieved. See also Badenhorst and Mostert 2004 *Stellenbosch Law Review* 47, where the authors state that: "Upon the introduction of the MPRD Act, the (unsevered) mineral resources of the country are vested in the people of South Africa (or the state)." Mostert *Mineral Law* 133-135.

¹⁶⁰³ Dale *et al Mineral and Petroleum Law* MPRDA126-MPRDA128; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 223.

¹⁶⁰⁴ Section 3(2)(a) of the MPRDA. Badenhorst 2004 *Journal of Energy and Natural Resources Law* 223; Badenhorst and Malherbe 2001 *TSAR* 465.

¹⁶⁰⁵ Dale *et al Mineral and Petroleum Law* MPRDA125-MPRDA131. For a discussion of the different views of academic authors see Van der Schyff *Property in Minerals and Petroleum* 258-264. See also Van der Schyff 2008 *TSAR* 757-768.

The MPRDA prohibits the prospecting¹⁶⁰⁶ for or removal of or mining of any mineral or the commencement of any work incidental thereto on any area, without:¹⁶⁰⁷

- (a) An environmental authorisation;
- (b) A reconnaissance permission, prospecting right, permission to remove, mining right, mining permit or retention permit;
- (c) Giving the landowner or lawful occupier at least 21 days written notice.

It is submitted that these functions are performed by the State as part of its custodianship of minerals and not as holder of the right to mine. The State cannot arbitrarily grant prospecting rights and mining rights. The person who is entitled to prospect or mine diamonds in terms of the MPRDA is the person who obtained a prospecting right or a mining permit or mining right and in terms of the MPRDA and an environmental authorisation in terms of NEMA. The difference is that an applicant for those rights in terms of the MPRDA is not entitled to be granted a prospecting or mining right or mining permit by virtue of being the holder of the rights to minerals or depending on the form of land tenure, but by complying with a number of prescribed conditions. This was necessary to address the history of racial discrimination in South Africa as a large part of the population was previously excluded from acquiring rights to mine in South Africa.¹⁶⁰⁸ The rights of the landowner have been reduced in that the

¹⁶⁰⁶ "Prospecting" is defined in s 1 of the MPRDA to mean: "intentionally searching for any mineral by means of any method-

- (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or
- (b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or
- (c) In the sea or other water on land."

See also *Sephaku Tin (Pty) Limited v Kranskoppie Boerdery* (NGP) (unreported) case number 47561/2010 of 7 May 2012 (hereafter the *Sephaku* case).

¹⁶⁰⁷ Section 5A of the MPRDA as amended in terms of the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 (hereafter the 2008 MPRDA Amendment Act). Badenhorst and Mostert 2003 *Stellenbosch Law Review* 394.

¹⁶⁰⁸ This appears from the objects in ss 2(c), (d) and (f) of the MPRDA. See fn 1585 above. The Minister is in terms of s 23(1)(h) of the MPRDA required *inter alia*, to grant a mining right to an applicant, if the granting of the mining right will further the objects of ss 2(d) and (f) of the MPRDA "and (is) in accordance with the charter contemplated in s 100 and the prescribe social and labour plan." See Dale *et al Mineral and Petroleum Law* MPRDA590-MPRDA594. Section 104 of the MPRDA provides for a preferential right to any community who wishes to obtain a right to prospect or mine

landowner is entitled to be consulted as an interested and affected person or party.¹⁶⁰⁹ The requirements to obtain a prospecting right and a mining right are briefly discussed below.

12.3 Prospecting rights

Any person who wants to prospect for diamonds on land that is not subject to any of the transitional provisions, has to apply for a prospecting right in terms of section 16 of the MPRDA. The application for a prospecting right has to be lodged at the office of the Regional Manager in whose region the land is situated and in the prescribed manner with payment of the prescribed fee.¹⁶¹⁰ If the application complies with the requirements of section 16(1) of the MPRDA, the Regional Manager is obliged to accept the application provided firstly, that no other person holds a prospecting right, mining right, mining permit or retention permit for diamonds in respect of the same land and mineral.¹⁶¹¹ Secondly, it is provided that no prior application for a prospecting right,

in respect of any mineral and land which is registered or to be registered in the name of the community. See Badenhorst "Mining rights and mining permits to minerals" 16-17-16-19; Van der Schyff *Property in Minerals and Petroleum* 529-532; *Bengwenyama 2011 CC case*; *Bengwenyama-Ya-Maswazi Community v Genorah Resources (Pty) Ltd* 2015 1 SA 197 (SCA); *Bengwenyama-Ya-Maswazi Community v Genorah Resources (Pty) Ltd* 2015 1 SA 219 (SCA); Badenhorst and Olivier 2011 *De Jure* 126-148; Humby 2016 *SALJ* 316-351; Olivier, Williams and Badenhorst 2017 *PELJ* 1-34.

¹⁶⁰⁹ Section 16(4)(b) of the MPRDA in relation to an application for a prospecting right and s 22(4)(b) of the MPRDA in relation to an application for a mining right. See the *Bengwenyama 2011 CC case* paras 62-68 in relation to the meaning of consultation.

¹⁶¹⁰ Section 16(1) of the MPRDA. The details of an application for a prospecting right are prescribed in reg 5 read with Form B contained in Annexure I of the regulations promulgated under the MPRDA. See Badenhorst 2004 *Journal of Energy and Natural Resources Law* 223-226; Badenhorst "Prospecting Rights, permission to remove minerals and retention permits to minerals" 15-4-15-5; Dale *et al Mineral and Petroleum Law* MPRDA225-MPRDA228; Van der Schyff *Property in Minerals and Petroleum* 433-434, 440-441.

¹⁶¹¹ Section 16(2)(b) of the MPRDA. If the Regional Manager accepts an application for a prospecting right, he must in terms of s 16(4) of the MPRDA within 14 days from the date of acceptance, notify the application in writing:

- (a) to submit relevant required environmental reports required in terms of chapter 5 of the *National Environmental Management Act* 107 of 1998 (hereafter NEMA) within 60 days of the date of the notice; and
- (b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and to include the results of the consultation in the relevant environmental reports.

Dale *et al Mineral and Petroleum Law* MPRDA227-MPRDA228; Badenhorst "Prospecting Rights, permission to remove minerals and retention permits to minerals" 15-5.

mining right, mining permit or retention permit has been accepted for diamonds in respect of the same land, which remains to be granted or refused.¹⁶¹² If the application for a prospecting right does not comply with the requirements of section 16, the Regional Manager must in terms of section 16(3) of the MPRDA notify the applicant in writing within 14 days of receipt of the application. Before the commencement of the 2008 MPRDA Amendment Act, section 16(3) of the MPRDA provided that in the case of non-compliance with section 16, the Regional Manager in addition, had to return the application to the applicant. A possible explanation for the different wording could be that the Regional Manager is in the case of non-compliance with section 16(2)(c) of the MPRDA not entitled to return the application, but that the acceptance of the application is suspended until a decision is taken to grant or refuse the application that had previously been accepted. Once the first application had been rejected, the suspended application is next in line to be processed further in terms of the MPRDA. This interpretation is also supported by section 9(1)(b) of the MPRDA which provides that if a Regional Manager receives more than one application for a prospecting right, a mining right, or a mining permit in respect of the same mineral and land on different dates, the applications must be dealt with in order of receipt. Section 9(2) of the MPRDA furthermore provides that when the Minister considers applications received on the same date, he or she must give preference to an application from historically disadvantaged persons.¹⁶¹³ An application is in terms of section 16(5) of the MPRDA only forwarded to the Minister after it has been accepted by the Regional Manager and after receipt of the information prescribed in section 16(4) of the MPRDA. The possibility that the Minister considers more than one application is clearly contemplated in section 9(2) of the MPRDA.¹⁶¹⁴

¹⁶¹² Section 16(2)(c) of the MPRDA, which was inserted by the 2008 MPRDA Amendment Act.

¹⁶¹³ Badenhorst "Prospecting Rights, permission to remove minerals and retention permits to minerals" 15-22-15-29.

¹⁶¹⁴ For a different interpretation see Dale *et al Mineral and Petroleum Law* MPRDA227-MPRDA228.

The Minister or his delegate¹⁶¹⁵ is obliged to grant a prospecting right within 30 days of receipt of the application from the Regional Manager, if the application for a prospecting right complies with the following requirements:¹⁶¹⁶

- (a) The applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in terms of the prospecting work programme;¹⁶¹⁷
- (b) The expenditure as estimated by the applicant, is compatible with the proposed prospecting operation and the duration of the prospecting work programme;¹⁶¹⁸
- (c) The prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;¹⁶¹⁹
- (d) The applicant has the ability to comply with the relevant provisions of the *Mine Health and Safety Act* 29 of 1996 (hereafter the MHSA);¹⁶²⁰
- (e) The applicant is not in contravention of any relevant provision of the MPRDA;¹⁶²¹ and
- (f) In respect of prescribed minerals, the applicant has given effect to the objects referred to in section 2(d) of the MPRDA.¹⁶²²

¹⁶¹⁵ The Minister has in terms of s 103 of the MPRDA delegated his powers to grant or refuse an application for prospecting right to the Deputy Director-General. Dale *et al Mineral and Petroleum Law* MPRDA656, DOP2.

¹⁶¹⁶ Section 17(1) of the MPRDA. The requirement that the prospecting right must be granted within 30 days was inserted by s 13(a) of the 2008 MPRDA Amendment Act. Badenhorst "Prospecting Rights, permission to remove minerals and retention permits to minerals" 15-7-15-15; Van der Schyff *Property in Minerals and Petroleum* 437-438, 457-462.

¹⁶¹⁷ Section 17(1)(a) of the MPRDA.

¹⁶¹⁸ Section 17(1)(b) of the MPRDA.

¹⁶¹⁹ Section 17(1)(c) of the MPRDA.

¹⁶²⁰ Section 17(1)(d) of the MPRDA.

¹⁶²¹ Section 17(1)(e) of the MPRDA.

¹⁶²² Section 17(1)(f) of the MPRDA was inserted by s 13(c) of the 2008 MPRDA Amendment Act. Section 2(d) of the MPRDA provides that one of the objects of the MPRDA is to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities to enter into and to actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.

The Minister has no discretion and once the requirements of section 17(1) of the MPRDA have objectively been complied with, the relevant applicant is entitled to be granted a prospecting right. A prospecting right can be granted for a maximum period of five years, which period has to be substantiated in the prospecting work programme.¹⁶²³ The holder of a prospecting right has the exclusive right to apply for the renewal of a prospecting right.¹⁶²⁴ The holder of a prospecting right has the exclusive right to apply for and to be granted a mining right in respect of the mineral and relevant prospecting area, provided that he complies with the requirements for the granting of a mining right.¹⁶²⁵ The holder of a prospecting right is further entitled to remove and dispose of any mineral to which the prospecting right relates and which is found during prospecting.¹⁶²⁶ The holder of a prospecting right is required to commence with prospecting activities within 120 days from the date on which the

¹⁶²³ Section 17(6) of the MPRDA.

¹⁶²⁴ Section 19(1)(a) of the MPRDA. The requirements for an application for the renewal of a prospecting are set out in s 18 of the MPRDA. A prospecting right can in terms of s 18(4) of the MPRDA only be renewed once for a period not exceeding three years. Section 18(5) of the MPRDA provides that if an application for a prospecting right has been lodged timeously, the prospecting right remains in force until the application has been granted or refused, that is the decision taken to grant or refuse the application for renewal.

¹⁶²⁵ Section 19(1)(b) of the MPRDA; Dale *et al Mineral and Petroleum Law* MPRDA244-MPRDA246; Badenhorst and Malherbe 2001 *TSAR* 468-469; See para 12.4 below. Badenhorst "Prospecting Rights, permission to remove minerals and retention permits to minerals" 15-17-15-19.

¹⁶²⁶ Section 19(1)(c) of the MPRDA. The holder of a prospecting right could, however, in terms of s 20(1) of the MPRDA only remove and dispose of any minerals found in the course of prospecting operations in such quantities as may be required to conduct tests on it or to identify or analyse it. Section 20(2) of the MPRDA provides that the holder requires the Minister's written consent if the holder wants to remove and dispose for the holder's own account of diamonds and bulk samples of any other minerals found by the holder in the course of prospecting operations. The reference to diamonds was with effect from 7 June 2013, inserted by s 16 of the 2008 MPRDA Amendment Act. Section 20(1) of the MPRDA is expressly stated to be subject to s 20(2) thereof and the holder of a prospecting right therefore required the written consent from the Minister to remove and dispose of diamonds irrespective of whether the purpose of the removal is restricted to tests and to identify or analyse it. The holder of a mining permit or mining right is in terms of s 5(3)(cA) of the MPRDA entitled, subject to s 59B of the *Diamonds Act* 56 of 1986, to remove and dispose of any diamond found during the course of mining operations. Dale *et al Mineral and Petroleum Law* MPRDA254-MPRDA256.

prospecting right becomes effective and must actively and continuously conduct prospecting operations in terms of the prospecting work programme.¹⁶²⁷

12.4 Applications for mining rights

A person who wants to mine for diamonds has to submit an application in the prescribed manner with the relevant regional office.¹⁶²⁸ Similar provisions apply as in the case of a prospecting right. If the application complies with the requirements of section 22(1) of the MPRDA, the Regional Manager is obliged to accept the application provided that no other person holds a prospecting right, mining right, mining permit or retention permit for diamonds in respect of the same land.¹⁶²⁹ The Regional Manager must also make sure that no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for diamonds in respect of the same land, which remains to be granted or refused.

The Minister or his delegate is obliged to grant a mining right if the prescribed requirements have been met, namely if the applicant demonstrates that the:¹⁶³⁰

¹⁶²⁷ Sections 19(2)(b) and 19(2)(c) of the MPRDA. The period of 120 days may be extended by the Minister or his delegate. See the *Sephaku* case; Badenhorst "Prospecting Rights, permission to remove minerals and retention permits to minerals" 15-19.

¹⁶²⁸ Section 22(1) of the MPRDA. The details of an application for a mining right are prescribed in reg 10 of the regulations promulgated under the MPRDA read with Form D contained in Annexure I to the MPRDA. Dale *et al Mineral and Petroleum Law* MPRDA259-MPRDA263; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 226-228; Badenhorst "Mining rights and mining permits to minerals" 16-3-16-6; Van der Schyff *Property in Minerals and Petroleum* 442-443.

¹⁶²⁹ Section 22(2)(b) of the MPRDA. If the Regional Manager accepts an application for a mining right, he must in terms of s 22(4) of the MPRDA within 14 days from the date of acceptance, notify the application in writing:

- (a) to submit relevant required environmental reports required in terms of chapter 5 of NEMA within 180 days of the date of the notice; and
- (b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and to include the results of the consultation in the relevant environmental reports.

¹⁶³⁰ Section 23(1) of the MPRDA. The Minister is in terms of s 23(3) of the MPRDA obliged to refuse to grant a mining right within 60 days of receipt of the application from the Regional Manager, if the applicant does not meet the requirements referred to in s 23(1) of the MPRDA. The Minister has in terms of s 103 of the MPRDA delegated his powers to grant or refuse an application for a mining right to the Director-General. Dale *et al Mineral and Petroleum Law* MPRDA657, DOP2; Badenhorst, Carnelley and Mostert "Administration of mineral and petroleum law statutes" 2-5-2-12; Van der Schyff *Property in Minerals and Petroleum* 437-438, 467-464.

- (a) Mineral which forms the subject of the application can be optimally mined in terms of the mining work programme;¹⁶³¹
- (b) Applicant has access to financial resource and has the technical ability to conduct the mining operations optimally;¹⁶³²
- (c) Financial plan is compatible with the intended mining operation and the duration requested;¹⁶³³
- (d) Mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;¹⁶³⁴
- (e) Applicant has provided for the prescribed social and labour plan;¹⁶³⁵
- (f) Applicant has the ability to comply with the relevant provisions of the MHSA;¹⁶³⁶
- (g) Applicant is not in contravention of any provisions of the MPRDA;¹⁶³⁷ and
- (h) Granting of the mining right will further the objects referred to in sections 2(d) and 2(f) of the MPRDA and in accordance with the charter and the prescribed social and labour plan.¹⁶³⁸

A mining right can be granted for a maximum period of 30 years, but may be renewed indefinitely for periods not exceeding 30 years each.¹⁶³⁹ The holder of a mining right must comply with certain prescribed requirements, which include that the holder must commence with mining operations within one year from the date on which the mining

¹⁶³¹ Section 23(1)(a) of the MPRDA.

¹⁶³² Section 23(1)(b) of the MPRDA.

¹⁶³³ Section 23(1)(c) of the MPRDA.

¹⁶³⁴ Section 23(1)(d) of the MPRDA.

¹⁶³⁵ Section 23(1)(e) of the MPRDA.

¹⁶³⁶ Section 23(1)(f) of the MPRDA.

¹⁶³⁷ Section 23(1)(g) of the MPRDA.

¹⁶³⁸ Section 23(1)(h) of the MPRDA.

¹⁶³⁹ Section 23(6) read with s 24(4) of the MPRDA. The requirements for the renewal of a mining right is set out in s 24 of the MPRDA. Dale *et al Mineral and Petroleum Law* MPRDA273-MPRDA277; Badenhorst "Mining rights and mining permits to minerals" 16-16-16-17.

right becomes effective¹⁶⁴⁰ and the holder must conduct mining in accordance with the mining work programme.¹⁶⁴¹

12.5 Transitional provisions

The transitional provisions in the MPRDA are an essential component of the MPRDA. The Supreme Court of Appeal held in the *Holcim* case that the transitional provisions were necessary:¹⁶⁴²

To prevent the stultification and total disruption of an important sector of the economy until such time as existing mining operations could be regulated in terms of the new Act.

The Legislature's intention of a seamless continuation of existing rights appears from the objects of the transitional provisions, which are insofar as prospecting and mining are concerned, to:¹⁶⁴³

- (a) Ensure that security of tenure is prospected in respect of the prospecting and mining operations which are being undertaken;
- (b) Give the holder of an old order right an opportunity to comply with the MPRDA; and
- (c) Promote equitable access to the nation's mineral and petroleum resources.

Three new bundles of rights were created in the transitional provisions to ensure this seamless transition to the new dispensation, namely old order mining rights,¹⁶⁴⁴ old

¹⁶⁴⁰ Section 23(5) read with the definition of "effective date" in s 1 of the MPRDA provides that a mining right becomes effective on the date that the prospecting right is executed.

¹⁶⁴¹ Sections 25(2)(c) and 25(2)(d) of the MPRDA. Dale *et al Mineral and Petroleum Law* MPRDA281-MPRDA282; Badenhorst "Mining rights and mining permits to minerals" 16-16-16-17.

¹⁶⁴² Para 26.

¹⁶⁴³ Item 2 of schedule II of the MPRDA. *Holcim* case para 27.

¹⁶⁴⁴ The term "old order mining right" is defined in item 1 of schedule II of the MPRDA to mean: "any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted."

order prospecting rights¹⁶⁴⁵ and unused old order rights.¹⁶⁴⁶ The holders¹⁶⁴⁷ of each of these old order rights¹⁶⁴⁸ were afforded a period of time within which the holders had to comply with certain requirements to convert old order prospecting rights or old order mining rights and in the case of an unused old order rights, to apply for either a prospecting right or a mining right.¹⁶⁴⁹

In order to ensure compliance with the object of security of tenure, items 6(1) and 7(1) of Schedule II of the MPRDA provides for the continued existence of old order prospecting rights and old order mining rights for specific periods of time, subject to the requirement that the holders of such rights lodge the rights for conversion within the stipulated periods.¹⁶⁵⁰

12.5.1 Old order prospecting rights

It is clear from the definition of an old order prospecting right, that it has two components. The first component refers to the existence of a prospecting lease, permission, permit or licence and the rights attached there, as listed in Table 1 which was in force immediately before 1 May 2004. The second component refers to

¹⁶⁴⁵ The term "old order prospecting right" is defined in item 1 of schedule II of the MPRDA to mean: "any prospecting lease, permission, consent, permit or licence, and the rights attached thereto, listed in Table 1 to this Schedule in force immediately before the date on which this Act took effect and in respect of which prospecting is being conducted."

¹⁶⁴⁶ The term "unused old order right" is defined in item 1 of schedule II of the MPRDA to mean: "any right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect."

¹⁶⁴⁷ A "holder" is defined in item 1 of schedule II of the MPRDA to mean: "in relation to an old order right, means the person to whom such right was or is deemed to have been granted or by whom it is held or is deemed to be held, or such person's successor in title before this Act came into effect."

¹⁶⁴⁸ The term "old order right" is defined in item 1 of schedule II of the MPRDA to mean: "an old order mining right, old order prospecting right or unused old order right, as the case may be."

¹⁶⁴⁹ Items 6, 7 and 8 of schedule II of the MPRDA. Badenhorst 2004 *Journal of Energy and Natural Resources Law* 229-233; Badenhorst and Mostert "Transitional Arrangements" 25-11-25-12; Van der Schyff *Property in Minerals and Petroleum* 136-138.

¹⁶⁵⁰ An old order prospecting right continued in force for a period of two years from the date of commencement of the MPRDA. See the *De Beers prospecting* case. An old order mining right continued in force for a period not exceeding five years from the commencement of the MPRDA, but limited to the duration of the relevant mining authorisation. See the *Idada* case and the *Gelletich Mining* case; Dale *et al Mineral and Petroleum Law* SCH-II-137; Badenhorst and Mostert "Transitional Arrangements" 25-14-25-15, 25-21-25-22.

prospecting that should have been conducted in respect of such right. In this study, only the first component is discussed. The second component requires a factual enquiry in each instance to determine whether the holder conducted prospecting before the commencement of the MPRDA.

12.5.1.1 Categories of old order prospecting rights

12.5.1.1.1 Category 1

The first category of old order prospecting rights created in the transitional provisions is a bundle of rights comprising the common law mineral right, together with a prospecting permit in terms of section 6(1) of the 1991 Minerals Act.¹⁶⁵¹ There is no definition of the term "common law mineral right" in the MPRDA or in the 1991 Minerals Act. It is submitted that this is a reference to the holder of the rights to diamonds prior to the commencement of the MPRDA. In instances where the rights to diamonds have not been severed from the ownership of the land, the surface owner would in terms of the *cuius est solum* principle be the holder of the rights to diamonds. As indicated above,¹⁶⁵² the holder of the right to diamonds was in terms of section 6(1) of the 1991 Minerals Act entitled to apply for a prospecting permit. Both the common law mineral right and the prospecting permit that were in force before the commencement of the MPRDA constituted the first category of old order prospecting rights.

12.5.1.1.2 Category 2

The second category of old order prospecting rights is a bundle of rights comprising of the consent to prospect by the holder of the right to diamonds in terms of either section 6(1)(b) of the 1991 Minerals Act, where the holder of right to diamonds had given written consent to another to prospect on the relevant land or in terms of section 6(3) of the 1991 Minerals Act, where the State was the holder of the right to diamonds, together with the relevant prospecting permit issued.¹⁶⁵³ Both the consent to prospect

¹⁶⁵¹ Category 1 in table 1 of schedule II of the MPRDA.

¹⁶⁵² See para 11.2.1 above.

¹⁶⁵³ Category 2 in table 1 of schedule II of the MPRDA. See para 11.2.1 above.

and the prospecting permit formed were included in this category of old order prospecting right. The holder of the common law mineral right who granted the written consent and the holder of the prospecting permit were, however, two different persons or entities and it is submitted that the holder of the prospecting permit was the holder of the old order prospecting right for purposes of the MPRDA. The only relevance of the common law mineral right is therefore that it forms a component of the old order prospecting right.¹⁶⁵⁴

12.5.1.1.3 Category 3

The third category of old order prospecting rights is a bundle of rights comprising of the following:¹⁶⁵⁵

- (a) A prospecting lease,¹⁶⁵⁶ prospecting permit,¹⁶⁵⁷ prospecting licence or prospecting permission referred to in section 44 of the 1991 Minerals Act;
- (b) The common law mineral right attached thereto; and
- (c) A prospecting permit obtained in terms of section 6(1) of the 1991 Minerals Act.

All three these components formed part of the old order prospecting right. Also, it is the holder of the prospecting permit who is the holder of the old order prospecting right.

12.5.1.1.4 Category 4

The fourth category of old order prospecting rights is a bundle of rights comprising of the following:¹⁶⁵⁸

¹⁶⁵⁴ See the *De Beers prospecting* case para 2.5.

¹⁶⁵⁵ Category 3 of table 1 of schedule II of the MPRDA.

¹⁶⁵⁶ Entered in respect of State land in terms of s 4(1) of the 1964 Precious Stones Act, which was preserved in terms of s 44(1)(a)(i) of the 1991 Minerals Act. See paras 10.4.1 and 11.3.1.2 above.

¹⁶⁵⁷ Issued in respect of alienated State land in terms of s 5 of the 1964 Precious Stones Act or in respect of private land (which was not subject to a prospecting and diggings agreement) in terms of s 6(1) of the 1964 Precious Stones Act and preserved in terms of s 44(1)(a)(i) of the 1991 Minerals Act. See paras 10.4.2-10.4.3 and 11.3.1.2-11.3.1.3 above.

¹⁶⁵⁸ Category 4 of table 1 of schedule II of the MPRDA.

- (a) Any permissions to prospect in terms of certain legislation applicable in the former independent states and self-governing territories;¹⁶⁵⁹
- (b) The common law mineral right attached thereto; and
- (c) A prospecting permit obtained in terms of section 6(1) of the 1991 Minerals Act.

Again, all three these components formed part of the old order prospecting right and it is the holder of the prospecting permit who was the holder of the old order prospecting right.

12.5.1.1.5 Category 5

The fourth category of old order prospecting rights, is a temporary permit authorising the continuation of a prospecting operation on the land comprising the subject of a prospecting permit which had been authorised under such prospecting permit in terms of section 10 of the 1991 Minerals Act.¹⁶⁶⁰ The regional director could in terms of section 10 of the 1991 Minerals Act, pending an application for a prospecting permit, issue a temporary prospecting permit authorising the continuation of prospecting operations on the relevant land.

12.5.1.2 Continuation of old order prospecting rights

In order to provide for a seamless transition, item 6(1) of schedule II of the MPRDA provided that the abovementioned old order prospecting rights continued in force for a period of two years from 1 May 2004, subject to the terms and conditions under which they were granted.¹⁶⁶¹ In order to continue prospecting for diamonds, the

¹⁶⁵⁹ Section 16(1) of the *Bophuthatswana Land Control Act* 39 of 1979 (hereafter the Bophuthatswana Land Control Act), s 16 of the *Venda Land Control Act* 16 of 1986 (hereafter the Venda Land Control Act), s 15 of the *Lebowa Minerals Trust Act* 9 of 1987 (hereafter the Lebowa Minerals Trust Act), s 51(1) of the *Rural Areas Act (House of Representatives)* 9 of 1987 (hereafter the Rural Areas Act) or s 6 of the *Transformation of Certain Rural Areas Act* 94 of 1998 (hereafter the Transformation of Rural Areas Act).

¹⁶⁶⁰ Category 5 of table 1 of schedule 1 of the MPRDA.

¹⁶⁶¹ It was confirmed in the *De Beers prospecting* case that the correct interpretation of item 6(1) of schedule II of the MPRDA which accorded with the objects of the MPRDA, was that the period of two years was effectively a moratorium and that all old order prospecting rights continued in force for a period of two years, notwithstanding the fact that the underlying prospecting permit would

abovementioned holders of old order prospecting rights had to lodge their old order prospecting rights for conversion.¹⁶⁶²

The Minister is obliged to convert an old order prospecting right if the:¹⁶⁶³

- (a) Prescribed requirements have been complied with;
- (b) Holder had conducted prospecting operations in respect of the old order prospecting right;
- (c) Holder has an approved environmental management programme; and
- (d) Holder has paid the prescribed fee.

have lapsed within the period of two years in terms of the 1991 Minerals Act. Badenhorst and Mostert "Transitional Arrangements" 25-14-25-15.

¹⁶⁶² The requirements for a conversion submission of an old order prospecting right are set out in item 6(2) of schedule II of the MPRDA and are briefly that the holder of the old order prospecting right had to lodge the right for conversion within the period of two years at the relevant regional office, together with the following:

- (a) The prescribed particulars of the holder. Provision is made in part A of Form I of Annexure I to the MPRDA Regulations for the details of the holder.
- (b) A sketch plan or diagram depicting the prospecting area for which the conversion was required. The requirements for the sketch plan is contained in reg 2(2) of the regulations promulgated under the MPRDA.
- (c) The name of the mineral or group of minerals for which the old order prospecting right was held.
- (d) An affidavit verifying that the holder was conducting or had conducted prospecting operations immediately before the commencement of the MPRDA on the land to which the conversion related and setting out the period during which the prospecting operations were conducted and the results thereof. The prescribed affidavit is contained in Form W of Annexure II to the MPRDA Regulations. The term "prospecting operations" is defined in s 1 of the MPRDA to mean: "any activity carried on in connection with prospecting." It is defined in broader terms as "prospecting" as it does not require a disturbance of the surface of the earth and would include desktop studies. See the *Sephaku* case.
- (e) A statement setting out the period for which the prospecting right was required, substantiated by a prospecting work programme. The requirements for a prospecting work programme are contained in reg 7 of the MPRDA Regulations.
- (f) Information as to whether the old order prospecting right is encumbered by any mortgage bond or other right registered in the Deeds Office or Mining Titles Office.
- (g) A statement setting out the terms and conditions that apply to the old order prospecting right.
- (h) The original title deed in respect of the land to which the old order prospecting right relates or a certified copy thereof.
- (i) The original old order prospecting right or a certified copy thereof.
- (j) All prospecting information and the results thereof to which the old order prospecting right relates.

Badenhorst and Mostert "Transitional Arrangements" 25-15-25-16.

¹⁶⁶³ Item 6(3) of schedule II of the MPRDA. Badenhorst and Mostert "Transitional Arrangements" 25-17.

Item 6(4) of schedule II of the MPRDA provides that no terms and conditions applicable to the old order prospecting right remains in force if they are contrary to any provision of the MPRDA or the 1996 Constitution.¹⁶⁶⁴

The old order prospecting right ceases to exist upon the conversion of the old order prospecting right and the registration of the prospecting right into which it was converted.¹⁶⁶⁵ An old order prospecting right also ceased to exist, if the relevant holder failed to lodge the old order prospecting right for conversion before 30 April 2006.¹⁶⁶⁶

12.5.2 Old order mining rights

An old order mining right similarly has two components, firstly the existence of a mining lease, consent or permission to mine, claim licence or mining authorisation as listed in Table 2 which was in force immediately before 1 May 2004 and secondly, the requirement that mining operations¹⁶⁶⁷ should have been conducted in respect of such right. Only the first component is discussed, as the second component requires a factual enquiry in each instance to determine whether the holder conducted mining operations before the commencement of the MPRDA.

12.5.2.1 Categories of old order mining rights

12.5.2.1.1 Category 1

The first category of old order mining rights created in the transitional provisions is a bundle of rights comprising the common law mineral right, together with a mining authorisation obtained in terms of section 9(1) of the 1991 Minerals Act.¹⁶⁶⁸

¹⁶⁶⁴ Item 6(4) of schedule II of the MPRDA is discussed in more detail in para 12.5.4 below.

¹⁶⁶⁵ Item 6(7) of schedule II of the MPRDA.

¹⁶⁶⁶ Item 6(8) read with item 1 of schedule II of the MPRDA. Badenhorst and Mostert 2003 *Stellenbosch Law Review* 393; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 231-232; Badenhorst and Malherbe 2001 *TSAR* 469-470.

¹⁶⁶⁷ The term "mining operation" is defined in broad terms in s 1 of the MPRDA to mean: "any operation relating to the act of mining and matters directly incidental thereto."

¹⁶⁶⁸ Category 1 in table 2 of schedule II of the MPRDA. See para 12.5.1.1.1 above in respect of the comment on the relevant common law mineral right which applies equally in this instance.

12.5.2.1.2 Category 2

The second category of old order mining rights is a bundle of rights comprising the:¹⁶⁶⁹

- (a) Consent to prospect by the holder of the rights to diamonds in terms of either section 9(1)(b) or 9(2) of the 1991 Minerals Act;
- (b) Common law mineral right to diamonds attached to the consent; and
- (c) Mining authorisation obtained in terms of section 9(1) of the 1991 Minerals Act.

The holder of the common law mineral right who granted the written consent, and the holder of the mining authorisation were two different persons or entities and the holder of the old order mining right was the holder of the old order mining right for purposes of the MPRDA.

12.5.2.1.3 Category 3

The third category of old order mining rights is a bundle of rights comprising of the following:¹⁶⁷⁰

- (a) A right to dig or mine or a claim licence referred to in section 47 of the 1991 Minerals Act;
- (b) The common law mineral right attached thereto; and
- (c) A mining authorisation obtained in connection therewith in terms of section 47(1)(e) read with section 9(1) of the 1991 Minerals Act.

All three these components formed part of the old order mining right and it is the holder of the mining authorisation who is the holder of the old order mining right.

¹⁶⁶⁹ Category 2 in table 2 of schedule II of the MPRDA.

¹⁶⁷⁰ Category 3 of table 2 of schedule II of the MPRDA. These rights to dig or mine or claim licences are for purposes of this study, the rights to dig or mine in terms of the 1964 Precious Stones Act which were preserved in terms of s 47 of the 1991 Minerals Act. See paras 11.3.2.1-11.3.2.10 above.

12.5.2.1.4 Category 4

The fourth category of old order mining rights is a bundle of rights comprising of the following:¹⁶⁷¹

- (a) A right to dig or mine comprising a prospecting or digging agreement entered into in terms of section 20 of the 1964 Precious Stones Act and claim licences issued in terms of section 35 of the 1964 Precious Stones Act;¹⁶⁷²
- (b) The common law mineral rights to diamonds attached to the right to dig or mine; and
- (c) The mining authorisation contained in connection therewith in terms of section 9 of the 1991 Minerals Act.

Again, all three these components formed part of the old order mining right and it is the holder of the mining authorisation who was the holder of the old order prospecting right.

12.5.2.1.5 Category 5

The fifth category of old order mining rights is a bundle of rights comprising of the following:¹⁶⁷³

- (a) Any permissions to mine in terms of certain legislation applicable in the former independent states and self-governing territories;¹⁶⁷⁴
- (b) The common law mineral right attached thereto; and
- (c) A mining authorisation obtained in terms of the 1991 Minerals Act.

¹⁶⁷¹ Category 4 of table 2 of schedule II of the MPRDA.

¹⁶⁷² Preserved in terms of s 47(5) of the 1991 Minerals Act.

¹⁶⁷³ Category 5 of table 2 of schedule II of the MPRDA.

¹⁶⁷⁴ Section 16(1) of the Bophuthatswana Land Control Act, s 16 of the Venda Land Control Act, s 15 of the Lebowa Minerals Trust Act, s 51(1) of the Rural Areas Act and s 6 of the Transformation of Rural Areas Act.

Again, all three these components formed part of the old order mining right and it is the holder of the mining authorisation who was the holder of the old order mining right.

12.5.2.1.6 Category 6

The sixth category of old order mining rights is a temporary permit or authorisation which authorised the continuation of a mining operation in terms of section 10 of the 1991 Minerals Act.¹⁶⁷⁵ As in the case of prospecting, section 10 of the 1991 Minerals Act provided that the regional director could, pending an application for a mining authorisation issue a mining authorisation to authorise the continuation of mining operations on the relevant land.

12.5.2.2 Continuation of old order mining rights

Item 7(1) of schedule II of the MPRDA provided that the abovementioned old order mining rights continued in force for a period not exceeding five years from 1 May 2004, subject to the terms and conditions under which they were granted. In order to continue mining for diamonds, the abovementioned holders of old order mining rights had to lodge their old order mining rights for conversion before the expiry of the old order mining rights, but within the period of five years.¹⁶⁷⁶

¹⁶⁷⁵ Category 6 of table 2 of schedule II of the MPRDA.

¹⁶⁷⁶ See the *Idada* case and the *Gelletich Mining* case. The requirements for a conversion submission of an old order mining right are set out in item 7(2) of schedule II of the MPRDA and are briefly that the holder of the old order mining right had to lodge the old order mining right for conversion within the prescribed period at the relevant regional office, together with the following:

- (a) The prescribed particulars of the holder. Provision is made in part A of Form J of Annexure I to the MPRDA Regulations for the details of the holder.
- (b) A sketch plan or diagram depicting the prospecting area for which the conversion was required. The requirements for the sketch plan is contained in reg 2(2) of the regulations promulgated under the MPRDA.
- (c) The name of the mineral or group of minerals for which the old order prospecting right was held.
- (d) An affidavit verifying that the holder was conducting or had conducted mining operations immediately before the commencement of the MPRDA on the land to which the conversion related and setting out the period during which the mining operations were conducted. The prescribed affidavit is contained in Form X of Annexure II to the MPRDA Regulations.

The Minister is obliged to convert an old order mining right into a mining right, if the:¹⁶⁷⁷

- (a) Prescribed requirements have been complied with;
- (b) Holder has conducted mining operations in respect of the old order mining right;
- (c) Holder has an approved environmental management programme; and
- (d) Holder has paid the prescribed conversion fee.

Item 7(4) of schedule II of the MPRDA provides that no terms and conditions applicable to the old order mining right remains in force if they are contrary to any provision of the MPRDA or the 1996 Constitution.¹⁶⁷⁸

The old order mining right ceases to exist upon the conversion of the old order mining right and the registration of the mining right into which it was converted.¹⁶⁷⁹ An old order mining right also ceased to exist, if the relevant holder failed to lodge the old order mining right for conversion before the expiry of the old order mining right or within the period of five years, whichever occurred last.¹⁶⁸⁰

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- (e) A statement setting out the period for which the mining right was required, substantiated by a mining work programme. The requirements for a mining work programme are contained in reg 11 of the MPRDA Regulations.
 - (f) Information as to whether the old order mining right is encumbered by any mortgage bond or other right registered in the Deeds Office or Mining Titles Office.
 - (g) A statement setting out the terms and conditions that apply to the old order mining right.
 - (h) The original title deed in respect of the land to which the old order mining right relates or a certified copy thereof.
 - (i) The original old order mining right or a certified copy thereof.
 - (j) An undertaking that and the manner in which the holder will give effect to the objects contained in s 2(d) and 2(f) of the MPRDA.

Badenhorst and Mostert "Transitional Arrangements" 25-21-25-23.

¹⁶⁷⁷ Item 7(3) of schedule II of the MPRDA. Badenhorst and Mostert "Transitional Arrangements" 25-25-25-26

¹⁶⁷⁸ Item 7(4) of schedule II of the MPRDA is discussed in more details in para 12.5.4 below.

¹⁶⁷⁹ Item 7(7) of schedule II of the MPRDA.

¹⁶⁸⁰ Item 7(8) read with item 1 of schedule II of the MPRDA. Badenhorst and Mostert 2003 *Stellenbosch Law Review* 393; Badenhorst 2004 *Journal of Energy and Natural Resources Law* 232-233. See the *Idada* case and the *Gelletich Mining* case.

12.5.3 Unused old order rights

The MPRDA also created a bundle of rights referred to as unused old order rights.¹⁶⁸¹ In essence, these bundle of rights comprised firstly, of a combination of the rights listed in Tables 2 and 3, except that no prospecting or mining had been conducted under any of such rights or permissions prior to the commencement of the MPRDA or secondly, rights or permissions where no prospecting permits or mining authorisations under the 1991 Minerals Act had been issued in respect of such rights or permissions.¹⁶⁸² The holders of unused old order rights were afforded a period of one

¹⁶⁸¹ An "unused old order right" is defined in item 1 of schedule II of the MPRDA to mean: "any right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect."

¹⁶⁸² These rights and permissions listed in table 3 of schedule II of the MPRDA as unused old order rights are briefly the following:

- (a) Category 1 - a common law mineral right to diamonds for which no prospecting permit or mining authorisation was issued in terms of the 1991 Minerals Act.
- (b) Category 2 - a common law mineral right to diamonds in respect of which a prospecting permit or mining authorisation was issued in terms of the 1991 Minerals Act, but in respect of which no prospecting had been conducted immediately before the commencement of the MPRDA.
- (c) Category 3 - a consent to prospect in terms of s 6(1)(b) or 6(3) of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which a prospecting permit was issued in terms of the 1991 Minerals Act, but no prospecting had been conducted in respect of such prospecting permit immediately before the commencement of the MPRDA.
- (d) Category 4 - a consent to prospect in terms of s 6(1)(b) or 6(3) of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which no prospecting permit was issued in terms of the 1991 Minerals Act.
- (e) Category 5 - a prospecting lease, prospecting permit, prospecting licence or prospecting permission referred to in s 44 of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which a prospecting permit was issued in terms of the 1991 Minerals Act, but where no prospecting had been conducted immediately before the commencement of the MPRDA.
- (f) Category 6 - a prospecting lease, prospecting permit, prospecting licence or prospecting permission referred to in s 44 of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which no prospecting permit was issued in terms of the 1991 Minerals Act.
- (g) Category 7 - A consent to mine issued or granted in terms of s 9(1)(b) or 9(2) of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which a mining authorisation was issued in terms of the 1991 Minerals Act, but where no mining had been conducted immediately before the commencement of the MPRDA.
- (h) Category 8 - A consent to mine issued or granted in terms of s 9(1)(b) or 9(2) of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which no mining authorisation was issued in terms of the 1991 Minerals Act.

year from the commencement of the MPRDA to apply for a prospecting right or for a mining right.¹⁶⁸³ If the holder of an unused old order right applied within the one year period for either a prospecting right or mining right, the unused old order right remained valid until the application is granted and dealt with in terms of the MPRDA or is refused.¹⁶⁸⁴ If the holder of an unused old order right failed to comply for a prospecting right or a mining right within the one year period, the unused old order right ceased to exist.¹⁶⁸⁵

12.5.4 Lease of the State's interest in a mine

Item 9(7) of schedule II of the MPRDA provides as follows:

Any lease of the State's interest in a mine in terms of section 74 of the Precious Stones Act, 1964 (Act No. 73 of 1964), which was in force immediately before this Act took effect in terms of section 47(1)(a)(iii) of the Minerals Act continues in force subject to the terms and conditions contained in the document under which was granted or entered into.

As discussed above,¹⁶⁸⁶ the Minister was in terms of section 74 of the 1964 Precious Stones Act, entitled to lease the State's interest in any diamond mine to the person entitled to work the mine on the terms and conditions agreed to. A lease of the State's

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- (i) Category 9 - A consent to mine issued or granted in terms of s 9(1)(a) or 9(2) of the 1991 Minerals Act and the common law mineral right attached thereto in respect of which no mining authorisation was issued in terms of the 1991 Minerals Act.
 - (j) Category 10 - A right to dig or mine referred to in s 47 of the 1991 Minerals Act and the common law mineral right attached thereto, with a mining authorisation obtained in terms of s 42(1)(e) read with s 9(1) of the 1991 Minerals Act, but in respect of which no mining had been conducted immediately before the commencement of the MPRDA.
 - (k) Category 11 - Any permission to prospect or mine in terms of s 16(1) of the Bophuthatswana Land Control Act, s 16 of the Venda Land Control Act, s 15 of the Lebowa Minerals Trust Act, s 51(1) of the Rural Areas Act or s 6 of the Transformation of Rural Areas Act and the common law mineral right attached thereto and where a prospecting permit or mining permit had been issued in terms of the 1991 Minerals Act, but in respect of which no mining had been conducted immediately before the commencement of the MPRDA.

¹⁶⁸³ Item 8(2) of schedule II of the MPRDA. An applicant for a prospecting right had to comply with s 16 of the MPRDA and in the case of an application for a mining right, with s 22 of the MPRDA. *C4 Visser Delwerye (Pty) Limited v Du Plooy* 2006 All SA 614 (NC).

¹⁶⁸⁴ Item 8(3) of schedule II of the MPRDA.

¹⁶⁸⁵ Badenhorst and Mostert 2003 *Stellenbosch Law Review* 393; Badenhorst and Mostert "Transitional Arrangements" 25-31-25-34.

¹⁶⁸⁶ See para 10.6.2 above.

interest concluded in terms of section 74 of the 1964 Precious Stones Act continued in force in respect of former State land or alienated State land in terms of the 1991 Minerals Act as it formed part of the terms and conditions that were contained in a document and formed part of the right to mine contained in a discoverer's certificate in respect of State land and an owner's certificate (in respect of alienated State land and private land).¹⁶⁸⁷

It is submitted that a lease of the State's interest concluded in terms of section 74 of the 1964 Precious Stones Act does not form a component of an old order mining right listed in Table 2 or an unused old order right listed in Table 3 of schedule II of the MPRDA.¹⁶⁸⁸ It forms part of the terms and conditions relating to such rights which continued in force under the 1991 Minerals Act and only in respect of former State land and alienated State land. Dale *et al*¹⁶⁸⁹ hold a contrary view that a lease of the State's interest conferred on the lessee a right to mine which remained in force under the 1991 Minerals and therefore ranked as an old order mining right or unused old order right. According to Dale *et al*'s interpretation, a lease of the State's interest could form a component of the old order mining right referred to in Category 3 of Table 2 or of an unused old order right referred to in Category 10 of Table 3 of schedule II of the MPRDA.¹⁶⁹⁰ If the authors are correct, a lease of the State's interest would in terms of items 7(7) or 7(8) of schedule II of the MPRDA cease to exist when the old order mining rights or unused old order right cease to exist, which is in conflict with item 9(7) of schedule II of the MPRDA.¹⁶⁹¹ It can also and in support of the Dale *et al*¹⁶⁹² be argued, that item 9(7) of schedule II of the MPRDA was inserted to avoid the cessation of the lease of the State's interest in terms of items 7(7) or 7(8) of schedule II of the MPRDA. This argument is, however, based on the premise that a lease of the State's interest concluded in terms of section 74 of the 1964 Precious Stones Act

¹⁶⁸⁷ See para 11.3.2.7 above.

¹⁶⁸⁸ See paras 12.5.2 and 12.5.3 above.

¹⁶⁸⁹ Dale *et al Mineral and Petroleum Law* SCHII173; See para 11.3.2.7 above.

¹⁶⁹⁰ Dale *et al Mineral and Petroleum Law* SCHII173; See para 12.5.2.1.3 above.

¹⁶⁹¹ Dale *et al Mineral and Petroleum Law* SCHII173.

¹⁶⁹² Dale *et al Mineral and Petroleum Law* SCHII173-SCH174.

contained a right to mine and it is submitted that this is not correct.¹⁶⁹³ It is, for the reasons discussed above¹⁶⁹⁴ submitted that a lease of the State's interest in terms of section 74 of the 1964 Precious Stones Act was not *per se* a right to mine, it was merely a lease of the State's interest or right to share in the profits derived from the working of the diamond mine and concluded by virtue of the State's rights to dispose of diamonds. A lease of the State's interest formed part of the terms and conditions under which a mineholder or person was entitled to work a diamond mine in terms of the 1964 Precious Stones Act and such terms and conditions were, with certain exceptions preserved in section 47 of the 1991 Minerals Act.¹⁶⁹⁵ A lease of the State's interest therefore continued in force under the 1991 Minerals Act in respect of State land and alienated State land, not because it contained a right to mine, but because it formed part of the terms and conditions contained in a document in respect of the relevant right to dig or mine, which could be a discoverer's certificate or an owner's certificate.

It is submitted that in the case of a lease of the State's interest in respect of land where the rights to diamonds were previously held by the State (in the case of former State land or alienated State land) the lessee was for the duration of the lease agreement obliged to continue paying the lease consideration in terms of the 1991 Minerals Act.

As stated in chapter 1, it is not the focus of this study to analyse the impact of item 7(4) (or item 6(4) in the case of an old order prospecting right) of schedule II of the MPRDA. Item 7(4) of schedule II of the MPRDA could be interpreted to mean that the terms and conditions that formed part of an old order mining right continue to exist after the conversion thereof. This is on condition that such terms and conditions are not contrary to the MPRDA or the Constitution. It could be argued in support of this interpretation that item 9(7) of schedule II of the MPRDA was inserted to avoid a

¹⁶⁹³ Dale *et al Mineral and Petroleum Law* SCHII173-SCH174.

¹⁶⁹⁴ See para 11.3.2.7 above.

¹⁶⁹⁵ See para 11.3.2.7 above.

possible argument that the terms and conditions of a lease of a State's interest is contrary to the MPRDA. Conversely, it could also be argued that the insertion of item 9(7) of schedule II of the MPRDA was necessary to specifically preserve the provisions of a lease of the State's interest concluded in terms of section 74 of the 1964 Precious Stones Act (to the extent that it was preserved in terms of the 1991 Minerals Act) because the terms and conditions of the old order mining right, would otherwise cease to exist upon the cessation of the old order mining right and the registration of the mining right into which it is converted.¹⁶⁹⁶

12.6 Historical mine dumps or tailings

A number of diamond mines in South Africa have been in operation for more than a hundred years. Mining technology, particular during the early years following the discovery of diamonds, was such that diamondiferous material was placed on what was during the early years referred to as "depositing sites" or "depositing floors."¹⁶⁹⁷

Two question arises in respect of such historical tailings or old mine dumps,¹⁶⁹⁸ firstly, whether they are moveable or immovable property and secondly, whether they are regulated by the MPRDA. These two questions are briefly discussed below.

¹⁶⁹⁶ Before proceeding to discuss the relevance of historical development of the right to mine diamonds on historical or old mine dumps or tailings, reference should be made to item 9(1)(b) of schedule II of the MPRDA, which preserves certain reservations, permissions and certain rights to use the surface of the land. Although item 9(1)(b) of schedule II of the MPRDA refers specifically to the 1964 Precious Stones Act, item 9(1)(b) of schedule II of the MPRDA has no practical effect on diamonds mines. For a detailed discussion of item 9(1)(b) of schedule II of the MPRDA see Dale *et al Mineral and Petroleum Law* SCH-159-SCH-160.

¹⁶⁹⁷ The term "historical tailings" are hereafter used to refer to tailings created before the commencement of the MPRDA on 1 May 2004.

¹⁶⁹⁸ The Orange Free State Provincial Division held in the *Ataqua* case para 56 that: "The concept of tailings differs from mineral to mineral. Tailings comprise the mined material. It may have been put through a process of extraction or refinement, for example coal which has to be sold in small pieces. Tailings can be a heap, it is mined material. There are vast differences in the processes which different minerals have to go through. There is not a uniform process for all minerals to arrive at the extracted mineral or tailings." *Bosaletse v Minister of Mineral Resources* (O) (unreported) case number 1891/2013 of 26 September 2013.

12.6.1 Nature of tailings

In the *Mondira Pula* case, the Northern Cape Division *inter alia* had to determine the nature of a specific old mine dump, known as the "Stadium dump" which emanated from the historical mining operations in respect of the De Beers Mine. The court held as follows regarding the nature of tailings:¹⁶⁹⁹

There is certainly nothing in tailings that renders it specifically suitable for permanent annexation to land. There is also no indication in the manner of the '*annexation*' of the tailings to the land that would justify the conclusion that it had become part of the land. The evidence is quite clearly to the effect that it would be possible to discern between the tailings and the natural surface of the land and that it would be possible to separate and remove the tailings therefrom.

The question regarding the nature of historical tailings, in other words whether they have acceded to the land, is thus a factual question and will depend on the circumstances of each and every case. The court held further that the question as to whether the historical tailings have acceded to the land has to be determined by examining the following: ¹⁷⁰⁰

- (a) The nature of the substance that was dumped on the relevant land;
- (b) The manner of its annexation to the land; and
- (c) The intention of its owner in dumping the material on the land.

12.6.2 Regulation of historical tailings in terms of the MPRDA

Section 5A of the MPRDA prohibits the unauthorised mining or the commencement of any work incidental thereto of any "mineral" without complying with certain

¹⁶⁹⁹ At para 28. Van der Schyff *Property in Minerals and Petroleum* 313.

¹⁷⁰⁰ At para 28. See the *Ataqua* case. For a discussion of the *Ataqua* case, see Hartzer and Du Plessis 2014 *SAPL* 469-693. See also *Simmer and Jack Mines v GF Industrial Property Co* 1987 2 SA 654 (WLD) 658D-659A; *Standard-Vacuum Refining Co of South Africa (Pty) Limited v Durban City Council* 1961 2 SA 669 (A) 677H-678A; *Konstanz Properties (Pty) Limited v WM Spilhaus (WP) Bpk* 1996 (A); *Sumatie (Edms) Bpk v Venter* 1990 (1) SA 173 (T); *Bezuidenhout v Worcester Gold Mining Company* 1894 1 OR 249 at 251; *Roets v Secundior Sand BK* 1989 1 SA 902 (T) 906; Van der Walt and Pienaar *Introduction to the Law of Property* 117-122; Mostert *et al* *Law of Property* 165-167; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 5th ed 141-142; Van der Merwe *Sakereg* 2nd ed 244-258; Van der Merwe and Pope "Ownership" 496-504.

requirements. The prohibition in section 5A of the MPRDA is defined with reference to "any mineral". The MPRDA will therefore only regulate the mining of diamonds contained in historical tailings, if the diamonds are "minerals" for the purposes of the MPRDA. A "mineral" is defined in section 1 of the MPRDA to mean (own underlining):

any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes-

(a) water, other than water taken from land or sea for the extraction of any mineral from such water;

(b) petroleum; or

(c) peat.

The definition of a "mineral" in section 1 of the MPRDA firstly requires that the substance occurs naturally in or on the earth. In the *Ataqua* case, the Orange Free State Provincial Division held that the diamonds in the tailings which formed the subject of the dispute and which emanated from mining operations conducted in respect of the Jagersfontein Mine before the commencement of the MPRDA, do not occur "naturally in or on the earth." The High Court held that the relevant tailings were:¹⁷⁰¹

... formed by the placement of processed and partly processed materials to be reworked in future years when technology improves.

¹⁷⁰¹ At para 68. The court held further that: " (vi) A finding that the State is now the custodian of the minerals remaining in tailings dumps, would amount to expropriation, which is not expressly provided for and cannot be inferred to have been contemplated by the Legislature. Our law requires that a strict construction be placed upon statutory provisions which interfere with elementary rights ... Legislative provisions curtailing common law rights must be restrictively interpreted ... The court must be satisfied that the Legislature has in express terms or by clear implication altered the common law and taken away existing rights. If the Legislature intended to take away private rights in tailings dumps which have existed for more than a hundred years, it would have stated so clearly and unambiguously." For a different view see Badenhorst and Van Heerden 2010 *Stellenbosch Law Review* 116-131; Van der Schyff *Property in Minerals and Petroleum* 312-315.

The definition of a "mineral" in section 1 of the MPRDA secondly, also includes any substance that occurs in "residue stockpiles" and in "residue deposits."¹⁷⁰² "Residue stockpiles" and "residue deposits" have been specifically defined in the MPRDA. A residue stockpile" is defined in section 1 of the MPRDA to mean (own underlining):

any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right.

It is thus only debris, discard, tailings, slimes, screening, slurry, waste rock foundry sand, beneficiation plant waste, ash or any other product which was disposed of by someone who is the holder of a mining right, mining permit, production right or an old order right, that will be a "residue stockpile" as contemplated in the MPRDA. The terms "mining right", "mining permit" and "production right" are all defined in section 1 of the MPRDA to refer to such rights granted in terms of the MPRDA. The term "old order right" was inserted with the commencement of the First MPRDA Amendment Act and is defined in item I of the transitional provisions contained in schedule II to the MPRDA to refer to an "old order prospecting right, old order mining right or unused old order right". An "old order right" is a newly created statutory right that came into existence on 1 May 2004.¹⁷⁰³ Tailings that were created before the commencement of the MPRDA, can therefore not fall within the definition of a "residue stockpile" as they were not created by the holder of an "old order right".¹⁷⁰⁴

¹⁷⁰² The term "residue deposit" is defined in s 1 of the MPRDA to mean: "any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or an old order right."

¹⁷⁰³ The *Sishen CC* case para 63; *Xstrata* case para 10; *Holcim* case para 37. This was recently confirmed by the Northern Cape High Court in *Ekaapa Minerals (Pty) Limited v Lucky Seekoei* (NC)(unreported) case number 2057/2016 of 13 January 2017 (hereafter the *Ekaapa* case); Van der Schyff *Property in Minerals and Petroleum* 318.

¹⁷⁰⁴ Dale *et al Mineral and Petroleum Law* MPRDA-105. This interpretation was confirmed in the *Ekaapa* case. For a different view, see Badenhorst "Development of Mineral and Petroleum Law" 1-13.

It appears that this interpretation that the processing of historical tailings is not regulated by the MPRDA, is the correct interpretation. In the *Mineral and Petroleum Resources Development Amendment Bill* [B15D-2013]¹⁷⁰⁵ the Department of Mineral Resources seeks to further amend the definition of a "residue stockpile" to extend the definition to: "historic mines and dumps created before the implementation of this Act".¹⁷⁰⁶ It is clear from the 2013 MPRDA Bill that the Legislature intends to bring old tailings created before the commencement of the MPRDA, within the ambit of the MPRDA. The 2013 MPRDA Bill also provides for the insertion of the term "historic residue stockpiles" which is defined to mean:¹⁷⁰⁷

Any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is or was stockpiled, stored or accumulated for potential re-use, or which is or was disposed of, by the holder of any right or title (including common law ownership) other than a prospecting right, mining right, mining permit, exploration right or production right issued in terms of this Act.

It is not the focus of this study to analyse the 2013 MPRDA Bill, but it is submitted that the enactment of the 2013 MPRDA Bill will raise a number of problems with regard to historical tailings. Although the 2013 MPRDA Bill recognises that historic residue stockpiles and residue deposits which are currently not regulated under the MPRDA belong to its the owners, the 2013 MPRDA Bill provides that such historic residue stockpiles and residue deposits:

... continue in force for a period of two years from the date on which the Mineral and Petroleum Resources Development Amendment Act, 2014 is promulgated.

It appears that the Legislature intends that the ownership of such historic residue stockpiles and residue deposits continue for a period of two years. This in itself creates difficulties. The 2013 MPRDA Bill distinguishes between historic residue stockpiles and

¹⁷⁰⁵ Hereafter the 2013 MPRDA Bill.

¹⁷⁰⁶ In the *Ataqua* case para 68(vi) the court cautioned against this approach and held that the application of the MPRDA to tailings created before the commencement of the MPRDA, could amount to an expropriation. See the *Ekapa* case para 24; Van der Schyff *Property in Minerals and Petroleum* 319-320.

¹⁷⁰⁷ Clause 1(l) of the 2013 MPRDA Bill.

residue deposits located (a) within a mining area and (b) outside a mining area. The holder of a mining right or mining permit who owns "historic residue deposits"¹⁷⁰⁸ and residue stockpiles located within the mining area, is afforded an exclusive right to apply for an amendment of the mining works programme in terms of section 102 of the MPRDA to include such "stockpiles and deposits" into the right.¹⁷⁰⁹ Although the owner is only required to apply for the amendment of the mining works programme within the period of two years, it is not clear what the consequences will be if the consent in terms of section 102 of the MPRDA is not granted within the two year period. An owner will be entitled to wait until the very last day before the expiry of the two year period to apply for an amendment of the mining works programme. The proposed section 42A(1) of the MPRDA acknowledges the need to guarantee security of tenure and it is submitted that a reasonable interpretation as envisaged in section 4(1) of the MPRDA of the proposed section 42A(1) of the MPRDA is that the owner of a historic residue stockpile or residue deposit continues to be the owner pending the approval of the amendment to the mining work programme.¹⁷¹⁰ The relevant owner may also have to apply in terms of section 102 of the MPRDA for the amendment of the mining right to amend the duration of the mining right if the inclusion of the processing of "historic residue stockpiles" as part of the mining right, may result in an extension of the duration of the mining right.

The owner of any "historic residue deposit" and residue stockpile located outside the mining area, is afforded a period of two years to apply for a mining right or mining permit in terms of the MPRDA.¹⁷¹¹ The requirements for obtaining a mining right in terms of the MPRDA are extremely onerous. The owner of what is in fact already mined diamonds will *inter alia* have to prepare a social and labour plan which requires a number of financial and social commitments¹⁷¹² and comply with the requirements of

¹⁷⁰⁸ A term which is not defined in the 2013 MPRDA Bill.

¹⁷⁰⁹ The proposed s 42A(2) of the MPRDA read with clause 30 of the 2013 MPRDA Bill.

¹⁷¹⁰ See Van der Schyff *Property in Minerals and Petroleum* 319-320.

¹⁷¹¹ The proposed s 42A(4) of the MPRDA read with clause 30 of the 2013 MPRDA Bill.

¹⁷¹² Section 23(1)(e) of the MPRDA.

section 2(d) and (f) of the MPRDA. The owner will in terms of the proposed amendments to section 23(h) of the MPRDA also have to comply with the "Amended Broad Based Socio-Economic Empower Charter for the South Africa Mining and Minerals Industry" which in effect means the holder has to dispense with a certain percentage of its ownership.¹⁷¹³ If the intended "mining area" does not exceed five hectares in extent, the owner of any "historic residue deposit" and residue stockpile could apply for a mining permit in terms of section 27 of the MPRDA. Although an applicant for a mining permit is not required to submit a social and labour plan and there is no requirement to comply with sections 2(d) and (f) of the MPRDA, a mining permit is only granted for a limited period of time, which may not exceed two years. The holder of a mining permit may only renew the mining permit for three periods each of which may not exceed one year.¹⁷¹⁴

The proposed section 42A(9) of the MPRDA provides that in cases of "historic residue deposits" and residue stockpiles located outside the mining area, where the relevant owner failed to apply for a mining right or a mining permit within the period of two years, the custodianship of the minerals in such:

historic residues and stockpiles shall revert back to the State and the State shall be entitled to invite applications thereon in terms of section 9.

The wording of the proposed section 42A(9) of the MPRDA is problematic because the diamonds in the so-called "historic residue deposits" and residue stockpiles in respect of historical tailings were never "minerals" for purposes of the MPRDA and the custodianship thereof never vested in the State. It also raises the question why the proposed section 42A(9) only refers to "historic residue deposits" and residue stockpiles located outside a mining area and will the consequences be if the owner of these "historic residue deposits" and residue stockpiles situated within a mining area

¹⁷¹³ The proposed amendment of s 23(1)(h) of the MPRDA read with clause 18 of the 2013 MPRDA Bill.

¹⁷¹⁴ Section 27(8)(a) of the MPRDA.

fails to apply for the amendment of the mining works programme (and if necessary the mining right) within the period of two years.

The current position is that the owners of historical tailings are entitled to process such tailings to extract diamonds, without having to obtain a right or permission in terms of the MPRDA, as such processing does not constitute the mining of a "mineral" as defined in section 1 of the MPRDA. The diamonds contained in historical tailings are therefore not subject to the custodianship of the State in terms of the MPRDA.

12.7 Summary and conclusion

In this chapter the right to mine diamonds under the MPRDA was discussed. The prospecting and the mining of diamonds and all other minerals are regulated in terms of the MPRDA which brought an entire new mineral regime, in which the former land tenure, including common law rights to minerals were disconnected from the right to prospect or to mine for diamonds. Any person is entitled to obtain a prospecting right or a mining right in respect of any land, provided that they comply with the mandatory requirements of the MPRDA. The State, through the Minister may grant or refuse any prospecting right or mining right.

The only relevance of the form of land tenure in respect of the right to mine diamonds under the MPRDA is the transitional provisions contained in schedule II of the MPRDA. Three new types of statutory rights were created, each of which comprised of a number of different categories, namely old order mining rights, old order prospecting rights and unused old order rights.

The historical development of diamond mining legislation continues to impact on diamond mines where leases in terms of section 74 of the 1964 Precious Stones Act had previously been concluded in respect of former State land or alienated State land. A lease of the State's interest concluded in terms of section 74 of the 1964 Precious Stones Act does not form a component of an old order mining right listed in Table 2 or an unused old order right listed in Table 3 of schedule II of the MPRDA. It forms

part of the terms and conditions relating to such rights which continued in force under the 1991 Minerals Act and only in respect of former State land and alienated State land. A lease of the State's interest therefore continued in force under the 1991 Minerals Act in respect of State land and alienated State land, not because it contained a right to mine, but because it formed part of the terms and conditions contained in a document in respect of the relevant right to dig or mine and this lease of the State's interest continues in force in terms of item 9(7) of schedule II of the MPRDA subject to the terms and conditions under which it was granted or entered into.¹⁷¹⁵

The historical development of diamond mining legislation may also continue to impact on historical tailings, which are currently not regulated by the MPRDA. These historical tailings will be included within the ambit of the MPRDA if the 2013 MPRDA Bill comes into effect. It is inevitable that this inclusion of historical tailings, which is mostly regarded as movable assets belonging to the person or entity who lawfully mined and created the historical tailings, will be confronted by arguments of expropriation and it will be necessary for litigants and courts to consider the terms and conditions that applied to these historical tailings.

¹⁷¹⁵ See para 12.5.4 above.

Chapter 13 Summary and conclusion

13.1 Introduction

This study comprised of an analytical literature review of the historical development of diamond mining legislation in South Africa. The primary objective and research question of this study was to determine the influence of the form of land tenure on the historical development of the right to mine diamonds in South Africa. In order to achieve this primary objective and to answer the research question, it was necessary to review and analyse the historical development of diamond mining legislation in South Africa to determine:

- (a) Who was entitled to access land to prospect for or to mine diamonds; and
- (b) The rights and/or obligations of the holder of the right to prospect for or to mine diamonds.

Before discussing the outcome of the research with reference to the research question, a few introductory remarks are apposite. It is clear from an analysis of the historical development of diamond mining legislation that the diamond mining legislation in South Africa developed as a direct result of and following the discovery of diamonds in the late 1860s. It was right at the outset evident to the diggers working at the diamond fields that some form of regulation was necessary for the orderly working of what was referred to as "claims".¹⁷¹⁶

There were, in addition to the form of land tenure, at least three factors that influenced the development of diamond mining legislation in South Africa. The first is the governing authority. In almost all instances where there was a change in the governing authority in areas where diamonds had been discovered, one of the very first legislation that was amended and/or repealed, was the diamond mining legislation. The State or relevant Government had since the very early years following the proclamation of

¹⁷¹⁶ See paras 3.2 and 3.3 above.

Griqualand West as a British territory in 1871, played a regulatory role in respect of diamond mining.¹⁷¹⁷

The second factor which contributed to the development of diamond mining legislation in South Africa was the habitat or the source of the diamonds, in other words whether the diamonds occurred in alluvial form or in a kimberlite pipe. The 1874 GW Mining Ordinance which was enacted in Griqualand West, was the first diamond mining legislation in which the working of alluvial diggings and the mining of diamonds were regulated separately.¹⁷¹⁸ The separate regulation of the working of alluvial diggings and mining of diamonds was continued in the Cape Colony in terms of the 1899 Cape Precious Stones Act,¹⁷¹⁹ in the Orange River Colony in terms of the 1904 OFS Precious Stones Act¹⁷²⁰ and in the Transvaal Colony in terms of the 1903 Tvl Precious Stones Ordinance¹⁷²¹ and later in terms of the 1919 Alluvial Amendment Act.¹⁷²² When the different diamond mining legislation which applied in the four provinces of the Union of South Africa were consolidated in terms of the 1927 Precious Stones Act¹⁷²³ and thereafter in terms of the 1964 Precious Stones Act in the Republic of South Africa,¹⁷²⁴ the separate regulation of the working of alluvial diggings and the mining of diamonds was continued. All alluvial diggings were, however, with the commencement of the 1991 Minerals Act deproclaimed and with effect from 1 January 1994, a person who wanted to prospect for or to extract diamonds from former alluvial diggings had to apply for a prospecting permit or a mining authorisation in terms of the 1991 Minerals Act.¹⁷²⁵

The third factor which impacted on the development of diamond mining legislation, is the developments in diamond mining technology and in particular with reference to

¹⁷¹⁷ See para 4.2 above.

¹⁷¹⁸ See para 4.3.3 above.

¹⁷¹⁹ See para 5.3.4.2 above.

¹⁷²⁰ See para 6.5.5 above.

¹⁷²¹ See para 7.7.8 above.

¹⁷²² See para 7.7.9 above.

¹⁷²³ See para 9.4 above.

¹⁷²⁴ See para 10.7 above.

¹⁷²⁵ See para 11.3.3 above.

the early years following the discovery of the first diamonds, the method of diamond mining. The early diamond mining legislation had to make provision for depositing floors or sites, where mined material could be deposited and left to be pulverised by the sun because of the imperfections in the early primitive diamond mining methods.¹⁷²⁶ A further change in diamond mining legislation brought about by the method of diamond mining was the removal of the statutory prohibition on the number of claims that could be held and allowing claims to be amalgamated. This was in particular necessary in Griqualand West where diggers who owned individual claims removed the soil within each claim at their own time, resulting in ground slides between adjoining claims.¹⁷²⁷

In the remaining part of this final chapter, a brief summary of the influence of the form of land tenure on the historical development of the right to mine diamonds is provided.¹⁷²⁸ This thesis concludes with a few remarks and recommendations regarding the influence of the results of this study on diamond mines in South Africa.¹⁷²⁹

13.2 The influence of the form of land tenure

The historical development of the right to mine diamonds in South Africa depended primarily on the form of land tenure. It is clear from an analytical literature review of the historical development of diamond mining legislation that, despite the fact that the right to mine diamonds was in some legislation reserved to the Crown or relevant

¹⁷²⁶ In Griqualand West after the annexation thereof as part of the Cape Colony, the 1880 GW Mining Proclamation provided for depositing floors, see para 4.4.2.2 above. Thereafter provision was also made in the 1883 Cape Precious Stones Act for the use of depositing floors, see para 5.3.3.1 above. After the second Anglo-Boer War, provision was made in the 1904 OFS Precious Stones Ordinance for the proclamation of mining areas which could be used as depositing floors, see para 6.5.3.1 above. Similar provision was made in the Transvaal Colony in terms of the 1903 TVI Precious Stones Ordinance, see para 7.7.5 above. The provision for the proclamation of mining areas which could be used for depositing sites was continued in the Union of South Africa in terms of the 1927 Precious Stones Act, see para 9.4.6 above and in the Republic of South Africa in terms of the 1964 Precious Stones Act, see para 10.6 above.

¹⁷²⁷ See paras 4.3 and 4.3.6 above.

¹⁷²⁸ See para 13.2 below.

¹⁷²⁹ See para 13.3 below.

State, the form of land tenure had a direct impact on the question who was entitled to access land to prospect for or to mine diamonds.

In common law, the right to mine diamonds formed part of the entitlement of the holder of the rights to diamonds in respect of the relevant land.¹⁷³⁰ Unless the rights to diamonds had been severed from the title of the land, the rights to diamonds vested in the landowner in terms of the *cuius est solum* principle, which formed part and is submitted, still forms part of the common law of South Africa.¹⁷³¹

13.2.1 Part 1: Early diamond mining legislation

It is ironic that the Eureka diamond and the diamond rush that followed soon after the discovery of the Star of South Africa,¹⁷³² occurred at a place which was initially regarded as "no-man's land" and where the boundaries of the former Boer Republics and the Cape Colony appeared to have met.¹⁷³³ There was, with the exception of land in the former Cape Colony and where land had been granted under perpetual *quitrent* in terms of the Cradock Proclamation, no statutory reservation in any of the diamond mining legislation of the right to mine diamonds in favour of the British Crown or the relevant Government when the Eureka diamond was discovered in 1866.¹⁷³⁴ In fact, there was no legislation in force which regulated the searching for or the working of diamonds in what later became known as Griqualand West.¹⁷³⁵ Although the diggers did not necessarily respect the rights of landowners during the early diamond mining years, the rules that were adopted evidenced that they conceded that some form of

¹⁷³⁰ See para 1.1 above.

¹⁷³¹ See paras 2.1 and 12.2 above.

¹⁷³² See para 3.2 above.

¹⁷³³ See para 3.2 above. Although the question as to who was entitled to the legal control of the diamond fields should have been finally resolved in the Keate award, it appears that this remained in dispute as appears from the *Stockenstrom judgment in the matter of certain land claims* and the *Carter* case, discussed in para 4.2.2 above. This question appears still to be relevant with reference to the *obiter* finding of the Constitutional Court in the *Sishen CC* case para 3, that the relevant authorities refused to recognise the Griqua's claim in respect of the diamond fields, which is clearly incorrect. See para 3.4 above.

¹⁷³⁴ Section 4 of the Cradock Proclamation, see para 2.3 above.

¹⁷³⁵ Although it may be argued that the 1865 NM Mining Leases Act applied in respect of diamonds, it did not apply to the diamond fields. See fn 1144 above.

payment was due to the landowners of privately owned land where diamonds had been recovered.¹⁷³⁶

After the diamond fields were awarded to the Griqua chiefdom of Nicholas Waterboer, the British Government proclaimed the area as a British territory, known as Griqualand West. During the period 1871 and 1872, the mining of diamonds in Griqualand West was regulated by the 1871 GW Diggings Proclamation and the 1872 GW Prospecting Proclamation.¹⁷³⁷ When Griqualand West was designated as a Province, the diamond mining legislation was, with certain exceptions again amended in the form of the 1874 GW Mining Ordinance.¹⁷³⁸ Approximately two weeks before the annexation of Griqualand West as part of the Cape Colony in 1880, the diamond mining legislation was amended in terms of the 1880 GW Fixity of Tenure in Mines Ordinance¹⁷³⁹ and the 1880 GW Mining Proclamation.¹⁷⁴⁰ There was no statutory reservation of the right to mine diamonds in any of the aforementioned diamond mining legislation in favour of the British Crown or the relevant Government. From the discussion of the diamond mining legislation adopted by each of the three administrations, it appears that the question as to who was entitled to prospect or search for diamonds or to work claims at the diamond fields, depended on the specific form of land tenure.

¹⁷³⁶ At Pniel, one of the first diggers' camps at the Vaal River, the Diggers' Committee acknowledged the right of the landowner to charge a fee of ten shillings per claim for the working of each claim, see para 3.2.2 above. At the so-called "dry-diggings", the Dutoitspan Diggings Regulations provided that each digger was entitled to work a maximum of two claims and in return the digger had to pay the landowner a royalty, see para 3.3.1 above. Similar arrangements, where the landowner permitted the diggers to search for diamonds in return for the payment of a royalty, were in place at the farm Bultfontein, see para 3.3.2 above and at the farm Vooruitzicht, see para 3.3.3 above.

¹⁷³⁷ See para 4.2 above.

¹⁷³⁸ See para 4.3.3 above.

¹⁷³⁹ See para 4.4.1 above.

¹⁷⁴⁰ See para 4.4.2 above.

Three forms of land tenure existed, namely Crown land,¹⁷⁴¹ reserved private land¹⁷⁴² and unreserved private land.¹⁷⁴³ In the case of Crown land and reserved private land, the rights to diamonds vested in the British Crown or the relevant Government by virtue of the *cuius est solum* principle. Unreserved private land was land that was granted to individuals mainly by the Government of the Orange Free State. The landowner of the unreserved private land was in terms of the *cuius est solum* principle, the holder of the rights to the diamonds *in situ*.¹⁷⁴⁴

During the period 1871 and 1872, there was no legislation regulating the prospecting for diamonds on Crown land in Griqualand West. The prospecting for diamonds on reserved private land and unreserved private land was for the first time regulated in terms of the 1872 GW Prospecting Proclamation. A person who wanted to prospect on reserved private land required a prospecting licence and in the case of unreserved private land, it is submitted that an applicant in addition to a prospecting licence, required the landowner's consent. The 1871 GW Diggings Proclamation provided for a diamond field to be proclaimed on Crown land and on reserved private land, in the latter instance the consent of the landowner was not required. A diamond field could, however, only be regulated on unreserved private land, with the consent of the landowner.¹⁷⁴⁵

During the period that Griqualand West was designated a province, the 1874 GW Mining Ordinance regulated the prospecting and working of claims on Crown land and on reserved private land. The 1874 GW Mining Ordinance did not apply to the prospecting for diamonds or the working of claims on unreserved private land and the

¹⁷⁴¹ The term Crown land was used in chapter 4 to refer to land that was owned by the British Crown or Government.

¹⁷⁴² The term reserved private land was used in chapter 4 to refer to land that was privately owned or held under perpetual *quitrent* in terms of the Cradock Proclamation, but where the rights to diamonds were reserved in favour of the Crown or Government.

¹⁷⁴³ The term unreserved private land was used in chapter 4 to refer to land that was privately owned without any reservation of the rights to diamonds in the title deed of the land in favour of the British Crown or Government.

¹⁷⁴⁴ See fn 11 above.

¹⁷⁴⁵ See para 4.2.2 above and schedule A below.

1871 GW Diggings Proclamation read with the 1872 GW Prospecting Proclamation continued to apply in respect of unreserved private land.¹⁷⁴⁶ Diamond fields could be proclaimed on Crown land and on reserved private land and diggings could be converted to a mine or proclaimed as a mine. Similar provisions applied in terms of the 1880 GW Mining Proclamation when Griqualand West was annexed as part of the Cape Colony in 1880.¹⁷⁴⁷ Schedule A hereto provides a schematic summary of the persons entitled to prospect for diamonds or to work claims in diamond fields in Griqualand West during the period 1871 until 1880.

13.2.2 Part 2: The British colonies, the Boer Republics and the Union of South Africa before 1927

Different diamond mining legislation regulated the mining of diamonds in the former Cape Colony, Natal, the ZAR and the Orange Free State. After the Second Anglo-Boer war ended in 1899, new diamond mining legislation was enacted in the former two Boer Republics, which became British Colonies known as the Transvaal Colony and the Orange River Colony. In the Transvaal Colony, the 1903 Tvl Precious Stones Ordinance¹⁷⁴⁸ was enacted and in the Orange River Colony, the 1904 OFS Precious Stones Ordinance.¹⁷⁴⁹

13.2.2.1 Cape Colony

In the Cape Colony, there was with the exception of the Cradock Proclamation, which only applied to land granted under perpetual *quitrent*, no general statutory reservation of the right to mine diamonds in favour of the relevant Crown or Government. The diamond mining legislation in the Cape Colony, which after 1880 included Griqualand West, was consolidated in terms of the 1883 Cape Precious Stones Act and after its repeal, in terms of the 1899 Cape Precious Stones Act. The question, namely who was

¹⁷⁴⁶ See para 4.3.3.1 and figure 4.1 in para 4 5 above and schedule A below.

¹⁷⁴⁷ With reference to the 1874 GW Mining Ordinance, see para 4.3.3.2 above and with reference to the 1880 GW Mining Proclamation, see para 4.4.2.2 above and schedule A below.

¹⁷⁴⁸ See para 7.7 above.

¹⁷⁴⁹ See para 6.5 above.

entitled to prospect for or to mine diamonds in the 1883 Cape Precious Stones Act and the 1899 Cape Precious Stones Act, depended on the form of land tenure. Three forms of land tenure were distinguished in the 1883 Cape Precious Stones Act and in the 1899 Cape Precious Stones Act namely Crown land, reserved private land¹⁷⁵⁰ and unreserved private land.¹⁷⁵¹ The 1883 Cape Precious Stones Act did not apply to unreserved private land, except in the case of existing mines and alluvial diggings that had already been opened on unreserved private land.

The exercise of the right to prospect for or to mine diamonds required a prospecting licence in terms of the 1883 Cape Precious Stones Act and after its repeal, also in terms of the 1899 Cape Precious Stones Act.¹⁷⁵² Initially, the consent of the owner of reserved private land was not required, but this was changed with the commencement of the 1887 Cape Precious Stones Amendment Act which afforded more protection to the owner of reserved private land.¹⁷⁵³ In the case of unreserved private land, the prospecting of diamonds continued to be regulated by the 1872 GW Prospecting Proclamation, which required that a prospecting licence be obtained and it is submitted also the consent of the landowner.¹⁷⁵⁴ The mining of diamonds on unreserved private land in the Cape Colony, was only regulated by the 1883 Cape Precious Stones Act in respect of mines and alluvial diggings that had already been proclaimed as such with the commencement of the 1883 Cape Precious Stones Act or in instances where the landowner consented to the proclamation of mines or alluvial diggings on the unreserved private land. The remaining unreserved private land was, however, subject to the 1894 Cape Private Mine Inspection Act.¹⁷⁵⁵ The 1899 Cape Precious Stones Act

¹⁷⁵⁰ The term "reserved private land" was used in chapter 5 to refer to land that was privately owned, but the title deed of which contained a reservation of the rights to diamonds in favour of the Crown. See para 5.3.1 above.

¹⁷⁵¹ The term "unreserved private land" was used in chapter 5 to refer to privately owned land, the title deed of which did not contain a reservation of the rights to diamonds in favour of the Crown. See para 5.3.1 above.

¹⁷⁵² See para 5.3.2.1 above.

¹⁷⁵³ See para 5.3.2.1 above.

¹⁷⁵⁴ See para 5.3.1 above.

¹⁷⁵⁵ See para 5.3.1 above.

did not apply to unreserved private land and the *status quo* was thus preserved in respect of unreserved private land when the 1899 Cape Precious Stones Act commenced on 6 October 1899.¹⁷⁵⁶

An important amendment was brought about by the commencement of the 1907 Cape Precious Stones Amendment Act on 21 September 1907, which amended the 1899 Cape Precious Stones Act in that it made provision for the Crown to share in the profits derived from the working of diamond mines on Crown land and on reserved private land. There was no provision in the 1907 Cape Precious Stones Act which reserved the right to mine diamonds in favour of the Government or British Crown. In instances where diamond mines were discovered and proclaimed after 21 September 1907 on land where the rights to diamonds were reserved to the Crown, the Crown was entitled to share in the profits derived from the working of the mine. In the latter instance, the discoverer was entitled to work the new diamond mine on Crown land and on reserved private land. Provision was also made for the discoverer and the landowner to share in the profits derived from the working of the mine.¹⁷⁵⁷ Schedule B hereto provides a schematic summary of the persons entitled to prospect for or to mine diamonds in the Cape Colony between 1883 until 1927.

13.2.2.2 Orange Free State and Orange River Colony

There was no general statutory reservation of the rights to diamonds in favour of the Crown or Government in the Orange Free State. The diamond mining legislation that regulated the mining of diamonds in the Republic of the Orange Free State was the 1871 OFS Diamond Fields Ordinance¹⁷⁵⁸ and the 1891 OFS Statute which was a codification of all statutes in the Orange Free State.¹⁷⁵⁹ After the Second Anglo-Boer ended, the 1904 OFS Precious Stones Ordinance was enacted in respect of the Orange

¹⁷⁵⁶ See para 5.3.1 above and figure 5.2 in para 5.3.1 above.

¹⁷⁵⁷ See para 5.4 above.

¹⁷⁵⁸ See para 6.3 above.

¹⁷⁵⁹ See para 6.4 above.

River Colony.¹⁷⁶⁰ The question as to who was entitled to mine diamonds in the Orange Free State before 1927 depended on the form of land tenure.

A person who wanted to prospect for diamonds or work claims in the Republic of the Orange Free State on land owned by the Government, required the permission from the State President.¹⁷⁶¹ In the case of private land, the permission of the landowner was required.¹⁷⁶² The 1904 OFS Precious Stones Ordinance distinguished between Crown land¹⁷⁶³ and private land. A person who wanted to prospect for diamonds on unalienated Crown land, and on alienated Crown land had to obtain a prospecting licence. In the case of alienated Crown land, the consent of the landowner was not required.¹⁷⁶⁴ The 1904 Orange Free State Ordinance made provision for the Government to share in the profits derived from the working of diamond mines proclaimed after 17 June 1904. The question, who was entitled to work the mines, depended on the form of land tenure. The shares that the Government, the discoverer and the relevant landowner were entitled to also depended on the form of land tenure.¹⁷⁶⁵ In the case of unalienated Crown land or alienated Crown land, the discoverer of the diamond mine who held a discoverer's certificate was entitled to elect to work the mine. In the case of private land, the landowner was entitled to elect to work the mine.¹⁷⁶⁶

A number of existing mines which existed in the Orange Free State was recognised as such in the 1904 OFS Precious Stones and were excluded from the application of the 1904 OFS Precious Stones Ordinance. The 1904 OFS Precious Stones Ordinance only applied to such existing mines insofar as its provisions were not repugnant to the any

¹⁷⁶⁰ See para 6.5 above.

¹⁷⁶¹ Law 27 of 1899, which amended the 1891 OFS Statute. See para 6.4.2 above.

¹⁷⁶² Law 16 of 1899, which amended the 1891 OFS Statute. See para 6.4.4 above.

¹⁷⁶³ The term "Crown land" was used in chapter 6 above to refer to unalienated Crown land, which was land owned by the Government and alienated Crown land, which was land alienated by the Government, but subject to the reservation of the rights to diamonds in favour of the Government. See para 6.45 above.

¹⁷⁶⁴ See para 6.5.1 above.

¹⁷⁶⁵ See para 6.5 and figures 6.1 and 6.2 in para 6.5.2 above.

¹⁷⁶⁶ See para 6.5.3 above.

of the prior repealed laws.¹⁷⁶⁷ Schedule C hereto provides a schematic summary of the persons entitled to prospect for or to mine diamonds in the Republic of the Orange Free State and thereafter in the Orange River Colony until 1927.

13.2.2.3 ZAR and the Transvaal Colony

The former ZAR differed from the Republic of the Orange Free State and the two British Colonies in that the right to mine precious stones in the ZAR was from the very first Gold Law, *Law 1* of 1871 reserved to the State irrespective of the form of land tenure.¹⁷⁶⁸ This statutory reservation of the right to mine precious stones in favour of the Government was continued in *Law 22* of 1898, when the mining of and dealing in precious stones were for the first time regulated in separate legislation.¹⁷⁶⁹ Despite this unqualified statutory reservation, it appears that the right to prospect for and to mine diamonds in terms of *Law 22* of 1898 depended on the form of land tenure. *Law 22* of 1898 distinguished between private land and State land.¹⁷⁷⁰ The landowner of private land was in terms of *Law 22* of 1898 entitled to prospect on his own land, without having to obtain a prospecting licence. Any person who wanted to prospect on private land, required the written permission of the landowner and a prospecting licence. A person who wanted to prospect on State land also required a prospecting licence.¹⁷⁷¹ The landowner of private land could, however, not prevent or oppose the proclamation of a public digging on his land.¹⁷⁷² The landowner of private land and the discoverer of diamonds, were entitled to be awarded a number of claims in terms of *Law 22* of 1898.¹⁷⁷³

¹⁷⁶⁷ See para 6.5.4 above.

¹⁷⁶⁸ See para 7.4 above.

¹⁷⁶⁹ See para 7.5 above.

¹⁷⁷⁰ The term "State land" was defined in *Law 22* of 1898 to refer only to land that belonged to the Government and the term "private land" was defined in *Law 22* of 1898 to include land which was privately owned but the title deeds of which contained a reservation of the rights to diamonds in favour of the Government. See para 7.5.1 above.

¹⁷⁷¹ See para 7.5.2 above.

¹⁷⁷² See para 7.5.3 above.

¹⁷⁷³ See paras 7.5.4 and 7.5.5 above.

In the Transvaal Colony, the right to mine for and to dispose of all precious stones was in terms of the 1903 Tvl Precious Stones Ordinance reserved to the Crown. Despite the unqualified reservation of the right to mine diamonds it appears that the question as to who was entitled to prospect for or to mine diamonds in terms of the 1903 Tvl Precious Stones Ordinance, depended on the form of land tenure and the holder of the rights to diamonds.

The 1903 Tvl Precious Stones Ordinance distinguished between Crown land, which was defined to include land that had been alienated by the Crown, but subject to the reservation of the rights to precious stones in favour of the Crown.¹⁷⁷⁴ A person that wanted to prospect for diamonds on Crown land required a prospecting licence. In the case of alienated Crown land, the consent of the landowner was not required.¹⁷⁷⁵ The owner of private land was in terms of the 1903 Tvl Precious Stones Ordinance entitled to prospect on his land without having to obtain a prospecting licence and he could also grant written consent to any other person to prospect for diamonds on his land.¹⁷⁷⁶ Similar to the position in the Cape Colony and in the Orange River Colony, the 1903 Tvl Precious Stones Ordinance provided for the Crown to share in the profits derived from the working of a diamond mine. The discoverer of the mine and the landowner of private land, were also entitled to share in the profits and their shares depended on the form of land tenure.¹⁷⁷⁷ In the case of Crown land, the holder of a discoverer's certificate was entitled to elect to work the mine and in the case of private land, the holder of an owner's certificate was entitled to elect to work the mine.¹⁷⁷⁸

Schedule D hereto provides a schematic summary of the persons entitled to prospect for or to mine diamonds in the ZAR and thereafter in the Transvaal Colony until 1927.

¹⁷⁷⁴ Referred to in chapter 7 as alienated Crown land. See fn 879 above.

¹⁷⁷⁵ See para 7.7.2 above.

¹⁷⁷⁶ See para 7.7.3 above.

¹⁷⁷⁷ See para 7.7.7 above and figures 7.1 and 7.2 in para 7.7.7 above.

¹⁷⁷⁸ See para 7.7.7 above.

13.2.2.4 Natal

The mining of diamonds in Natal was not regulated in separate legislation. This is most probably due to the fact that there were no reports of the discovery of diamond mines in Natal. There was also no provision in the mining legislation in Natal for the Crown to share in the profits derived from any diamond mine. Although Natal was primarily during the period before 1927 known as a British Colony, the Cradock Proclamation was never enacted in respect thereof.¹⁷⁷⁹ The right to mine for and dispose of precious stones was in Natal during the period 1887 until 1927 reserved to the Crown, but in every instance the reservation was expressly stated to be subject to the provisions of the relevant mining legislation and it appears from an analysis of the mining legislation that the right to mine diamonds would have depended on the specific form of land tenure.¹⁷⁸⁰

13.2.3 Part 3: The Union of South Africa after 1927

The different diamond mining legislation that applied in the former colonies and after 31 May 1910 in the Union of South Africa, was consolidated in the 1927 Precious Stones Act. The right to mine for precious stones was in terms of the 1927 Precious Stones Act reserved in favour of the Crown, but subject to the provisions thereof. There was thus no absolute reservation of the right to mine diamonds in favour of the Crown in the Union of South Africa.¹⁷⁸¹ It is submitted that the right to prospect for and to mine diamonds in terms of the 1927 Precious Stones Act depended on the form of land tenure and the holder of the rights to diamonds. Three different types of land tenures were provided for, namely unalienated Crown land, alienated Crown land and private land. In the case of unoccupied unalienated Crown land, the right to prospect for diamonds vested in the Crown and a person who wanted to prospect thereon had

¹⁷⁷⁹ See para 8.2 above.

¹⁷⁸⁰ See para 8.4.1 above with reference to the statutory reservation of the right to mine and dispose of precious stones in terms of the 1887 Natal Mines Law, the 1888 Natal Mines Law, the 1889 Zululand Proclamation and the 1894 Zululand Proclamation.

¹⁷⁸¹ Section 1 of the 1927 Precious Stones Act. See para 9.4.1 above.

to obtain a prospecting permit.¹⁷⁸² In the case of alienated Crown land, the right to prospect for diamonds vested in the surface owner of the land provided that he obtained a prospecting permit to exercise the right. The surface owner could also nominate another person to prospect on such land. The right of the surface owner of alienated Crown land to prospect on his own land was qualified in that the Crown was entitled to take or expropriate such land for public or for mining purposes.¹⁷⁸³ In the case of private land, the holder of the rights to diamonds in respect of the land was entitled to prospect for diamonds in respect of the land without a prospecting permit.

The discoverer of a diamond mine, the holder of the rights to precious stones in respect of private land and the landowner of unalienated Crown land, were also entitled to share in the profits in the profits derived from the working of the mine and their shares depended on the form of land tenure.¹⁷⁸⁴ The person who was entitled to work a diamond mine in terms of the 1927 Precious Stones Act depended on the form of land tenure. In the case of unalienated Crown land, the holder of a discoverer's certificate was entitled to elect to work the mine and in the case of private land, the holder of an owner's certificate was entitled to elect to work the mine. In the case of the proclamation of a diamond mine on alienated Crown land, the surface owner who was the holder of an owner's certificate was entitled to elect to work the mine.¹⁷⁸⁵ In the case of private land, the holder of the rights to precious stones who held an owner's certificate was entitled to elect to work the mine.¹⁷⁸⁶

The rights of the discoverer, surface owner, holder of the rights to precious stones and the Crown to shares in the mine should be distinguished from the right to work the mine. The right of the Crown to a share in a proclaimed mine, was a right to receive a share of the profits derived from the working of the mine. The 1927 Precious Stones Act specified who was entitled to work a proclaimed mine or alluvial digging, depending

¹⁷⁸² See para 9.4.2.1 above.

¹⁷⁸³ See para 9.4.2.2 above.

¹⁷⁸⁴ See para 9.4.7.2 above.

¹⁷⁸⁵ See para 9.4.7.3 and figure 9.2 in para 9.4.7.2 above.

¹⁷⁸⁶ See para 9.4.7.3 and figure 9.3 in para 9.4.7.2 above.

on the form of land tenure. Schedule E hereto provides a schematic summary of the persons entitled to prospect for or to mine diamonds in the Union of South Africa after the enactment of the 1927 Precious Stones Act.

13.2.4 Part 4: The Republic of South Africa prior to the MPRDA

13.2.4.1 The 1964 Precious Stones Act

The 1964 Precious Stones Act was enacted a few years after South Africa became a Republic and regulated the prospecting for and the mining of diamonds for a number of decades until it was repealed by the 1991 Minerals Act. The 1964 Precious Stones Act continued to apply in respect of the former TBVC-states and the self-governing territories until 7 December 1994 with the commencement of the 1994 Mineral Rationalisation Act, when the 1991 Minerals Act became applicable in the former TBVC-states and self-governing territories.¹⁷⁸⁷

The right of mining for and disposing of precious stones was in terms of section 2 of the 1964 Precious Stones Act vested in the State, but subject to the provisions of the 1964 Precious Stones Act. There was thus no absolute reservation of the right to mine diamonds in favour of the State. In addition, an analysis of the 1964 Precious Stones Act reveals that the right to mine depended on the form of land tenure and in effect the holder of the rights to diamonds. The State's right to dispose of diamonds appears from the provisions in the 1964 Precious Stones Act that the State could share in the profits derived from the working of the mine. The State was in terms of section 74 of the 1964 Precious Stones Act entitled to lease its interest in a mine to a person entitled to work the mine, which in turn depended on the form of land tenure.¹⁷⁸⁸ In the case of State land, the right to elect to work a mine vested in the holder of a discoverer's certificate. In the case of alienated State land and private land, the right to elect to work the mine vested in the holder of an owner's certificate.¹⁷⁸⁹ Schedule E hereto

¹⁷⁸⁷ See para 11.4 above.

¹⁷⁸⁸ See para 10.6.2 above.

¹⁷⁸⁹ See para 10.6.1 above.

provides a schematic summary of the persons entitled to prospect for or to mine diamonds in the Republic of South Africa in terms of the 1964 Precious Stones Act.

13.2.4.2 The 1991 Minerals Act

The 1964 Precious Stones Act was repealed by the 1991 Minerals Act. There was no statutory reservation of the right to mine diamonds in favour of the State in the 1991 Minerals Act. With exception of the transitional provisions in the 1991 Minerals Act which preserved certain prospecting and mining rights,¹⁷⁹⁰ the question who was entitled to prospect for or to mine diamonds depended on the common law holder of the rights to diamonds. A prospecting permit or mining authorisation was required to exercise such right, but in essence only the holder of the rights to diamonds or the person who has obtained the written permission of such holder, could apply for a prospecting permit or a mining authorisation in terms of the 1991 Minerals Act. The form of land tenure, at least in instances where the rights to diamonds had not been severed from the title deed of the land, continued to influence the right to mine diamonds in terms of the *cuius est solum* principle.¹⁷⁹¹ The 1991 Minerals Act was repealed by the MPRDA on 1 May 2004.

13.2.5 Part 5: The Republic of South Africa under the MPRDA

The form of land tenure had a significant influence on the historical development of the right to mine diamonds in South Africa. The right to prospect for or to mine diamonds was prior to the enactment of the MPRDA, dependent on the form of land tenure and in certain respects on the holder of the common law rights to diamonds. The unfortunate consequence is that for a large part of the twentieth century, the majority of the people in South Africa were excluded from the opportunity of acquiring any authorisation to mine diamonds in South Africa as a result of South Africa's racial discriminatory system referred to as "apartheid."

¹⁷⁹⁰ See para 11.3 above.

¹⁷⁹¹ See para 11.2 above.

The MPRDA forms part of the key legislation enacted to address the inequality of access to the minerals (including diamonds) of South Africa. With effect from 1 May 2004, all persons who want to prospect for or mine diamonds (and all other minerals) in the Republic of South Africa, has to obtain a prospecting right or a mining right in terms of the MPRDA. The effect of the MPRDA was to completely disconnect the right to mine for diamonds (and other minerals) from land tenure.

Certain former rights which existed prior to the enactment of the MPRDA were preserved in the form of three newly created statutory rights, namely old order prospecting rights, old order mining rights and unused old order rights.¹⁷⁹² Common law mineral rights ceased to exist, except to the extent that they formed part of old order prospecting rights, old order mining rights or unused old order rights provided for in schedule II of the MPRDA. The form of land tenure is therefore no longer relevant in respect of new applications for prospecting rights or mining rights, except that the application for a prospecting right or a mining permit or mining right has to consult with a landowner.¹⁷⁹³

13.3 Concluding remarks and recommendations

Having analysed the historical development of the right to mine diamonds in South Africa, from the discovery of the famous Eureka diamond until the current dispensation under the MPRDA, where there is an entire disconnect between the right to mine diamonds from land tenure, the unavoidable question remains, namely what is the impact of the historical development of the right to mine diamonds on diamond mines in South Africa. This question was already alluded to in the introduction of this thesis when the relevance of this research was discussed.

¹⁷⁹² See para 12.5 above.

¹⁷⁹³ See para 12.2 above.

The first impact is the possible argument that certain terms and conditions which applied to old order rights continue to apply in respect of converted old order prospecting rights¹⁷⁹⁴ or converted old order mining rights.¹⁷⁹⁵ There are a number of arguments which could be raised in support of both options. It is, however, submitted that the courts will as far as possible, avoid having to interpret this provision. The Department of Mineral Resources clearly holds the view that the terms and conditions which applied to old order rights, cease to exist when the old order rights cease to exist, as no reference whatsoever is made to previous terms and conditions that applied to old order rights or to item 6(4) or item 7(4) of schedule II of the MPRDA in the mining right which is notarially executed and registered in the Mineral and Petroleum Titles Registration Office. It will from a practical perspective also be difficult to determine with regard to both former old order prospecting rights and old order mining rights, which terms and conditions apply. These terms and conditions could be included in a number of agreements, title deeds and repealed diamond mining legislation. It is submitted that the correct approach will be to follow the approach enunciated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁷⁹⁶ where more than one interpretation is possible, namely to prefer a sensible meaning to one that leads to "insensible or unbusinesslike results."

The courts may, however, not be able to avoid interpreting the terms and conditions which applied to old order mining rights insofar as they are relevant for purposes of item 9(7) of schedule II of the MPRDA, namely dealing with the lease of the State's interest. As discussed above,¹⁷⁹⁷ a lease of the State's interest in terms of section 74 of the 1964 Precious Stones Act was not a right to mine, it was merely a lease of the State's interest or right to share in the profits derived from the working of the diamonds mine and concluded by virtue of the State's right to dispose of diamonds. The lease of the State's interest formed part of the terms and conditions under which a mineholder

¹⁷⁹⁴ Item 6(4) of schedule II of the MPRDA.

¹⁷⁹⁵ Item 7(4) of schedule II of the MPRDA.

¹⁷⁹⁶ 2012 4 SA 593 (SCA) at para 18.

¹⁷⁹⁷ See paras 11.3.2.7 and 12.5.4 above.

was entitled to work a diamond mine in terms of the 1964 Precious Stones Act and such terms and conditions were, with certain exceptions preserved in section 47 of the 1991 Minerals Act. It is submitted that in the case of a lease of the State's interest in respect of land where the rights to diamond were previously held by the State, the lessee was for the duration of the agreement obliged to continue paying the lease consideration in terms of the 1991 Minerals Act. This lease of the State's interest continues in force in terms of item 9(7) of schedule II of the MPRDA subject to the terms and conditions under which it was granted or entered into.¹⁷⁹⁸

There is finally the issue of so-called historical tailings, which the Department of Mineral Resources will be including within the ambit of the MPRDA if the 2013 MPRDA Bill is enacted and comes into effect. The 2013 MPRDA Bill provides for the owners of historical tailings to (a) apply for the amendment of their mining work programmes where the historical tailings are located within a mining area or (b) apply for a mining right or a mining permit where the historical tailings are located outside a mining area. The enactment of the 2013 MPRDA will raise a number of difficulties.¹⁷⁹⁹ In instances where the historical tailings have not acceded to the relevant land, they are currently considered to be moveable assets and belong to the person or entity who lawfully mined them. The inclusion of these historical tailings as part of a mining right or mining permit will no doubt, raise arguments about expropriation and it will be necessary for litigants and courts to consider the terms and conditions that applied to these historical tailings. It is recommended that when the courts are confronted with the terms and conditions which applied to diamond mines proclaimed before the commencement of the MPRDA, the courts and in particular the relevant legal representatives have proper regard to the historical development of the relevant diamond mining legislation and

¹⁷⁹⁸ See para 12.5.4 above.

¹⁷⁹⁹ See para 12.6.2 above.

refrain from any unsubstantiated submissions and assertions. In conclusion, one can only agree with the following quotation from Wiener,¹⁸⁰⁰ quoted by Van Zyl¹⁸⁰¹:

... a lawyer who is ignorant of legal history, who is not trained to use the techniques of historical scholarship and who is unable to defend his client's case against fictitious history and unproved or unprovable historical assertions when those are used against it, is not simply unlearned, he is poorly equipped, and therefore ineffective ...

This is even more appropriate in the context of this thesis as the diamond mining legislation in South Africa developed as a direct result of the discovery of diamonds.

¹⁸⁰⁰ Wiener *Uses and Abuses of Legal History*.

¹⁸⁰¹ Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 3.

ANNEXURES

Schedule A: Griqualand West from 1871 until 1880

Nature of activity	Form of land tenure	1871 GW Diggings Proclamation	1872 GW Prospecting Proclamation	1874 GW Mining Ordinance	1880 GW Mining Proclamation
Prospecting	Crown land	Unregulated	Unregulated	Prospector had to register as a miner and obtain a prospecting licence	Prospector required a prospecting licence
	Reserved private land	Unregulated	Required a prospecting licence and not consent from landowner	Prospector had to register as a miner and obtain a prospecting licence. Consent of landowner was not required	Prospector required a prospecting licence and consent of landowner was not required
	Unreserved private land	Unregulated	Required a prospecting licence and consent from landowner	1871 GW Diggings Proclamation and the 1872 GW Prospecting Proclamation applied	1871 GW Diggings Proclamation and the 1872 GW Prospecting Proclamation applied
Digging or mine	Crown land	High Commissioner could proclaim diamond field. Diggers required claim licence	Not relevant	Diggers had to register as a miner and obtain claim licence	Diggers had to register as a miner and obtain claim licence
	Reserved private land	Consent of landowner not required to proclaim diamond field. Diggers required claim licence	Not relevant	Diggers had to register as a miner and obtain claim licence	Diggers had to register as a miner and obtain claim licence
	Unreserved private land	Consent of landowner required to proclaim diamond field. Diggers required claim licences	Not relevant	1871 GW Diggings Proclamation applied	1871 GW Diggings Proclamation applied

Schedule B: Cape Colony from 1883 until 1927

Nature of activity	Form of land tenure	1883 Cape Precious Stones Act	1899 Cape Precious Stones Act	1899 Cape Precious Stones Act as amended in terms of 1907 Cape Precious Stones Act
Prospecting	Crown land	Prospector required a prospecting licence	Prospector required a prospecting licence	Prospector required a prospecting licence
	Reserved private land	Prospector required a prospecting licence and after enactment of the 1887 Cape Precious Stones Amendment Act also the consent of the landowner	Prospector required a prospecting licence and the consent of the landowner	Prospector required a prospecting licence and the consent of the landowner
	Unreserved private land	Prospecting licence and the consent of the landowner in terms of the 1872 GW Prospecting Proclamation	Prospecting licence and the consent of the landowner in terms of the 1872 GW Prospecting Proclamation	Prospecting licence and the consent of the landowner in terms of the 1872 GW Prospecting Proclamation
Digging or mine	Crown land	Governor could proclaim a mine or an alluvial digging. Miners or diggers required claim licence	Prospecting licence	1899 Cape Precious Stones Act before amendment continued to apply in respect of mines or diggings proclaimed before 21 September 1907
	Reserved private land	Governor could proclaim or an alluvial digging. Miners or diggers required claim licence	Prospecting licence and the consent of the landowner	1899 Cape Precious Stones Act before amendment continued to apply in respect of mines or diggings proclaimed before 21 September 1907
	Existing mines proclaimed before 27 September 1883 on unreserved private land	Miners or diggers required claim licence	1883 Cape Precious Stones Act continue to apply	1883 Cape Precious Stones Act continue to apply
	Mines proclaimed after 21 September 1907 on Crown land or on reserved private land	Not relevant	Not relevant	Discoverer of the mine who held either a discoverer's or an owner's certificate was entitled to work the mine
	Other unreserved private land	Not applicable	Not applicable	Not applicable

Schedule C: Orange Free State and Orange River Colony until 1927

Nature of activity	Form of land tenure	1871 OFS Diamond Fields Ordinance	1891 OFS Statute	1904 OFS Precious Stones Ordinance
Prospecting	Land owned by the Government of the Republic of the Orange Free State	Not regulated	Regulated in terms of <i>Law 27</i> of 1894. Prospector required permission from the State President and conditions had to be recorded in a written agreement	Not applicable
	Crown land (unalienated and alienated] in the Orange River Colony	Not applicable	Not applicable	Prospector required a prospecting licence from the Lieutenant-Governor. In the case of alienated Crown land the consent of the landowner was not required
	Private land in the Republic of the Orange Free State	Not regulated. Prospector would have required landowner's consent	<i>Law 16</i> of 1899 provided that Government could only proclaim a prospecting area if the landowner himself prospected or granted permission	Not applicable
	Private land in the Orange River Colony	Not applicable	Not applicable	Landowner could prospect without a prospecting licence. Other prospectors required landowner's written consent and a prospecting licence from the Resident Magistrate
Digging or Mine	Land owned by Government of the Republic of the Orange Free State	Not regulated	Regulated in terms of <i>Law 27</i> of 1894. Prospector required permission from the State President. Conditions had to be recorded in a written agreement	Not applicable
	Crown land (unalienated and alienated) in the Orange River Colony	Not applicable	Not applicable	Holder of discoverer's certificate was entitled to elect to work the mine
	Private land in the Republic of the Orange Free State	The State President could proclaim diggings on the land. Diggers required a digger's licence	<i>Law 16</i> of 1899 provided that Government could only proclaim new public diggings if the landowner granted permission	Not applicable.
	Private land in the Orange River Colony	Not applicable	Not applicable	Holder of owner's certificate was entitled to elect to work the mine
	Certain existing mines after 17 June 1904	Not applicable	Continued to apply as amended in terms of number of laws	Not applicable if repugnant to previous laws

Schedule D: ZAR and the Transvaal Colony until 1927

Nature of activity	Form of land tenure	Law 22 of 1898	1903 Tvl Precious Stones Ordinance
Prospecting	State land in the ZAR	Prospector required a prospecting licence	Not applicable
	Private land in the ZAR (including private land where the rights to precious stones were reserved in favour of the State)	Landowner was entitled to prospect without a prospecting licence. Other prospectors required landowner's written permission and a prospecting licence	Not applicable
	Crown land in the Transvaal Colony (including unalienated and alienated Crown land)	Not applicable	Prospector required a prospecting licence and in the case of alienated Crown land, the consent of the landowner was not required
	Private land in the Transvaal Colony	Not applicable	Landowner was entitled to prospect on his own land without a prospecting licence. Other prospectors could only prospect with the consent of the landowner
Digging or mine	State land in the ZAR	Holder of a claim was entitled to work the diggings	Not applicable
	Private land in the ZAR (including private land where the rights to precious stones were reserved in favour of the State)	Public digging could be proclaimed without the landowner's consent. Holder of a claim was entitled to work the diggings	Not applicable
	Crown land in the Transvaal Colony (including unalienated and alienated Crown land)	The State President could proclaim diggings on the land. Diggers required a digger's licence	The holder of a discoverer's certificate was entitled to elect to work a mine
	Private land in the Transvaal Colony	Not applicable	Mine could be proclaimed without landowner's consent. The holder of an owner's certificate was entitled to elect to work a mine.

Schedule E: 1927 Precious Stones Act and the 1964 Precious Stones Act

Nature of activity	Form of land tenure	1927 Precious Stones Act	1964 Precious Stones Act
Prospecting	Unalienated Crown land/ Unalienated State land	Prospector required a prospecting permit	Prospector required a prospecting lease
	Alienated Crown land/ Alienated State land	The surface owner had the exclusive right to prospect, but required a prospecting permit. The surface owner could also nominate another person to prospect on his land	Surface owner had the exclusive right but required a prospecting permit. The surface owner could also nominate another person to prospect on his land
	Private land	The holder of the rights to diamonds was entitled to prospect without a prospecting permit and could permit others to prospect on his land	The holder of the rights to diamonds was entitled to prospect but required a prospecting permit and could permit others to prospect on the land
Digging or mine	Unalienated Crown land/ Unalienated State land	The holder of a discoverer's certificate was entitled to elect to work the mine	The holder of a discoverer's certificate was entitled to elect to work the mine
	Alienated Crown land/ Alienated State land	The surface owner who was the holder of an owner's certificate was entitled to elect to work the mine	The holder of an owner's certificate was entitled to elect to work the mine
	Private land	The holder of the rights to precious stones who held an owner's certificate was entitled to elect to work the mine	The holder of an owner's certificate was entitled to elect to work the mine
	Unreserved private land in the Cape Colony on which mining or digging operations had been carried on prior to 6 October 1899 and a certificate in terms of section 2(1) of the 1927 Precious Stones Act had been issued	Continued to be regulated by the 1883 Cape Precious Stones Act	Continued to be regulated by the 1883 Cape Precious Stones Act until 19 March 1976
	Unreserved private land in the Cape Colony on which mining or digging had been carried on between 6 October 1899 and 1 April 1927 and a certificate in terms of section 2(1) of the 1927 Precious Stones Act had been issued	Continued to be regulated by the 1894 Cape Private Mines Inspection Act applied	Continued to be regulated by the 1894 Cape Private Mines Inspection Act applied
	Certain existing mines referred to in Part 8 of the 1904 OFS Precious Stones Ordinance	Continued to be regulated by the 1891 OFS Statute as amended in terms of number of laws	Continued to be regulated by the 1891 OFS Statute as amended in terms of number of laws
	Mines proclaimed in terms of prior laws	Continued to be regulated under laws in terms of which the mines were proclaimed in so far as they were not repugnant to administrative provisions in Part II of Chapter V of the 1927 Precious Stones Act	Continued to be regulated under laws in terms of which the mines were proclaimed in so far as they were not repugnant to administrative provisions in Part II of Chapter V of the 1927 Precious Stones Act

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