

# A landowner's ability to negotiate compensation with the holder to rights to minerals

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## **Abstract**

In 2002 the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA) was promulgated to regulate the exploitation of minerals and petroleum in South Africa. With the promulgation of the MPRDA landowners' rights regarding the minerals embedded in their land have been annihilated. South Africa's mineral and petroleum resources were statutorily bequeathed to all the people of South Africa and the state was statutorily appointed as the custodian thereof for the benefit for all South Africans. All the rights to minerals have been severed from the ownership of land and the MPRDA does not recognise the existence of common law mineral rights as they existed directly before the MPRDA took effect. As a result thereof, landowners are not entitled to compensation for the loss of the minerals that are mined from the soil of their land. In addition, landowners ostensibly no longer possess the right to enforce negotiations regarding compensation for losses suffered or damages caused during the course of mining operations.

It is against this background that this study seeks to determine to what extent the MPRDA or common law provide for the protection of landowners' rights regarding compensation claims against the holder of statutory prospecting or mining rights for the infringement of their ownership brought about by mining activities on their land.

Keywords: Compensation, landowner, mining rights, prospecting rights, consultation.

## **Opsomming**

Die *Mineral and Petroleum Resources Development Act* (MPRDA) van 2002 is in 2002 gepromulgeer om die ontginning van minerale en petroleum in Suid-Afrika te reguleer. Met die promulgering van die MPRDA is grondeienaars se regte ten opsigte van minerale op hulle grond verwyder. Suid Afrika se mineraal- en petroleumhulbronne is statutêr aan al die mense van Suid-Afrika bemaak en die Staat is statutêr as die bewaarder daarvan aangestel ten behoeve van alle Suid-Afrikaanse burgers. Mineraalregte is geskei van eiendomsreg van grond en die MPRDA erken geensins meer enige gemeenregtelike mineraalregte soos dit bestaan het voor die inwerkingtreding van die MPRDA nie. As gevolg daarvan is grondeienaars nie geregtig op vergoeding vir die verlies van die minerale wat ontgin word op hul grond nie. Daarbenewens besit grondeienaars klaarblyklik nie meer die reg om te onderhandel oor die vergoeding vir verliese of skade wat veroorsaak word tydens mynbedrywighede nie.

Dit is teen hierdie agtergrond wat hierdie studie poog om te bepaal tot in watter mate die MPRDA voorsiening maak vir die beskerming van grondeienaars se regte ten opsigte van vergoedingseise teen die houers van statutêre prospekter- of, mynregte teen die skending van hulle eienaarskap wat teweeg gebring word deur mynbedrywighede.

Sleutelwoorde: Vergoeding, grondeenaar, mynregte, prospekterregte, konsultasie.

## List of abbreviations

MA *Minerals Act 50 1991*

MPRDA *Mineral and Petroleum Resources Development Act 28 of 2002*

MPRDAA *Mineral and Petroleum Resources Development Amendment Act 49 of 2008*

# 1 Introduction

The granting and execution of a prospecting right [or a mining right] represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting [or mining] is to happen. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it in all the fullness that the common law allows, or as use only of its surface, if what lies below does not belong to the landowner but somehow resides in the custody of the state.<sup>1</sup>

Since the beginning of time the human race has always been fascinated by all the minerals found in the depths of the earth.<sup>2</sup> The infatuation over minerals has formed and ruined empires and sparked uprisings that caused the destruction of entire nations.<sup>3</sup> South Africa is a mineral rich country and one of the leading mining countries in the world as far as the magnitude and selection of its minerals are concerned.<sup>4</sup> The mining of minerals can reinforce an entire country's economy and increase the prosperity of all within the areas where such minerals have been found.<sup>5</sup> This is the reason why the mining industry plays an important role in South Africa's national economy and why the mining of minerals commenced almost immediately upon the first discovery of diamonds and gold in South Africa.<sup>6</sup>

Over the years mining legislation was promulgated to regulate the mining industry in South Africa.<sup>7</sup> In 1992 the *Minerals Act* 50 of 1991<sup>8</sup> (hereafter the MA) was introduced to consolidate those laws for the whole of South Africa. Mining and mineral law was not rooted in legislation alone, however, but also in important common law principles

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1 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2010 ZACC 26 par [63] (hereafter *Bengwenyama-case*).

2 Moxon *A Study of the Relationship Between the Landowner, Mineral Rights Holder and the State* 1.

3 Meredith *Diamonds, Gold and War: The Making of South Africa* 345.

4 Van der Vyver 2012 *De Jure* 126.

5 Moxon *A Study of the Relationship Between the Landowner, Mineral Rights Holder and the State* 1.

6 Meredith *Diamonds, Gold and War: The Making of South Africa* 345.

7 Van der Vyver 2012 *De Jure* 126; *Master v African Mines Corporation Ltd* 1907, TS 925; Van der Schyff 2012 *New Contree* 136; Mostert and Pope (eds) *The Principles of the Law of Property* 52.

8 *Minerals Act* 50 of 1991.

inherent to property law.<sup>9</sup> Due to the application of the *cuius et solum eius usque ad caelum ad inferos* maxim,<sup>10</sup> landowners' rights to the minerals embedded in the soil of their land were traditionally recognised by the common law and taken into consideration in statutes.<sup>11</sup> Through the working of this maxim, landowners were afforded wide-ranging powers over their land that extended to the subsurface.<sup>12</sup> Minerals not removed from the soil were considered to form part of the land and were therefore owned by the owner of the land.<sup>13</sup> Once they were removed from the land, the minerals became a separate legal entity distinctive from the land and could subsequently become the property of an individual other than the landowner.<sup>14</sup> Landowners were entitled to make arrangements with third parties who wanted to extract the minerals from their land.<sup>15</sup> These arrangements enabled the landowner to either separate the mineral rights from the ownership of the land or to give permission for mining activities to commence.<sup>16</sup> Thus, landowners were entitled to confer with third parties regarding mining activities, in terms of which the latter could infringe on the landowners' rights once the applicable right was granted.<sup>17</sup> Prospecting-, mining- or complete

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9 *Cuius et solum eius usque ad caelum ad inferos* maxim; Franklan & Kaplan *The Mining and Mineral Laws of South Africa* 5. Also see Pienaar 1989 *THRHR* 216-227 for an in depth discussion regarding this maxim.

10 The owner of the land owns everything up to the sky and down to the centre of the earth.

11 With the promulgation of the MA, all the mineral rights vested in the state were abolished and the common law rights of the holders were restored; Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 6; Mostert *Mineral Law: Principles and Policies in Perspective* 93.

12 Majoni 2013 *De Rebus* 43; MO Dale *A Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* 78; Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 4.

13 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 667; Van der Vyver 2012 *De Jure* 126; Van der Merwe *Sakereg* 566.

14 Franklan & Kaplan *The Mining and Mineral Laws of South Africa* 5; Badenhorst & Mostert *Mineral and Petroleum Law of SA* 32; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 693-694; Viljoen & Bosman *Guide to Mining Rights* 55; Van der Vyver 2012 *De Jure* 126; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 499 (A) 509I-510A.

15 Section 5(1) of the *Minerals Act*.

16 Section 6(1)(b) and 9(1)(b) of the *Minerals Act*.

17 *Rocher v Registrar of Deeds* 1911 TPD 311; Van der Schyff 2012 *New Contree* 141; *Erasmus and Lategan v Union Government* 1954 (3) SA 415 (O).

mineral rights could be granted to third parties.<sup>18</sup> The individual who has been granted prospecting, mining- or mineral rights was also entitled to cede the right to explore for minerals and to mine them to a third person.<sup>19</sup>

The agreements that succeeded the deliberations between landowners and prospective holders of prospecting or mining rights usually stipulated the extension of the rights acquired by the third parties as well as the compensation payable to the landowner.<sup>20</sup> Compensation was usually provided for the loss of the land's minerals as well as the infringement of a landowner's ownership attributable to losses suffered or harm incurred due to or during the mining activities. The second category could *inter alia* include surface damage, dust deposits on crops or the inability to continue with farming activities on a particular portion of the land.<sup>21</sup>

Due to the fact that access to South Africa's mineral resources in the pre-1994 era was inherently bound to the ownership of land, mining contributed to the uneven allocation of wealth.<sup>22</sup> In 2002 the *Mineral and Petroleum Resources Development Act 28 of 2002*<sup>23</sup> (hereafter MPRDA) was promulgated in an effort to bring about fair and equitable reform. With the promulgation of the MPRDA, landowners' rights regarding the minerals embedded in their land were annihilated.<sup>24</sup> The country's mineral and petroleum resources were statutorily bequeathed to all the people of South Africa and the state was statutorily appointed as the

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18 Van der Vyver 2012 *De Jure* 127.

19 This was possible either through a prospecting contract or a mineral lease agreement. The mineral lease agreement was available for a limited period only. See also Kaplan & Dale *A Guide to the Minerals Act 1991* 5; Mostert *Mineral Law: Principles & Policies in Perspective* 59.

20 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 710; Van der Vyver 2012 *De Jure* 127.

21 Badenhorst 2011 *TSAR* 328.

22 Van der Schyff 2012 *New Contree* 132.

23 *Mineral and Petroleum Resources Development Act 28 of 2002*.

24 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) par 25; *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC); Van der Schyff 2008 *TSAR* 757-768, Van der Berg 2009 *STELL* 139-158.

custodian thereof for the benefit for all South Africans.<sup>25</sup> This particular section in the Act ousted the Roman-Dutch common law principle that the ownership of land extends to the sky and down to the centre of the earth.<sup>26</sup> As a result thereof landowners are not entitled to compensation for the loss of the minerals that are mined from the soil of their land.<sup>27</sup> In addition, landowners do not have the previously existing bargaining power to enforce negotiations regarding compensation for losses suffered or harm incurred due to or during mining activities.<sup>28</sup> Evidently there is a dire need to delve into South Africa's mineral law dispensation to discuss the potential difficulties landowners face with regards to the claiming of compensation for the infringement of their ownership brought about by the performance of mining activities on their land.

It is against this background that this dissertation seeks to determine the extent to which the MPRDA or common law<sup>29</sup> provides for the protection of landowners' rights regarding compensation claims against the holder of statutory prospecting or mining rights. Therefore this research will focus on the relationship between the landowner and the holder of statutory prospecting or mining rights. The question that underpins this study is to what extent a landowner can negotiate compensation with the holder of statutory prospecting or mining rights for damages caused in the course of mining operations under the current mineral law regime.

This dissertation will consider a number of separate seemingly disconnected aspects of the law, which will ultimately be linked with one another to answer the research question. The point of departure will be

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25 Section 3 of the MPRDA.

26 *Cuius et solum eius usque ad caelum ad inferos* maxim. See *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC).

27 Section 19(2)(g) of the MPRDA requires of the holder of a prospecting right to pay the state royalties in respect of minerals removed and disposed of during the course of prospecting operations; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 23-30.

28 Section 42(1)(e)(ii) of the MA enabled the landowner to claim compensation for losses suffered or harm incurred due to or during mining activities. The MPRDA merely requires consultation with landowners and affected parties.

29 Section 4 of the MPRDA states that the MPRDA will prevail if the common law contradicts any of the provisions set out in the MPRDA.

a discussion of ownership of land and the state's power to infringe thereon. This is relevant because the state's power to encroach on landownership can significantly influence the extent to which compensation can be claimed by landowners and prospective holders of prospecting or mining rights.<sup>30</sup> Thereafter a broad discussion regarding the historical perspectives and the common law considerations relating to the ownership of land and mining law will be given. It is imperative to fully comprehend the position prior to the promulgation of the MPRDA not only to enable one to understand why certain changes were made and contextualise the current mineral law regime, but also to provide a perspective on the nature and extent of the change introduced by the MPRDA. This will be followed by a discussion of selected aspects of the MPRDA to determine the position of the landowner regarding the claiming of compensation for damages caused in the course of mining. Finally, this research will conclude with a discussion of the land access rights and mining legislation of Western Australia, to seek alternative ways of compensating landowners for damages caused during the course of mining operations.

## **2 Ownership of land and the state's power to infringe thereon**

The notion of absolute ownership is one that was deeply ingrained in our law.<sup>31</sup> Through this lens, ownership was perceived to entail that the owner of an object had control over a particular thing, although ownership could be limited where restrictions were imposed by law.<sup>32</sup> This might sound like a dichotomy but such is the reality of the ownership notion in South African jurisprudence. Ownership was thus defined as the most complete right a legal subject could obtain in relation to an object and the most comprehensive right that a person could have

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30 Section 25(3)(a)-(e) of the Constitution; Budlender "The Constitutional Protection of Property Rights" 48-55.

31 Van der Walt *Constitutional Property Law* 4; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 4; Majoni 2013 *De Rebus* 43.

32 *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1319.

regarding a thing,<sup>33</sup> although it could in reality be limited to a certain extent. Ownership was frequently depicted with reference to the different entitlements that an owner could have, depending on the particular type of property and the circumstances of each situation.<sup>34</sup> The general principle with regards to ownership was that the owner could do with his or her property as he or she deemed fit, subject to all the limitations present in public and private law.<sup>35</sup>

According to the common law perception of ownership of land, the idea of ownership is reflected in the maxims of *superficies solo cedit*<sup>36</sup> and *cuius et solum eius usque ad caelum ad inferos*.<sup>37</sup> Both maxims imply that ownership is absolute and an unrestricted right, a *plena in re potestas*.<sup>38</sup> However, it is evident that this long-established view of ownership as an absolute and individualistic right could no longer be accepted due to changes in the prevailing social, economic and political conditions.<sup>39</sup> The law relating to ownership has therefore undergone a paradigm-shift.<sup>40</sup> An owner of a particular object is not always in a position to exercise full control over the object due to external limitations imposed by law.<sup>41</sup> Even before the advent of the Constitution, this development regarding ownership was highlighted in *Gien v Gien* 1979

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33 See Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 91; Mostert and Pope (eds) *The Principles of the Law of Property* 89-95; and Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-8 for a detailed clarification of the concept of ownership.

34 Mostert and Pope (eds) *The Principles of the Law of Property* 92; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9.

35 *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1319; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106-107. See also Van der Merwe *Sakereg* at 170-173.

36 Everything attached to a specific piece of land belongs to the owner of that land.

37 *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 121 (A) at 147 A-B; see Badenhorst 1994 *TSAR* 502.

38 Van der Merwe *Sakereg* at 170-171; Domanski 1989 *THRHR* 433 ff.

39 *Milton Ownership* 697; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 93.

40 *First National Bank of SA Ltd Wesbank v Commissioner for the South African Revenue Services and Others* 2002 4 SA 768 (CC) 796 F-H; Van der Walt *Constitutional Property Law* 4; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 4.

41 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 93; Van der Walt 1987 *SALJ* 469 ff.

(2) SA 1113 (T),<sup>42</sup> when Acting Judge Spoelstra expressed his view regarding this change in the concept of ownership:

The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law.

The new development relating to ownership was given fresh momentum with the introduction of the new constitutional dispensation, and Van der Merwe<sup>43</sup> encapsulated this new approach as follows:

Ownership should no longer be regarded as a universal and timeless set of abstract and neutral principles based on the authority of rational (Grotius) and scientific (Pandectist) reasoning. By contrast, the traditional notion of ownership should be subjected to criticism on moral and expediency grounds and adapted to the changing needs of the society in which it functions. This recent development in nature conservation and the land reform policy of the government should not be seen as pernicious and abnormal inroads into the sanctity of ownership but rather as natural and beneficial consequences of allowing the concept of ownership to fulfil its social function by *inter alia* eradicating fundamental inequalities that exist in contemporary society.

It is therefore clear that even though ownership is the most complete right a person can have with regard to an object, it is not unlimited nor is it unrestricted. Consequently this entails that the owner may be deprived of any of the entitlements of ownership.<sup>44</sup> Ownership becomes limited as soon as an owner is deprived of any of the entitlements. Thus the presence of any limitation ousts any views of ownership being absolute and individualistic.

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42 *Gien v Gien* 1979 (2) SA 1113 (T) 1120; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 91.

43 Van der Merwe *Electronic Journal of Comparative Law* 10; Du Bois ea Wille's *Principles of South African Law* 472; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 94.

44 Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 7.

Section 25 of the *Constitution of the Republic of South Africa, 1996*<sup>45</sup> (hereafter the Constitution) determines how property should be regulated in South Africa.<sup>46</sup> As ownership of a thing is regarded to be property for the purposes of section 25 of the Constitution,<sup>47</sup> it is important to understand the manner in which ownership may be restricted.

## **2.1 Limitations imposed on ownership**

The extent of ownership can be determined only by reference to the limitations imposed thereon by private law and public law.<sup>48</sup> There are different types of limitations, and a few of those which are most relevant for the purposes of this study will be discussed to determine the scope of the right of ownership.<sup>49</sup> The focus will fall on private law and public law limitations, and the discussion will be concluded with a discussion of the provisions made for the limitation of ownership and regulation of property in terms of section 25 of the Constitution.

### **2.1.1 Private law**

The limitations imposed on ownership by the private law flow from the rights of other persons, which consist primarily of the rights of neighbours. Due to the particular focus of this work, only the limitations imposed by the right to lateral and subjacent support will be discussed,

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45 *Constitution of the Republic of South Africa, 1996.*

46 Section 25 of the Constitution; Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 8.

47 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 91; Mostert and Pope (eds) *The Principles of the Law of Property* 89-95; Section 25 of the Constitution.

48 See *Gien v Gien* 1979 (2) SA 1113 (T) at 1120 D-H per Spoelstra AJ: "The absolute power of an owner is limited by the restrictions imposed thereupon by the law. These restrictions can flow either from the norms of the law or they may consist of restrictions imposed by the rights of other persons. Therefore, no owner has an unlimited competence to exercise his powers of ownership in respect of his property as he pleases and as he sees fit"

49 These limitations include the right to lateral- and subjacent support and deprivation and expropriation in terms of section 25 of the Constitution.

despite the existence of the broader context within which ownership can be restricted from a private law point of view.<sup>50</sup>

#### 2.1.1.1 Lateral support

For purposes of this study, this discussion will not focus on the historical development of the principle of lateral support but on how this particular principle is applied in South African law, particularly in the context of mining.<sup>51</sup>

A landowner has the right to dig upon his own soil as he deems fit.<sup>52</sup> In doing so the landowner may not encroach on any of his neighbour's rights, or the world at large, by digging too close to the neighbour's property, as this might lead to issues regarding ground-stability.<sup>53</sup> The right to lateral support<sup>54</sup> is a natural right inherent in the ownership of land and exists in a neighbour law setting.<sup>55</sup> The general principle in neighbour law is that every landowner must exercise his or her rights in

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50 Mostert and Pope (eds) *The Principles of the Law of Property* 117.

51 For an in-depth discussion regarding historical perspectives of the right to lateral support see Boyd *Lateral and Subjacent Support* 20.

52 Milton 1965 SALJ 459-460.

53 Maasdorp and Hall *Maasdorp's Institutes of South African Law: The Law of Things* 80; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 111; Milton 1969 *Acta Juridica* 123-126; Viljoen and Bosman *Guide to Mining Rights in South Africa* 68.

54 According to Maasdorp and Hall, landowners have certain duties in regard to adjoining lands and these duties are sometimes referred to by jurists as natural servitudes. These natural servitudes are of either a negative or a positive nature. Servitudes of a negative nature enable the holder to exercise specific rights over the land belonging to a neighbour, such as a right of way of necessity. Servitudes of a positive nature, of which the prevention of nuisances and the duty of lateral support are the most important, are limitations upon ownership in the general interest. The duty of lateral support can therefore be classified as a positive servitude. See Maasdorp and Hall *Maasdorp's Institutes of South African Law: The Law of Things* 72 -80; Boyd *Lateral and Subjacent Support* 19 and Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 111.

55 It was not until the late 1800's that lateral support found new meaning in South African law and was enunciated in the case between *London and South African Exploration Company v Rouliot*. In this case, Judge De Villiers argued that it would be just and equitable to incorporate the principle of lateral support in our law, and it was subsequently accepted into our jurisprudence. See Milton 1965 SALJ 459-460; Hall and Kellaway *Servitudes* 91; *London and South African Exploration Company v Rouliot* 1891 SC 74 (hereafter *Rouliot-case*) and Boyd *Lateral and Subjacent Support* 5.

a manner that is least injurious to the neighbour's similar entitlements.<sup>56</sup> Therefore, ownership is limited the moment when an owner has the obligation to avoid unreasonable infringements on the property of another owner. The law pertaining to lateral support for land in South Africa can be explained in two propositions.<sup>57</sup> The first proposition relates to an owner's right to the lateral support which the land naturally derives from adjoining property.<sup>58</sup> Secondly, an owner's right to exhume the soil of his land for mining purposes is restricted by the obligation not to remove the lateral support which the land affords to adjacent land.<sup>59</sup> Thus lateral support comes in to play where a landowner has an interest in maintaining the quality and efficacy of his or her land against the actions of a neighbouring landowner or holder of prospecting or mining rights on the property of the neighbouring landowner.<sup>60</sup>

Upon encroachment of the right to lateral support due to the extraction or interruption thereof, an aggrieved owner may normally sue for damages.<sup>61</sup> Neither *dolus* nor *culpa* is a prerequisite for legal liability that flows from the damage that is caused due to the withdrawal of lateral support.<sup>62</sup> The right to lateral support exists only to the degree to which it is necessary to support the natural state of the land itself.<sup>63</sup> The duty of lateral support is not limited to owners of private land but is also imposed on public corporations.<sup>64</sup> Lateral support forms an integral part of our mining law because it protects the interests of landowners by

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56 Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 10.

57 Boyd *Lateral and Subjacent Support* 28.

58 Kadigamar 1965 SALJ 213; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 119; Maasdorp and Hall *Maasdorp's Institutes of South African Law: The Law of Things* 79-80.

59 *Demont v Akal's Investments (Pty) Ltd* 1955 (2) SA 312 (D) at 316B-G; Van der Walt *Risiko-aanspreeklikheid* at 374-378; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 119; Van der Merwe *Oorlas* 499-522; Van der Walt 1987 *THRHR* 462 ff; Van der Vyver 1988 *SALJ* 9-12; Delpont and Olivier *Sakereg Vonnisbundel* 176.

60 Boyd *Lateral and Subjacent Support* 98.

61 *Demont v Akal's Investments (Pty) Ltd* 1955 (2) SA 312 (D) at 316E-F.

62 *Grieves & Anderson v Sherwood* 1901 22 NLR 225.

63 *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E); *Douglas Colliery Ltd v Bothma* 1947 (3) SA 602 (T); Sonnekus 2002 *TSAR* 342.

64 *Gordon v Durban City Council* 1955 (1) SA 634 (D).

maintaining the value and efficacy of his or her land against the actions of a neighbouring landowner or a holder of a prospecting or mining right on the property of the neighbouring landowner. This principle also forces landowners to exercise their rights in a manner that is least injurious to the neighbour's entitlements. Even though lateral support forms an essential part of our mining law, it is important that we shift the focus to subjacent support. The reason for this is because for the purposes of this paper we need to focus on the relationship between a landowner and a holder of prospecting or mining rights in relation to one piece of land.

#### 2.1.1.2 Subjacent support

The right to lateral support forms part of one of the many entitlements of ownership. In addition to lateral support, an owner is also entitled to subjacent support<sup>65</sup> of the land from the holder of mineral or mining rights.<sup>66</sup> The concept of subjacent support refers to the relationship between a landowner and a holder of prospecting or mining rights in relation to a single portion of land.<sup>67</sup> A landowner's concern to safeguard the surface of the land is threatened where a holder of prospecting or mining rights conducts mining operations to remove the minerals that provide vertical support to the surface.<sup>68</sup> The conceptual distinction between the principle of lateral support and the principle of subjacent support was fore grounded in the case of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*,<sup>69</sup> when the court had to determine whether

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65 Subjacent support is sometimes referred to as vertical support.

66 In *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) the court expressed the view that lateral support formed part of an owner's entitlements of ownership; Sonnekus 2002 TSAR 333. In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 382D-E the court incorrectly identified lateral support as a competence.

67 Boyd *Lateral and Subjacent Support* 88.

68 Boyd *Lateral and Subjacent Support* 88.

69 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) (hereafter *Sandhurst-case*).

these natural servitudes protect landowners' rights when mining operations are conducted on their land.<sup>70</sup>

In the *Sandhurst*-case the appellant had all the coal rights in respect of a farm owned by the respondent. The conflict between the parties started when the appellant decided to conduct its mining operations by making use of open-cast mining, and to divert a natural stream on the farm to help carry out these operations.<sup>71</sup> The respondents lodged an application against the use of open-cast mining due to the invasive nature of this method of mining.<sup>72</sup> Franklin and Kaplin point out that the method of open-cast mining deprives the landowner of the agricultural use of the specific land, and even if the land is returned to the landowner, its character and efficacy are likely to be negatively altered.<sup>73</sup>

The court *a quo* in the *Sandhurst*-case held that a landowner has the right to subjacent support of land from holders of prospecting or mining rights when they conduct mining operations.<sup>74</sup> This court concluded that the right to subjacent support was a natural right and that a landowner could not be deprived of this right unless he or she had explicitly or tacitly agreed thereto.<sup>75</sup> Counsel for the respondent did not pay any attention to the conceptual distinction between lateral and subjacent support.<sup>76</sup> As explained above, the latter refers to a situation where the landowner has an interest in maintaining the character and usefulness of the surface by resisting mining operations that are conducted by the holder of prospecting or mining rights on his land that infringe on this

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70 The conceptual distinction between these two principles was clearly defined in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T).

71 Open-cast mining, also known as open-pit mining, open-cut mining and strip mining, is a surface mining procedure that is used to remove rock or minerals from the earth's soil by their extraction from an open pit or borrow. See Thompson *Surface Strip Coal Mining Handbook* 68.

72 *Sandhurst*-case 366 C-D.

73 Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 138.

74 *Sandhurst*-case 376. See also Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 120, 705.

75 *Sandhurst*-case 376. The court *a quo* relied on *Coronation Collieries v Malan* 1911 TPD 577 to come to a conclusion.

76 *Sandhurst*-case 377.

right.<sup>77</sup> Lateral support, on the other hand, refers to a situation where a landowner has an interest in upholding the character and usefulness of his or her land against the activities of a neighbouring landowner or holder of prospecting or mining rights on the property of the neighbouring landowner.<sup>78</sup>

However, the Supreme Court of Appeal in the *Sandhurst*-case concluded that rights to minerals in the property of a landowner were in the nature of a quasi- servitude over the land.<sup>79</sup> Thus, as in the case of a servitude, the exercise of mineral rights would constantly lead to disputes between the landowner's right to preserve the character and usefulness of the surface and the holder of prospecting or mining rights to remove the minerals from the soil underneath. The court further held that these kinds of conflict had to be resolved in accordance with the principles of South African law, and the adoption of the principle of subjacent support from the English law was not needed.<sup>80</sup> Judge De Villiers concluded that a landowner still has the obligation to allow the holder of prospecting or mining rights to exercise its rights and the holder of prospecting or mining rights is in return obliged to exercise its rights in a manner that is least injurious to the landowner.<sup>81</sup> So the holder of prospecting or mining rights is entitled to go onto the property of the landowner and conduct mining operations by way of open-cast mining,<sup>82</sup> subject to the absence of any express or tacit term that prohibits this method of mining.<sup>83</sup> The *Sandhurst*-case was decided before the promulgation of the MPRDA<sup>84</sup> and Judge De Villiers argued this case by following the provisions and the common law principles underlying the

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77 *Boyd Lateral and Subjacent Support* 98.

78 *Boyd Lateral and Subjacent Support* 98.

79 *Sandhurst*-case 372.

80 *Sandhurst*-case 373.

81 *Boyd Lateral and Subjacent Support* 102; *Sandhurst*-case 373.

82 Under the current mineral law regime, open-cast mining must be accompanied by an Environmental Management Plan.

83 *Boyd Lateral and Subjacent Support* 102.

84 The case was heard on the 23<sup>rd</sup> of September 2004 in the Transvaal Provincial Division.

Minerals Act.<sup>85</sup> The MPRDA currently regulates minerals and petroleum in South Africa and landowners no longer have the privilege to decide if, and by whom, prospecting and mining operations can take place on their land. It would thus seem irrational to follow the same line of reasoning as that adopted by Judge De Villiers today, considering that the state now has the prerogative to manage and control all mining and prospecting rights and the landowner has no specific say in the matter.<sup>86</sup>

Due to the fact that holders of prospecting or mining rights are entitled to go onto landowners' property, their activities will inevitably damage landowners' property during the course of their mining operations. In the light of South Africa's new mineral law regime and the changes in the management and control of mining and prospecting rights brought about by the MPRDA, it is vitally important to seek other mechanisms that will provide for the protection of landowners' rights regarding compensation claims against the holder of statutory prospecting or mining rights.

### *2.1.2 Public law and the constitutional protection of property*

Apart from the private law spectrum, the public law also imposes certain limitations on ownership. A discussion regarding the constitutional protection of property is therefore vitally important for this study. The limitations that the provisions of the MPRDA impose on landowners can also be classified within the public law context, because they flow from the legislation governing the relationship between the state and the landowner. A thorough and comprehensive discussion regarding section 25 of the Constitution is needed, even though some of the aspects considered are not directly relevant to this study.

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85 50 of 1991.

86 *Agri South Africa v Minister of Minerals and Energy and Another* 2013 (4) SA 1 (CC) par 51; Van den Berg *STELL* 158.

The vast majority of the limitations on ownership fall within the public law spectrum.<sup>87</sup> These limitations are imposed by different statutes.<sup>88</sup> The MPRDA serves as an example of one of these limitations.<sup>89</sup> The limitations imposed on ownership with regards to the public law are regulated by the state and the specific limitations are to be found in ordinary statutes and the Constitution.<sup>90</sup> It is of the utmost importance to take cognisance of the fact that all limitations imposed on ownership by statutes must first be justified by the Constitution.<sup>91</sup> The following discussion concerning the state's power to regulate property and thus limit ownership in terms of section 25 of the Constitution will highlight this issue.

Section 2 of the Constitution clearly states that the Constitution is the supreme law of South Africa and any law or conduct inconsistent with the provisions thereof is null and void.<sup>92</sup> Any obligations imposed by the Constitution must be fulfilled and all other laws have to comply with it.<sup>93</sup> Section 25 of the Constitution contains the property clause, which makes provision for the protection of property as a fundamental right.<sup>94</sup> The main function of this particular section is twofold. Firstly, it has a protective purpose, which is to safeguard existing property rights against

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87 Mostert and Pope (eds) *The Principles of the Law of Property* 117; Liebenberg *Constitutional Law of South Africa* 33.

88 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 97.

89 Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 10.

90 It should be noted that ownership is a right to property and therefore falls within the scope of property as set out in s 25 of the Constitution. See Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 119; Currie and De Waal *The Bill of Rights Handbook* 536-540 and Budlender "The Constitutional Protection of Property Rights" 1-19. Also see Van der Walt *Constitutional Property Clause* 30-71, Chaskalson and Lewis "Property" 2-6 and Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 63-65.

91 Mostert and Pope (eds) *The Principles of the Law of Property* 117; Badenhorst and Malherbe 2001 *TSAR* 768.

92 Section 2 of the Constitution.

93 Currie and De Waal *The Bill of Rights Handbook* 32-35.

94 Section 25 of the Constitution.

unconstitutional state-interference,<sup>95</sup> and secondly it has a reform purpose, which is to promote land and other related property reform.<sup>96</sup> The property clause contained in the Constitution exemplifies a negative guarantee of property and allows the state to deprive or expropriate an owner of his or her entitlements of ownership in a very specific, constitutionally determined context.<sup>97</sup>

Two essential provisions concerning property are contained in section 25 of the Constitution.<sup>98</sup> Firstly, it provides that no person may be deprived of property except in terms of law of general application, and no law may permit the arbitrary deprivation of property.<sup>99</sup> Secondly, it provides that property may be expropriated in terms of law of general application only for a public purpose or in the public interest; and it must be accompanied with the payment of compensation.<sup>100</sup> Section 25 of the Constitution imposes certain conditions under which an infringement on property by the state will be constitutionally acceptable. These infringements can take the form of either deprivation or expropriation.<sup>101</sup> It is imperative to distinguish between the two concepts of deprivation and expropriation, due to the fact that expropriations are subject to stricter requirements which will be discussed later.<sup>102</sup>

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95 Van der Walt *Constitutional Property Clause* 3; Van der Walt *Constitutional Property Law* 62; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 119.

96 Van der Walt *Constitutional Property Law* 13.

97 *Gildenhuis v Onteieningsreg* 9; *Harksen v Lane* 1997 (11) BCLR 1489 (CC) 1502 C-D; *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) 1246B-1247G; Van der Walt *Constitutional Property Law* 187.

98 Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 12.

99 Van der Walt *Constitutional Property Law* 62; Section 25(1) of the Constitution; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 98.

100 Section 25(2) of the Constitution.

101 Section 25(1) and (2) of the Constitution; Mostert and Pope (eds) *The Principles of the Law of Property* 119.

102 Van der Walt *Constitutional Property Law* 269; Mostert and Pope (eds) *The Principles of the Law of Property* 126; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 541.

In order to differentiate between deprivation and expropriation, we have to take a closer look at the characteristics of each of them.<sup>103</sup> The prevailing opinion is that all expropriations are deprivations, while only some deprivations take the form of expropriations.<sup>104</sup> This implies that expropriation cannot be present if there is no deprivation.<sup>105</sup> The best way to differentiate between the two concepts is to establish the true intention with which a certain encroachment of property is undertaken.<sup>106</sup> According to Van der Walt<sup>107</sup> the power and the reason for the infringement is the best way to determine whether the infringements amount to either deprivation or expropriation. He argues that the source of the power and the reason for the infringement will indicate if the action taken by the state must be accompanied by compensation.<sup>108</sup> Determining if compensation is payable will ultimately determine which of the two concepts is in play, as compensation is payable in cases of expropriation only. In *Agri South Africa v Minister of Minerals and Energy* 2013 7 BCLR 727 (CC)<sup>109</sup> the Constitutional Court differentiated between these two concepts by stating that while deprivation for the purposes of section 25(1) consists of a “taking away” of property, one of the supplementary characteristics that must be present for a deprivation to be an expropriation is that the state must have “acquired” the rights that were taken away or interfered with.<sup>110</sup> Van der Walt, on the other hand, does not regard acquisition as the most important requirement to

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103 Characteristics of expropriation involve the payment of compensation, the performance of the expropriation without the co-operation of the owner, and its public purpose. For an in-depth discussion of the characteristics of these two concepts, see Van der Walt *Constitutional Property Law* 128-132 and 188-189.

104 Van der Walt *Constitutional Property Law* 204.

105 *City of Cape Town v Rudolph* 2003 11 BCLR 123 (C) 1260F-G; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 57; Currie and De Waal *The Bill of Rights Handbook* 541; Van der Walt *Constitutional Property Law* 181.

106 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 544.

107 Van der Walt *Constitutional Property Law* 131.

108 Van der Walt *Constitutional Property Law* 193.

109 *Agri South Africa v Minister of Minerals and Energy* 2013 7 BCLR 727 (CC) (hereafter *Agri SA-case*).

110 See Rautenbach 2013 *TSAR* 306, 746; *FNB-case* par 57; *Harksen-case* par 32.

differentiate between the concepts of deprivation and expropriation.<sup>111</sup> It is therefore necessary to consider these two concepts more closely in order to clarify how property is regulated by the state in terms of section 25 of the Constitution.

#### 2.1.2.1 Deprivation

Section 25(1) of the Constitution determines that no person may be deprived of property except in terms of law of general application, and no statute or law may allow for the arbitrary deprivation of property.<sup>112</sup> Deprivation is often equated with the state's police power to carry out certain regulatory procedures without the obligation to pay any compensation.<sup>113</sup> This is so because the regulatory deprivation of property in terms of the police power limits the use, enjoyment and exploitation of property.<sup>114</sup> Van der Walt<sup>115</sup> expresses his view regarding the term *deprivation* by pointing out that members of the public can sometimes misguidedly believe that deprivation is the removal of property.<sup>116</sup> In the *FNB-case*<sup>117</sup> Judge Ackermann resolved any uncertainties regarding this term by explaining the true meaning of deprivation.<sup>118</sup> The *FNB-case* launched a major methodological change by proposing that all limitations of property will be regarded as deprivations and should firstly be tested against the requirements of section 25(1) of the Constitution before any limitation could be regarded

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111 See Van der Walt *Constitutional Property law* 121.

112 Section 25(1) of the Constitution.

113 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 544.

114 Van der Walt *Constitutional Property Law* 212.

115 Van der Walt *Constitutional Property law* 121.

116 See Van der Walt *Constitutional Property Law* 190. The term deprivation may be confusing in this context because the word "deprive" can create the impression that the section refers to dispossession in the sense of taking away someone's property (expropriation).

117 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereafter *FNB-case*).

118 *FNB-case* par 57. Judge Ackerman felt the need to address the true meaning of deprivation due to the fact that the term could be mistaken as referring to the taking away of property.

as expropriation.<sup>119</sup> The Court attached a wide interpretation to the term deprivation, and Judge Ackerman explained it as any interference with the use, enjoyment or exploitation of private property.<sup>120</sup> In this wide sense, expropriation must be seen in a narrow sense as a specific form of deprivation, and seemingly the Court did not allow for any grey areas of overlap between the two categories.<sup>121</sup> In other words, all expropriations are deprivations, but just some deprivations are expropriations.<sup>122</sup> In a subsequent Constitutional Court case in *Mkontwana v Nelson Mandela Metropolitan Municipality, Bisser and Others v Buffalo City Municipality, Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others*<sup>123</sup> that followed the FNB-case, Judge Yacoob expressed his view regarding deprivation:

Whether there has been a deprivation depends on the extent of the interference with, or limitation of the use, enjoyment or exploitation [of property]. At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.<sup>124</sup>

It is clear from Judge Yacoob's interpretation with regards to the meaning of deprivation that the interpretation of the notion by the Court in the *FNB*-decision was significantly restricted.<sup>125</sup> Van der Walt is of the opinion that the *Mkontwana*-decision is incorrect, and any state-interference that exceeds the borders of what is normal in an open democracy will be in conflict with section 25(1) of the Constitution.<sup>126</sup> Van der Walt further states that the *Mkontwana*-decision is confusing

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119 *FNB*-case par 46, 57, 58.

120 *FNB*-case par 57.

121 Van der Walt *Constitutional Property Law* 204; *FNB*-case par 57.

122 Van der Walt *Constitutional Property Law* 204.

123 *Mkontwana v Nelson Mandela Metropolitan Municipality, Bisser and Others v Buffalo City Municipality, Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) (hereafter *Mkontwana*-case).

124 *Mkontwana*-case par 32.

125 *Mkontwana*-case par 32.

126 Van der Walt is of the view that section 25(1) of the Constitution makes allowance for a wide category of limitations regarding property. See Van der Walt *Constitutional Property Clause* 102.

and that all limitations, regardless of how insignificant they are, should be regarded as deprivations that are subject to section 25(1) of the Constitution. He convincingly argues that deprivation should be defined as properly authorised and fairly imposed regulatory limitations on the use, enjoyment, exploitation or disposal of property, for the sake of protecting and promoting public health and safety or other legitimate public purposes, without compensation.<sup>127</sup>

In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>128</sup> the Constitutional Court increased the confusion by following the *Mkontwana*-decision but applying the principles used in the *FNB*-case. The decision in the *Offit*-case could just as well have been reached by using the definition of deprivation formulated in the *FNB*-case.<sup>129</sup> In *Offit* the Constitutional Court held that before one can determine if deprivation had taken place one should firstly test it against the requirements set out in section 25(1) of the Constitution, and that there must at least be substantial interference that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society.<sup>130</sup> The array of existing interpretations of the true meaning of deprivation amounts to a modern-day labyrinth, but for the purposes of this research Judge Yacoob's definition of deprivation will suffice.<sup>131</sup>

The most common examples of deprivation are regulations aimed at the protection of health and safety, and the regulation of land-use, development and building.<sup>132</sup> These restrictions on the property of an owner limit the free use and enjoyment of the property and sometimes even the extent of profitability, but the infringement or deprivation never

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127 Van der Walt *Constitutional Property Law* 212.

128 *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) (hereafter *Offit*-case).

129 Van der Walt *Constitutional Property Law* 208.

130 Van der Walt 2011 *Annual Survey of South African Law* 208; Van der Walt *Constitutional Property Law* 212.

131 See footnote 122.

132 Van der Walt *Constitutional Property Law* 196.

takes the property away.<sup>133</sup> In some cases deprivation can lead to the total destruction of property, but even then the state does not obtain the property.<sup>134</sup> There are two requirements in section 25(1) of the Constitution that have to be complied with in order for deprivation to be constitutionally acceptable. Firstly, section 25(1) determines that the deprivation of property has to be authorised by law of general application, and secondly it prescribes that the deprivation cannot be arbitrary.<sup>135</sup> These requirements require further attention and will subsequently be discussed to highlight their importance.

#### 2.1.2.1.1 Law of general application

The sole purpose of the principle that deprivations can be legitimate only if they are *inter alia* brought about by law of general application is to assure that the law is always applied generally and that no individual or any small group of people is singled out.<sup>136</sup> Laws that single out certain identifiable individuals or property with the sole purpose of discriminating against them will not meet the requirement of general applicability.<sup>137</sup> In addition, it also implies that the law should be published officially and be accessible to all citizens of South Africa.<sup>138</sup> Any law that singles out and burdens one person or a specific group of people in a judicially untried manner will not be in line with law of general application.<sup>139</sup> In practice, all original and delegated legislation will fall within the scope of law of

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133 Van der Walt *Constitutional Property Clauses: A Comparative Analysis* 410.

134 Currie and De Waal *The Bill of Rights Handbook* 542.

135 Section 25(1) of the Constitution.

136 See Woolman & Botha "Limitations" in Woolman S ea (eds) *Constitutional Law of South Africa* 48-49; Gildenhuys *Onteieningsreg* 93; Currie & De Waal *The New Constitutional and Administrative Law* 340; Van der Walt *Constitutional Property Law* 232-237 on the meaning of this phrase; Van der Walt *Property and Constitution* 28.

137 See *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) at 29H; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 566.

138 Van der Walt *Property and Constitution* 28.

139 See *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) 29H. Woolman & Botha "Limitations" in Woolman S et al (eds) *Constitutional Law of South Africa* 48-50 point out that discriminatory treatment is not allowed by this requirement.

general application for the purposes of section 25.<sup>140</sup> Of course, policy documents or any guidelines issued by statutory bodies will probably not meet the qualification of being regarded as law.<sup>141</sup> The term “law of general application” is interpreted broadly, and the reference in section 25 of the Constitution to “law of general application” includes the regulatory deprivation of property authorised by the rules of common and customary law.<sup>142</sup> A discussion regarding the requirement of non-arbitrariness will now follow.

#### 2.1.2.1.2 Non-arbitrariness

The next prerequisite for deprivation to be constitutionally acceptable is that it should not be arbitrary. This provision is set out in section 25(1) of the Constitution.<sup>143</sup> The Constitutional Court in the *FNB*-case focused extensively on the provision in section 25(1) that no law shall permit arbitrary deprivation of property.<sup>144</sup> The Court commenced the discussion by adopting a substantive arbitrariness test which boils down to the view that a deprivation is arbitrary when there is inadequate reason for it, or when it is procedurally unfair.<sup>145</sup> Judge Ackerman explained that to determine whether or not there is adequate reason for the deprivation, certain factors have to be considered. They include the presence of a nexus between a web of relations, including the relationship between the means employed and the ends sought; the relationship between the purpose for the deprivation and the individual whose property is affected; and the relationship between the purpose, the nature of the property, and the extent of the deprivation.<sup>146</sup>

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140 *Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C) 167; Van der Walt *Constitutional Property Law* 233.

141 Gildenhuis *Onteieningsreg* 93.

142 Chaskalson and Lewis “Property” 13.

143 Section 25(1) of the Constitution.

144 Van der Walt *Constitutional Property Law* 245; *FNB*-case par 57-60; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman’s The Law of Property* 566.

145 In the introductory sentences of paragraph 100 of the *FNB*-case, the Court adopts a substantive arbitrariness test.

146 *FNB*-case para 100(e)-(f); Van der Walt *Constitutional Property Law* 245; Van der Walt *Constitutional Property Clauses: A Comparative Analysis* 135-141.

Roux<sup>147</sup> expressed the opinion that this substantive arbitrariness test in the *FNB*-case would create a wide scope for judicial discretion. He argued that the level of arbitrariness could not be determined by making use of the factors set out in the *FNB*-case. Roux explained that the level of scrutiny should rather be determined by means of an assessment of rationality. This test would arguably fall just short of proportionality, as required by the Court in the *FNB*-case.<sup>148</sup> It has not taken long for Roux's prediction to prove correct, considering that the Constitutional Court has already deviated from the test that was formulated by Judge Ackerman in the *FNB*-case.<sup>149</sup>

In the *Mkontwana*-case the Court primarily applied the substantive arbitrariness test that had been formulated in the *FNB*-case, but the slight rephrasing of the test caused a significant shift into another direction.<sup>150</sup> Judge Yacoob stated that:

There would be sufficient reason for the deprivation if the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment.<sup>151</sup>

This view is significantly different from the view expressed by Judge Ackerman in the *FNB*-case, due to the fact that the emphasis has shifted from proportionality to rationality.<sup>152</sup> The Court thus proved Roux to be correct in his predictions.<sup>153</sup> It is evident from the above-mentioned Constitutional Court cases that the law is fickle when dealing with

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147 Roux "The Arbitrary Deprivation Vortex: Constitutional Property Law after FNB" 5-7; Van der Walt *Constitutional Property Law* 247.

148 Van der Walt *Constitutional Property Law* 248; Roux "The Arbitrary Deprivation Vortex: Constitutional Property Law after FNB" 5.

149 Van der Walt *Constitutional Property Law* 247-248.

150 *Mkontwana*-case par 35.

151 *Mkontwana*-case par 51.

152 See Mostert and Pope (eds) *The Principles of the Law of Property* 123-125; Van der Walt *Constitutional Property Law* 145-148.

153 See footnote 118.

constitutional matters, and matters regarding the requirement of arbitrariness will differ from case-to-case basis.<sup>154</sup>

#### 2.1.2.2 Expropriation

The reader is reminded that this dissertation focuses on the relationship between landowners and holders of rights in minerals, particularly with the aim of determining the extent to which a landowner can negotiate compensation with the holder of statutory prospecting or mining rights.<sup>155</sup> The research is therefore not aimed at establishing the possibility of the expropriation of property in terms of the MPRDA or the constitutionality of the MPRDA.<sup>156</sup> Nonetheless, in order to understand the notion of deprivation clearly, it must be contrasted with the notion of expropriation.

Section 25(2) of the Constitution provides that property may be expropriated only in terms of law of general application for a public purpose or in the public interest and the expropriation must be accompanied with the payment of compensation.<sup>157</sup> The *Expropriation Act*<sup>158</sup> (hereafter the *Expropriation Act*) provides for the expropriation of land and other property for public purposes, but it must be kept in mind that the provisions set out in section 25 of the Constitution are still part of the supreme law of the Republic. The *Expropriation Act* in fact determines or prescribes the manner in which expropriation should be effected, while section 25 of the Constitution determines the legal principles underlying a valid expropriation. In *Harksen v Lane NO* 1998

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154 Freedman 2006 TSAR 99; Van der Walt *Constitutional Property Law* 282-288; Du Plessis *Compensation for Expropriation under the Constitution* 88; Currie and De Waal *The Bill of Rights Handbook* 543-545.

155 Subjects who have already acquired rights in minerals.

156 This issue has been dealt with extensively by Van der Schyff. See Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 51; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-8; *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) par 24; *Agri South Africa v Minister of Minerals and Energy and Another* 2013 (4) SA 1 (CC) par 44 and 52.

157 Section 25(2) of the Constitution.

158 *Expropriation Act* 63 of 1975.

1 SA 300 (CC) <sup>159</sup> (hereafter the *Harksen*-case) the court defined expropriation as the attainment of rights in property by the state.<sup>160</sup> According to Mostert and Pope,<sup>161</sup> expropriation takes place when the state takes away private property without the permission of the owner to serve a public purpose, and the action is accompanied by the payment of compensation.<sup>162</sup>

In the recent *Agri SA*-case, the issue before the Constitutional Court was whether or not the MPRDA expropriated a certain mining company's (Sebenza (Pty) Ltd) coal rights when the Act came into force.<sup>163</sup> Sebenza (Pty) Ltd acquired coal rights in 2001. These rights became unused old order rights when the MPRDA was introduced in 2004. The mining company subsequently claimed that its old order mining rights had been expropriated due to the promulgation of the MPRDA, which ultimately deprived the company of its rights and bestowed those rights in the custodianship of the state.<sup>164</sup> The Constitutional Court dismissed the company's claim on the basis of the interpretation of the definition of expropriation as set out in section 25(2) of the Constitution.<sup>165</sup> In the first instance the Court had to decide if there had been a deprivation of property and secondly if the property had been acquired by the state.<sup>166</sup> The Court concluded that even though Sebenza (Pty) Ltd had been deprived of their old order mining rights, the state had not acquired the mineral rights.<sup>167</sup> Sebenza (Pty) Ltd had failed to prove the second prerequisite to the definition of expropriation, and therefore the claim for compensation was dismissed.<sup>168</sup>

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159 *Harksen v Lane* NO 1998 1 SA 300 (CC).

160 *Harksen*-case par 32.

161 Mostert and Pope (eds) *The Principles of the Law of Property* 120.

162 Mostert and Pope (eds) *The Principles of the Law of Property* 120.

163 *Agri SA*-case 1 C-D.

164 *Agri SA*-case 1 D-E.

165 *Agri SA*-case 19 A-B.

166 *Agri SA*-case 19 B-C.

167 The meaning attributed to the concept corresponds with Van der Schyff's view of the meaning of expropriation. See Van der Schyff 2007 *CILSA* 310.

168 The minority judgment of Van der Westhuizen was also focused on the nature of expropriation, and it is clear from this decision that the meaning of "acquisition" will be questioned in future court cases.

Van der Walt identified three main characteristics of expropriation which would enable one to fully comprehend the nature of such an act by the state.<sup>169</sup> Firstly, an owner's property can be expropriated only by way of an action by the state.<sup>170</sup> The expropriation of property is performed by way of original acquisition and not by transfer.<sup>171</sup> Secondly, expropriation always causes an absolute or partial loss of property for the previous owner.<sup>172</sup> Lastly, the acquisition or destruction of property through expropriation must always be in the best interest of the public, and the previous owner(s) must be compensated.<sup>173</sup> There are specific requirements in section 25(2) of the Constitution that have to be complied with in order for expropriation to be constitutionally acceptable. A discussion of the requirements as set out in section 25(2) of the Constitution will now follow.

#### 2.1.2.2.1 Public purpose or public interest

Section 25(2)(a) of the Constitution stipulates that property may be expropriated only for a public purpose or in the public interest.<sup>174</sup> It is possible to determine how these requirements are interpreted as the Courts are often confronted with issues regarding public purpose. The *Expropriation Act* defines public interest as "any purpose connected with the administration of the provisions of any law by an organ of state".<sup>175</sup> This requirement prevents the expropriation of property for illegal purposes<sup>176</sup> and it can be interpreted in a strict or a lenient sense, but the lenient approach should always prevail when a statute authorises

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169 Van der Walt *Constitutional Property Law* 344.

170 There is currently uncertainty in our law that expropriation can be effected by an order of court. See Mogoeng's minority judgement in Agri-case at par 73-75; Van der Walt *Constitutional Property Law* 344.

171 Gildenhuis *Onteieningsreg* 8-9.

172 In *Harksen v Lane* 1998 (1) SA 300 (CC) the Constitutional Court argued that expropriation involves the permanent acquisition of property; Van der Walt *Constitutional Property Clauses: A Comparative Analysis* 579.

173 Van der Walt *Constitutional Property Law* 345.

174 Section 25(2)(a) of the Constitution.

175 Section 1 of the *Expropriation Act*.

176 Van der Walt *Constitutional Property Law* 459.

expropriation in terms of either public purpose or public interest.<sup>177</sup> In *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd*<sup>178</sup> the court endeavoured to explain the difference between expropriation in the public interest and expropriation for a public purpose.<sup>179</sup> The court argued that the privilege of deciding what is in the public interest lies with the legislature.<sup>180</sup> Judge Smalberger explained the difference as follows:

The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. [It does not appear] that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case.<sup>181</sup>

Even though South African courts do not clearly distinguish the difference between the public purpose and public interest requirements, it has been argued that “public purpose” is a narrower concept than “public interest”.<sup>182</sup> The Constitution does not elaborate on the meaning of the concept of “public purpose”, but the *Expropriation Act* gives a clear definition of this term.<sup>183</sup> The Constitution does not give us a clear description of the meaning of “public interest” either, but section 25(4)(a) of the Constitution stipulates that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources”.<sup>184</sup> Van der Walt argues that the South African courts must ensure that expropriation always takes

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177 Budlender “The Constitutional Protection of Property Rights” 48-50; Gildenhuis *Onteieningsreg* 98; Van der Walt *Constitutional Property Law* 462.

178 *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 660I-661I (hereafter *Streepen-case*). Even though this case was decided before the Constitution was introduced in South Africa, it is still useful to examine older cases such as this one to develop a better understanding of certain concepts.

179 Par 47-48 of the *Streepen-case*.

180 See Mostert and Pope (eds) *The Principles of the Law of Property* 126.

181 Par 47-48 of the *Streepen-case*.

182 In the *Offit-case* 674, the Court described the public interest requirement as a broader matter than public purpose.

183 Section 1 of the *Expropriation Act*.

184 Section 25(4)(a) of the Constitution.

place for a public purpose or in the public interest and if it benefits a third party, it can still be valid.<sup>185</sup>

The Constitution contains the public purpose and public interest requirement to avoid the frivolous use of the state's eminent domain.<sup>186</sup> This requirement is therefore aimed at the prevention of improper expropriations of property and to control the power to expropriate.<sup>187</sup> In a sense it guarantees the existence of a defensive shield against unnecessary state interference in the property realm.<sup>188</sup>

#### 2.1.2.2.2 Compensation

For expropriation to be constitutionally valid, it must be accompanied by the payment of compensation.<sup>189</sup> Section 25(3) of the Constitution stipulates that the obligation to compensate for expropriation, the amount of compensation and the method and time of payment have to be determined by court.<sup>190</sup> All compensation payable is determined by making use of the *Expropriation Act*,<sup>191</sup> but it must be kept in mind that this Act is subject to the constitutional provisions, and valid only in so far as it does not come into conflict with the Constitution.<sup>192</sup> In terms of section 25(2) of the Constitution, expropriation must always be accompanied with the payment of compensation.<sup>193</sup> In *Haffejee NO and Others v eThekweni Municipality and Others*<sup>194</sup> the Constitutional Court

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185 This was the finding in the *Offit*-case. See also Van der Walt 2008 ASSAL 259-262 and *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* 2010 ZAFSHC 11; Slade 2014 PELJ; Van der Walt *Constitutional Property Law* 462.

186 Van der Walt *Constitutional Property Law* 242.

187 Van der Walt *Constitutional Property Law* 242.

188 Gildenhuys *Onteieningsreg* 89-92. See *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP) par 82.

189 Section 25(3) of the Constitution.

190 Van der Walt *Constitutional Property Law* 503.

191 The *Expropriation Act* provides the procedure to determine the compensation payable by the state, but it must be done within the constitutional framework. See section 12 of the *Expropriation Act*.

192 Section 25(3)(a)-(e) of the Constitution.

193 Section 25(2)(b) of the Constitution.

194 *Haffejee NO and Others v eThekweni Municipality and Others* 2011 ZACC 28.

decided that the payment of compensation does not have to be determined prior to the expropriation.<sup>195</sup>

Section 25(1) and (2) of the Constitution, together with section 12 of the *Expropriation Act*, regulates the way in which compensation is calculated, which is by making use of fair market value.<sup>196</sup> Section 25(3) of the Constitution stipulates that compensation has to be determined in a just and equitable manner and all the relevant circumstances have to be taken into account.<sup>197</sup> In *Khumalo v Potgieter*<sup>198</sup> Judge Gildenhuys had to determine what the notion of just and equitable compensation entails and how to calculate it. The Land Claims court followed a two-stage process to calculate just and equitable compensation. Firstly the court determined the fair market value of the land to be expropriated by making use of the *Expropriation Act*, and secondly the court calculated how the fair market value should be altered or adjusted in terms of section 25(3) of the Constitution.<sup>199</sup>

#### 2.1.2.2.3 Summary

Consideration of the above discussion of ownership and the state's power to infringe thereon leads to the conclusion that the traditional view of ownership as an absolute individual right can no longer be thought to be valid, in the context of the changes that have taken place in the prevailing social, economic and political conditions. In the *Sandhurst*-case the court refrained from applying the principle of subjacent support and concluded that landowners have the obligation to allow holders of

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195 Compensation does not have to be monetary, but prompt payment is necessary. See Van der Walt *Constitutional Property Law* 509.

196 Section 12 of the *Expropriation Act*.

197 Section 25(3)(a)-(e) of the Constitution.

198 *Khumalo v Potgieter* 2002 2 All SA 456 (LCC) (hereafter the *Khumalo*-case).

199 Par 93 of *Khumalo*-case. See also *Ex parte Former Highland Residents; In re: Ash and Others v Department of Land Affairs* 2002 2 All SA 26 (LCC). In order to calculate the compensation the Courts must consider the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation.

prospecting or mining rights to exercise their rights in a reasonable manner that, considering the facts of each case, is least injurious to landowners. As the dispute between the parties arose on a date prior to the commencement of the MPRDA, the court made use of the *Minerals Act* 50 of 1991 to decide the matter. This Act regulated the mining industry in South Africa in the previous mineral law regime and landowners had the privilege to decide if, and by whom, prospecting and mining operations could be performed on their land. The MPRDA significantly changed the position of the landowner by giving the state the prerogative to manage and control all mining and prospecting rights. The *Sandhurst* decision therefore has to be observed with circumspection, considering that Judge De Villiers did not make use of the provisions in the MPRDA to decide the matter.

In order to better understand South Africa's current mineral law regime and so to answer the research question that underlies this dissertation, it is imperative that we take a closer look at the position prior to the promulgation of the MPRDA. A discussion of historical perspectives on South Africa's mineral law dispensation is therefore included in this dissertation. This will enable us to fully understand why certain changes were made to the mineral law regime and how to interpret the current regime with regard to the claiming of compensation from the holder of statutory prospecting or mining rights.

### **3 Historical perspectives**

A historical overview of South Africa's mineral law legislation will provide the much-needed perspective to better understand South Africa's current mineral law regime. Before the MPRDA came into operation on 1 May 2004, the *Minerals Act* 50 of 1991 (hereinafter referred to as the MA) regulated the mining industry in South Africa. When it came into operation the MA significantly changed South African mining law by

restoring the common law rights<sup>200</sup> of the holder of the property. However, due to the occurrence of political changes in our country and the need to address past racial inequalities including the uneven allocation of wealth, the mineral law regime of South Africa was changed by the promulgation of the MPRDA. In order to examine how landowners were compensated for damages caused by mining operations conducted on their land prior to the inception of the MPRDA, a discussion regarding the common law foundation of the South African mineral law dispensation and an analysis regarding the MA is imperative. Firstly the applicable common law principles to resolve conflict arising from the exercise of the ownership of land will be set out. Thereafter the modification of these common law principles by legislation, particularly the MA, will be examined.

### **3.1 Common law**

When the Dutch colonised the Cape of Good Hope in 1652, the *cuius est solum* maxim was introduced to South African law.<sup>201</sup> South Africa was divided into four entities,<sup>202</sup> and throughout the colonial era every entity had its own mineral legislation.<sup>203</sup> After South Africa became a Union in 1910 all the existing statutes of the four original entities remained in force until they were specifically repealed.<sup>204</sup> After South Africa became a Republic in 1961, all of the existing legislation remained in force until it was repealed or amended by new legislation.<sup>205</sup> Four new mining acts

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200 With the promulgation of the MA, all the mineral rights vested in the state were abolished and the common law rights of the holders were restored. See Erasmus *Protection of Landowners' Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002* 6 and Mostert *Mineral Law: Principles and Policies in Perspective* 93.

201 Dale 1997 *Resources Policy* 15; Hahlo and Kahn *The South African Legal System and its Background* 572.

202 The Cape of Good Hope, the Republic of Transvaal, the Orange Free state and Natal.

203 Viljoen and Bosman *A Guide to Mining Rights in South Africa* 10.

204 Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 1; Dale *An Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* 226; Section 135 of *South African Act 9 of 1909*.

205 Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 1.

were introduced during this time. They were the *Precious Stones Act*,<sup>206</sup> the *Atomic Energy Act*,<sup>207</sup> the *Mining Titles Registration Act*<sup>208</sup> and the *Mining Rights Act*.<sup>209</sup> The common law principles regarding the exercise of rights to minerals were developed and modified by the inception of new legislation<sup>210</sup> prior to the promulgation of both the MA and the MPRDA. In this section the impact of particular provisions of the legislation on the common law principles of rights to minerals will also be explained, although the broader scope within which the MA and the MPRDA provide for compensation will be discussed later on.

In *Hudson v Mann*<sup>211</sup> the common law principles, as implemented by earlier case law,<sup>212</sup> were formulated. These principles entailed that a holder of rights to minerals should always act in good faith and exercise his rights in a way that was least injurious to the landowner's property.<sup>213</sup> All unsevered minerals belonged to the owner of the land, and all minerals not yet extracted from the earth could not be separated from the ownership of the land, irrespective of who held the mining and prospecting rights.<sup>214</sup> Once the minerals were removed from the earth by the landowner, they subsequently became movable things and ownership of these minerals vested in the holder of the mineral rights.<sup>215</sup> The courts applied the principle of lateral and subjacent support, which was accepted into South African property law to resolve the conflict

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206 *Precious Stones Act* 73 of 1964.

207 *Atomic Energy Act* 90 of 1967.

208 *Mining Titles Registration Act* 16 of 1967.

209 *Mining Rights Act* 20 of 1967.

210 See Badenhorst 1999 *LAWSA* 56.

211 *Hudson v Mann* 1950 4 SA 485 (T) (hereafter *Hudson-case*) at 488B and 488E.

212 *Coronation Collieries v Malan* 1911 TPD 577; *Witbank Colliery Ltd v Lazarus* 1929 TPD 529; *Transvaal Property and Investment Co Ltd and Reinhold and Co v SA Townships Mining and Finance Corporation Ltd and the Administrator* 1938 TPD 512; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 532.

213 *Hudson-case* at 488F-488G.

214 Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 5.

215 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 693-694; Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 5.

between the holders of mineral rights and the landowners.<sup>216</sup> The principle of subjacent support was rejected in the *Sandhurst*-case, prior to the inception of the MPRDA,<sup>217</sup> and the case was decided by applying the common law principles regarding the relationship between landowners and the holders of servitudes. During this period the common law principles did not oblige the holder of rights to minerals to pay any compensation to the landowner for damage incurred during mining operations, in the absence of any contract or mandate obliging the holder of the rights to the minerals to do so.<sup>218</sup> Priority of right was thus granted to the holder of the rights to the minerals, and disputes were resolved by determining whether or not the holder of the rights to the minerals acted in good faith and in the way that was least injurious to the landowner.<sup>219</sup> It is submitted that this approach was fair and reasonable, as landowners were compensated when they alienated their rights to the minerals on their properties.<sup>220</sup>

The applicable common law principles were supplemented by section 42 of the MA. This section provided landowners with a right to compensation for the loss of minerals on their land, as well as the infringement of a landowner's ownership attributable to losses suffered or harm incurred due to or during the mining activities in certain circumstances.<sup>221</sup> It is submitted that this can be attributed to the fact

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216 See *Coronation Collieries v Malan* 1911 TPD 591; In *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) the court expressed the view that lateral support formed part of an owner's entitlements of ownership; Sonnekus 2002 TSAR 333; In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 382D-E.

217 See 2.1.1.2 above.

218 Kaplan and Dale *A Guide to the Minerals Act 1991* 189.

219 The *Hudson*-case at 488G.

220 Landowners were entitled to make arrangements with third parties who wanted to extract the minerals from their land. These arrangements enabled the landowner either to separate the mineral rights from the ownership of land or to give permission for mining activities to commence. See *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 499 (A) 509I-510A.

221 Section 42(1)(e) of the MA ; Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 710; Van der Vyver 2012 *De Jure* 127; Van der Schyff 2012 *New Contree* 141. See section 2 of the *Precious Stones and Minerals Mining Act* 19 of 1883, section 5(d) of the *Disposal of Crown Lands Act* 15 of 1887, section 5 of the *Transvaal Mining Leases and Minerals Law*

that the landowner was compensated when the miner acquired the right to mine or prospect. The application of section 42 of the MA and the significance thereof for this study will be explained in finer detail in the chapter dealing with the broader perspectives of the MA hereunder.

A new beginning for South African mineral law emerged with the promulgation of the MA in 1992. This particular Act regulated the mining industry in South Africa before the MPRDA was introduced on 1 May 2004.<sup>222</sup> It is therefore necessary to include a broader discussion regarding the MA to determine if and how landowners were compensated for damages caused by mining operations conducted on their land prior to the inception of the MPRDA.

### **3.2 Minerals Act 50 of 1991**

When the *Minerals Bill*<sup>223</sup> was published for comment in 1988 it received a lot of criticism from the Chamber of Mines.<sup>224</sup> This was because the Bill was formulated and structured without consulting any division of the South African mining and minerals industry.<sup>225</sup> The MA came into force in 1992<sup>226</sup> and the aim of the Act was to restore the common law rights of the holder.<sup>227</sup> With the promulgation of the MA, all the mineral rights vested in the state were abolished and the common law rights of the holders were restored.<sup>228</sup>

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*Amendment Act 30 of 1918 and section 3(2)(b) of the Base Minerals Amendment Act 39 of 1942.*

222 Section 5(1) of the MA. This provision in the act made it possible for holders of mineral rights to be treated equally.

223 Government Notice R 856 in GG 11606 of 15 December 1988.

224 See Badenhorst 1991 *TSAR* 113.

225 Martinson 1989 *Annual Survey of South African Law* 208.

226 Proclamation 123 of Government Notice 13682 of 20 December 1991.

227 The aims of the Act are to regulate the prospecting for and the optimal exploitation, processing and utilization of minerals; to regulate the orderly utilization and the rehabilitation of the surface of land during and after prospecting and mining operations; and to provide for matters connected therewith; See also Badenhorst 1991 *TSAR* 124.

228 Section 5(1) of the MA. This provision in the act made it possible for holders of mineral rights to be treated equally.

When the MA was promulgated in 1992 it repealed the previously existing mining legislation<sup>229</sup> to simplify the laws pertaining to South Africa's mining industry by combining them into a simple and easily accessible body of law.<sup>230</sup> As indicated above the MA abolished the differentiation of various classes of land<sup>231</sup> and minerals.<sup>232</sup> The Act also recognised the common law rights of landowners and provided that landowners had the prerogative to decide if prospecting and mining operations could take place on their land, and by whom they could be performed.<sup>233</sup> Section 5(1) of the MA reads as follows:

Subject to the provision of this Act, the holder of the right to any mineral in respect of land or tailings, as the case may be, or any other person who has acquired the consent of such holder in accordance with section 6(1)(b) or 9(1)(b), shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such minerals on such land or tailings, as the case may be, and to dispose thereof.<sup>234</sup>

Under the MA, the right to prospect for, mine and dispose of minerals, precious metals and precious stones therefore vested in the holder of the rights to the minerals or third parties who had the consent of the mineral rights holder to prospect or mine.<sup>235</sup> The ownership of minerals *in situ* thus remained with the landowner until the minerals were removed from the soil of his land.<sup>236</sup> Once the minerals were severed from the soil of the land, they became movable property and could be acquired by the mineral rights holder.<sup>237</sup> All rights to prospect or mine in

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229 See section 68 of the MA.

230 Dale 1994 *JENRL* 228-229.

231 The different classes of land included state land, alienated land and private land.

232 Before the promulgation of the MA, a distinction was made between precious metals, base minerals, natural oil, precious stones, source material and tiger's eye. See Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 51.

233 Section 5(1) of the MA; Van der Schyff 2012 *New Contree* 151.

234 Section 5(1) of the MA.

235 Section 5(1) of the MA.

236 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 693-694; Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 289.

237 Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 5.

respect of all minerals had to be acquired by way of a written contract with the mineral rights holder, whether that holder was a private individual, a juristic person or the state.<sup>238</sup> To gain a proper perspective on how landowners were compensated for damages caused by mining operations conducted on their land prior to the inception of the MPRDA, section 42 of the MA needs to be addressed.

When the MA came into force in 1992, the common law principles were supplemented by section 42 of the MA.<sup>239</sup> Section 42 of the MA regulated the acquisition of land by the state and the payment of compensation under certain circumstances.<sup>240</sup> Provision was made through section 42 of the MA for the state to acquire land that had been rendered uneconomic for agricultural purposes due to mining activities.<sup>241</sup> The acquisition of the uneconomic farm land could take place upon request by the landowner<sup>242</sup> or a person who wanted to mine on such land.<sup>243</sup> If the Minister of Agriculture was of the view that certain land should be acquired by the state, the land was deemed to be required for public purposes and was subsequently expropriated in terms of the *Expropriation Act*.<sup>244</sup> The market value of the land, and an amount for the financial loss and inconvenience suffered by the landowner could be claimed in terms of section 12 of the *Expropriation Act*.<sup>245</sup> If a landowner wanted to keep the uneconomic land or when an agreement was entered into between the miner and the landowner with regard to the payment of compensation, the state could not lay its hands on such

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238 Franklin and Kaplan *The Mining and Mineral Laws in South Africa* 79. This written permission was usually exemplified in a prospecting contract under which the third party obtained from the holder of the right to precious metals a contractual right to prospect. The *Deeds Registries Act* 47 of 1937 contained a specific section that regulated the registration of prospecting contracts, which on registration were binding on third parties.

239 Kaplan & Dale *A Guide to the Minerals Act 1991* 189; See *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 at 315 and *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 532.

240 Section 42 of the MA.

241 Section 42(1)(ii) of the MA.

242 Section 42(1)(d)(i) of the MA.

243 Section 42(1)(d)(ii) of the MA.

244 Section 42(2) of the MA.

245 Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 230.

land and acquisition by the state was not possible.<sup>246</sup> Section 42 of the MA did not restrict the payment of compensation to landowners for the expropriation of their land, but it also provided compensation for other damages caused in the course of mining operations conducted on their land.<sup>247</sup> If the miner and the landowner failed to reach a settlement, compensation had to be determined by arbitration or a competent court.<sup>248</sup> If the Minister was of the opinion that such a failure was due to default on the part of the miner, the Minister could prohibit the miner from continuing with the mining operations.<sup>249</sup> Compensation was determined by using the provisions of section 12 of the *Expropriation Act*.<sup>250</sup>

Normally the agreements that succeeded the deliberations between landowners and prospective holders of prospecting or mining rights stipulated the extent of the rights acquired by the third parties as well as the compensation payable to the landowner.<sup>251</sup> Compensation was provided for the loss of the land's minerals as well as the infringement of a landowner's ownership attributable to losses suffered or harm incurred due to or during the mining activities.<sup>252</sup> Section 42 of the MA thus supplemented the common law principles with regards to mineral rights by providing certain remedies to protect the landowner. It consequently enhanced the common law position with regards to the absence of the payment of compensation for mining operations conducted on land.<sup>253</sup>

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246 Section 42(1)(d) of the MA.

247 Section 42(1)(d)(ii) of the MA.

248 Section 42(3) of the MA.

249 Section 42(4)(i) of the MA.

250 Section 42(3)(a) of the MA.

251 Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 710; Van der Vyver 2012 *De Jure* 127.

252 Section 42(1)(e) of the MA; Van der Schyff 2012 *New Contree* 141. See section 2 of the *Precious Stones and Minerals Mining Act* 19 of 1883, section 5(d) of the *Disposal of Crown Lands Act* 15 of 1887, section 5 of the *Transvaal Mining Leases and Minerals Law Amendment Act* 30 of 1918 and section 3(2)(b) of the *Base Minerals Amendment Act* 39 of 1942.

253 The common law principles did not oblige the holder of rights to minerals to pay compensation to the landowner for damages caused due to mining operations. See Kaplan & Dale *A Guide to the Minerals Act* 1991 190.

#### 4 The MPRDA

Shortly after the MA was introduced, there was concern about the future of South Africa's mining and mineral laws in the context of the political changes that had come about.<sup>254</sup> The nationalisation of South African mineral law was predicted in the 90's. The origin of this idea can be found in clause 4.6.1 of the ANC Freedom Charter.<sup>255</sup> This clause provided that:

The minerals in the ground belong to all South Africans, including future generations. Thus we must seek the return of the mineral rights to the democratic government, which should in turn give the people control over optimum exploitation of this important natural resource.<sup>256</sup>

The future of South Africa's mining and mineral laws was now in question. South Africa's mineral resources in the pre-1994 era had been closely connected to the ownership of land, and mining the minerals had thus contributed to the uneven allocation of wealth. It was necessary to change the country's mineral law regime as part of the effort to address the existing racial inequalities. Hence the promulgation of the MPRDA on 1 May 2004.

The MPRDA commenced on the 1<sup>st</sup> of May 2004.<sup>257</sup> The Act was promulgated to regulate the exploitation of the mineral and petroleum resources of South Africa. It stipulates that the nation's mineral and petroleum resources are statutorily bequeathed to all the people of South Africa and the state is statutorily appointed as the custodian thereof for the benefit of all South Africans.<sup>258</sup> This particular section of the Act ousted the Roman-Dutch common law principle that the ownership of land extends to the sky and down to the centre of the

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254 Badenhorst 1994 *Journal of Energy and Natural Resources Law* 287.

255 Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin in Suid-Afrikaanse Reg* 1992.

256 Freedom Charter 1955 <http://www.anc.org.za/ancdocs/history/charter.html>.

257 Date of the commencement of the act.

258 Section 3 of the MPRDA. For a more detailed discussion regarding this specific phrase in the MPRDA, see Van der Schyff 2008 *TSAR* 757 and Van den Berg *STELL* 139.

earth.<sup>259</sup> As a result thereof, all the rights to minerals have been severed from the land and the MPRDA does not recognize the existence of common law mineral rights as they existed directly before the MPRDA took effect.<sup>260</sup>

In addition to these alterations, section 3(2)(a) of the MPRDA stipulates that:

The Minister of the Department of Mineral Resources may grant, issue, refuse, control, administer, and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.<sup>261</sup>

The state therefore has the prerogative and duty to manage and control all mining and prospecting rights.<sup>262</sup> In order to answer the question that informs this study<sup>263</sup> it is important to discuss the encumbrance on landowners brought about by the MPRDA, examine specific sections in the MPRDA that are of relevance for this study, and compare the position of the landowner before and after the promulgation of the MPRDA, to establish whether or not the MPRDA grants landowners better protection today than what was afforded when the common law principles prevailed<sup>264</sup> and the MA still regulated our country's mining and mineral laws. In addition to this, a cursory discussion regarding the position in Western Australia will be included to determine how a similar situation is dealt with in another legal jurisdiction. This specific foreign

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259 See par 8 in the case of *Meepo v Kotze* 2008 1 SA 104 (NC) (hereafter the *Meepo*-case). *Cuius et solum eius usque ad caelum ad inferos maxim*. See *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC).

260 See *Milton Ownership* 697; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 23-30 and *Agri South Africa v Minister of Minerals and Energy and Another* 2013 (4) SA 1 (CC) par 8.

261 Section 3(2)(a) of the MPRDA. Also see Badenhorst and Shone *OBITER* 37.

262 *Agri South Africa v Minister of Minerals and Energy and Another* 2013 (4) SA 1 (CC) par 51; Van den Berg *STELL* 158.

263 The question that underpins this study is to what extent a landowner can negotiate compensation with the holder of statutory prospecting- or, mining rights under the current mineral law regime.

264 Section 4 of the MPRDA states that the MPRDA will prevail if the common law contradicts any of the provisions set out in the MPRDA.

system was chosen for the comparative view because the mining laws in Western Australia make provision for compensation for any harm or loss suffered by the landowner. In addition to that, Badenhorst<sup>265</sup> compared South Africa and Western Australia's mineral law regime in one of his articles and subsequently identified a possible solution to the problem landowners are currently facing with regards to the claiming of compensation for damages caused during the course of mining operations.

#### **4.1 Encumbrance on landowners brought about by the MPRDA**

Section 5 of the MPRDA grants certain entitlements to prospective holders of prospecting or mining rights.<sup>266</sup> Simultaneously this section of the MPRDA also brings about an encumbrance on landowners due to the fact that the rights granted in section 5 are granted in respect of land possessed by other individuals.<sup>267</sup> Section 5(3) of the MPRDA stipulates that prospective holders of prospecting or mining rights may enter the land to which such rights relate together with the necessary employees,<sup>268</sup> make use of any plant, machinery or equipment on that land to build and construct any infrastructure as needed,<sup>269</sup> prospect or mine (whichever the case may be),<sup>270</sup> remove any minerals found,<sup>271</sup> make use of the water on such land,<sup>272</sup> and carry out any other activities which are related to prospecting or mining.<sup>273</sup> Effectively section 5(3) grants entitlements to prospective holders of prospecting or mining rights, even though the landowner has ownership of his or her land. It is therefore safe to say that these entitlements will most definitely impose on the rights held by the landowner. It is a consequence that holders of prospecting or mining rights and landowners may share some of the

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265 See Badenhorst 2010 *THTHR* 325 and Badenhorst 2011 *TSAR* 335.

266 Section 5 of the MPRDA.

267 Section 3(1) of the MPRDA.

268 Section 5(3)(a) of the MPRDA.

269 Section 5(3)(a) of the MPRDA.

270 Section 5(3)(b) of the MPRDA.

271 Section 5(3)(c) of the MPRDA.

272 Section 5(3)(d) of the MPRDA.

273 Section 5(3)(e) of the MPRDA.

entitlements in respect of the owner's land.<sup>274</sup> As a result thereof, a landowner's entitlements to his or her land are limited.

In the *Sandhurst*-case Judge de Villiers indicated that in cases of conflict the entitlements of the holders of prospecting or mining rights enjoy priority over the entitlements of the landowner.<sup>275</sup> Due to the fact that the dispute between the parties in this case arose on a date prior to the commencement of the MPRDA, Judge De Villiers adopted this line of reasoning with the MA as his main guide. With this in mind, it would seem unreasonable to follow the same argumentation today, as landowners no longer have the prerogative to decide if prospecting and mining operations can take place on their land, and by whom they should be performed. In order to answer the research question asked in this study, certain sections of the MPRDA have to be addressed, because such an analysis will make it possible to determine the position of the landowner regarding the claiming of compensation for damages caused in the course of mining. These are sections 10<sup>276</sup> and 54<sup>277</sup> of the MPRDA.

#### 4.1.1 *The duty to consult*

Section 10 of the MPRDA regulates the consultation process with interested and affected parties such as landowners. As the legislature predicted the inevitable conflict the MPRDA would invoke between landowners and holders of prospecting or mining rights, a consultation process was introduced. Section 10 of the MPRDA requires that within

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274 The entitlements granted to the holder of a prospecting or mining right in section 5(3) of the MPRDA correspond with some of the uneven allocation of wealth entitlements landowners are entitled to. See Badenhorst, Pienaar, Mostert *Silberberg and Schoeman's The Law of Property* 704-705.

275 *Sandhurst*-case 240; see also Badenhorst 2006 *OBITER* 541.

276 Section 10 of the MPRDA regulates the consultation process between the holders of prospecting or mining rights and landowners.

277 Section 54 of the MPRDA provides for the payment of compensation under certain circumstances and it prescribes what measures need to be taken if the landowner refuses access to his or her land.

14 days after accepting an application lodged in terms of section 16,<sup>278</sup> 22<sup>279</sup> or 27,<sup>280</sup> the Regional Manager must make known that such an application for a prospecting right, mining right or mining permit has been accepted<sup>281</sup> and call upon any affected landowners to furnish him or her with their comments regarding the application within 30 days of the date of the notice.<sup>282</sup> Section 10(2) further provides that if a landowner objects to the granting of the prospecting right or mining right, the Regional manager must report the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon.<sup>283</sup> So the Regional Manager must first notify the landowner within 14 days after an application has been accepted, in order to give the landowner a chance to object to this potential invasion of his or her land.

In addition to this particular section, section 16(4)(b) of the MPRDA stipulates that if an application for a prospecting right has been accepted, the applicant must within 14 days from date of acceptance consult with the landowner.<sup>284</sup> Parallel to this section, section 22(4)(b) of the MPRDA also provides that the applicant must consult with the landowner within 14 days after an application for a mining right has been accepted.<sup>285</sup> In *Doe Run Exploration SA (Pty) Ltd and Others v Minister of Minerals and Energy and Others*<sup>286</sup> the court stressed the fact that the consultation process is essential for the protection of landowners' rights and it must be strictly complied with.<sup>287</sup> Section 105 of the MPRDA also confirms the importance of this consultation process by providing that

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278 Section 16 of the MPRDA provides the steps that need to be taken to apply for a prospecting right.

279 Section 22 of the MPRDA provides the steps that have to be taken to apply for a mining right.

280 Section 27 of the MPRDA deals with the issuing of mining permits.

281 Section 7 of the *Mineral Petroleum Resources Development Amendment Act* 49 of 2008 (hereafter the MPRDAA).

282 Section 10(b) of the MPRDA.

283 Section 10(2) of the MPRDA. The Regional Manager has an obligation to perform this task as set out in Reg 3 of GN R 527 of 23 April 2004.

284 Section 16(4)(b) of the MPRDA.

285 Section 22(4)(b) of the MPRDA.

286 *Doe Run Exploration SA (Pty) Ltd and Others v Minister of Minerals and Energy and Others* 2008 ZANHC 3 Par 40-41 (hereafter the *Doe-case*).

287 See also the *Bengwenyama*-case par 63.

the Regional Manager may allow an applicant to install a notice on a visible place on the land if the landowner cannot be reached.<sup>288</sup>

Landowners have the right to consultation and they have to permit the holders of prospecting or mining rights to exercise their rights.<sup>289</sup> Thus a landowner must allow the holder of prospecting or mining rights to gain access to his or her land.<sup>290</sup> However, a landowner only has the obligation to allow a holder of prospecting or mining rights to gain access to his or her land after such a holder has fulfilled all the prerequisites as prescribed by the MPRDA.<sup>291</sup> In the *Meepo*-case the court explained that:

The consultative process envisaged in section 5(4)(c) of the Act is intended to afford a landowner the opportunity of “softening the blow” inevitably suffered as a consequence of the granting of a prospecting or other right under the Act.<sup>292</sup>

According to the Acting Judge in the *Meepo*-case, this consultative process is the only means afforded in the MPRDA to protect landowners’ rights.<sup>293</sup> However, this duty to consult as set out in section 5(4)(c) of the MPRDA does not oblige the holder of prospecting or mining rights to *negotiate* with the landowner at all.<sup>294</sup> Therefore, the only conclusion that can be drawn is that the MPRDA does not allow the landowner the prerogative of deciding whether or not a holder of prospecting or mining rights can enter his or her land. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2010 ZACC<sup>295</sup> Judge Froneman, on behalf of the Constitutional Court, critically

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288 Section 105(a) of the MPRDA.

289 The *Bengwenyama*-case par 63.

290 Section 5(4)(a)-(e) of the MPRDA.

291 This includes all the necessary notification and consultation procedures as set out in the MPRDA. Non-compliance can be used as an argument when presenting reasons for the refusal of access to the land to the Regional Manager. See the *Bengwenyama*-case par 38.

292 *Meepo*-case par 15.

293 See *Meepo*-case par 15 and 16.

294 In *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 1 SA 198 (SCA) Acting Judge Murphy explained that section 5(4) of the MPRDA is simply an obligation to consult and no negotiation is needed.

295 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2010 ZACC (hereinafter *Bengwenyama*-case).

analysed the consultation process as set out in the MPRDA and subsequently gave landowners new hope by re-affirming the importance of the process. A short discussion of the facts and outcome of this case is essential to highlight the importance of this case for this research.

In the *Bengwenyama*-case the state granted a prospecting right to Genorah Resources (Pty) Ltd on some of the properties<sup>296</sup> belonging to Bengwenyama Minerals (Pty) Ltd. A traditional community (hereafter the Community) who lived on the Bengwenyama property had applied for prospecting rights on the two farms long before Genorah did, but the Department of Mineral Resources had turned down their request. The Community (acting through Bengwenyama Minerals) applied for the setting aside of the prospecting right granted to Genorah Resources.<sup>297</sup> The Department of Mineral Resources informed Genorah Resources that they must present an environmental management plan, consult with the affected parties and report their results to the Regional Manager.<sup>298</sup> Genorah Resources submitted their environmental management plan but they omitted to consult with any affected parties and did not report the results to the Regional Manager.<sup>299</sup>

On the 22 August 2007 the Community and Bengwenyama Minerals launched review proceedings in the High Court, seeking to set aside the granting of prospecting rights to Genorah Resources in respect of the farms.<sup>300</sup> Judge Hartzenberg dismissed the review application on the grounds that no internal appeal was available and that the review had

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296 The property consisted of two farms, namely Eerstegeluk and Nooitverwacht and is situated in the Limpopo Province.

297 They contended that contrary to s 16(4)(b) of the MPRDA, Genorah had not consulted with any of the affected parties.

298 Consultation with landowners is mandatory for purposes of the environmental management plan.

299 Moxon *A Study of the Relationship Between the Landowner, Mineral Rights Holder and the State* 13; *Bengwenyama*-case par 13. See also s 16 of the MPRDA.

300 Humby 2012 PELJ 170; *Bengwenyama*-case par 23.

been brought out of time.<sup>301</sup> Leave to appeal to the Supreme Court of Appeal was granted.<sup>302</sup> The Supreme Court of Appeal took a different route in its reasoning but also reached the same conclusion as the court *a quo*.<sup>303</sup> The Supreme Court of Appeal dismissed the appeal on the grounds that an appeal had initially existed but had been abandoned. The Court also concluded that the review had been brought out of the time, the time limit being stipulated by a 180-day judicial review deadline.<sup>304</sup>

The Constitutional Court approached this matter from a perspective different from that adopted by the court *a quo* and the Supreme Court of Appeal. The Court identified a number of essential questions<sup>305</sup> that needed answering to decide the matter at hand, but the most important question the Court had to answer was whether or not there had been proper consultation by Genorah with Bengwenyama Minerals and the Community.<sup>306</sup> The Constitutional Court specifically looked into the purpose of consultation and why this is so important for the landowner. Froneman J stated that the purposes of consultation are to see if it is possible to accommodate the applicant for a prospecting right and to equip landowners with the necessary knowledge regarding the process

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301 The setting aside of the granting of prospecting rights was applied for but the High Court dismissed the main review application due to the fact that it was brought out of time.

302 Moxon *A Study of the Relationship Between the Landowner, Mineral Rights Holder and the State* 13; *Bengwenyama*-case par 23.

303 The Supreme Court of Appeal did not deal with the grounds at all, but agreed with the High Court that discretionary relief should be refused even if the review had merit. See *Bengwenyama*-case par 24.

304 *Bengwenyama*-case par 27.

305 The Constitutional Court had to decide whether leave to appeal should be granted; whether the MPRDA provides for internal remedies; whether the decision-maker was obliged to afford Bengwenyama Minerals a hearing before awarding the prospecting rights to Genorah; whether proper consideration had been given to the environmental requirements of the MPRDA prior to the granting of prospecting rights to Genorah; whether the review had been brought out of time and whether there had been proper consultation by Genorah with Bengwenyama Minerals and the Community. See *Bengwenyama*-case par 23, 27, 42, 43, 56, 69 and 75.

306 *Bengwenyama*-case par 62.

that will be followed so that landowners can make informed decisions in advance.<sup>307</sup> Judge Froneman further elaborated by stating that:

The purpose of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right [or mining right] and the landowner insofar as the interference with the landowner's rights to use the property is concerned.<sup>308</sup>

Judge Froneman supported his contention by explaining that in terms of the common law, the holder of rights to minerals had to conclude a contract with the landowner.<sup>309</sup> Under the MPRDA, consultation is the equivalent of such a contract and should therefore be conducted to "ascertain whether an accommodation of sorts can be reached in respect on the impact of the landowner's right to use his land".<sup>310</sup> The Court stressed the fact that the consultation process must be complied with for the granting of a right to either prospect or mine to be procedurally fair.<sup>311</sup> The Court stated that in terms of section 16(4)(b) of the MPRDA, Genorah had the obligation to notify the community and Bengwenyama Minerals in writing that their application for prospecting rights on their land had been accepted.<sup>312</sup> Genorah had the obligation to inform the landowners of the specific prospecting operations that would be performed and to consult with them to reach an agreement that would satisfy both parties.<sup>313</sup> After the consultation process had been finalised Genorah also had the responsibility to submit the results to the Regional Manager within 30 days of receiving the notification to consult.<sup>314</sup> Even though Genorah relied on case law,<sup>315</sup> the Constitutional Court was not

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307 See *Bengwenyama*-case par 65 and 66.

308 *Bengwenyama*-case par 65.

309 *Bengwenyama*-case par 65.

310 *Bengwenyama*-case par 65.

311 *Bengwenyama*-case par 68.

312 Humby 2012 PELJ 182; *Bengwenyama*-case par 67 and section 16(4) of the MPRDA.

313 Moxon A *Study of the Relationship Between the Landowner, Mineral Rights Holder and the State* 13; *Bengwenyama*-case par 67.

314 Section 16(4)(b) of the MPRDA.

315 See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA); *Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA).

convinced that it should follow the same line of reasoning as the Supreme Court of Appeal, and consequently held that Genorah had not complied with the requirements of consultation set out in section 10 of the MPRDA.<sup>316</sup> Bengwenyama minerals and the community were successful in vindicating their rights and Genorah was ordered to pay all the costs.

This case was decided in support of Bengwenyama minerals and set a major precedent on issues relating to consultation with landowners. It re-affirmed the importance of the consultation process set out in the MPRDA in so far as it relates to the rights of the parties who will be negatively affected by unlawful administrative action. A person who has been awarded prospecting rights is categorically required to comply with all the provisions of the MPRDA, including consultation with the landowner who will be affected by the prospecting, before commencing any mining operations. The *Bengwenyama*-case therefore highlighted the importance of proper consultation and subsequently clarified landowners' rights with regards to the consultation process so that they can better protect themselves from damages caused in the course of the mining operations conducted on their land.

However, while the *Bengwenyama*-case indicated the importance of the consultation process, it also emphasised the fact that if the holder of rights to minerals complies with the consultation process as set out in the MPRDA, the landowner does not have a choice but to permit access to his or her land. Therefore, considering the outcome of this case, the only inference that can be drawn is that in terms of the MPRDA, the holder of rights to minerals may gain access to the property of the landowner by complying with the consultation process and the consent of the landowner is not necessary.<sup>317</sup> The duty to consult in terms of section 10 of the MPRDA is therefore very important when a holder of

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316 Humby 2012 PELJ 183; *Bengwenyama*-case par 68.

317 As in the *Meepo*-case at par 15, it seems as if the consultative process is the only means afforded in the MPRDA to protect landowners' rights. See Humby 2010 <http://www.fse.org.za> 2.

rights to minerals wants to gain access to the landowner's property, but it does not guarantee the protection of landowners' rights when mining activities are conducted on their land.

Apart from section 10 of the MPRDA it is also imperative to examine section 54 of the MPRDA, because this section provides for the payment of compensation. This will help to determine the extent to which a landowner can negotiate compensation with the holder of statutory prospecting or mining rights under the current mineral law regime.

#### *4.1.2 Section 54 of the MPRDA*

Section 54 of the MPRDA provides for the payment of compensation under certain circumstances and it prescribes what measures need to be taken if the landowner refuses access to his land.<sup>318</sup> The common law principles with regards to the exercise of rights to minerals were supplemented by section 54 of the MPRDA as section 42 of the MA has not been carried forward into the MPRDA.<sup>319</sup> Section 54(1) and (2) of the MPRDA were inserted into the Act because the legislator predicted that landowners would try to prevent holders of prospecting or mining rights from gaining access to their land. Section 54(1) of the MPRDA provides that the holder of a prospecting or mining right must inform the Regional Manager if he is obstructed from conducting mining operations because the landowner<sup>320</sup> refuses access to the land,<sup>321</sup> places outrageous conditions on granting access to the land<sup>322</sup> or cannot be traced in order to be requested to grant access.<sup>323</sup> Section 54(2) further provides that the Regional Manager must within 14 days from the date of

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318 Section 54(1) and (2) of the MPRDA prescribes what measures need to be taken if the landowner refuses access to his or her land and section 54(3)-(6) of the MPRDA provides for the payment of compensation under certain circumstances.

319 Section 4 of the MPRDA states that the MPRDA will prevail if the common law contradicts any of the provisions set out in the MPRDA. See Badenhorst 2011 *TSAR* 334.

320 Or lawful occupier.

321 Section 54(1)(a) of the MPRDA.

322 Section 54(1)(b) of the MPRDA.

323 Section 54(1)(c) of the MPRDA.

notice of this prevention call upon the landowner to list all the issues caused by the holder of prospecting or mining rights,<sup>324</sup> inform the landowner of such a holder's rights,<sup>325</sup> notify the landowner of the provisions of the MPRDA that are being breached,<sup>326</sup> and warn the landowner of the steps that will be taken if he or she continues this infringement of the law.<sup>327</sup>

The content of section 54(3) and (4) of the MPRDA is important to this study because these sub-sections stipulate when a landowner can claim compensation for damages caused in the course of mining operations. Section 54(3) of the MPRDA provides that if the Regional Manager is of the opinion that the landowner will suffer a loss or damage due to the mining operations conducted on his land, the Manager must call upon the parties involved to reach an agreement for the payment of compensation.<sup>328</sup> Section 54(4) of the MPRDA goes further and stipulates that if the parties cannot reach an agreement as to the payment of compensation, an arbitrator<sup>329</sup> must be appointed to determine the compensation, and if that fails, the parties may approach a competent Court to settle the matter.<sup>330</sup>

Currently landowners' rights with regards to mining operations conducted on their land are protected by the common law principles, which are supplemented by section 54 of the MPRDA. The common law

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324 Section 54(2)(a) of the MPRDA.

325 Section 54(2)(b) of the MPRDA.

326 Section 54(2)(c) of the MPRDA.

327 Section 54(2)(d) of the MPRDA.

328 Section 54(3) of the MPRDA. This is in accordance with the *Bengwenyama*-case par 65.

329 Compensation must be determined by way of arbitration in accordance with the *Arbitration Act* 42 of 1965.

330 Section 54(4) of the MPRDA. See also the *Bengwenyama*-case par 38. If the Regional Manager concludes that any further negotiations between the parties will lead to further chaos, the Manager may inform the Minister that the land is to be expropriated in terms of section 55 of the MPRDA. Lastly, if the Regional Manager determines that the holder of rights to minerals is preventing the parties from reaching an agreement, the Manager may in writing prohibit such a holder from continuing with any mining activities. See section 54(5) and (6) of the MPRDA.

principles regarding the exercise of rights to minerals<sup>331</sup> are still applicable, but in so far as the common law is inconsistent with the MPRDA, the MPRDA will prevail. In order to seek alternative ways of compensating landowners for damages caused during the course of mining operations, a perfunctory discussion regarding the position in Western Australia will be included to determine how a comparable situation is handled in another legal jurisdiction.

## **4.2 Western Australia**

Badenhorst<sup>332</sup> is of the opinion that the MPRDA lacks an independent statutory claim for compensation for any harm or loss suffered by the landowner against mining companies. Liability for the payment of compensation due to mining operations did not exist in the common law,<sup>333</sup> but even if such a claim did exist, a defence of statutory authority could be used to prevent such a claim from realising.<sup>334</sup> An independent statutory claim for compensation for any harm or loss suffered by the landowner is to be found in the mining laws in Western Australia which have a comparable framework to the granting of rights by the Crown.<sup>335</sup>

Section 123 of the *Mining Act* 1978 of Western Australia makes provision for a compensation-agreement and an independent statutory claim for compensation for any harm or loss suffered by the landowner before mining operations are conducted on the landowner's property.<sup>336</sup> Statutory authority against such a claim is therefore ousted by this

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331 The relationship between the landowner and holder of statutory prospecting or mining rights has changed in such a way that the provisions in terms of servitudes can now find application despite the fact that section 5 of the MPRDA stipulates that a prospecting right or mining right is a limited real right.

332 See Badenhorst 2010 *THTHR* 325 and Badenhorst 2011 *TSAR* 335.

333 See Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 135; Kaplan & Dale *A Guide to the Minerals Act 1991* 190.

334 See Badenhorst 2010 *THTHR* 325 and Badenhorst 2011 *TSAR* 335.

335 Hunt *Mining Law in Western Australia* 59-60; Badenhorst 2010 *THTHR* 325 and Badenhorst 2011 *TSAR* 335.

336 Section 123 of the *Mining Act* 1978 (hereafter the *Mining Act*); Hunt *Mining Law in Western Australia* 59-60.

particular section.<sup>337</sup> Before any mining operations are conducted on private land, the holder of prospecting or mining rights has the obligation to compensate the landowner under the Act or make an arrangement with the landowner as to the amount, time and mode of compensation.<sup>338</sup> The sum total of compensation payable by the holder of prospecting or mining rights may include any compensation for the deprivation of the ownership or use of a part of the private land; harm incurred to any part of the private land; severance of any part of the private land; loss of a right of way or other servitudes registered on the private land; loss or damage to improvements made on the private land; social disturbance; and any expenses made by the landowner to reduce the damage resulting from the mining operations.<sup>339</sup>

In addition to the above, landowners are also compensated for mining operations conducted on private land under cultivation. In the case of such land compensation is payable for the loss of income; postponement; time-consuming activities; legal fees; damage to agricultural land; and the failure of the miner to prevent the spread of weeds, pests, diseases, fire or erosion.<sup>340</sup> Compensation can also be claimed for any damage caused to adjoining or subjacent land in the area of mining.<sup>341</sup> In Western Australia the consent of the landowner is required before any mining operations can be conducted in specific “restricted” areas.<sup>342</sup> Section 29(2) of the *Mining Act* provides that the consent of the landowner is needed when mining operations are conducted on agricultural land.<sup>343</sup> Compensation is not payable for minerals, however, because in Australia minerals are owned by the

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337 Section 123 of the *Mining Act*.

338 Section 35(1) of the *Mining Act*, Hunt *Mining Law in Western Australia* 70.

339 Section 123(4) of the *Mining Act*, Hunt *Mining Law in Western Australia* 297-298.

340 Section 123(4)(g) of the *Mining Act*, Hunt *Mining Law in Western Australia* 298.

341 Section 123(5) of the *Mining Act*.

342 Bodenmann *A Comparative Study into the Rights of Landholders to Prevent Access to Land by Mining Companies* 14.

343 Section 29(2) of the *Mining Act*. Restricted areas include agricultural land and land under cultivation.

Crown.<sup>344</sup> Badenhorst is of the opinion that an independent statutory claim for compensation for any harm or loss suffered by the South African landowner will help prevent the problems landowners are currently facing.<sup>345</sup> He goes further to state that because of the obvious advantages of the Western Australian system, section 54 of the MPRDA should be amended to make provision for the conclusion of a compensation-agreement prior to any mining operations conducted on the landowner's private land.<sup>346</sup>

## 5 Conclusion and recommendation

The question that was posed in this research and which has to be answered is to what extent the MPRDA or common law provides for the protection of landowners' rights regarding compensation claims against the holder of statutory prospecting or mining rights. This dissertation has consisted of consideration of a number of separate, disconnected components of the law which were subsequently linked with one another to provide an answer to the research question.

This research has confirmed that even though ownership is the most complete right a person can have with regard to an object, it is not unlimited, nor is it unrestricted.<sup>347</sup> If a prospecting right or mining right is granted, this inevitably leads to an imposition on the ownership of land.

This research has also confirmed that the common law principles supplemented with section 42 of the MA provided landowners with compensation for the loss of the land's minerals as well as the infringement of a landowner's ownership attributable to losses suffered or harm incurred due to or during the mining activities.<sup>348</sup>

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344 Hunt *Mining Law in Western Australia* 297. See Badenhorst 2010 *SALJ* 646 for a discussion regarding the ownership of minerals in Australia; Badenhorst 2010 *THTHR* 326 and Badenhorst 2011 *TSAR* 337.

345 Badenhorst 2011 *TSAR* 337.

346 Badenhorst 2010 *THTHR* 326 and Badenhorst 2011 *TSAR* 337.

347 See par 2.

348 See par 3.1.

After the promulgation of the MA, section 42 of the Act enhanced landowners' rights with regards to the claiming of compensation for damages caused in the course of mining operations conducted on their land.<sup>349</sup> Section 42 of the MA not only provided compensation for the expropriation of land, but also for other damages caused in the course of mining operations.<sup>350</sup> Thus, when the MA applied, landowners had a definite right to claim compensation from the holder of rights to minerals for damages caused by that person's mining operations. The law pertaining to the exercise of rights to minerals was clearly defined in the MA and landowners were absolutely certain of the fact that they could claim compensation from the holder of rights to minerals if damages occurred on their land. The law was therefore clear before the promulgation of the MA.<sup>351</sup>

After the promulgation of the MPRDA, the position of the landowner as to the claiming of compensation changed significantly.<sup>352</sup> A landowner will be able to claim compensation only if the Regional Manager is of the opinion that the landowner has suffered or is likely to suffer a loss or damage due to mining activities conducted on his or her land. The Act does not contain a general provision that if the parties fail to reach an agreement *as to the payment of compensation* the mining activities should be suspended or discontinued. This will occur only when the Regional Manager is of the opinion that a holder of rights to minerals is preventing the parties from reaching an agreement. Payment of compensation to the aggrieved landowner is possible only if further negotiations between the parties involved will encroach on the objectives of the Act.<sup>353</sup> These objectives include equitable access to minerals, social and economic welfare, and the provision of employment and security of tenure for miners. These objectives are not aimed at

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349 See par 3.2.

350 See par 3.2.

351 See par 3.2.

352 See par 4.

353 See par 4.1.2.

protecting landowners' rights against damages caused by mining operations.<sup>354</sup>

The problem that landowners are currently facing in South Africa is that prospecting or mining rights are granted by the state with no provision of compensation to the affected landowners unless they follow the process as set out in section 54 of the MPRDA. The payment of compensation by the state rests merely upon the Regional Manager's decision as to whether or not the landowner will suffer or is likely to suffer a loss during the mining operations.<sup>355</sup> If the Regional Manager is not convinced that the mining operations conducted on the landowner's land will lead to a loss, then the mining company need only consult with the landowner before it can start with the mining process.<sup>356</sup>

Apart from section 54 of the MPRDA, consultation is ostensibly the only bargaining tool available to the landowner to minimise the damage to property and the consequent devaluation of his or her land.<sup>357</sup> The landowner has been shifted onto the periphery of the mining process and is merely consulted before mining operations can commence on his or her land. Even though the *Bengwenyama*-case illustrated the importance of the consultation process, landowners are still uncertain of their rights and the extent to which they can claim compensation from the state when mining operations are conducted on their land.<sup>358</sup> Section 54 of the MPRDA is problematic in the sense that it finds application only if the landowner refuses access to his or her land; makes irrational demands for such access; or cannot be located for consultation. Section 54 is there to provide landowners with compensation for any loss or damage caused by the mining operations, but instead it mainly protects the rights of the holders of prospecting or mining rights, leaving

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354 These objectives are not aimed at the protection of landowners' rights with regards to their land.

355 See par 4.1.2.

356 See par 4.1.2.

357 See par 4.1.1.

358 See par 4.1.1.

landowners, especially owners of agricultural land, in a very vulnerable situation.

Prior to the promulgation of the MPRDA the state, the landowner and the holder of prospecting or mining rights formed a triangle of legal relationships. This was so because the holder of a prospecting or mining right directly or indirectly compensated the landowner for the rights granted to it and the state had to make sure that the necessary legislative requirements had been met.<sup>359</sup> After the promulgation of the MPRDA the state now grants these rights in exchange for the payment of prospecting fees and royalties. In addition, landowners do not seem to have the previously existing bargaining power to enforce negotiations regarding compensation for losses suffered or harm incurred due to or during mining activities. As a result of this, landowners are not actively involved in the decision-making process with regards to the granting of prospecting or mining rights and they are also not in a position to shield themselves from damage caused by mining operations or to claim any compensation, except to the extent that compensation is provided for in section 54 of the MPRDA. As a result of this, an asymmetrical legal triangle is skewed in favour of the holder of prospecting or mining rights, at the expense of the landowner.

Badenhorst is of the opinion that a compensation agreement and the recognition of an independent statutory claim for damage for compensation for any harm or loss suffered by the landowner could resolve the age-old clash between landowners and holders of prospecting or mining rights, and consequently bring about a more balanced outcome for all the affected parties.<sup>360</sup>

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359 See par 3.1.

360 See par 4.

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