An enquiry into the accommodation of rights and permits to minerals awarded in terms of the Mineral and Petroleum Resources Development Act 28 of 2002, in the administration of a deceased estate

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ABSTRACT

The intention of this study was to assess, through the lens of succession law, the provisions of the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the MPRDA), and the entitlements that arose from them, namely being: reconnaissance permissions, retention permits, mining permits, and prospecting and mining rights. These rights and permits are hereinafter collectively referred to as "entitlements to minerals". In the spirit of this theme, the objective was to determine how entitlements to minerals, acquired in terms of the MPRDA, by a person during his/her lifetime, could be accommodated into the administration of such persons deceased estate, after his/her death. It is argued in this work, that for an entitlement to minerals to be eligible for such accommodation, it must be an asset of the deceased estate. Thus, the secondary objective was to determine whether each entitlement to mineral, respectively granted or issued in terms of the MPRDA, could be regarded as deceased estate assets. To address this primary and secondary objectives, it was necessary to determine the meaning and scope of the term 'estate asset'. Thereafter, the nature and transferability of the entitlements to minerals was ascertained. This was in order to determine whether any of these entitlements could be regarded as estate assets. After identifying which of these categories of entitlements to minerals would be regarded as estate assets, one was then able to further determine how such relevant entitlements should be accommodated in the process of administrating the deceased estate.

OPSOMMING

Die doel van die studie was om vanuit die oogpunt van erfopvolgingsreg die bepalings van die Wet op die Ontwikkeling van Minerale en Petroleumhulpbronne, Wet 28 van 2002 (MPRDA), asook die regte wat hieruit voortspruit, naamlik verkenningsvergunnings, retensiepermitte, mynpermitte en prospekteer- en mynregte, vas te stel. Die versamelterm *regte op minerale* is in die studie vir bogenoemde regte en permitte gebruik.

Die doel was om te bepaal hoe die regte op minerale wat ’n persoon ingevolge die Wet op die Ontwikkeling van Minerale en Petroleumhulpbronne in die loop van sy of haar lewe verkry het, ná sy of haar dood in die bereddering van sodanige persoon se bestorwe boedel hanteer moet word.

Die studie betoog dat die regte op minerale reeds ’n bate in die bestorwe boedel sou moes wees alvorens dit vir sodanige hantering oorweeg kan word. Derhalwe was die sekondêre doel om te bepaal of alle regte op minerale wat toegestaan of uitgereik is ingevolge die Wet op die Ontwikkeling van Minerale en Petroleumhulpbronne beskou kan word as bates in bestorwe boedels.

Die primêre en sekondêre doelwitte het vereis dat die betekenis en omvang van die term *boedelbate* bepaal moes word. Daarna is die aard en oordraagbaarheid van die regte op minerale ondersoek ten einde te bepaal of enige van hierdie regte as boedelbates beskou kan word. Nadat daar vasgestel is watter kategorie regte op minerale as boedelbates beskou kan word, is bepaal hoe sodanige regte hanteer moet word in die bereddering van die bestorwe boedel.

CONTENTS

ABBREVIATIONS

AEA	*Administration of Estates Act* 66 of 1965
MPRDA	*Minerals and Petroleum Resources Development Act* 28 of 2002
MTRA	*Mining Titles Registry Act* 16 of 1967.
SALJ	*South African Law Journal*
SAMCODES	South African Mineral Reporting Codes
SAMVAL	The South African Code for the Reporting of Mineral Asset Valuation
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*

1 Introduction

1.1 Background and research question

With the promulgation of the *Mineral and Petroleum Resources Development Act*,[1] (hereinafter the MPRDA), the country's mineral and petroleum resources were vested in the nation.[2] Although this development brought about a regime change regarding the ownership of unsevered mineral resources,[3] the statutory regulation under the MPRDA regarding access to, and the development of, the country's mineral resources still provides for the acquisition of certain entitlements to mineral resources. In this regard the MPRDA provides for reconnaissance permissions,[4] retention permits,[5] mining permits,[6] and prospecting and mining rights.[7] These rights and permits are hereinafter collectively referred to as "entitlements to minerals". The MPRDA prescribes the acquisition, transfer, and termination of the entitlements to minerals that can be acquired in terms of the Act.

This dissertation focuses on with the accommodation and transfer of entitlements acquired in terms of the MPRDA during the administration of a deceased estate. The need for a study of this nature is illustrated by actual problems encountered by the researcher acting as an executor in two separate deceased estates. The first relates to a deceased client who held the rights to mine gold on his farm. The second was a deceased client who held the permit to mine sand from a large river in KwaZulu-Natal. While in both matters the mining enterprises were small in nature, they yielded significant income to the clients and provided employment to many members of their respective families. The families were wholly dependent on the continuation of the mining endeavours after the client's deaths. It therefore follows that the research question underpinning this mini-dissertation is: "How can rights and permits to minerals

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1 *Mineral and Petroleum Resources Development* Act 28 of 2002 (hereinafter the MPRDA).
2 The Preamble of the MPRDA reads: "Acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof . . . ".
3 The previous regime was regulated by the *Minerals Act* 50 of 1991. S 5(1) stated that the entitlement of the holder of a mineral right, be it the landowner or a person who acquired the mineral right after severance (s 1 of the Act), to prospect and dispose of minerals within a statutory framework. Mostert *et al The Principles of the Law of Property in South Africa* 269; van der Schyff *Property in Minerals and Petroleum* ch5 and ch6.
4 S 14(1).
5 S 32(2).
6 S 27(7)(a).
7 S 5.

granted and issued in terms of the MPRDA be accommodated in the administration of deceased estates?

The intention of this study was to assess the provisions of the MPRDA and the entitlements that arose from them through the lens of succession law and not mining or environmental law. To deal with an entitlement to minerals in a deceased estate, an executor first needs to determine whether the relevant entitlement is an asset that needs to be accounted for in the estate as an estate asset. If such an asset is deemed to be an estate asset, the executor needs to determine how it should be accommodated in the process of administrating the deceased estate.

1.2 Objectives of the study

The main objective of this mini dissertation was to determine how statutory entitlements to minerals could be accommodated in the administration of a deceased estate. In order to realise this primary objective, a secondary objective needed to be addressed first. This secondary objective was to determine whether entitlements to minerals respectively granted or issued in terms of the MPRDA could be regarded as estate assets.

1.3 Framework of the study

To address the primary and secondary objectives set out above, it was necessary to determine the meaning and scope of the term ‘estate asset’. Thereafter, the nature and transferability of entitlements to minerals respectively granted or issued in terms of the MPRDA needed to be ascertained. This is in order to determine whether any of these entitlements could be regarded as estate assets. Once it is determined which, if any, of these categories of entitlements to minerals would be regarded as estate assets, it has to be determined how these entitlements should be accommodated in the administration of deceased estates.

2 Entitlements to minerals as estate assets

2.1 Introduction

When the accommodation and transfer of entitlements to minerals, acquired in terms of the MPRDA, in the administration of a deceased estates, is under discussion, it first needs to be determined whether these entitlements should be regarded as estate assets. In order to realise this objective of the study, it is important to delineate the term 'estate asset' at the outset of the discussion. Thereafter, it will be possible to determine which, if any, of the entitlements to minerals provided for in the MPRDA could be categorised as an estate asset.

2.2 Estate assets

The question: "What is an estate asset?" is an interesting one to answer considering the fact that no piece of legislation[8] specifically defines this kind of asset. The need for being able to define estate assets is evident from the fact that letters of executorship, granted in terms of the *Administration of Estates Act*[9] (hereinafter the AEA) authorise executors to administer deceased estates assets.[10] For the purpose of this work, two distinct aspects pertaining to estate assets were viewed together in order to create a working explanation of the term. These two aspects are, namely (i) the source and (ii) the nature of the estate asset.

In the deduction of the first of these distinct aspects (being the source of estate assets) the writings of Meyerowitz are useful. Meyerowitz states: "In the ordinary sense, estate includes all the deceased's assets wherever situated."[11] This description indicates that the source of estate assets are the deceased's assets, but it is submitted here that this is only a partial description as to what will be regarded as an estate asset. Section 9 of the AEA provides further insight into the full description as to what will be regarded as an estate asset. Section 9(1)(a) of the AEA determines as follows:

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8 Many sources utilize the definition of 'property' in terms of s 3 of the *Estate Duty Act* 45 of 1955 as the definition of an estate asset. This is wholly inadequate as the definition caters for different needs (i.e., taxation).
9 *Administration of Estates Act* 66 of 1965 (hereinafter the AEA).
10 S 12 of the AEA.
11 Meyerowitz *Administration of Estates and Their Taxation* 15–30.

> [One must] make an inventory in the prescribed form, in the presence of such persons having an interest in the estate as heirs as may attend, of all property known by him to have belonged, at the time of the death–
> (i) to the deceased; or
> (ii) in the case of the death of one of two or more spouses married in community of property, to the joint estate of the deceased and such surviving spouse; or
> (iii) in the case of the death of one of two or more persons referred to in section thirty-seven, to the massed estate concerned;

From this section one gleans that the source of the estate assets of any given deceased estate can be the assets of the deceased, the assets of a joint estate of spouses married in community of property[12] and/or assets of a massed estate under section 37 of the AEA.[13] More importantly, assets are property, which leads to the deduction of the second "distinct aspect", namely the nature of an estate asset. If section 9 of the AEA is considered, it is clear that only those entitlement that can be regarded as property could be regarded as estate assets. Unfortunately, this exposition still does not assist in defining which "things" can be regarded as "property" that will fall within the ambit of section 9 of the *AEA*. Fortunately, Regulation 3 of the *Administration of Estates: Regulations*[14] provides valuable guidance in this regard.[15] Regulation 3 determines that:

> Form B in Schedule I shall, by deleting therefrom matter which is not applicable in the relevant circumstances, be applied to make an inventory in pursuance of sections 9, 27 or 78 of the Act.

12 In South Africa universal community of property applies as the default matrimonial property system in civil marriages (Heaton *The Law of Divorce and Dissolution of Life Partnerships* 59). At the moment of the conclusion of a marriage in community of property a so-called merger of estates takes place, thus the two separate estates of the spouses' merge into one joint or shared estate (Robinson *et al Introduction to South African Family Law* 142). Each spouse acquires an undivided and indivisible share, which means that no asset can physically be divided and that no rights belong exclusively to one of the spouses. Bounded co-ownership presupposes that neither of the spouses can alienate his or her share in the joint estate. The two sections of the estate are indivisibly joined to each other and one part cannot be sold, donated or burdened independently from the other (*Ex parte Menzie et Uxor* 1993 3 SA 799 (K) at 811) (hereinafter the *Menzie* case). Thus, upon the death of a spouse married in community of property, the whole joint estate vests in the executor (Meyerowitz *Administration of Estates and Their Taxation* 12–20) even those assets that are registered in the name of the surviving spouse. (Meyerowitz *Administration of Estates and Their Taxation* 12–28) It is these assets of which the executor takes possession.

13 S 37 of the AEA deals with massing, which is the occurrence of two or more persons executing a joint will in which each person adds a part or the whole of his or her estate to that of the other and they jointly dispose of it on the death of one of them (Abrie *et al Deceased Estates* 80). Before massing occurs, certain requirements need to be met. Firstly, it must be ascertained that the testators intended their assets to be massed. This is because of the interpretation of wills rule, that there is a presumption against massing (Abrie *et al Deceased Estates* 80; Baker *The Drafting of Wills 42–43*). Once it is ascertained that the testator did intend to mass his or her assets, then the survivor must adiate (accept) the massing of the assets, for massing to occur. If the survivor repudiates the massing, the massing will not occur, irrespective of the conditions of the will.

14 GN R473 in *GG* 3425 March 1972.

15 Reg 3 in GN R473 in *GG* 3425 March 1972.

Form B[16] provides for three distinct categories of property, namely (i) immovable property, (ii) movable property and (iii) claims in favour of the estate.[17] Thus, to be regarded as an estate asset, the nature of a "thing" must be categorised as either immovable property, movable property or a claim in favour of the estate. It is necessary for the sake of comprehensiveness to provide a basic exposition of these three categories of property. It should be noted that a definition of 'property' for purposes of the administration of deceased estates will differ substantially from a discussion of what property entails for purposes of section 25 of the Constitution.[18] For this reason, the two concepts must be kept separate from each other.

2.2.1 Immovable and movable property of a deceased estate

Things are movable when they can be moved from one place to another without being damaged or losing their identity, while immovable things cannot be so moved.[19] Typical examples of movable property are furniture and vehicles. Land is the most typical

16 Of schedule 1 current format J 243.

17 Kernick seemingly concurs with this submission that the assets of the estate must originate from a source listed in s 9(1) of the AEA and submits that the assets of the estate must be immovable property, movable property or a claim in favour of the estate (Kernick dedicates three pages to a discussion of these three categories and how the executor practically obtains information about each type of assets in the absence of the deceased's pre-death guidance of exactly what he or she owned, in order to complete the Preliminary Inventory). However, Kernick does not state why the assets must be one of these three kinds but does mention that the "inventory form is obtained from the Master's office" and it needs to be completed by placing the assets in one of the three categories (Kernick *Administration of Estates & Drafting of Wills* 12–15). It is submitted here that the reason, which Kernick lacks, is that Reg 3 (as discussed above) only allows for estate assets to be immovable property, movable property or a claim in favour of the estate. Meyerowitz also seemingly concurs with the submission. He submits that the contents of the inventory of a deceased estate must fall under the heading "for purposes of the prescribed form" as either immovable property, movable property or a claim in favour of the estate (Meyerowitz *Administration of Estates and Their Taxation* 6–3). However, his writing is contradictory when it comes to the sources of the estate assets as either only being the deceased assets or being all the sources listed in s 9(1) of the AEA. It is submitted here that in the light of the forgone submissions the correct stance is that the source of estate assets is not only the deceased's assets, but also the other sources listed in s 9(1) of the AEA.

18 Although an interest is recognised as a property right at common law, customary law or in terms of legislation, the courts will have to consider independently whether said interest is property for the sake of s 25 of the *Constitution of the Republic of South Africa* 1996 (hereinafter the Constitution)(Roux and Davis 'Property' in *Cheadle et al South African Constitutional Law: The Bill of Rights* ch 15, ch 20). This is because, for the purpose of identifying property as "constitutional property", the court should not view property as a collection of hierarchically ordered individual property rights (as a traditional common law approach would), but rather as a single, regulated system of rights and obligations within which the spirit, purpose and objectives of the Bill of rights must be realised (van der Walt *Property and Constitution* 173). See *Shoprite Checkers (Pty) Ltd v Members of the Executive Council for Economic Development, Environmental Affairs and Tourism, Easter Cape* 2015 6 SA 125 (CC) par 51, (hereinafter the *Shoprite* case). While in the *Shoprite* case Moseneke DCJ, Madlanga J and Froneman J all held different views on the meaning of the concept of "constitutional property", van der Schyff points out that the three Justices agreed that the question whether a particular interest constituted "constitutional" property had to be determined on a case-by-case basis, considering the facts of each case and within the country's historical context (Van der Schyff *Property in Minerals and Petroleum* 383).

19 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 34; Du Bois *et al (eds) Willie's Principles of South African Law* 421; Mostert *et al The Principles of the Law of Property in South Africa* 33.

example of an immovable. However, incorporeal things[20] are particularly problematic to classify as immovable or movable, because it is seemingly illogical to base the decision on their mobility when incorporeal things cannot physically be moved.[21] Mostert *et al* explain that in Roman-Dutch law the mobility of an incorporeal thing was established only when necessary,[22] with the decisive factor being the nature of the object of the right concerned.[23] Thus, some incorporeals will always be immovable when their object is immovable;[24] an example of this is the nature of a *habitatio* being immovable. Likewise, some incorporeals will always be movable because their object is movable;[25] an example of this is the nature of a share in a company being movable.[26] However, case law[27] has shown that rights, licences and quotas,[28] as incorporeals, are particularly difficult to classify. *Mostert et al*[29] argue that there is not enough clarity in case law to enable the formulation of a single general rule in this regard. However, regarding what is immovable property in a deceased estate, section 1 of the AEA does provide guidance in defining 'immovable property' as:

> Immovable property: means land and every real right in land or minerals (other than any right under a bond) which is registrable in any office in the Republic used for the registration of title to land or the right to mine;

Considering this definition, it is clear that an estate asset is immovable property if it can be defined as a real right in minerals that is registrable in any office in the Republic of South Africa, which assists greatly in respect of the classification of incorporeal things

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20 Things are classed as corporeal or incorporeal according to the convictions of the community, that is, when they are tangible or can be perceived by the senses (Mostert *et al The Principles of the Law of Property in South Africa* 32). Incorporeal things cannot be touched or perceived by the senses, "they are abstract conceptions with no physical existence but an intrinsic pecuniary value" (Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 34). It is submitted here that the entitlements to minerals that are granted or issued by the MPRDA are incorporeals.

21 Mostert *et al The Principles of the Law of Property in South Africa* 34.

22 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 35.

23 *Lief NO v Dettman* 1964 2 SA 252 (A) at 266.

24 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 34; Du Bois et al (eds) *Willie's Principles of South African Law* 421; Mostert *et al The Principles of the Law of Property in South Africa* 34.

25 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 34; Du Bois et al (eds) *Willie's Principles of South African Law* 421; Mostert *et al The Principles of the Law of Property in South Africa* 34.

26 Mostert *et al The Principles of the Law of Property in South Africa* 34.

27 In the case *Receiver of Revenue, Cape v Cavanagh* 1912 AD 459 at 463, a liquor license was found not to be ratable for municipal purposes, and not subject to transfer duty upon sale of the land because the license was not immovable property. However, Mostert *et al* discuss the fact that the same train of thought is applied inconsistently as in the cases *De Chazal De Chamarel's Estate v Tongaat Group Ltd.* 1972 1 SA 710 (D), a matter concerning sugar quotas, such quotas seemingly follow the land to which they have been allotted and are seen to be immovable, (Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 37).

28 See par 2.3 below, entitlements to minerals, granted or issued in terms of the MPRDA come in the form of rights, permits and permissions (similar to rights, licenses and quotas).

29 Mostert *et al The Principles of the Law of Property in South Africa* 35.

However, unfortunately, the AEA does not contain a similar definition for 'moveable property', leading to the classification of incorporeal things as movable being particularly problematic.[30]

2.2.2 Claims against the estate

Meyerowitz[31] states that a claim in favour of the estate is "[a]ll claims which the deceased has against other persons". Kernick[32] concurs with Meyerowitz and provides as examples of such claim balances in current, savings and deposit accounts, and amounts due in respect of salary and leave pay.

2.3 Entitlements to minerals

In the South African context all entitlements to minerals originate from the provisions of the MPRDA.[33] These entitlements come in the form of rights, permits and permissions.[34] The MPRDA provides for reconnaissance permissions,[35] retention permit,[36] mining permit,[37] prospecting rights[38] and mining rights.[39] The investigation at this point is to determine whether these entitlements to minerals granted or issued by the MPRDA can be described as either immovable property, movable property or a claim in favour of the estate, because if they can, then the first hurdle in determining whether these entitlements can be regarded as estate assets is crossed. If it is indicated as per this discussion that some or all of the entitlements to minerals can be regarded

30 As seen in par 2.3.2 below.
31 Meyerowitz *Administration of Estates and Their Taxation* 6–4.
32 Kernick *Administration of Estates and the Drafting of Wills* 14.
33 These entitlements can be granted or issued to either a juristic person (such as a company) or a natural person. Owing to the specific focus of this dissertation, entitlements held by juristic persons fall outside the scope of this work and, consequently, the discussion will only focus on entitlements as held by natural persons. It is acknowledged that a limited number of cases will exist where entitlements to minerals are awarded to a natural person, but practice has shown that such cases exist.
34 Mostert *et al The Principles of the Law of Property in South Africa* 276.
35 S 14(1). The holder of reconnaissance permission is entitled to enter the designated land for the purpose of conducting non-invasive reconnaissance operations (Van der Schyff *Property in Minerals and Petroleum* 349).
36 S 32(2). The holder of a prospecting right may apply for a non-transferable retention permit (Van der Schyff *Property in Minerals and Petroleum* 356).
37 S 27(7)(a). The holder of a mining permit may mine for the particular mineral for which the permit was granted on the land identified in the permit, for his or her own account (van der Schyff *Property in Minerals and Petroleum* 370).
38 S 17(1). The holder of a prospecting right may prospect for the particular mineral for which the right was granted on the land identified in the right (van der Schyff *Property in Minerals and Petroleum* 356).
39 Ss 5, 11 and 25 ensure that the holder of the mining right is entitled to exercise all such subsidiary or ancillary rights, without which he or she will not be able to carry on his or her mining operation effectively (van der Schyff *Property in Minerals and Petroleum* 371).

as estate assets, it needs to be determined further whether there are any statutory provisions that may negate such a view.[40]

2.3.1 Entitlements to minerals as immovable property

An overview of what the immovable property is deemed to be in a deceased estate was provided in paragraph 2.2.1 above. Considering this, it can be stated that rights, permits and permissions (granted or issued by the MPRDA) can be described as immovable property, for purposes of the AEA, if they can be defined as (i) a real right, [and] (ii) which is registrable in any office in the Republic of South Africa. Thus, the following is an investigation into whether any of such rights, permits and permissions can be described as (i) a real right, [and] (ii) whether or not they are registrable.

In conventional property law, rights may be differentiated as being either real rights or personal rights. A basic theoretical distinction is that a real right establishes a direct relationship between the person and the property, while a personal right establishes a relationship between one person and another in respect of a delictual or contractual obligation called a "performance".[41] A complementary explanation of this difference is found in the personalist theory.[42] This theoretical approach focuses on the person against whom the particular rights operate.[43] A real right can be enforced against all other people,[44] while a personal right can only be enforced against the person who is party to the agreement.[45] This distinction is not always clear and thus South African courts have developed a special approach (known as the 'subtraction from the

40 The second component of the investigation, namely determining whether such entitlements could originate from one of the three sources listed above, as indicated by s 9(1)(a) of the AEA, see par 2.2 above, is largely a question of fact and thus would only be relevant in application to a particular set of facts in a real-life situation. As such, they are not discussed here.

41 Badenhorst, Pienaar and *Mostert Silberberg and Schoeman's The Law of Property* 51; Mostert *et al The Principles of the Law of Property in South Africa* 45.

42 Mostert *et al The Principles of the Law of Property in South Africa* 45.

43 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 51– 54; Du Bois (ed) *et al Willie's Principles of South African Law* 428–429; Mostert *et al The Principles of the Law of Property in South Africa* 45.

44 Kilborn and Botha (Kilborn and Botha *The ABC of Conveyancing* 2–4) describe this as "strong rights in relation to things and can generally be enforced against the whole world as opposed to just one or two individuals".

45 Kilborn and Botha (Kilborn and Botha *The ABC of Conveyancing* 2–4) describe this as: "[r]ights against other persons (the right may or may not relate to a particular thing) that obligates that person to do something or permit something to be done".

dominium test') to distinguish between real and personal rights in such problematic situations.[46]

However, despite the availability of such a 'special approach', Mostert *et al*[47] explain that the position of 'historic' mineral rights within the traditional property classification was always contested.[48] This is because in the early jurisprudence on the matter the judicial approach was that rights to minerals amounted to quasi-servitudes in traditional property terms.[49] This differed from the scholarly opinion, which favoured a description of mineral rights as real rights *sui generis*.[50] This general argument of whether mineral rights can be defined in traditional property terms or whether they are rights *sui generis* has continued after the enactment of the MPRDA. Section 5(1) of the MPRDA stipulates that prospecting rights and mining rights granted in terms of the Act and registered in terms of the Mining Titles Registry Act[51] are statutorily described as "limited real rights" in respect of minerals and the land to which such rights relate.[52] As far as academic writing on the matter of what is meant by the classification of prospecting rights and mineral rights as "limited real rights" is concerned, authors differ in their opinion.[53] Once again, the dispute is whether prospecting and mining rights can be defined in traditional property terms as "limited real rights" or whether they are "*sui generis* limited real rights". However, it is submitted here the that the term "real rights" in the definition of

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46 The case *Ex Parte Geldenhuys* 1926 OPD 155 at 164, expressed this test well as:

"One has to look not so much to the right, but to the correlating obligation. If that obligation is a burden upon the land, a subtraction from the dominium, the corresponding right is a real right and registerable; if it is not such obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right or a right in *personam*, and as a rule cannot be registered."

47 Mostert *et al The Principles of the Law of Property in South Africa* 44.

48 A detailed discussion of this previous dispensation is outside the scope of this mini dissertation, but a simple overview is given here to provide background on the point.

49 *Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estate, Town and Mine Ltd* 1903 TS 499 (T) at 510. A view that Mostert supports vigorously (Mostert *Mineral Law: Principles & Policies in Perspective* 14).

50 Viljoen and Bosman support this view, citing the ruling in *Ex parte Pierce* 1950 3 SA 628 (O) at 634 (Viljoen and Bosman *A Guide to Mining Rights in South Africa* 7). Van der Merwe also makes similar arguments (Van der Merwe *Sakereg* 21, 513–514).

51 *Mining Titles Registry Act* 16 of 1967 (hereinafter the MTRA).

52 *Meepo v Kotze* 2008 1 SA 104 (NC) at 110I.

53 Mostert *et al* submitted that the term "limited real rights" might be taken to mean the same as the common law phrase "limited real right" (Mostert *et al The Principles of the Law of Property in South Africa* 276). However, Badenhorst and van der Schyff argue, independently, that the traditional common law 'limited real rights' and the 'MPRDA limited real rights' are different. They submit that limited real rights under the MPRDA are rather rights *sui generis*. Badenhorst submits that prospecting rights and mining rights are not fully compatible with the common law notion of a limited real right. Through comparing mineral rights with limited real rights or property in terms of property theory; equivalent rights that existed during the previous mineral dispensation; other rights to minerals issued under the MPRDA; public law instruments; and the nature of 'property' in terms of s 25(1) of the Constitution, he argues that the rights differ in nature and origin. Van der Schyff similarly argues that traditional limited real rights and MPRDA limited real rights are different mainly due to the MPRDA regulation of the latter, as well as her submitted "four reasons" for their creation. The last of these four reasons is that the MPRDA recognises limited real rights as it "emphasizes the value of these rights in the hands of their holders as commodities in the economic and trade environment" (Van der Schyff *Property in Minerals and Petroleum* 346).

"immovable property" in section 1 of the AEA should be interpreted in a manner that includes a limited real right granted by the MPRDA, regardless of which academic argument is followed. The recognition of a limited real right granted by the MPRDA as either a traditional limited real right or some form of *sui genesis* limited real right should not affect its recognition as a component of the definition of "immovable property" for the purposes of the AEA. It is argued here that the reason for this is that either way both descriptions only amount to a legal construct representing ownership of a commodity in the economic and trade environment. Considering that the AEA's purpose is regulates the process by which a deceased person's liabilities are settled and the remainder (assets that can be distributed) are awarded and transferred to the heirs,[54] such commodity needs to be utilised to settle the deceased's liabilities and then distributed to the deceased heirs. Thus, for the purposes of this mini dissertation, mining rights and prospecting rights are deemed to be adequate "real rights" (although limited) for the purpose of meeting the definition of immovable property in the AEA.

Regarding the question of whether entitlements to minerals are registrable, it can be stated that, generally, the registrability of rights to minerals goes hand in hand with their classification as either real or personal in character.[55] As regards prospecting rights and mining rights granted in terms of section 5 of the MPRDA, they must be registered in the Mineral and Petroleum Title Registration Office.[56] Thus, a prospecting right and mining right granted in terms of section 5[57] can be described as immovable property for the purpose of the application of the AEA.

However, considering the above, the nature of reconnaissance permissions, retention permits, and mining permits remains unanswered.[58] The MPRDA is silent about the nature of these "other entitlements to minerals".[59] Academics have, however, addressed this aspect. Mostert *et al*[60] submit that because the MPRDA treats prospecting rights and mining rights differently from the other entitlements to minerals, it indicates that a distinction does exist between those rights that can be classified as limited real rights

54 See par 3.2 below.
55 Mostert *et al The Principles of the Law of Property in South Africa* 276.
56 In terms of s 19(2)(a) and s 25(2)(a) of the MPRDA respectively.
57 Of the MPRDA.
58 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development* Act *28 of 2002*.
59 See Mostert *et al The Principles of the Law of Property in South* Africa 276; van der Schyff *Property in Minerals and Petroleum* 346.
60 Mostert *et al The Principles of the Law of Property in South Africa* 276.

and those that cannot. However, what this distinction is, is unclear. Although the MPRDA does not specifically define or describe reconnaissance permissions, retention permits and mining permits as limited real rights, these rights may still meet the test set out in the AEA to be immovable property. Regarding the first leg of the inquiry (that such must be a real right), it can be argued that these rights contain the necessary qualities, in theory, to be described as a *jus in personam ad rem acquirendam* since they are acquired in a personal capacity but limit the ownership entitlements of the owner of the land in whose land the minerals are embedded. If the subtraction from the *dominium* test[61] is considered, it is plausible that such rights could be seen as limited real rights. However, considering the second element of the inquiry (that such must be registered in an office in the Republic of South Africa), it must be stated that reconnaissance permissions,[62] retention permit[63] and mining permit[64] can only be recorded and filed with the Mineral and Petroleum Title Registration Office[65] and not registered. As they are not registerable such entitlements cannot be regarded as immovable property for the purposes of deceased estate administration and the submission that they could be limited real rights is redundant.

In summing up the above it is submitted that out of the five types of entitlements to minerals for which the MPRDA makes provision,[66] only prospecting rights and mining rights can be described as real rights (although limited) and are registerable in an office in the Republic of South Africa. As a result of this, they are immovable property as per the definition in the AEA and are thus estate assets. Regarding reconnaissance permissions, retention permits, and mining permits it was found that they cannot be registered in any office in the Republic of South Africa and are thus not immovable property. However, the question remains whether they can be described as movable property.

61 See fn 46 above.
62 S 14(1) of the MPRDA.
63 S 32(2) of the MPRDA.
64 S 27(7)(a) of the MPRDA.
65 S 5(1)(v) of the *Mining Titles Registry Act* 16 of 1967.
66 Reconnaissance permissions, retention permits, mining permits, prospecting rights and mining rights.

2.3.2 Entitlements to minerals as movable property

The nature of reconnaissance permissions, retention permits, and mining permits is a point of dispute amongst scholars because the MPRDA is silent on this aspect. As regards this dispute, there are two schools of thought:

The first school of thought is that held by Badenhorst and Mostert, who in multiple academic works[67] state that such permissions and permits can be described as personal rights in nature. They base this submission on the reasoning that because the permits and permissions are not statutorily defined as real rights (which are limited) they, in turn, can only be personal rights. Badenhorst and Mostert[68] thereafter state in another work[69] that all personal rights are movable property[70] in nature. Thus, under this school of thought it can be submitted that such permissions and permits can be described as movable property since they are regarded as personal rights. If this theory is accepted, the first hurdle in determining whether such rights are estate assets is seemingly crossed. However, the second hurdle, namely the provisions of the MPRDA, as discussed below,[71]undermine this premise.

The second school of academic thought is that held by Van der Schyff.[72] She proposes an alternative view, while acknowledging Badenhorst and Mostert's submissions and such's short comings, she counter-argues their point by saying:

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67 Badenhorst "Nature of New Order Rights to Minerals" 2005 26 (3) 520; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa: Commentary and Statutes* 13–20 J; and Mostert [and Badenhorst] *et al The Principles of the Law of Property in South Africa* 276.

68 Mostert [and Badenhorst] *et al The Principles of the Law of Property in South Africa* 34.

69 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 35.

70 See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 35; which present the following case law as authority of this submission: "*Perumal v The Messenger of the Court* 1953 2 SA 734 (N) at 736D–E 738 where a purchaser's interest in an agreement by which he had bought land on instalments, but was not entitled to transfer until he had paid the price in full, was held to be a movable because it represented only a claim against the seller, i.e. a personal right. This decision was followed in *Nathan and Co v Sheonandan* 1963 1 SA 179 (N) at 182A–B. In *Samuel v Pagadia* 1963 3 SA 45 (D) the court held that a sugar cane quota in respect of land conferred a personal right and should accordingly be classified as movable. In *Registrar of Deeds v Banham* 1922 AD 361 at 368 Innes CJ regarded a fiduciary interest in land as immovable, but the term 'fiduciary interest' of course refers to the right of the fiduciary which is a real right, and not to the 'right' of the fideicommissary . . . In *Nahrungsmittel Gmbh v Otto* 1992 2 SA 748 (C) at 753G a claim for a payment of costs was considered as an incorporeal movable. In *Tigon Ltd v Bestyet Investments* (Pty) Ltd 2001 4 SA 634 (N) at 642J–643B a distinction was drawn between a share itself, which was held to be an incorporeal movable entity, and the bundle of personal rights to which it gives rise. In *Badenhorst v Balju, Pretoria Sentraal* 1998 4 SA 132 (T) at 138G–H, it was decided that a member's interest in a close corporation is an incorporeal movable. A right of action is accepted by the courts as constituting moveable incorporeal property: *Thomas v BMW South Africa (Pty) Ltd* 1996 2 SA 106 (C) at 118D–E."

71 See par 2.3.4. below.

72 Van der Schyff *Property in Minerals and Petroleum* 346.

> Although it has been stated that theses permits and permissions are "by implication personal in nature" [73] it is proposed that these permits and permissions represent *sui generis* statutory authority that are neither real nor personal. Their acquisition, content and duration are determined statutorily, and the discussion will not be advanced by trying to box these rights into existing categories of property rights.[74]

In support of this submission Van der Schyff[75] argues that the MPRDA has deviated radically from the pre-existing principles of property law and that is has rather introduced new legal principles by excluding South Africa's unexploited minerals from the realm of private law and placing them within the sphere of public law. In the light of van der Schyff's submissions it can be suggested that reconnaissance permissions, retention permits and mining permits cannot be regarded as movable property as they represent a form of *sui generis* statutory authorisation and not movable property. According to this approach, these entitlements cannot be regarded as estate assets. The view that these permissions and permits should be seen as a form of *sui generis* statutory authority is strengthened when one looks at the statutory restrictions on transfer imposed on such permissions and permits, as discussed below.[76]

2.3.3 Entitlements to minerals as claims in favour of the estate

Meyerowitz states that a claim in favour of the estate is "[a]ll claims which the deceased has against other persons".[77] As regards entitlements to minerals, the only potential scenario in which a deceased held such a claim is where the deceased has applied for the granting or issuing of a particular entitlement to minerals, in terms of the provisions of the MPRDA*,* but such application was not granted or issued before death. However, since the issuing of such entitlement is inseparably linked to the particular circumstances of the applicant, such as race, financial means and experience to exploit the entitlement,[78] it is submitted that the application would immediately fail as a result of the applicant's death. In view of this, it is submitted that it is seemingly impossible for an entitlement to minerals to be a claim in favour of the estate.

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73 Badenhorst and Mostert *Mineral and Petroleum Law of South Africa: Commentary and Statutes* 13–20J.
74 Van der Schyff *Property in Minerals and Petroleum* 346.
75 Van der Schyff *Property in Minerals and Petroleum* 346.
76 See par 2.3.4. below.
77 Meyerowitz *Administration of Estates and Their Taxation* 6–4.
78 Botes *The role of ministerial discretionary powers in the granting of rights to minerals*.

2.3.4 Context of specific provisions of the MPRDA

As stated above, the second hurdle that has to be overcome is that it needs to be determined whether there are any statutory provisions that may negate a view that an entitlement is an estate asset. In considering this, one must examine the submissions made above[79] under the Badenhorst and Mostert[80] school of thought that reconnaissance permissions, retention permits and mining permits can be described as movable property in nature and are thus estate assets. If this is the case and they are described as estate assets, then their accommodation into the administration of a deceased estate[81] process seems to be in conflict with the provisions of the MPRDA. The MPRDA places statutory restrictions on such permissions and permits. The transfer of reconnaissance permissions[82] in any form whatsoever is disallowed by section 14 (5) of the Act. Likewise, the transfer of retention permits is disallowed by section 36,[83] and mining permits by section 27(8)(b).[84] Section 56 of the Act further provides that any rights, permits or permissions granted or issued by the Act lapse on the death of the holder in the absences of a successor in title. Sections 14(5), 36 and 27(8)(b) of the Act disallow for any successor in title and thus it is submitted here that these rights should lapse at the time of death of the holder.[85] Thus, the permission or permit no longer exists after moment of death and it is therefore not an asset that could be described as an estate asset as it is not transferable, especially not via inheritance.

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79 See par 2.3.2 above.
80 Mostert [and Badenhorst] *et al The Principles of the Law of Property in South Africa* 34.
81 See par 3 below.
82 S 15(1) of the MPRDA.
83 Of the MPRDA.
84 Of the MPRDA.
85 It is clear that the intentions of the above sections are to stop the transfer of the permit or permission in anyway, thus one can accept that such would cease to exist in the event of the death of the holder. However, the problem is determining if this occurs at moment of death or alternatively, once the estate vests in the executor. It is submitted in par 4.2 below that, the vesting of an asset in the executor cannot be seen as akin to this change in ownership. Rather, the vesting is only the fiduciary representation of the deceased ownership. Thus, on first assessment one would say that the permit or permission would vest in the executor and then cease to exist (this interpretation could attract tax implications). However, it is submitted here that this would be fundamentally flawed. The only reason for the construct of "an executor's fiduciary representation of the deceased ownership", is to provide a legal mechanism for the executor to carry out his or her fiduciary duty to transfer the asset to either the onerous successor(s) in title (to settle the obligations of the estate) or the gratuitous successor in title (to transfer the remaining assets to the appropriate heir). As the sections of the Act discussed above clearly prohibit any form of transfer of the permit or permission, the executor's duty to transfer such assets would be redundant and undermine the reason for the legal construct. In view of this, it is submitted here that the correct opinion should be that the permit or permission should lapse at the moment of death of the holder. This being said, however, there still remains an element of uncertainty thus, it is further submitted that the Act should be amended to cater specifically for the situation of the death of the holder of such permit or permission.

2.4 Conclusion

The objective of this discussion was to ascertain exactly what an estate asset is, and then thereafter determine whether rights to minerals are such estate assets. As regards the first question, namely "What is an estate asset?", the conclusion was reached that the nature of an estate asset is either immovable property, movable property or a claim in favour of the estate.[86] Furthermore, the sources of such asset must originate as an asset of the deceased, an asset of a joint estate of spouses married in community of property or a massed asset under section 37 of the AEA.[87] If an asset has the appropriate nature and originates from such an appropriate source, then it can be defined as an 'estate asset'.

The determination of this definition of 'estate asset' leads to the second question, namely "Are entitlements to minerals estate assets?" and makes it possible to address it. In this regard it was found that the MPRDA provided for five different forms of entitlements to minerals. These entitlements are: (i) reconnaissance permissions, (ii) retention permits, (iii) mining permits, (iv) prospecting rights and (v) mining rights. It was submitted that not all entitlements to minerals were estate assets.[88] Only prospecting rights and mining rights can be described as estate assets, as it was found that they were both real rights (although limited) and were registerable in an office in the Republic of South Africa, thus making them immovable property as per the definition in the AEA.[89] For this reason, they are collectively termed 'mineral estate assets' for the purposes of this mini dissertation. As it was found that reconnaissance permissions, retention permits and mining permits could not be described as immovable property, movable property or a claim in favour of the estate, they could not be viewed as estate assets.[90]

86 See par 2.2 above.
87 See par 2.2 above.
88 See par 2.3 above.
89 See par 2.3.1 above.
90 See paras 2.3.2, 2.3.3 and 2.3.4 above.

3 The process of administering a deceased estate

3.1 Introduction

It is generally believed that the process of administering a deceased estate is a simplistic administrative task in which one follows a step-by-step guide set out in the AEA. It is submitted here that nothing could be further from the truth of the practical reality. It must be understood that before one can assess how 'mineral estate assets', granted and issued in terms of the MPRDA can be accommodated in the administration of deceased estates, one must first understand what the process of administering a deceased estate entails. The following paragraphs provide clarity by asking: "What does the administration of a deceased estate process entail?"

3.2 What does the administration of a deceased estate process entail?

In addressing the question "What does the administration of a deceased estate process entail?", one can explain such as the process of executorship that commences upon the death of the person involved, whereby the estate of the deceased[91] is liquidated and distributed.[92] The person who administers the estate is the executor.[93] De Waal and Schoeman-Malan[94] in their work describe the "administration of a deceased estate as":

> the process by which the deceased person's liabilities are settled and the remainder (assets that can be distributed) is awarded and transferred to the beneficiaries.

Following similar reasoning, Victor and King[95] state in their work:

> Estate administration seeks to facilitate the process of fulfilling/expunging a deceased person's legal obligations and liabilities due to other persons, while at the same time transferring the deceased balance of available assets to those persons entitled thereto in accordance with the directions of the deceased will, or else by way of intestate division.

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91 As well as the assets of a joint estate of spouses married in community of property and the massed assets under s 37 of the AEA.

92 De Waal and Schoeman-Malan *Law of Succession* 238.

93 S 1 of the AEA defines an 'executor' as "any person who is authorized to act under letters of executorship granted or signed and sealed by a Master, or under an endorsement made under section fifteen".

94 De Waal and Schoeman-Malan *Law of Succession* 238.

95 Victor and King *Law and Estate Planning* 256.

These views were substantiated in the case of *Lochhat's Estate v North British & Mercantile Insurance*[96] (hereinafter the *Lochhat's Estate* case) that served before the Appellate Division. In determining the general duties of an executor in carrying out the deceased estate administration process, the court held that the executor was:

> to obtain possession of the estate assets of the deceased including rights of action, to realise such of them as may be necessary for payment of debts of the deceased, taxes and the costs of administration and winding-up, to make the payment and to distribute the assets and money that remain after debts and expenses have been paid among the legatees under the will or among the intestate heirs on intestacy.[97]

While the AEA legislatively regulates the step-by-step requirements that need to be followed during the administration process, it is submitted that the administration of a deceased estate process may also be split into four elemental phases, considering the passages cited above.[98] These elements are (i) the deceased estate vests in the executor; (ii) the executor takes control of the estate assets; (iii) the executor settles the estate's legal obligations and liabilities; and (iv) the executor distributes the remaining estate assets to the heirs or legatees. The following is an examination of the operation of each of these four elemental phases, as an understanding of such is vital for the subsequent sections of this mini dissertation, where these processes are, in turn, examined against the provisions of the MPRDA.

3.2.1 The operation of the first elemental phase, "The deceased estate vests in the executor"

As a starting point to examine this first element de Waal and Schoeman-Malan explain:

> In terms of the Law of Succession a beneficiary never becomes owner of inherited assets immediately upon the death of the deceased. [99]
>
> This stems from our system of administration of estates that replaces the common law system of universal succession (*succession in universitatem*). Succession is

96 *Lochhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (AD) (hereinafter *Lochhat's Estate* case).
97 *Lochhat's Estate* case at 302.
98 The four phases stated here are in reference to the general procedural flow rather than the legislative step-by-step elements. Thus, legislative elements such as the executor's duty to advertise for creditors to lodge their claims (s 29 of the AEA), and to draft a Liquidation and Distribution Account (s 35 of the AEA), are not stated. Davis, Beneke and Jooste *Estate Planning* 4–5 set out the entire process incorporating the legislative elements into the four phases in the general process identified here.
99 *Greenberg v Estate Greenburg* 1955 3 SA 361(A) (hereinafter the *Greenberg* case); *Commissioner SARS v Executor Frith Estate* 2001 2 SA 261 (SCA) 270; *Dique v van der Merwe* 2001 2 SA 1006 (T) 1012F.

> thus in itself not a mode of acquiring ownership. The most that a beneficiary can obtain upon the death of the deceased (if vesting of rights has already occurred) is a claim (personal right) against the executor of the deceased estate. The content of this right is that, upon completion of the process of administration of the estate, the executor must transfer the bequeathed asset to the beneficiary (assuming obviously that the liabilities of the estate do not exceed its assets). Only upon transfer of the assets (in the appropriate manner) will the beneficiary become the owner of the assets.[100]

In this regard, the question of who owns the assets of the estate in the period between the death of the deceased and the transfer of the assets to the beneficiaries becomes vitally relevant. Although the Appellate Division[101] has explicitly refrained from giving a decisive answer, it is submitted here that the assets vest in the executor.[102] This submission is based on the following two arguments:

First, it is argued that, the administration of a deceased estate starts[103] when an executor is appointed under letters of executorship issued by the Master.[104] Meyerowitz[105] explains that the deceased estate vests in the executor upon his or her appointment to this position. It is argued here, in the light of Meyerowitz's submission that the appointment as executor operates as a *quasi*-vesting order. A 'vesting order' is defined as "[a]n order of the High Court creating or transferring a legal estate".[106] The vesting of the deceased estate is by way of the Master of the High Court issuing Letters of Executorship in terms of his or her statutorily divulged powers. Thus, on issuing of such Letters of Executorship, the legal estate (deceased estate) is transferred to the executor. The deceased estate (as opposed to the estate of the deceased)[107] is the aggregate of assets and liabilities, together with the totality of rights, obligations and powers of dealing therewith.[108]

The second argument, in support of the first, is that the scenario in which the estate vests in the executor is the only situation that remains legally sound. Considering this

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100 De Waal and Schoeman-Malan *Law of Succession* 10.
101 *Greenberg* case at 365–365.
102 While the Supreme Court of Appeal/ Appellate Division has refrained, there are two high court decisions of *Malcomess v Kuhn* 1915 CPD 852 (hereinafter the *Malcomess case*) and *Krige v Scoble* 1912 TPD 814 (hereinafter the *Krige case*) that state that an estate vests in the executor.
103 The procedural and administrative step to appoint the executor can be seen as pre-commencement of the administration steps.
104 In terms of s 14 of the AEA.
105 Meyerowitz *Administration of Estates and Their Taxation* 12–18.
106 *Oxford Dictionary of Law* 577.
107 See above par 2.2.
108 Meyerowitz *Administration of Estates and Their Taxation* 12–18.

submission, four potential scenarios are identified: (i) the estate vests in the executor; (ii) the estate is a separate juristic person; (iii) the executor is an agent of the heir(s); or (iv) the executor is a mere curator. Regarding the point that the deceased estate is some form of separate juristic person, it was found in the case of *Commissioner for Inland Revenue v Emary*[109] (hereinafter the *Emary* case) that in the absence of a statutory provision casting a deceased estate in the mould of juristic personality, no such persona can be said to exist for purposes of a particular statute. Thus, this potential scenario fails as a viable option. Regarding the point that the executor is an agent of the heir(s), it was found in the case of *Goosen v Bosch and The Master* [110] that the executor had no principle (no instructing party) and was therefore not an agent of either the heir(s) or the creditor(s) of the estate.[111] This potential scenario also fails. An answer to whether or not the executor is a mere curator can be found in the case of *Malcomess v Kuhn*[112] (hereinafter the *Malcomess* case) that served before the Cape Provincial Division. The court found that the executor is not a mere curator and additionally stated that the executor is vested with the deceased estate.[113] This is supported by the findings in the *Krige case* before Transvaal Provincial division. The court found that a deceased estate vested in the executor, regardless of whether the administration of the estate was by means of intestate or testamentary succession.[114]

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109 *Commissioner for Inland Revenue v Emary* 1961 2 SA 621 (A).

110 *Goosen v Bosch and The Master* 1917 CPD 189.

111 Meyerowitz *Administration of Estates and Their Taxation* 12–18.

112 *Malcomess v Kuhn* 1915 CPD 852 (hereinafter the *Malcomess* case).

113 In the *Malcomess case*, Ms Olga Malcomess had died 11 years previously. Son Carl, who lived in East London, was her executor and wanted to sue Kuhn for unpaid rentals. Mr Malcomess, the husband and a beneficiary, had been in South Africa for over 47 years but had been detained as an alien enemy. Kuhn said the estate could not sue him since Malcomess, his deceased wife and her estate were all alien enemies. Advocate Benjamin said that the deceased estate was represented by the son who was a British subject. The beneficiary, Mr Malcomess, was now out of internment on parole and so could therefore sue in South African courts. Advocate Upington held that the executor (Carl) was an agent for the Malcomess heirs; the enemy aliens. A public custodian could be appointed to receive income payable to alien enemies. The Court found that the estate had vested in the executor Carl (Malcomess's son) who was a British subject and could therefore sue (The South African Military History Society).

114 In the *Krige* case certain heirs *ab intestato* of the deceased, Krige, instituted a vindicatory action alleging that certain immovable property that should have formed part of Krige's estate was registered in the name of the first defendant, a Mrs Scoble, and sought an order that she give transfer of the property to the estate. The defendants excepted to the declaration on the grounds that the plaintiffs were not entitled to sue, that it was their duty to have an executor dative appointed and that it was the executor dative who was entitled to sue, and not the heirs. Wessels J (Mason J concurring) held (*Krige's case* at 820):

If then, the estate vests in the executor dative, can the heir bring a vindicatory action against a third party without the aid of an executor? If such an action could be brought, the Court would have to inquire who really are the heir's *ab intestato*, and then to declare that the plaintiffs as heirs are entitled to the property. Yet according to Law 12 of 1870 the heirs cannot obtain the property, because they can only become the owners of it through the executor dative; therefore, we would, by such a declaration, violate the law. Therefore, all that the Court could do is to declare that if there were an executor dative he would be entitled to the property. In other words, the Court would have to give a declaration of rights in favour of one who is not before the Court. This shows at what an absurd conclusion we should arrive unless we adopt the view that the whole estate of the deceased vests in the executor dative. If the estate vests in the executor dative it is clear that the heirs have no right to institute the action as they have done, and that we ought to have before us the executor dative.

3.2.2 The operation of the second elemental phase, "Take control of estate asset"

The following section is an investigation into what the operation of the second elemental phase is. As a starting point Abrie *et al*[115] write: "In terms of section 26 it is the executor's duty to take control of the estate assets."

Section 26 is in reference to section 26(1) of the AEA which reads as follows:

> 26 Executor charged with custody and control of property in estate
> (1) Immediately after letters of executorship have been granted to him an executor shall take into his [or her] custody or under his [or her] control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.

This section seems to be written in a superfluous manner as books and documents are property; and custody of property is the control of the property.[116] To understand this better one can look to the writings of Davis, Beneke and Jooste[117] who state*:*

> The executor attends to the winding-up of a deceased estate, his [or her] duty is to obtain possession of the deceased assets . . .
> In this regard, it is submitted here that what is meant by the phrase "an executor shall take into his [or her] custody or under his [or her] control all the property, books and documents in the estate" is that the executor must take possession of all the deceased's assets. This view is confirmed in the *Lochhat's Estate* case[118] that served before the Appellate Division in which it was held that it was the executor's duty:
>
> [t]o obtain possession of the estate assets of the deceased including rights of action.

Thus, it can be stated definitively that it is the executor's duty to obtain possession of the estate assets. The legal construct of possession has been described as:

> the situation where a person has physical control (*detention*) of a thing together with the mental attitude (*animus possidendi*) that includes a consciousness of that control.[119]

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115 Abrie *et al Deceased Estates* 111.
116 Custody is defined as: "noun 1) holding property under one's control", https://legal-dictionary.thefreedictionary.com/custody (accessed 21/3/2018).
117 Davis, Beneke and Jooste *Estate Planning* 4–4.
118 Lochhat's Estate case at 302.
119 Mostert *et al The Principles of the Law of Property in South Africa* 66.

While the *animus* component should be clear in this situation, it must be stated that the *detention* component must be judged objectively that the physical control is both sufficient and effective.[120] The nature, as well as the source, of the estate asset would affect what is required to show sufficient and effective physical control.[121]

3.2.3 The operation of the third elemental phase, "The executor settles the estate's legal obligations and liabilities"

The third elemental phase in the administrations process is that the executor must fulfil his or her fiduciary duty to settle the legal obligations and liabilities of the estate. Victor and King[122] state:

> Estate administration seeks to facilitate the process of fulfilling/expunging a deceased person's legal obligations and liabilities due to other persons.

The difference between a legal obligation and a liability can be understood by looking at the dictionary definitions of the respective words. 'Obligation' is defined as "[a] legal duty"[123], and 'liability' is defined as "1. An amount owed. 2. A legal duty or obligation". In the light of these definitions, one can see that they are very similar. However, it is submitted here that the authors[124] intended by the concept "legal obligation", an obligation arising *ex lege* in the public law sphere (such as a duty to pay certain taxes), whereas "liability" was intended to mean debts and obligations arising in the private law sphere (such as contractual obligations to do something or pay something). Legal obligations are, for the most part, the duty to pay certain taxes. However, these are not the only *ex lege* obligations as other legislation also imposes similar obligations on an executor.[125] As regards the liabilities of the deceased, section 29 of the AEA requires that an executor must, as soon as possible after his or her appointment, publish a notice in the *Government Gazette* and one or more newspaper, calling on all persons who

120 Mostert *et al The Principles of the Law of Property in South Africa* 70.
121 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 276.
122 Victor and King *Law and Estate Planning* 256.
123 *Oxford Dictionary of Law* 374.
124 Victor and King *Law and Estate Planning* 256.
125 An example of such other obligations that the *National Environmental Management Act* 107 of 1998 might impose.

have a claim against the deceased to lodge such claim with the executor within the period[126] specified in the notice.[127] These claims come in a wide array of forms.

3.2.4 The operation of the fourth elemental phase, "The executor distributes the remaining estate assets to the heirs /legatees"

It is the duty of the executor to distribute the estate to the heir(s) and legatee(s) in accordance with the Liquidation and Distribution Account.[128] The heir(s) and legatee(s) would be determined by the Will[129] or the *Intestate Succession Act*.[130] During a person's lifetime he or she can execute a will in which he or she determines how his or her estate must devolve and be distributed when he or she dies. Abrie *et al*[131] explain that the "law of testate succession" refers to the legal rules that apply to wills and related matters. If no will has been made, an estate is distributed in accordance with the provisions of the law of intestate succession.[132] Thus, if a person dies and leaves an estate that cannot be distributed in terms of a will, the *Intestate Succession Act*[133] applies, and the distribution of the estate is made according to the provisions of this Act.[134]

126 This period must not be less than 30 (thirty) days or more than three (3) months from date of the latest publication of the notice.
127 Meyerowitz *Administration of Estates and Their Taxation* 12–4.
128 Davis, Beneke and Jooste *Estate Planning* 4–6(1).
129 In compliance with the *Wills Act* 7 of 1953.
130 *Intestate Succession Act* 81 of 1987.
131 Arbrie *et al Deceased Estates* 52.
132 Arbrie *et al Deceased Estates* 52.
133 *Intestate Succession Act* 81 of 1987.
134 Arbrie *et al Deceased Estates* 21.

3.3 Conclusion

From the outset of this section it was stated that the process of administering a deceased estate is not a simplistic administrative task in which a step-by-step guide set out in the AEA is followed. Thus, the question that needed to be addressed was: "What does the process of administering a deceased estate entail?"

In simplistic terms it was described as the process whereby the estate of the deceased is liquidated and distributed.[135] It was found that this process of administrating a deceased estate could be split into four elemental phases which are: (i) the deceased estate vests in the executor; (ii) the executor takes control of the estate assets; (iii) the executor settles the estate's legal obligations and liabilities; and (iv) the executor distributes the remaining estate assets to the heir(s) or legatee(s). The operation of each of these four elemental phases was then examined.

As regards the first elemental phase, it was argued in the light of Meyerowitz's submission that the appointment as executor operates as a *quasi*-vesting order.[136] The vesting of the deceased estate is by way of the Master of the High Court issuing Letters of Executorship in terms of his or her statutorily divulged powers. On the issuing of such Letters of Executorship, the deceased estate is transferred to the executor. The 'deceased estate' is the aggregate of assets and liabilities, together with the totality of rights, obligations and powers, of dealing therewith. In support of this approach, several potential scenarios were examined against judicial rulings, where it was found that the only valid scenario was that the executor was legally vested with the deceased estate.[137]

Regarding the operation of the second elemental phase, it was found, in terms of section 26 of the AEA, that it was the executor's duty to take control of the estate assets. This meant that it was the executor's duty to obtain possession of the deceased assets. It was determined that possession was the situation where a person had physical control (detention) of a thing together with the mental attitude (*animus*

135 See par 3.2 above.
136 See fn 105 above.
137 See par 3.2.1 above.

possidendi) that included a consciousness of that control. It was explained that while the animus component should be clear in this situation, it must be stated that the detention component must be judged objectively, and that the physical control was both sufficient and effective. The nature, as well as the source, of the estate asset would affect what was required to show sufficient and effective physical control.[138]

As regards the third elemental phase in the administrations process, it was found that the executor had to fulfil his or her fiduciary duty to settle the legal obligations and liabilities of the estate. It was stated that legal obligations were obligations arising *ex lege* in the public law sphere and were, for the most part, the duty to pay certain taxes.[139] Regarding the liabilities of the deceased, it was stated that the term 'liability' was intended to mean debts and obligations arising in the private law sphere, such as contractual obligations to do something or pay something, or marital claims. These claims would be claims in terms of section 29 of the AEA. Such claims come in a wide array of forms.[140]

Regarding the fourth elemental phase it was determined that it was the duty of the executor to distribute the estate to heir(s) and legatee(s) in accordance with the Liquidation and Distribution Account.[141] The heir(s) and legatee(s) would be determined by the Will or the *Intestate Succession Act*.[142]

138 See par 3.2.2 above.
139 See par 3.2.3 above.
140 See par 3.2.3 above.
141 See par 3.2.4 above.
142 *Intestate Succession Act* 81 of 1987.

4 The accommodation of *mineral estate assets* in the administration of deceased estates

4.1 Introduction

In the light of the findings of the two previous chapters of this mini dissertation, this chapter addresses how mineral estate assets can be accommodated for in the administration of deceased estates. In Chapter 2 it was concluded that not all entitlements to minerals that were granted or issued in terms of the MPRDA were estate assets.[143] The entitlements to minerals that could be described as estate assets were collectively termed "mineral estate assets".[144] The findings of Chapter 3 were that the administration of a deceased estate was the process whereby the deceased estate was liquidated and distributed, and that that process could be split into four elemental phases. These phases are: (i) the deceased estate vests in the executor; (ii) the executor takes control of the estate assets; (iii) the executor settles the legal obligations and liabilities of the estate; and (iv) the executor distributes the remaining estate assets to the heir(s) or legatee(s). The examination of how mineral estate assets can be accommodated for in the administration of a deceased estates is carried out in consideration of the impact that the provisions of the MPRDA have on the phases of the deceased's estate administration.

4.2 The accommodation of mineral estate assets in the first elemental phase, "The deceased estate vests in the executor"

As previously indicated, on issuing of the Letters of Executorship, the executor is legally vested with the deceased estate.[145] This is the process whereby the legal estate (deceased estate) is transferred to the Executor.[146] In this regard, one could argue that the vesting of the deceased estate in the executor could be seen as an event in which

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143 See par 2.4 above and; Mostert *et al The Principles of the Law of Property in South Africa* 269; van der Schyff *Property in Minerals and Petroleum* 346.

144 The term is used in this mini dissertation to describe two types of assets: First, it is used to describe only prospecting rights and mining rights that were granted to the deceased person, a spouse of a deceased person who is married in community of property or a person who masses such right in terms of s 37 of the AEA. Second, it is used to describe a shareholding in a company that was held by the deceased person, a spouse of a deceased person who is married in community of property or a person who masses such shareholding in terms of s 37 of the AEA, and such company held any of the five types of entitlements to minerals.

145 See par 3.2.1 above.

146 Meyerowitz *Administration of Estates and Their Taxation* 12–18.

there is a movement of the mineral estate asset from the deceased to the executor. This process becomes potentially problematic when one examines section 11 of the MPRDA. Section 11(1) of the MPRDA reads as follows:

> A prospecting right or mining right or an interest in any such right, or any interest in a close corporation or unlisted company or any controlling interest in a listed company (which corporations or companies hold a prospecting right or mining right or an interest in any such right), may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister.

It is evident from the wording that the section regulates the "transfer"[147] situations allowed for by the Act. The problematic element is that there is uncertainty as to whether the "vesting" process in which the mineral estate assets of the deceased move from the deceased to the executor would be seen as a "transfer" that would attract the application of section 11. Thus, the section needs to be interpreted to understand its scope of application. As du Plessis[148] states: "The realisation of statute law depends decisively on juridical interpretation."

4.2.1 Statutory interpretation

The traditional South African approach to statutory interpretation in the pre-democratic era was characterised by dogmatic reliance on textual interpretation[149] of statutes and parliamentary sovereignty[150]. However, after the enactment of the interim and then the Constitution[151] (hereinafter the Constitution), this stance fundamentally changed.

In the case of *Holomisa v Argus Newspaper* Ltd[152] (hereinafter the *Holomisa* case) Cameron J[153] summarised this principle very well, stating: "The Constitution has changed the context of all legal thought and decision-making in South Africa."

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147 In the wider meaning of the word.
148 Du Plessis "Statute Law and Interpretation" in Joubert, Faris and Harms (eds) *The Law of South Africa* par 291.
149 The textual approach is primarily characterised as a procedural framework that must be followed when interpreting a statute. The primary rule of textual interpretation is that if the plain meaning of the words of a provision is clear, unambiguous and does not lead to absurdity, the plain meaning will be deemed to be the meaning of the provision (and, as such, amount to the legislature's intention). Only if the plain meaning of the words is unclear, ambiguous or leads to absurdity may the interpreter (court) deviate from the plain meaning. This approach forms the basis of most English legal systems. It is derived from the doctrines of legal positivism, parliamentary sovereignty and separation of powers. See University of South Africa (UNISA) "How legislation is interpreted" 49.
150 Botha *Statutory Interpretation* 5.
151 See fn 18 above.
152 *Holomisa v Argus Newspaper Lt*d 1996 2 SA 588 (W) (hereinafter the *Holomisa* case).
153 *Holomisa* case at 616.

Section 2 of the Constitution, (known as the 'supremacy clause') is now the starting point for any statutory interpretation. As the provision requires the interpreter to revert to it as a pre-emptive step to interpretation, the interpreter is in reality consulting external aids. This inevitably means the plain meanings and so-called clear, unambiguous texts are no longer sufficient and the textual approach is therefore redundant.[154] However, in the absence of the textual approach, the Constitution does not expressly prescribe an approach. This has led to heated academic debate as to what is now the correct approach.[155] In support of Kroetze's[156] submissions, the text-in-context approach[157] is viewed as the correct approach and is utilised as such for the purposes of this mini dissertation.

The text-in-context approach requires that the interpretation must promote the spirit, purpose and objectives of the Constitution,[158] and that the internal and external aids that were allowed for in the previous textual interpretation dispensation can be used form the start of the interpretation practice.[159] Thus, as one of these historic contextual

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154 Van der Schyff *Property in Minerals and Petroleum* 145.

155 Botha (Botha *Statutory Interpretation*) insists that the correct approach to statutory interpretation in the post-constitutional era is a contextual purposive approach in which the contextual factors that the Constitution requires are used to determine the purpose of the legislation. However, it is submitted that this is fundamentally wrong as Kroetze (Kroetze "Power Play: A Playful Theory of Interpretation" 2007 *TSAR* (1) 18) using Hutchinson's (Hutchinson *It's All in the Game* 28) theory explains that the Constitution does not require its application to determine which approach to use, as Botha did in finding that the purposive approach was applicable. Rather, it merely requires its application. The impact of the Constitution is that its application only requires that the spirit, purpose and objectives of the Bill of Rights, together with the other contextual factors that which it allows are utilised in the interpretation of statutes. To follow Botha's approach would mean that the purpose and plain meaning of the text are elevated automatically to be more important than other contextual factors. Indirectly, this also means that the purpose of the legislation is higher ranking that the Constitution itself, which violates the principle of constitutional supremacy.

156 Kroetze "Power Play: A Playful Theory of Interpretation" 2007 *TSAR* (1) 18.

157 This approach can be described as a melting pot into which all the contextual factors are placed. Which contextual factors are thrown into the pot depends on what the particular legal system allows, in essence acting as the recipe. This so-called recipe acts as the confines of what is allowed as a contextual factor. Thus, pure uninhibited contextual interpretation is not the approach (one cannot throw in whatever contextual factor one wants). The fact that the recipe exists means that there is a narrower application of the contextual approach. Mcpherson *The progressive realisation of adequate authors' rights* 22. See further, Kroetze "Power Play: A Playful Theory of Interpretation" 2007 *TSAR* (1) 18.

158 As the Constitution is supreme, it directs which factors may be considered to provide context when interpreting legislation. Ordinary statutory interpretation has the following discussed factors as its recipe: firstly, in the case of *Investigating Directorate Serious Economic Offences v Hyundai Distributors (Pty) Ltd in re to Hyundai Motor Distributors (Pty) Ltd v Smit No and other* 2000 10 BCLR 1097 (CC) it was found that the constitutional foundation of the interpretation methodology could be explained by referring to s 39(2) of the Constitution. It was held to mean that all legislation must be interpreted to promote the spirit, purpose and objects of the Bill of Rights. These are, for the most part, abstract notions that could change according to the situation. This being said, one could, however, attribute a few characteristics to such notions of spirit, purpose and objectives. First, the values of human dignity, freedom and equality, and second, notions such as constitutional supremacy, transformation and respect for international law (The Preamble of the Constitution). (Mcpherson *The progressive realisation of adequate authors' rights* 23).

159 S 39(3) of the Constitution provides that "[t]he Bill of Rights does not deny the existence of any other rights/freedoms that are recognised or conferred by common/customary law or legislation, to the extent that they are

factors, one can look at preceding decisions of a higher court (in common law known as the '*stare decisis* principle') and the mischief rule (meaning the historical purpose) of section 11.[160] In the case of *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd*[161] (hereinafter the *Mogale Alloys* case), Coppin J held that the purpose of section 11 must be found within the context created by the scope and objectives of the MPRDA.[162] In this regard he found that: "The ultimate purpose of section 11 is to regulate the rights so granted." [163] Van der Schyff explains this as follows:

> The need to regulate the transfer of rights to minerals and petroleum arises from the fact that holders of rights to minerals and petroleum must meet a number of prescribed requirements, set out in the Act.[164] […]
>
> It would make no sense to subject initial applicants to a stringent application process, and then allow the successful applicant to alienate the right to any one they deem fit.[165]

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consistent with the Bill". This section can be comprehended more clearly in the light of the statement made by Justice Mohamed that

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic…"

(*S v Makwanyane* 1995 6 BCCR 665 (CC) par 262.) This means that old practices are not automatically void, and customary law and common law are still applicable as long as they are consistent with the Constitution. Thus, the historic sources of factors are still applicable, which are the internal and external aids. Internal aids are those that come from the statutory text itself, examples of which are the plain meaning of the text, alternative meaning of the text, legislative texts in other languages, preamble, long title and expressed legislative purpose. As regards external aids, the following are retained in the post-Constitutional era as contextual factors: preceding decisions of a higher court (in common law known as the *stare decisis* principle), the mischief rule (meaning the historical purpose), dictionaries, academic writings and presumptions (Mcpherson *The progressive realisation of adequate authors' rights* 24).

160 Of the MPRDA.

161 *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* 2011 6 SA 96 (GSJ) (hereinafter the Mogale Alloys case).

162 *Mogale Alloys* case par 23. The core spirit of the Constitution is the values of human dignity, freedom and equality. Secondary to this would be the notions such as constitutional supremacy, transformation and respect for international law. As van der Schyff (Van Der Schyff *Property in Minerals and Petroleum* 141) explains, the MPRDA is important in all these regards, she writes:

The MPRDA is 'umbilically'[162] bound to the Constitution through the indisputable transformation character of the Act. It is trite that the Constitution 'Furnishes the Foundation for Measures to reduce inequalities in respect of access to the natural resources of the country' (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty)* Ltd 2011 4 SA 133(CC) par 3) as this is pursued by the MPRDA, the Act falls in the category referred to as 'remedial legislation'.

The Constitutional Court in *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171 (GNP) par 1 (hereinafter the *Agri SA* case) stated explicitly that the MPRDA was promulgated as a legislative measure to address the gross economic inequality bought about by the fact that the overwhelming majority of black South Africans were unable to benefit directly from the exploitation of the country's mineral resources because of, among other things, their landlessness.

163 *Mogale Alloys* case par 37.

164 Van der Schyff *Property in Minerals and Petroleum* 476.

165 Van der Schyff *Property in Minerals and Petroleum* 476.

In the light of the above, it is submitted here that section 11 is aimed at regulating the change in ownership of the rights granted to either the onerous successors in title or the gratuitous successor in title.[166] The vesting of a mineral estate asset (as part of the deceased estate) in the executor cannot be seen as akin to this change in ownership. The vesting is only the fiduciary representation of the deceased ownership[167] and thus only creates a fiduciary duty to settle the obligations[168] of the estate and transfer the remaining assets[169] to the appropriate heir[170]. The actual ownership of the rights in question, being the entitlement to "use, possess and dispose of the mining or prospecting right"[171], is not "transferred"[172] through the vesting.[173] This view can be seen to be confirmed in the recent case[174] of *Executor of the Estate of the Late Josephine Terblanche Gouws v Magnificent Mile Trading 30 (Pty) Ltd*[175] (hereinafter the *Gouws Estate* case) where Plasket J[176] directly held that:

> Her [the executrix's] right arises not from any transfer of a right but by the fact that, on her appointment as executor, the right to deal with the 'aggregate of assets and liabilities' that is the estate of the deceased vested in her.

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166 An example of an onerous successor in title is a purchaser. An example of a gratuitous successor in title is an heir (Van der Schyff *Property in Minerals and Petroleum* 501)

167 The vesting of the deceased estate in the executor does not vest the exclusive right to use, possess, and dispose of the rights granted to the executor. See Meyerowitz *Administration of Estates and Their Taxation* 12–12.

168 If need be, a sale of the mineral estate asset to an onerous successor.

169 The mineral estate asset which were not sold to onerous successor.

170 Section 11 of the *MPRDA* is applicable to these secondary situations where the executor distributes the mineral estate assets to either the onerous successors in title or the gratuitous successor in title in execution of this duty.

171 Mostert et al The Principles of the Law of Property in South Africa 89

172 Wider meaning of the term covering cession, transfer, letting, subletting, assignment, alienation or otherwise disposal of.

173 See par 3.2.4 above. The change in ownership, which s 11 of the MPRDA is aimed at regulating, only occurs when the executor thereafter transfers the ownership to either the onerous successor(s) in title or the gratuitous successor in title.

174 The case was only reported on 1 June 2018, after this mini dissertation had been drafted, while the case was focused on old order rights which are not discussed in this mini dissertation, the case has been included here as the ruling confirms the argument submitted.

175 *Executor of the Estate of the Late Josephine Terblanche Gouws Charmaine Celliers NO v Magnificent Mile Trading* 30 Pty Ltd 2018 ZASCA 91 (hereinafter the *Gouws Estate* case). The case concerned Mr Gouws's conversion of an unused old order mineral right to a new order prospecting right for coal in respect of a property, Portion 9 of the farm Driefontein 338 in the district of Middelburg, Mpumalanga. Magnificent Mile brought a competing application for a prospecting right in respect of the same property and the same mineral. Mr Gouws passed away before his application had been decided, so a central question before the Supreme Court of Appeal was whether a prospecting right may be granted to a deceased estate, or whether the death of Mr Gouws put an end to his application. The effect of Mr Gouws's death on his application, once application had been made within the window period provided for in the *Mineral and Petroleum Resources Development Act* 28 of 2002 (the MPRDA), the unused old order right remained valid until the application was either granted or refused. If granted, the unused old order right was replaced with a prospecting or mining right. If refused, the holder lost the unused old order right. The SCA held that Mr Gouws was entitled to a decision in respect of his application to convert his older right to a new order right. Thus, Mr Gouws's estate was entitled to a decision. If the application was granted, it may be necessary for the executor of Mr Gouw's estate to seek the approval of the Minister of Mineral Resources for the transfer of the prospecting right to Mr Gouws's heirs (Swanepoel JH supervised by Clark C 13 July 2018 "*Executor of the Estate of the Late Josephine Terblanche Gouws"*) (The heir to Mr Gouws estate was Mrs Gouws, who passed during the preliminary litigation thus Mrs Gouws executors through a cession had locus standi to approach the SCA).

176 The *Gouws Estate* case at par 36.

In summary of this ruling, one could say that the executor's rights regarding mineral estate assets (or any other kind of asset) in an estate do not originate as a result of the executor's ownership of the asset (as he or she does not directly own such asset), but rather as a result of the vested deceased estate and resultant fiduciary duty to "deal with the 'aggregate of assets and liabilities' that is the estate of the deceased".[177] Having regard to this, it is submitted here that the interpretation of section 11 is that it does not cover the situation of the vesting of the deceased estate in the executor[178] and thus ministerial consent is not required for its operation.

4.3 The accommodation of mineral estate assets in the second elemental phase, "Take control of estate asset"

In Chapter 3 of this mini dissertation it was found that one of the executor's duties was to obtain control of the estate assets; this control amounted to possession.[179] The legal construct of possession is the situation where a person has physical control (detention) of a thing together with the mental attitude (*animus possidendi*) that includes a consciousness of that control.[180] While the *animus* component would need to be determined from the factual situation of each individual case, and is thus not discussed here,[181] the detention component would have to be judged objectively and it is therefore discussed further. The detention component requires that the physical control be both sufficient and effective.[182] The nature, as well as the source, of the estate asset would affect what is required to show sufficient and effective physical control.[183] Considering this, the question that needs to be examined is: "What is required to show sufficient and effective physical control of a mineral estate asset, firstly, considering its nature and, secondly, considering its source?"

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177 The *Gouws Estate* case at par 36.

178 This interpretation is further strengthened in considering the bureaucratic confines of s 11, if having to request the Minister's consent at the time when the executor is appointed. This is a lengthy application where, through the process the objectives of the MPRDA (being: equitable access, sustainable development, and the nation's mineral and petroleum resources) would probably be violated due to the nature of deceased estate administration. Considering the likely possibility that the Minister would reject the application (as it is unlikely the executor possessed all the attributes that the deceased had, which resulted in the first granting of the rights) would mean that the rights would be left in potential perpetual limbo never being resolved.

179 See par 3.2.2 above.

180 See par 3.2.2 and Mostert et al *The Principles of the Law of Property in South Africa* 66.

181 The executor will always have *animus possideni* to possess the assets of the deceased.

182 Mostert *et al The Principles of the Law of Property in South Africa* 70.

183 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 276.

4.3.1 Sufficient and effective physical control of a mineral estate asset, considering the nature of a mineral estate asset

A mineral estate asset is in nature both an asset created by the MPRDA, as well as an estate asset. The examination of what is required to show sufficient and effective physical control of such asset can therefore be ascertained from the MPRDA legislation and common law from the field of succession law. Firstly, the MPRDA provides no direct guidance on how or to what extent an executor has sufficient and effective control over a mineral estate asset. This is in contrast to the provisions of other statutes that provide guidance in their field of application in similar scenarios involving death. Examples of such "other" legislation are the *Pharmacy Act*[184] and the *Liquor Act*[185] which have specific provisions catering for how sufficient and effective control should be expressed by an executor in their respective spheres of application.[186] As the MPRDA does not provide similar guidance, one is left with the legislation and common law from the field of succession law to provide guidance as to what is required to show sufficient and effective control.

As a departure point, section 26 of the AEA provides that it is the executor's duty to take control of the estate assets, while at the same time common law places a fiduciary duty on the executor. Meyerowitz[187] states that one of the executor's fiduciary duties is to "take reasonable care to preserve the assets of the estate". Thus, it is submitted here that any actions that the executor takes in an endeavour to "preserve" the mineral estate asset would at least be a *prima facie* indication of sufficient and effective control

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184 *Pharmacy Act* 53 of 1974. Meyerowitz (Meyerowitz *Administration of Estates and Their Taxation* 12–36) explains that:
[t]The executor of a deceased chemist and druggist may, subject to the laws relating to the administration of estates, for a period of twelve months after his deceased, or for such further period as the Pharmacy Board sanction continue the pharmacy business of the deceased, provided it is conducted under the continuous personal supervision of a chemist and druggist.
(This ability is in terms of s 37 of the *Pharmacy Act*.)

185 *Liquor Act* 27 of 1989. Meyerowitz (Meyerowitz *Administration of Estates and Their Taxation* 12–37) explains that:
If the licensee dies, his licence ensures for the benefit of his executor, who, subject to his rights and duties under the Administration of Estates Act, may without formal transfer carry on the business.
(This is in terms of s 118 of the *Liquor Act*.)

186 It is submitted here that the MPRDA should be amended to provide such guidance in a similar fashion to that of the Pharmacy Act and the Liquor Act.

187 Meyerowitz *Administration of Estates and Their Taxation* 12–23.

of such asset.[188] It is submitted here that this is only a *prima facie* indication pending the determination of the executor's ability to transfer the asset, as discussed below.[189] It is further submitted that the executor is generally not required to exercise the right of the mineral estate asset and either mine or prospect. To exercise the rights would not be "preserving" the right, thus it must be found that this is not what is required for sufficient and effective control. What actions would "preserve" the mineral estate asset is a seemingly open-ended question that would need to be assessed on a case-by-case basis.

A second duty of the executor resulting from his or her common law-imposed fiduciary duty is that he or she is required to transfer the mineral estate asset to either an onerous successor[190] in the event that the executor realises the asset or, to the gratuitous successor[191] after all obligations have been settled.[192] Thus the executor has sufficient and effective control if he or she is able to transfer the mineral estate asset effectively after ministerial consent has been obtained in terms of section 11 of the MPRDA. However, there are concerns about the executor's ability to carry out this duty when one reads section 39 of the AEA which states:

> Registration of immovable property in deceased estate
> (1) An executor shall, subject to the provisions of subsections (2) and (3), the Deeds Registries Act, 1937 (Act 47 of 1937), cause immovable property (including, in the case of a massed estate, any such property forming part of the share of the survivor or survivors of that estate) to which an heir is entitled according to a distribution account, to be registered in the name of the heir, subject to any rights and conditions affecting such property.

The Act only provides for immovable property that is registerable in terms of the *Deeds Registries Act*.[193] Mining and prospecting rights are immovable property but registerable

188 The endeavor of an executor to preserve the estate asset (e.g., insure the asset) could potentially be biased on his or her subjective view that he or she controls a certain asset and needs to preserve such. As the act of preserving an asset is not directly linked to the actual control of the asset (as in taking out insurance), the endeavor to preserve the asset would only be *prima facie* evidence of objective control.

189 If it turns out that that the asset is not an estate asset, either as a result of mistaken ownership of an estate asset (e.g., the asset was not the deceased's) or the impossibility of the estate owning the asset (e.g., a mining permit, see par 2.4), the asset could not have been effectively transferred to a purchaser or an heir (see following paragraph in main text) thus, the executor would not have objective sufficient and effective control.

190 An example of an onerous successor in title is a purchaser (Van der Schyff *Property in Minerals and Petroleum* 501).

191 An example of a gratuitous successor in title is an heir (Van der Schyff *Property in Minerals and Petroleum* 501)

192 See par 3.2.3 above.

193 *Deeds Registries Act* 47 of 1937.

under the *Mining Titles Registry Act*.[194] This might have been an oversight as the AEA was enacted in 1965 and the *Mining Titles Registry Act* was enacted two years later in 1967. However, section 39 of the AEA was amended in 1970[195] and 1996,[196] but neither amendment addressed this shortcoming. The outcome, it must be argued, is that the executor is under a common law duty to transfer the asset to the correct recipient and the shortcomings of the AEA in section 39 do not hamper this.[197] Considering the above, it is argued here that sufficient and effective control of a mining and prospecting right by an executor is indicated by the executor's ability to transfer such right (either to the purchaser or the appropriate heir(s).[198]

4.3.2 Sufficient and effective physical control of a mineral estate asset, considering the source of a mineral estate asset

As stated above,[199] the sources of estate assets are: the assets of the deceased, the assets of a joint estate of spouses married in community of property and the massed assets under section 37.[200] Regarding the assets of the deceased, it is submitted that the executor has *prima facie* control if he or she endeavours to preserve the mineral estate asset. He or she has sufficient and effective control of the mineral estate asset, if he or she has the ability to transfer it to either the purchaser or the appropriate heir.[201]

Considering the assets of the joint estate of spouses married in community of property, an interesting dynamic occurs when evaluating marriages in community of property against section 11 of the MPRDA. In *Ex parte Menzie et Uxor*[202] (hereinafter the *Ex parte Menzie* case) it was held that co-ownership of the joint estate was a species of bounded co-ownership – the half share was not only undivided, but also indivisible. Thus, at the commencement of the marriage, the ownership of the assets passes automatically (*ex lege*) to the joint estate and the normal rules as to the passing of rights

194 *Mining Titles Registry Act* 16 of 1967
195 By s 4 of Act 54 of 1970.
196 By s 1 of Act 49 of 1996.
197 However, it is advisable here that the AEA be amended to cater accordingly for the *Mining Titles Registry Act* 16 of 1967.
198 Either onerous successor(s) in title or a gratuitous successor in title. An example of an onerous successor in title is a purchaser. An example of a gratuitous successor in title is an heir (Van der Schyff *Property in Minerals and Petroleum* 501).
199 See par 2.2 above.
200 Of the AEA.
201 As stated in par 4.3.1 above.
202 *Ex parte Menzie et Uxor* 1993 3 SA 799 (K) (hereinafter the *Ex parte Menzie* case).

do not apply.[203] This common law precedent is in direct conflict with section 11 of the MPRDA, as this would mean that the mineral asset would move to the joint estate on marriage, bypassing the need for ministerial consent. However, section 4 (4) of the MPRDA states:

> (2) In so far as the common law is inconsistent with this Act, this Act prevails.

In the light of this section, it is argued here that the common law precedent set in *Ex parte Menzie* that assets pass automatically (*ex lege*) to the joint estate on marriage is not applicable to mineral assets granted or issued in terms of the MPRDA. Thus, unless the Minister has consented to the mineral assets passing to the joint estate in terms of section 11, the mineral asset would remain in the 'ring-fenced' personal estate of the spouse who acquired it. It is submitted here that this would be similar to the situation in which one of the spouses receives an inheritance that is excluded from the joint estate.[204] It is further argued here that this would be the position regardless of whether the mineral asset was granted or issued before or during the marriage. Without such consent, the mineral asset is either in the deceased's estate as the deceased was the holder of such at date of death or in the spouse's estate if the spouse was the holder at date of death. It would not be in the joint estate unless ministerial consent in terms of section 11 had been granted. If the mineral asset is not an asset of the joint estate, the executor could not take control of it under the marital doctrine of joint assets of a communal estate.

Regarding mineral estate assets that are massed in terms of section 37 of the AEA[205] to a deceased estate from a living person, it is submitted here that such a transaction would definitely attract the application of section 11 of the MPRDA. This is because it would be the transfer of the ownership of the granted right and[206], as such, the transaction would require the Minister's consent. The critical question arises as to when the consent is required? Is it at the time of deposing the joint will or is it when the survivor adiates? It is argued here that the Minister's consent is only required after the survivor has adiated. This is based on two reasons. First, the factors that the Minister

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203 Ex parte Menzie case at 811.
204 Field *The Drafting of Wills* 136; see further on point the case *Badenhorst v Bekker NO* 1994 2 SA 155 (N).
205 See fn 13 above.
206 The living person would be alienating his or her ownership.

needs to consider before consenting to such a transfer (such as economic means and technical ability of the applicant to ensure optimal engagement in the industry)[207] could drastically chance between the date of deposing the joint will and the date of the adiation. To require the ministerial consent at the time of deposing the joint will would be premature and overlook the real possibility of such drastic changes in circumstance. This would, in turn, undermine the identified purpose of section 11 being to regulate the rights so granted[208] in order to achieve the ambitions of the MPRDA enactment.[209] The second reason why ministerial consent is only required after the survivor has adiated, is because if the survivor repudiates the massing, then no massing will occur.[210] In such an event no ministerial consent would be required. Given these two reasons, it is submitted here that the executor will only be entitled to take control of the mineral estate asset after the survivor has adiated and thereafter the Minister has provided consent to such massing. However, it is submitted here that it would be exceptionally unlikely that the Minister would provide such consent. This is because it is nearly impossible to imagine an event in which doing so would progress the ambitions of the MPRDA.[211] It is thus exceptionally unlikely that the Minister would ever give consent to massing of a mineral estate asset from a living person to a deceased estate. The extent of this results in the use of "massing" in estate planning becoming redundant in respect of mineral estate assets.

4.4 The accommodation of mineral estate assets in the third elemental phase, "The executor settles the legal obligations and liabilities of the estate"

The third elemental phase in the administration process is that the executor must fulfil his or her fiduciary duty to settle the legal obligations and liabilities of the estate.[212] As legal obligations and liabilities are two separate concepts, the effect of mineral estate assets on each is discussed individually below.

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207 Van der Schyff *Property in Minerals and Petroleum* 476. See for further discussion in Botes *The role of ministerial discretionary powers in the granting of rights to minerals*.
208 Mogale *Alloys case* par 37.
209 To provide equitable access to, and the sustainable development of, the nation's mineral resources, and to regulate all matters associated herewith. (See Preamble and s 2 of the MPRDA and, Botes *The role of ministerial discretionary powers in the granting of rights to minerals* 3).
210 See fn 13 above.
211 See fn 162 above.
212 See par 3.2.3 above.

4.4.1 The effects of an estate asset being a mineral estate asset on the "legal obligations" of the deceased

It was stated above that the legal obligations of a deceased estate are obligations arising *ex lege* in the public law sphere and are, for the most part, the duty to pay certain taxes.[213] In this regard the most pertinent tax is estate duty, as it is the only tax that is exclusive to deceased estate matters.[214] As such, the effects that a mineral estate asset has on the legal obligations imposed by the *Estate Duty Act*[215] finds particular relevance in this mini dissertation.

Estate duty is a type of wealth tax that is payable on the dutiable amount of the estate of a deceased person.[216] It is levied by the *Estate Duty Act*[217] and it is the executor's duty to determine any estate duty liability in terms of the Act.[218] At the outset it must be stated that the definition of an 'estate asset'[219] is different from what is defined as 'property' for estate duty purposes. Thus, the question is whether mineral estate assets are such property that forms part of the dutiable estate and, secondly, at what value? The word 'property' is defined in section 3(2) of the *Estate Duty Act*[220] as any right in, or to, property, movable or immovable, corporeal or incorporeal. Stein[221] writes:

> The term 'property' has a very wide meaning and includes every asset of a person who was living in South Africa at the date of his or her death, such as household and personal effects, jewellery, works of art, shares, a member's interest in a close corporation, coins and stamp collections. The term is wide enough to include a right in or to an asset, for example, a valuable option to acquire land or shares, provided the right does not terminate at date of death.

Thus, it is submitted here that the definition is definitely wide enough to include mineral estate assets, due to their being immovable property in nature,[222] as "property" for

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213 See par 3.2.3 above.
214 All taxes levied under the *Income Tax Act* 58 of 1962, such as income tax and capital gains tax, are, for the most part, the same (excluding certain rebates and allowances) for holding a mineral estate asset in a deceased estate, as it would be holding such in a living estate. They are not within the scope of this mini dissertation.
215 *Estate Duty Act* 45 of 1955.
216 Stein *Estate Duty* 1.
217 *Estate Duty Act* 45 of 1955.
218 S 12 of *Estate Duty Act* 45 of 1955.
219 As discussed in par 2 above.
220 *Estate Duty Act* 45 of 1955.
221 Stein *Estate Duty* 11.
222 As determined in par 2 above.

estate duty purposes.[223] The question now is: "How does one value them?" Meyerowitz[224] states in respect of the valuation of mining rights that:

> in the case of mineral rights, the Master insists upon the valuation of the Government Mining Engineer. This valuation is usually obtained by the Master and the executor should inquire from the examiner or other officials what information is wanted for this purpose. Such valuation by the Government Mining Engineer is also required for prospecting contracts. When the Master has obtained the valuation, he advises the executor.

However, this seems to be out of date and referencing the previous dispensation on mineral rights as the Office of the Government Mining Engineer no longer exists. It is submitted here that the mineral estate asset should rather be valued by an auditor or accountant, as a sole proprietorship or partnership. Such auditor or accountant should apply the provisions of the South African Mineral Reporting Codes (hereinafter SAMCODES)[225] and, in particular, the South African Code for the Reporting of Mineral Asset Valuation (hereinafter SAMVAL)[226] to value these assets.

4.4.2 The effects of an asset being a mineral estate asset on liabilities of the deceased

As regards liabilities of the deceased, it was stated above that the term 'liability' was intended to mean debts and obligations arising in the private law sphere, such as

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223 As regards reconnaissance permissions, retention permits and mining permits held by a natural person at the time of death, they would not be "property" for estate duty purposes as they terminate at death in terms of s 56 of the MPRDA. S 3(1)(d) of the *Estate Duty Act* is not applicable, as the holder of such permissions and permits is not competent to dispose of them immediately before his or her death as the MPRDA does not allow for such disposal.

224 Meyerowitz *Administration of Estates and Their Taxation* 15–17.

225 SAMCODES, the South African Mineral Reporting Codes, set out the minimum standards, recommendations and guidelines for the public reporting of mineral-related issues in South Africa. They currently comprise three codes, two guideline documents and an affiliated national standard:

1. Codes
a. SAMREC: The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves
b. SAMVAL: The South African Code for the Reporting of Mineral Asset Valuation
c. SAMOG: The South African Code for the Reporting of Oil and Gas Resources
2. Commodity, or subject, specific guidelines/standards:
a. SAMESG Guideline: The South African Guideline for the Reporting of Environmental, Social and Governance parameters within the mining and oil and gas industries
b. SAMREC Diamond Guidelines: SAMREC Guideline Document for the Reporting of Diamond Exploration Results, Diamond Resources and Diamond Reserves (and other Gemstones, where relevant)
3. National Standard:
a. SANS 10320:2004: South African guide to the systematic evaluation of coal resources and coal reserves (currently under review). This document is a South African National Standard, published by the South African Bureau of Standards.

(SAMCODE [Date unknown] https://www.samcode.co.za/samcode-ssc/about-samcodes).

226 SAMVAL: The South African Code for the Reporting of Mineral Asset Valuation.

contractual obligations to do something or pay something.[227] These would be claims in terms of section 29 of the AEA. Considering such, there are two potential forms of claim: the first being "to pay something". Thus, a creditor's claim could be for monetary settlement of an obligation owed by the deceased. The second claim is "to do something" a creditor's claim for specific performance of an obligation. An example of this would be the claim for the transfer of the asset of the deceased to the creditor. Mineral estate asset as estate assets could potentially affect both such claims.

Regarding the first form of claim (*i.e*., "to pay something") against a deceased estate that holds mineral estate assets, there is the possibility that the executor will have to realise the mineral estate asset to settle such claim.[228] However, such an action of the executor carries pre-emptive obligations.[229] As the sale would be a transfer to the purchaser (the onerous successors),[230] consent from the Minister in terms of section 11 of the MPRDA to transfer the assets would also have to be obtained.

As regards the second form of claim against a deceased estate ("to do something"), which in this scenario would be a claim for transfer of the mineral estate asset, would typically be a *pactum successorium*,[231] and would be invalid. However, in general practice there are two types of such claim that are not *pactum successorium*: (i) a claim from a surviving spouse married in community of property and (ii) a claim arising from a so-called buy and sell on death[232] agreement. Regarding the first, a claim from a surviving spouse married in community of property,[233] as discussed above, it is

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227 See par 3.2.3 above.

228 It is the not the executor's duty to convert the assets of the estate into cash, but only such assets as are sufficient to pay the liabilities (*Lochhat's Estate* case at 302).

229 Such as the executor should not sell assets if the legatee(s) or heir(s) are prepared to pay the liability themselves and, in turn, receive the asset and where assets are specially bequeathed, the executor must first exhaust the assets that fall into the general residue before realising the assets specially bequeathed. Meyerowitz *Administration of Estates and Their Taxation* 12–27. See remarks by de Villiers CJ in *Van der Lith's Estate v Conradie* 13 CTR 399.

230 See par 4.3.1 above.

231 Is an "agreement which purports to limit a contracting party's freedom of testation by irrevocably binding him to post-mortem devolution of the right to an asset in his estate. Such a contract is seen as contra bones mores or against the good morals of society to do it and is not enforceable as being a *pactum successorium*" (Davis, Beneke and Jooste *Estate Planning* 15–18.)

232 The term 'buy and sell on death' is used in this mini dissertation as a differentiation between it and a general "normal" buy and sell agreement.

233 Meyerowitz (Meyerowitz *Administration of Estates and Their Taxation* 15–25) explains that the executor in the estate of spouses married in community of property must deal with the assets of the joint estate and not merely with the half share of the deceased spouse. Further, he explains that when a community estate terminates by death, the survivor is not *ipso facto* vested with dominium of one half of such assets of the joint estate. The executor of the joint estate must first discharge all the joint estate liabilities and it is only thereafter that the surviving spouse may be vested with half of the net balance of the joint estate. After vesting in the surviving spouse, such spouse can claim

improbable that a mineral estate asset could ever form part of a join estate of parties married in community of property.[234] However, if there was such a spousal claim for a mineral estate asset, the executor would have to obtain ministerial consent in terms of section 11 of the MPRDA, to transfer the assets from the executor to the spouse.

Regarding the second claim, a claim arising from a buy and sell on death agreement, it must be stated that a general commercial buy and sell agreement differs from a buy and sell agreement at death. A buy and sell on death agreement is a contract entered into between business partners under which at the death of one of the parties, the survivor is entitled to purchase the deceased's interests.[235] Thus, a buy and sell on death agreement is a commercial buy and sell agreement between business partners that is suspended until the death of one of the parties. A buy and sell on death agreement does not constitute a *pactum successorium* if one can establish that a *quid pro quo* had been accorded to the promisor.[236]

If a normal commercial buy and sell agreement is over the transfer of an entitlement to mineral granted or issued by the MPRDA, one would have to agree that it would fall within the scope of section 11 of the MPRDA and thus ministerial consent would be required. However, the situation becomes problematic since in the South African legal system the abstract theory of transfer is followed.[237] The abstract theory of transfer separates the real agreement and delivery from the underlying cause of the transfer.[238] Thus, there is a separation between the obligation agreement and the transfer agreement. The question here is: To which agreement does the Minister need to consent? Considering this question, van der Schyff[239] submits that section 11 of the MPRDA could potentially apply to both, as she states that the section:

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possession or control of such estate assets (Meyerowitz *Administration of Estates and Their Taxation* 16–9; in support of this submission the author cites the case *Costain & Partners v Godden* 1960 4 SA 456 (SR) at 460).

234 See par 4.3.2 above.

235 Davis, Beneke and Jooste *Estate Planning* 15–18.

236 *Schauer v Schauer* 1967 3 SA 615 (W) at 620.

237 *Air-Kel h/a Merkel Motors v Bodenstein* 1980 3 SA 912(A).

238 Mostert *et al The Principles of the Law of Property in South Africa* 190. As an example, Mostert *et al* submit that if A and B agree to transfer ownership in a textbook from one to the other, the underlying cause for the transfer is problematic if A thinks she is selling the book and B thinks A is donating the book. While there is no real agreement under the abstract system, the book would still transfer as the parties' intention was both to transfer the book (sell and donate).

239 Van der Schyff *Property in Minerals and Petroleum* 480.

> May be interpreted to refer to both the cause that underlies any transfer of rights and to the completed transaction where rights have successfully changed hands and now vest in another holder.

However, Van der Schyff submits that the interpretation that should be applied to the section is the answer to which of the following two situations should apply: Firstly, should ministerial consent to transfer rights be obtained before an obligatory agreement that would constitute the cause of the transfer of rights is concluded? or, secondly, should the obtainment of ministerial consent be included as a suspensive condition in either the obligatory or the transfer agreement?[240] Van der Schyff submitted that the correct approach would be to deem the ministerial consent as a suspensive condition of the obligation agreement, on the basis that the rights would be transferred if the ministerial consent was acquired.[241] Pending the fulfilment of such a suspensive condition, the contract is inchoate.[242] Bradfield argues that the term 'inchoate' certainly does not mean that either party has a *locus poenitentiae* and can withdraw from the contract with impunity, nor does it mean that a sale comes into being only upon the fulfilment of a suspensive condition.[243] Rather, he refers to the case of *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd*, in which van den Heever J[244] held:

> The contract (in the modern sense, now that all contracts are consensual) is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation or its eligible content.

Since the above relates to normal commercial buy and sell agreements, the only question that remains is when, exactly, is the ministerial consent required in a buy and sell on death agreement? Firstly, it is argued here that the ministerial consent is not required before the obligation is agreed, nor immediately after the obligation has been agreed to as the transfer is held back by a second suspensive condition. This second suspensive condition being the death of one of the parties and such deceased party's

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240 Van der Schyff *Property in Minerals and Petroleum* 480.

241 Van der Schyff *Property in Minerals and Petroleum* 480–483 bases her finding on a number of submissions. First, she submits that legal certainty over security of tender is of extreme importance in the extraction industry, where immense importance is afforded to a right holder's ability to transfer or encumber such rights, due to the industry's highly competitive nature. The given interpretation provides such required legal certainty. Second, regarding the nation's interest, she submits that "[t]he importance of creating an internationally competitive regulatory regime is emphasised in the ninth item in the preamble to the MPRDA, and the promotion of security of tenure is one of the proclaimed objects of the Act. In the light of this object, it is advanced that the context of the MPRDA itself supports an interpretation that conditional obligatory agreements may be concluded in anticipation of the Minister's consent".

242 *Joseph v Halkett* (1902) 19 SC 289 at 293.

243 Bradfield *The Law of Contract in South Africa* 167.

244 *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) at 665–7.

executor accepting the contractual claim under the buy and sell on death agreement. In terms of section 29 of the AEA, an executor must, as soon as possible after his or her appointment, publish a notice in the *Government Gazette* and in one or more newspaper, calling upon all persons having a claim against the deceased to lodge such claim with the executor within the period specified in the notice. Thus, it is submitted here that, the surviving party to the buy and sell on death agreement can only lodge a claim for the mineral estate asset at this juncture. Such a claimant would also have to satisfy the executor that the required funds to purchase the asset were available and agree to when such funds would be transferred (after the Minister's consent has been given) so as to show that there is *quid pro quo,* thus the buy and sell on death is valid despite being a *pactum successorium.* Once the executor has accepted the claim then ministerial consent in terms of section 11 of the MPRDA should be sought. In the event that ministerial consent is not given, the contract would then be suspended.

4.5 The accommodation of mineral estate assets in the fourth elemental phase, "The executor distributes the remaining estate assets to the heirs or legatees"

Following from the discussion in the first part of this Chapter,[245] it is clear that ministerial consent is required in terms of section 11 (1) of the MPRDA for any transfer of any mineral estate asset from the executor to either onerous successors in title or a gratuitous successor in title.[246] The questions asked here are: "Is such a requirement constitutional?" and "What happens if the Minister declines to give consent?"

4.5.1 The constitutionality of section 11 (1) of the MPRDA

The question of whether section 11(1) of the MPRDA is constitutional must be considered in the light of one's right to freedom of testation. South African law recognises the principle of freedom of testation, thus allowing a testator to bequest whatever assets he or she owns to whomsoever he or she chooses.[247] The authors[248] of *The Law of Succession in South Africa* defined testamentary freedom as:

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245 See par 4.2 above.
246 An example of an onerous successor in title is a purchaser. An example of a gratuitous successor in title is an heir (Van der Schyff *Property in Minerals and Petroleum* 501).
247 Field *The Drafting of Wills* 4.

> The right of an individual to dispose of his or her property on death as he or she pleases.

This doctrine is held in high esteem in South African jurisprudence, with a testator's wishes being carried out by his or her executors. The first reason for upholding the doctrine of testamentary freedom is that the common law deems it to be in the public interest. In the case of *Bydawell v Chapman*[249] (hereinafter the *Bydawell* case) Van den Heever JA[250] held:

> Roman-Dutch law recognises as a matter of public interest, transcending the private interests of beneficiaries under a will, that effect should be given to the wishes of a testator . . . the "interests" of the testator and the public interest demand that effect should be given to a testator's last wishes.

The second reason for upholding the doctrine of testamentary freedom is that it forms part of constitutionally enshrined rights. This can be seen in the case *In re* BOE *Trust Ltd.* where Erasmus AJA[251] held in respect of the right to property as follows:

> Section 25(1) of the Constitution provides that no-one may be deprived of property. The view that s 25 protects a person's right to dispose of their assets as they wish, upon their death is well held.[252]

Erasmus[253] further held, regarding the right to dignity that:

> Not to give due recognition to freedom of testation will . . . also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.

These views are contrasted against the ministerial discretion over transfer of mineral estate assets in terms of section 11(1) of the MPRDA. Although section 25(1) of the Constitution requires that existing property rights be respected and dealt with according to the rule of law, section 25(4) of the Constitution indirectly compels the courts to bear in mind that the provisions of the MPRDA should be interpreted to embody the nation's

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248 Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 39.
249 *Bydawell v Chapman* 1953 3 SA 514 (A) (hereinafter the *Bydawell* case).
250 Bydawell case at 521E–F.
251 *In re BOE Trust Ltd* 2013 3 SA 236 (SCA) (hereinafter the *BOE Trust* case).
252 *BOE Trust* case at 26.
253 *BOE Trust* case at 27.

commitment to reforms aimed at bringing about equitable access to the country's natural resources, which include mineral and petroleum resources.[254] The application of section 33 of the Constitution compels the regulation of the country's mineral and petroleum resources within a just administrative system. Additionally, taking into consideration the earlier discussion in this mini dissertation that[255] in the *Mogale Alloys* case Coppin J[256] held that "[t]he ultimate purpose of section 11 is to regulate the rights so granted", it is submitted here that such regulation, in view of its importance to the nation, is entirely constitutional.[257] The provisions of section 11 only restrict the freedom of testation to the extent that regulation is required. It does not preclude a testator from making a testamentary disposition (bequeathing mineral estate assets), it simply requires that such bequest be to an appropriate person.

4.5.2 What happens if the Minister declines to give consent?

The departure point in examining what happens if the Minister declines to give consent in terms of section 11 of the MPRDA is first to investigate whether such mineral estate asset would lapse, considering the provisions of section 56(b) of the MPRDA. Section 56(b) states:

> Any rights, permits, permissions or licences granted or issued in terms of this Act shall lapse, whenever:
> a) […]
> b) The holder thereof is deceased and there are no successors in title[258]

Given the wording of the section, the question is: "What is meant by the term 'successor in title'?" The reason for this is that if the term is interpreted as only a gratuitous successor, and the minister declines consent to transfer to such gratuitous successor, the mineral estate asset would lapse. This is because there would be no other "successor in title". However, in this regard Dale *et al*[259] submit that the phrase 'successor in title' should be interpreted broadly to include both onerous successors in

254 *Agri SA* case par 61.
255 See par 4.2.1 above.
256 *Mogale Alloys* case par 37.
257 See par 4.2.1 above.
258 S 56(b) of the MPRDA.
259 Dale et al (eds) *South African Mineral and Petroleum Law* 524.

title and gratuitous successors[260] in title. Thus, in the event that ministerial consent is declined for the transfer of the mineral estate asset to the heir(s) (gratuitous successor(s)), the possibility would still exist for the executor to sell the mineral estate asset to a purchaser (onerous successor). In this case the mineral estate asset would not lapse. The question then is: "Does the executor have to sell the mineral estate asset, or would it fall into the residue of the estate?"

For the mineral estate asset to fall into the residue of the estate, ademption would have to occur. Meyerowitz[261] explains that ademption is where a legacy will fail if the legatee is incompetent to take under the will:

> Where a specific legacy fails it falls into the residuary estate for the benefit of the residuary heir.[262]

Thus, the ademption doctrine requires that on incompetency of a legatee to inherit, the asset becomes part of the residue. However, it is argued here that, first, not all bequests of mineral estate assets are legacies[263] and, second, the Minister's refusal to give consent is no reflection on the legatee's competency to inherit,[264] but rather his or her capacity to inherit that particular mineral estate asset. Thus, where ministerial consent is not granted, the asset should not automatically fall into the residue.

As the application of the ademption doctrine fail, the executor would need to sell the mineral estate assets. However, unless the will directs the executor to do so, it is not the executor's duty to convert the assets of the estate into cash, but only such as are sufficient to pay the liabilities.[265] As the sale of the mineral estate asset in this situation is not an endeavour to raise liquidity to settle the liabilities, the executor does not have the discretion to do so. However, if an heir wishes it, the executor can realise the asset in excess of the amount required to pay the liabilities of the estate.[266] Thus, if the

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260 Either testate or intestate heirs.
261 Meyerowitz *Administration of Estates and Their Taxation* 18 – 6.
262 Meyerowitz *Administration of Estates and Their Taxation* 18 -6; in reference to *Morse v Estate Edden* 1913 CPD 567 and *Ex parte Estate Kerr* 1942 NPD 412.
263 Could be intestate heirs or residue heirs.
264 An example of this is that a beneficiary can be disqualified because he or she caused the death of the testator by murdering him or her; or a person who signed a will as a witness, as he or she is an incompetent heir and cannot inherit (Abrie *et al Deceased Estates* 56).
265 *Lochhat's Estate* case at 302.
266 *George Municipality v Freysen* 1976 2 SA 945 (A) at 952 – 953.

ministerial consent was declined, it would be the heirs' prerogative to request the executor to sell the mineral estate asset. The heir would do this by providing his or her consent for such a sale in terms of section 47 of the AEA.[267] Once the asset is sold, the heir would be entitled to the monetary value from the sale of the asset. In the event that such a purchaser cannot be found, or the heir does not wish that such a sale takes place, it is submitted here that the executor could abandon the mineral estate asset as an avenue of last resort. Section 56(f) of the MPRDA stipulates that a right, permit or permission can be abandoned, and would lapse in such a scenario. However, as Van der Schyff[268] submits, section 43(3) of the Act requires that a closure certificate must be applied for upon the abandonment. This process would certainly incur costs and duties in terms of the environmental liabilities under section 43(1) of the Act. Van der Schyff[269] also indicates that there could be further implications if the abandonment would affect workers and the nearby communities in terms of section 52 of the Act but, due to poor drafting, the true effects are largely uncertain.

4.6 Conclusion

The purpose of this chapter was to address the question: "How can mineral estate assets be accommodated for in the administration of deceased estates?" This question was addressed by examining how mineral estate assets could be accommodated for in each of the four elemental phases of the administration process.[270]

Considering, how mineral estate assets could be accommodated for in the first elemental phase, it was submitted that the process of the estate vesting in the executor[271] was potentially problematic regarding section 11(1) of the MPRDA.[272] On interpreting the section, using the text-in-context approach, it was submitted that section 11(1) only covered the situation where the executor distributed the mineral estate assets to either the onerous successor(s) in title or the gratuitous successor in title, and not the situation where the estate vested in the executor.[273]

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267 Meyerowitz *Administration of Estates and Their Taxation* 12–27.
268 Van der Schyff *Property in Minerals and Petroleum* 509.
269 Van der Schyff *Property in Minerals and Petroleum* 510.
270 See par 3.2 above.
271 See par 3.2.1 above.
272 See par 4.3 above.
273 See par 4.3.1 above.

As to how mineral estate assets could be accommodated for in the second elemental phase,[274] it was submitted that the executor's duty was to obtain control of the estate assets. This would have to be proven objectively by having both sufficient and effective physical control of the mineral estate asset.[275] In this regard, the question that needed to be examined was: "What is required to show sufficient and effective physical control of a mineral estate asset considering its nature and source?" It was submitted that two common law fiduciary duties placed on an executor were important. Firstly, the duty to preserve the asset of the estate would mean that any endeavour to "preserve" the mineral estate asset would be at least a *prima facie* indication of sufficient and effective control of such asset. Secondly, the duty to transfer the mineral estate asset to either the purchaser or to the heirs after all obligations had been settled. It was argued that the executor had sufficient and effective control if he or she was able to transfer the mineral estate asset effectively. Thus, considering the source of a mineral estate asset firstly being an "asset of the deceased", it was submitted that the executor had *prima facie* control if he or she endeavoured to preserve the mineral estate asset. Further, he or she would have sufficient and effective control of the mineral estate asset, if he or she had the ability to transfer such right (either to the purchaser or the appropriate heir). Regarding the assets of the joint estate of spouses married in community of property, it was argued that section 4 of the MPRDA changed the common law position that assets passed *ex lege* to the joint estate.[276] For such a transfer to the joint estate to occur, it was submitted that the minister would have had to give consent in terms of section 11 of the MPRDA.[277] If the mineral estate asset was in the deceased estate, then the executor would take control in the same way as stated directly above as an asset of the deceased. Regarding the massing of a mineral estate asset, it was submitted that the executor would only be entitled to take control of the mineral estate asset after the survivor had adiated and the Minister had provided consent.[278] The executor will thereafter have sufficient and effective control of the mineral estate asset in the same way as an asset of the deceased.

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274 See par 3.2.2 above.
275 See par 3.2.2 above
276 See para 4.3.2 and fn 202 above (*Ex parte Menzie* case).
277 See par 4.3.2 above.
278 See par 4.3.2 above.

To determine how mineral estate assets should be accommodated for in the third elemental phase, the legal obligations and liabilities of the estate were examined independently.[279] As regards the legal obligations of the estate, it was found that mineral estate assets were property for estate duty purposes and should be valued by an auditor or accountant, through the application of SAMCODES[280] and in particular SAMVAL.[281] As for the liabilities of the deceased, it was submitted that there were two potential forms of claim: (i) a claim "to pay something" and (ii) "to do something". In respect of the first form of claim, if the executor realises the mineral estate asset to settle such claim, the sale to the purchaser would be a transfer within the scope of section 11 of the MPRDA. As such, consent from the Minister would have to be obtained. Regarding the second form of claim against a deceased estate, namely "to do something", it was submitted that such a claim would typically be a *pactum successorium*. However, there are two types of such a claim that are not. These are: (i) a claim from a surviving spouse married in community of property and (ii) a claim arising from a commercial buy and sell agreement.[282] Regarding the first, it was submitted that such a claim was improbable. However, if there was such a claim, the executor would have to obtain ministerial consent in terms of section 11 of the MPRDA to transfer the assets from the executor to the spouse.[283] Regarding the second, a salel agreement, it was found that the nature of the transaction would fall into the scope of section 11 of the MPRDA and ministerial consent would therefore be required. It was submitted that ministerial consent was only required after the executor had accepted the claim in terms of section 29 of the AEA.[284]

Considering how mineral estate assets should be accommodated for in the fourth elemental phase, it was found that the questions that needed to be answered were: "Was the ministerial consent that was required in terms of section 11 (1) of the MPRDA for any transfer of any mineral estate asset constitutional?" and "What happened if the Minister declined to grant such consent?"[285] Regarding the constitutionality, it was

279 See par 4.4 above.
280 See fn 225 above.
281 See par 4.4.1 above.
282 See par 4.4.2 above.
283 See par 4.4.2 above.
284 See par 4.4.2 above.
285 See par 4.5 above.

submitted that the regulations provided for by section 11 were entirely constitutional[286] in view of their importance to the nation.[287] As far as the question "What happens if the Minister declines to give consent?", it was found that mineral estate assets did not lapse if this consent was declined. In such an event the executor could sell the mineral estate asset, at the heir's request, to a third-party purchaser (onerous successor). Ministerial consent in terms of section 11 would be needed for this transfer of the mineral estate asset from the estate to the third-party purchaser. As an avenue of last resort, it was submitted that the executor could abandon these rights. However, this process could incur costs and duties in terms labour and environmental liabilities.[288]

286 See par 4.5.1 above.
287 See fn 162 above.
288 See par 4.5.2 above.

5 Final conclusion and application of findings

5.1 Final conclusion

This mini dissertation was concerned with addressing the following question:

> How can rights and permits to minerals, granted and issued in terms of the *Mineral and Petroleum Resource Development Act 28 of 2002*, be accommodated in the administration of deceased estates?

This primary research question, in a contextualised sense, was the study of the transfer of the entitlements acquired in terms of the MPRDA as estate assets in the administration of a deceased estate. For purposes of the framework of this study it was submitted that to address the primary research question adequately, it was first imperative to address the preliminary questions of; what is an estate asset; is an entitlement acquired in terms of the MPRDA such an estate asset; and, what does the process of administrating a deceased estate entail?

Regarding the first preliminary question, namely "What is an estate asset?", it was submitted that an 'estate asset' could be defined as an asset that, in nature, is either immovable property, movable property or a claim in favour of the estate,[289] and must originate as either an asset of the deceased, an asset of a joint estate of spouses married in community of property or an asset massed[290] in terms of section 37 of the AEA.[291] The determination of this definition of 'estate asset' leads to the second question ("Is an entitlement acquired in terms of the MPRDA such an estate asset?") being addressed.[292] In this regard, it was first found that rights to minerals were solely granted or issued by the provisions of the MPRDA.[293] Such provisions allow for reconnaissance permissions, retention permits, mining permits, and prospecting and mining rights. In the light of the definition identified above, it was found that reconnaissance permissions, retention permits and mining permits could not be described as either immovable property, movable property or a claim in favour of the

289 See par 2.2 above.
290 See fn 13 above.
291 See par 2.2.1 and 2.2.2 above.
292 See par 2.3 above.
293 See par 2.3.4 above.

estate. As a result, they could not be described as an estate asset.[294] However, prospecting and mining rights could be described as estate assets, as it was found that they were both real rights (although limited) and were registerable in an office in the Republic of South Africa, thus making them immovable property as per the definition in the AEA.[295] For purposes of this mini dissertation such rights were collectively termed 'mineral estate assets'.

Following the progression of the framework of this mini dissertation, the subsequent step to address the primary research question was to address the third preliminary question, namely: what does the process of administrating a deceased estate entail? In this regard it was stated that the process of administering a deceased estate was not a simplistic administrative task in which one followed a step-by-step guide laid out in the AEA.[296] Rather, it was submitted, that the administration of a deceased estate was a complicated process founded on four elemental phases.[297] These four phases were identified as: (i) the deceased estate vests in the executor;[298] (ii) the executor takes control of the estate assets;[299] (iii) the executor settles the estate's legal obligations and liabilities;[300] (iv) the executor distributes the remaining estate assets to the heirs or legatees.[301]

In the light of the above, the study was then able to address the primary question of, "How can rights and permits to minerals, granted and issued in terms of the MPRDA, be accommodated for in the administration of deceased estates?" directly by expressing the question as: How can mineral estate assets be accommodated for in each of the four elemental phases of the administration process?[302]

In consideration of how mineral estate assets can be accommodated for in the first elemental phase, being "the deceased estate vests in the executor", [303] it was

294 See par 2.3 above.
295 See par 2.3.1 above.
296 See par 3.1 above.
297 See par 3.2 above.
298 See par 3.2.1 above.
299 See par 3.2.2 above.
300 See par 3.2.3 above.
301 See par 3.2.4. above.
302 See par 4.1 above.
303 Being "the deceased estate vests in the executor", see par 3.2.1 above.

questioned whether section 11(1)[304] (which requires the ministerial consent to any "transfer"[305] of the mineral asset) was applicable to such vesting. It was submitted that section 11(1) should be interpreted using the text-in-context approach.[306] In the utilisation of the text-in-context approach section 11(1) was interpreted to only cover the situation where the executor distributed the mineral estate assets to either the onerous successors in title or the gratuitous successor in title. Thus, the process of the estate vesting in the executor would not attract the application of section 11(1) and thus not require ministerial consent.[307]

In consideration of how mineral estate assets could be accommodated for in the second elemental phase, being the "executor takes control of the assets",[308] it was submitted that it was the executor's duty to obtain control of the estate assets.[309] This would have to be proven objectively by showing both sufficient and effective physical control of the mineral estate asset.[310] It was submitted that two of the executor's common law fiduciary duties acted as guides on what was required to show sufficient and effective physical control of a mineral estate asset.[311] First, the executor's duty to preserve the asset of the estate would mean that any endeavour to "preserve" the mineral estate asset would at least be a *prima facie* indication of sufficient and effective control of such asset, pending the asset transfer.[312] Second, the executor's duty to transfer estate assets to either the purchaser or to the heirs, after all obligations had been settled, would mean that the executor would have sufficient and effective control if he or she was able to transfer the mineral estate asset effectively either to a purchaser or the appropriate heir.[313] Thus, regarding "assets of the deceased", the executor has *prima facie* control if he or she endeavoured to preserve the mineral estate asset, pending the assets transfer. He or she would further objectively have sufficient and effective control of the mineral estate asset, if he or she had the ability to transfer such asset.[314] It was submitted that this position was not different in situations regarding assets of the joint

304 Of the MPRDA.
305 See fn 147 above.
306 See par 4.2.1 above.
307 See par 4.2.1 above.
308 See par 3.2.2 above.
309 See pars 4.3 and 3.2.2 above.
310 See par 3.2.2 above
311 See par 4.3.1 above.
312 See fn 147 above.
313 See par 4.3.1 above.
314 See par 4.3.2 above.

estate of spouses married in community of property. However, it was argued that the common law position that assets passed *ex lege* to the joint estate upon the conclusion of a marriage was not applicable to mineral estate assets.[315] For such a transfer to the joint estate to occur the Minister would have had to give consent in terms of section 11 of the MPRDA.[316] Thus, unless the Minister had consented to the mineral estate assets passing to the joint estate in terms of section 11, the mineral estate asset would remain in the 'ring-fenced' personal estate of the spouse who acquired it. If the mineral estate asset was in the deceased ring-fenced estate,[317] then the executor would take control of the asset in the same way as an asset from a deceased who was not married or married out of community of property.[318] As regards massing[319] mineral estate assets, it was submitted that the executor would only be entitled to take control of the mineral estate asset after the survivor had adiated and the Minister had provided consent.[320] The executor would thereafter have sufficient and effective control of the mineral estate asset, in the same way as an asset of the deceased. However, it was submitted that it was exceptionally unlikely that the Minister would ever give consent to massing of a mineral estate asset from a living person to a deceased estate. The extent of this results in the use of "massing" in estate planning becoming redundant in respect of mineral estate assets.[321]

In consideration of how mineral estate assets could be accommodated for in the third elemental phase, being "the executor settles the estate's legal obligations and liabilities",[322] the legal obligations and liabilities of the estate were examined independently.[323] As regards the legal obligations of the estate, it was found that mineral estate assets were property for estate duty purposes and should be valued by an auditor or accountant through the application of the SAMCODES[324] and, in particular, SAMVAL.[325] As far as the liabilities of the deceased were concerned, it was submitted that there were two potential forms of claim: (i) a claim "to pay something"

315 See fn 202 above (*Ex parte Menzie* case).
316 See par 4.3.2 above.
317 See par 4.3.2 above.
318 See par 4.3.2 above.
319 See fn 13 above.
320 See par 4.3.2 above.
321 See par 4.3.2 above.
322 See par 3.2.3 above.
323 See par 4.4 above.
324 See fn 225 above.
325 See par 4.4.1 above.

and (ii) a claim “to do something”. Regarding the first form of claim, if the executor realised the mineral estate asset to settle such claim, the sale to the purchaser would be a transfer within the scope of section 11 of the MPRDA. As such, consent from the Minister will have to be obtained. As regards the second form of claim against a deceased estate, namely “to do something”, it was submitted that this is typically a *pactum successorium*. However, there are two types of such a claim that are not,[326] the first of which being “a claim from a surviving spouse married in community of property”.[327] It was submitted that such a claim is improbable. However, if there was, the executor would have to obtain ministerial consent in terms of section 11 of the MPRDA to transfer the assets from the executor to the spouse.[328] Regarding the second of type of such a claim, *being* a sale agreement on death, it was found that the nature of the transaction would fall within the scope of section 11 of the MPRDA.[329] Thus, ministerial consent would be required. However, as to when such consent was required, was identified as problematic. The problem lies in the fact that in the South African legal system the abstract theory of transfer is followed.[330] The abstract theory of transfer separates the obligation agreement and the transfer agreement. Thus, the question was: “To which agreement does the minister need to consent?” It was firstly found, based on van der Schyff’s writings,[331] that on a normal commercial sale agreement, the correct approach would be to deem the ministerial consent as a suspensive condition of the obligation agreement, on the basis that the rights would be transferred if the ministerial consent was acquired.[332] Following, and in knowledge of what the situation was regarding normal commercial sale agreements, it was submitted that a sale agreement on death only differed in respect of the fact that there was a second suspensive condition, namely the death of one of the parties and that of the testator.[333] Thus, it was submitted that the ministerial consent in terms of section 11 was only required after the executor had accepted the claim in terms of section 29 of the AEA.[334]

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326 See par 4.4.2 above.
327 See par 4.4.2 above.
328 See par 4.4.2 above.
329 See par 4.4.2 above.
330 See par 4.4.2 above.
331 See fn 241 above.
332 See par 4.4.2 above.
333 See par 4.4.2 above.
334 See par 4.4.2 above.

In consideration of how mineral estate assets should be accommodated for in the fourth elemental phase, namely "the executor distributes the remaining estate assets to the heirs" it was found that the questions that needed to be answered were: "Was the ministerial consent that was required in terms of section 11 (1) of the MPRDA for any transfer of any mineral estate asset constitutional?" and "What happened if the Minister declined to give such consent?" Regarding the constitutionality, it was submitted that the regulations provided for by section 11 were entirely constitutional,[335] given their importance to the nation. [336] It was submitted that the provisions only restricted the freedom of testation to the extent that regulation was required. The provisions did not preclude a testator from making testamentary dispositions bequeathing mineral estate assets but simply required that such bequest was to an appropriate person. Considering the question: "What happens if the minister declines to give consent?" it was found that mineral estate assets did not lapse if ministerial consent was declined. In such an event the executor could sell the mineral estate asset to a third-party purchaser (onerous successor) at the heir's request. Ministerial consent would need to be obtained for the transfer of the mineral estate asset from the estate to the third-party purchaser.[337] Finally, as an avenue of last resort, the executor could abandon the rights. However, it was submitted that this process could incur costs and duties (in terms of labour and environmental liabilities).[338]

5.2 Application of findings

As stated, the need for a study of this nature was illustrated by actual problems encountered by the researcher acting as an executor in two separate deceased estates. The intention was to conclude with a framework that could be applied in practical situations to provide guidance on how rights and permits to minerals granted and issued in terms of the MPRDA could be accommodated in the administration of deceased estates. Thus, the following is the application of the above findings. The first relates to a deceased client who held the rights to mine gold on his farm. The second was a deceased client who held the permit to mine the sand of a large river in KwaZulu-Natal.

335 See par 4.5.1 above.
336 See fn 162 above.
337 See par 4.5.2 above.
338 See par 4.5.2 above.

Regarding the deceased client who held the rights to mine gold on his farm, the following can be stated: the findings of this mini dissertation indicate that such a mining right is a mineral estate asset. As such, it vests in the executor as part of the estate. The asset is not a massed asset in terms of section 37 of the AEA, nor was the deceased married. Ministerial consent is therefore not required for the asset to form part of the estate. The executor would have sufficient and effective control of the mineral estate asset as he is entitled to distribute the asset to either the onerous successor(s) in title or the gratuitous successor(s) in title. The executor is required to settle the legal obligations of the estate and thus needs to have the right valued for Estate Duty purposes. The executor must have an auditor or accountant value the rights. Such auditor or accountant should apply the provisions of the SAMCODES (and in particular SAMVAL) in the valuation. Regarding liabilities of the deceased estate, there was no buy and sell on death agreement, marital claim claimed nor a claim that would require the asset to be realised. However, if there was such a claim, the executor would have to obtain the Minister's consent in terms of section 11 of the MPRDA to distribute such mineral estate asset to the onerous successors in title. On distribution of the asset to the gratuitous successor in title (if still applicable), the executor must obtain the Minister's consent in terms of section 11 of the MPRDA, as the asset is a mineral estate asset. If consent is not given, then the executor must seek an appropriate purchaser of the mining right and then apply for consent from the Minister to distribute to such purchaser as the onerous successor in title. If no such purchaser is found or if no ministerial consent is given, then the executor could abandon the right. However, this could burden the estate with additional financial implications.

Regarding the deceased client who held the permit to mine the sand of a large river in KwaZulu-Natal, from the findings of this mini dissertation it can be stated that a mining permit is not a mineral estate asset. As found above, considering section 56 of the MPRDA, the permit would lapse on the death of the holder.

5.3 Recommendation

The intention of this study was to assess the provisions of the MPRDA and the entitlements that arose through the lens of succession law and not mining or environmental law. This alternative viewpoint brought to light several shortcomings in

the legislation and general estate planning protocols when it comes to the administration of an estate that contains mineral estate assets.

5.3.1 Amendments to the MPRDA

It is submitted that the MPRDA should be amended in a manner that directly addresses the situation of a holder of one of its issued or granted entitlements passing away. This exercise should not only be an endeavour to streamline the administration of deceased estates but should also advance the goals of the MPRDA.[339] The amendments set out below are submitted in this spirit.

The first amendment is aimed at definitively identifying what a mineral estate asset is. As discussed above,[340] section 56 of the MPRDA is vague in stating that the listed entitlements lapse in the event that there is "no successor in title". The term "no successor in title" leads to ambiguity when considering reconnaissance permission, retention permits and mining permits. Sections 14(5), 36 and 27(8)(b) of the Act respectively disallow for any successor in title of each. It is submitted that the amendment that is required is for section 56 to state directly that reconnaissance permission, retention permits and mining permits lapsed in the event of the holder's death.

The second amendment that is required is to address the shortcomings of section 11 and its ambiguities regarding the vesting of the estate in the executor.[341] It is submitted that section 11 should specifically add "inheritance"[342] to the list of situations under which the section would find application. Additionally, there should be a provision that specifically excludes the vesting of the estate in the executor as an event under which the section would find application.

The final submission is that the MPRDA should additionally be amended to contain a provision that specifically caters for the death of the holder of an entitlement to minerals,

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339 See fn 162 above.
340 See par 2.3.4 above.
341 See par 4.2 above.
342 Inheritance to a gratuitous successor. This would not be needed for the transfer to an onerous successor as this would be covered by the term 'transfer'.

as has been the case in other Acts in their field of application.[343] The section should address the shortcoming of each of the four phases of the administration of the estate. Regarding vesting, it should acknowledge the mineral estate asset vesting in the executor in a ring-fenced fiduciary capacity. Supplementary to this, the amendment should indicate what the executor's powers and duties are over the asset while it is under the executor's care. Regarding the executor's control of the asset, the powers and duties stated above should additionally provide guidance in this regard. As regards the two remaining phases, it is submitted that the Act needs to be amended to provide a framework that could be applied when an executor distributes a mineral estate asset to a gratuitous successor, realises such to an onerous successor or abandons it. In the event that an executor abandons the mineral estate asset, the Act should be amended to clearly indicate what the financial obligations on the estate are.

As a separate legislative amendment, it was indicated above[344] that section 39 of the AEA only provided for the transfer of immovable property that was registerable in terms of the Deeds Registries Act.[345] It is submitted that section 39 of the AEA be amended to also cover the transfer of immovable property that is registerable in terms of the Mining Titles Registry Act.[346]

5.3.2 Amendments to estate planning protocols

In the estate planning process of an estate that holds entitlements to minerals granted or issued in terms of the MPRDA, the planner needs to bear in mind the intricacies of dealing with such assets. Regarding drafting a will, the planner must be mindful that one can only bequeath mineral estate assets to heirs that would satisfy the ministerial discretion of section 11 of the MPRDA.[347] If the desired heir would not meet the Minister's discretion, it is submitted that the executor be given the power to realise the mineral estate asset in the will.[348] Further, depending of the circumstances, it might be beneficial to write into a will power for the executor over the mineral estate asset such

343 See fn 184 and 185 above.
344 See par 4.3.1 above.
345 *Deeds Registries Act* 47 of 1937.
346 *Mining Titles Registry Act* 16 of 1967
347 See par 4.5; and, fn 78.
348 See par 4.4.2 above.

as the power to use the right and mine and prospect, or to have the discretion to sell the asset.

In the situation where a planner is planning for a joint estate of spouses married in community of property, the planner must be mindful of the fact that, as argued above,[349] unless the Minister has consented to the mineral estate assets passing to the joint estate in terms of section 11, the mineral estate asset would remain in the "ring-fenced" personal estate of the spouse who acquired such.[350]

Regarding the estate planning tools of massing and buy and sell on death agreements the planner must be mindful that in the event of massing it is exceptionally unlikely that the Minister would consent to the transfer of a mineral estate asset from a living person to a deceased estate,[351] thus making its use redundant. Regarding buy and sell agreements on death, the executor must obtain the Minister's consent in terms of section 11 of the MPRDA. Thus, as the requirement for ministerial consent would act as a suspensive condition of the contract, the planner should ensure that the surviving party to the agreement would satisfy the Minister's discretion.[352] In the event that the surviving party does not satisfy such discretion, the contract would be void and its use in the estate plan irrelevant.

349 See par 4.3.2 above.
350 Similar in nature to inheritances that are excluded from the joint estate, see Field *The Drafting of Wills* 136, see further on point the case *Badenhorst v Bekker NO* 1994 2 SA 155 (N).
351 See par 4.3.2 above.
352 See par 4.5; and, fn 78.

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