

South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals

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Abstract

The Mineral and Petroleum Resources Development Act 28 of 2002 [MPRDA] acknowledges that the country's mineral resources belong to the nation. The State is subsequently appointed as custodian of these resources. As custodian the State has the ultimate responsibility to grant, issue, control, administer and manage all rights in minerals. As a consequence of this wide regulatory authority a landowner's right to deal with the minerals imbedded in the soil of his property has completely been annihilated. This article gives an historical overview of the State's regulatory power regarding the exploitation of the country's minerals to determine the extent to which the State has, in the past, took upon itself the power to decide where, when and by whom the country's mineral riches could be mined. A historical perspective of the extent of the State's regulatory powers regarding the exploitation of minerals might be beneficial when the provisions of the MPRDA are interpreted.

Keywords: Custodian; Minerals; Mineral rights; Mining; Nationalisation; Ownership; Petroleum.

Introduction

Mining is a very important economic activity in South Africa. In 2009 mining contributed 8.8% directly and 10% indirectly to the country's gross domestic product (GDP), sustained approximately one million jobs and created roughly R10.5 billion in corporate tax receipts.¹ Due to the fact

¹ Mining and minerals in South Africa (available at: <http://www.southafrica.info/business/economy/sectors/mining.htm>), as accessed on 1 February 2012.

that access to the country's mineral treasures in the pre-1994 South Africa was intrinsically bound to ownership of land, mining also contributed to the unequal distribution of wealth. In an effort to bring about equitable reform, the Mineral and Petroleum Resources Development Act, 28 of 2002 [MPRDA] was promulgated. One of the most controversial features of the MPRDA is that it acknowledges that the country's mineral and petroleum resources belong to the nation and that the State is the custodian thereof. Although the courts of the country have not yet indicated the true meaning and legal implications of this acknowledgment, this one sentence captured in the Preamble of the MPRDA,² seemingly ousted the Roman-Dutch common law notion that formed the basis of the South African mineral law dispensation in the preceding era. No longer can landowners summarily be regarded to be owners of the minerals imbedded in and under the soil of their land. The State has taken on itself the common law privileges of landowners to decide where, when and by whom the country's mineral riches can be mined.³ No longer has the landowner the prerogative to decide who may enter his land and to what extent prospecting and mining activities may be conducted on his land.

This article is, however, not aimed at explaining or interpreting the provisions of the MPRDA. Nor is it focused on analysing the State's fiduciary responsibilities as created in the Act, or determining whether affected landowners can institute claims for compensation against the State. The sole aim is to delve in the past of South African mining law to determine whether the fact that the State procured for its sole prerogative the discretion to regulate every aspect regarding the exploitation of South Africa's minerals and petroleum, is indeed enigmatic and a novel concept in South African mineral law history. In tea-table discussions this development is often labelled (and criticised) as an ingenious move by the ANC government to nationalise the country's mineral and petroleum resources. A historic overview might shed more light on the reservation of rights and entitlements to minerals and provide the necessary perspective for interpreting the provisions of the MPRDA.

To facilitate the flow of the argument, the common law foundation of the South African mineral law dispensation will be stated, where after the country's mining laws will be analysed with the sole aim of determining the

2 It is acknowledged in the Preamble of the MPRDA that: "... South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof; ..."

3 *Holcim (South Africa, Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (641/09), 2010, ZASCA 109; 2011, 1 All SA 364 (SCA), 17 September 2010.

extent of the reservation of rights and entitlements to minerals through the decades.

Common law foundation of South African mineral law

South African mineral law has always been based on the Roman and Roman-Dutch law premise that the landowner is also the owner of the minerals embedded in and under the soil of the land he owned.⁴ The underlying basis for this premise differed through the ages with the early Romans regarding minerals as the fruits of the land,⁵ thus only exploitable by those who had the right to the fruits of the land, and the later development of the *cuius est solum eius et usque ad coelum et ad inferos* maxim⁶ imported by the Glossators during the Middle Ages.⁷

The earliest documented evidence of Roman law appears to date from approximately 450 BC.⁸ During the early ages up to 250 BC,⁹ when private property was an unknown concept and lands were owned publicly,¹⁰ it was expected and accepted that the State would conduct mining activities and benefit there from. The good fortune of the State was regarded to be the

4 Trojan Exploration Co v Rustenburg Platinum Mines Ltd, 1996, (4), SA 499 (A), p. 537C; H Mostert and A Pope, *The principles of the law of property in South Africa* (Cape Town, Oxford University Press, 2010), p. 269.

5 BE Morton, "The acquisition and registration of mineral rights in horizontal strata" (LLM, University of the Witwatersrand, 1985), p. 1; M Kaser, *Römisches Privatrecht* (München, CH Beck'sche Verlagsbuchhandlung, 1971), p. 93; HP Viljoen, "The rights and duties of the holder of mineral rights" (PhD, Leiden, 1975), pp. 6-9; J De Boer, *De winning van delfstoffen in het Romeinse Recht, De Middeleeuwse juridische literatuur en het Franse Recht tot 1810* (Leiden, Universitaire Pers, 1978), p. 54.

6 This maxim – "Ownership of what lay beneath the surface of private land went with ownership of the land" was especially important for minerals even during the pre-classical period - JA Crook, *Law and life of Rome* (New York, Ithaca Publishers, 1984), p. 161; See GJ Pienaar, "Ontwikkelings in die Suid-Afrikaanse Eiendomsbegrip in Perspektief", *THRHR*, 1986:1, pp. 216-227 for a discussion of this maxim.

7 MO Dale, "A historical and comparative study of the concept of acquisition of mineral rights" (LLD, UNISA, 1979), p. 78; BLS Franklin and M Kaplan, *The Mining and Mineral Laws of South Africa*, (Durban, Butterworths, 1982), p. 4 indicate that this maxim is ascribed to Accursius, a thirteenth century Italian commentator.

8 DH Van Zyl, *Geskiedenis en beginsels van die Romeinse Rivaatreg* (Durban, Butterworths, 1971), p. 1.

9 JAC Thomas, *Textbook of Roman Law* (Cape Town, Juta, 1986), p. 130; AJ Van der Walt, "Die ontwikkeling van houerkap" (LLD, PU for CHE, 1995), pp. 1-17 indicate that the concepts of ownership, possession and holdership were not defined in early Roman law up to 250 BC. Even during the pre-classical period that ranges from 250 BC-27 BC no definition of ownership existed although Roman citizens and non-Romans who had the right to engage in commerce could obtain *dominium ex iure Quiritium* in Italic land - F Schultz, *Classical Roman Law* (London, Oxford University Press, 1951), p. 338. This quiritary ownership was the strongest rights that individuals could acquire in movables or Italic land. During the classical period (27 BC-250 AD) a clear distinction developed between ownership, possession and limited real rights but the emperors absolute control over the sources of mining as they had to preserve the huge standing army needed to uphold the Roman Empire - M Kaser, *Römisches Privatrecht* (München, CH Beck'sche Verlagsbuchhandlung, 1971), pp. 106, 107; J de Boer, *De Winning van Delfstoffen ...* (Leiden, Universitaire Pers, 1978), p. 136.

10 M Kaser, *Römisches Privatrecht* (München, CH Beck'sche Verlagsbuchhandlung, 1971), p. 107.

good fortune of the people. As the notion of private rights and interests developed,¹¹ so did the principles regarding the exploitation of minerals. During the reign of Marcus Aurelius the notion of private property developed extensively and mining were also allowed on private land.¹² It is interesting to note, however, that despite the move towards recognising private rights in land, public interests were still overwhelmingly important.¹³ This is an indication that the economic value of mining, to not only the individual but also to the State, was recognised in Roman law. The State regulated mining activities by allowing mining by third parties on private lands.¹⁴ To protect the landowner's interests, compensation was paid.¹⁵

A study of Roman mineral law thus indicates that economical and political needs dictated the initial restriction of mining to public land and later necessitated the restriction on private land in favour of certain mining operations.¹⁶ Mining operations were strictly regulated and the system endeavoured to protect the State, the miner and the landowner.¹⁷ Unsevered minerals¹⁸ were regarded to form part of the land until it was severed, but the private landowner did not have the sole prerogative to decide if and by whom mining could be conducted.

When Roman law was received in the State of Holland¹⁹ there was not much mining activity, with the effect that scant attention was given to minerals and rights to minerals.²⁰ As a result, Roman law principles were assimilated into Dutch law and consequently formed the basis of the South African common law.

11 For a detailed discussion of the development of private rights and interests in property in Roman law the reader is referred to AJ van der Walt, "Die ontwikkeling ..." (LLD, PU for CHE, 1995).

12 MO Dale, "A historical and comparative study ..." (LLD, UNISA, 1979), p. 10.

13 M Kaser, *Römisches Privatrecht* (München, CH Beck'sche Verlagsbuchhandlung, 1971), p. 108.

14 GC Gibbens, "Die billikheidsgrondslag van die regsverhouding tussen die mineraalreghouere en die grondeienaar" (LLM, PU vir CHO, 1993), pp. 53, 54; M Kaser, *Römisches Privatrecht* (München, CH Beck'sche Verlagsbuchhandlung, 1971), p. 108; J De Boer, *De winning van delfstoffen...* (Leiden, Universitaire Pers, 1978), p. 136.

15 MO Dale, "A historical and comparative study ..." (LLD, UNISA, 1979), p. 11.

16 MO Dale, "A historical and comparative study ..." (LLD, UNISA, 1979), pp. 2-15; J de Boer, *De winning van delfstoffen...* (Leiden, Universitaire Pers, 1978), E van der Schyff, "The Constitutionality of the Mineral and Petroleum Resources Development Act, 28 of 2002" (LLD, North-West University, 2006), pp. 84-92.

17 This general statement applies to all the periods of Roman law from early Roman law up to 250 BC to the pre-classical Roman law period (250 BC-27 BC), the classical period (27 BC-250 AD), the post classical period (250 AD-1100 AD) and the Middle Age law; See J de Boer, *De winning van delfstoffen...* (Leiden, Universitaire Pers, 1978).

18 Unsevered minerals are minerals that have not yet been mined. It is thus still contained in the soil.

19 FJ van Zyl and JD van der Vyver, *Inleiding tot die Regswetenskap* (Durban, Butterworth, 1982), p. 191.

20 GE Norton, "The conflict between the land owner, mineral right holder and the mining title holder in South African mining law" (LLM, University of the Witwatersrand, 1985), p. 15; JC Linde, "Die invloed van 'n staatkundig versnipperde Suider-Afrika op die mineraalregte en mineraalontwikkeling van die subkontinent" (LLM, University of the Witwatersrand, 1983), p. 33.

Pre-2002 South African mineral law dispensation

The intricacy of early South African mineral law is illustrated by the following quotation from *The Mining Laws of the British Empire*:²¹

There is a further difficulty induced by the fact that on the one hand until the Union was effected there were several Supreme Courts all administering the Roman-Dutch law in South Africa and as a consequence there was a tendency [for] the different South African colonies to drift apart by reason of contradictory decisions,²² while on the other hand each of the various parts of the Union has a special and elaborate code of statute law relating to mining which codes are by no means the same in detail and differ on occasion in principle.

The question that underlies this article necessitates us to enter the labyrinth of pre- and post-Union mining legislation to determine to what extent the private landowner's rights to exploit, or refrain from exploiting, the minerals embedded in and under the soil of his land were protected or restricted by State regulation. As ownership of land underlies the right to minerals, it is necessary to start this journey with a quick glance at institution of land ownership in early South Africa.

Pre-Union mining legislation

Until the year 1812, three modes of tenure existed in the Cape Colony: freehold, loan occupation and quit-rent tenure.²³ The first grant of freehold was made on 22 June 1657. The nature of freehold was that of true ownership, the owner having full dominium of his land.²⁴ As such, the dominium of the land encompassed the surface of the land and all the minerals in it.²⁵ Stone²⁶ indicates that the first instance of a loan occupation occurred in 1654. He explains that the title of the occupier was of the most precarious nature as the holder had no right to alienate without consent and the occupation could be terminated without notice at any time after the expiration of a year. In terms

21 G Stone, *The mining laws of the British Empire and Foreign Countries*, Vol. 3 (London, HM Stationery Office, 1922), p. 1.

22 *Mtembu v Webster*, 1904, 21 SC 323, p. 346.

23 G Stone, *The mining laws...*, Vol. 3 (London, HM Stationery Office, 1922), p. 2.

24 *Pitch and Bhyat v Union Government*, 1912, AD 719, p. 734.

25 *Neebe v Registrar of Mining Rights*, 1902, TS 65, p. 85; *Rocher v Registrar of Deeds*, 1911, TPD 311. *Acol Syndicate v Ashby*, 1889, 10 NLR 181, p. 183: "We know that in an out and out sale of a freehold in land without reservations, according to the maxim, all above and under the soil goes to the purchaser..."

26 G Stone, *The mining laws...*, Vol. 3 (London, HM Stationery Office, 1922), p. 2.

of a proclamation of 1813 all these holdings were exchanged for perpetual quit-rent holdings.²⁷ De Villiers CJ states in *De Villiers v Cape Divisional Council*²⁸ that perpetual quit-rent grants became more numerous than any other grant after 1813. Perpetual quit-rent holdings were also known as *erfpacht*.²⁹ After referring to case law,³⁰ Stone³¹ concludes that it appears that the question whether the holder of an *erfpacht* possessed the rights to the minerals depended, apart from statute, on the nature of the original grant which could vest in the grantee rights to minerals. *Prima facie* the *erfpacht* holder was an *emphyteuta* and, as such, did not have the rights to minerals. However, if the *erfpacht* holder once had the right to minerals he could not be required, unless by express legislative act, to accept a title which excluded or lessened his right to minerals in place of his original title.

The brief discussion above regarding land tenure in early South African history indicates that the development of the mineral law dispensation initially accorded to the principles drawn from Roman-Dutch common law. Nevertheless, as the discussion below will indicate, due to unique South African conditions and a better understanding of minerals themselves,³² a series of mining legislation was promulgated that catered for the unique South African circumstances. It was necessary to adapt the Roman-Dutch law towards the needs of a 'then' modern legal system which had to serve a vibrant mining industry.³³ The adaptation of the common law by statute and case law was a method to create mining rights exercisable under a system of license and control.³⁴ The focus of the discussion that follows is specifically on the State's reservation of rights or entitlements relating to minerals, for the antithesis of the State's regulatory intervention is the landowner's prerogative to deal with his property as he deems fit.

To understand the extent of pre-Union mining legislation, it is necessary to look at the mining legislation as it was promulgated in the Cape Colony and

27 Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure, 6 August 1813.

28 *De Villiers v Cape Divisional Council*, 1874, 5 BUCH, p. 58.

29 G Stone, *The mining laws...*, Vol. 3 (London, HM Stationery Office, 1922), p. 4.

30 *Webb v Wright*, 1883, 8 AC 324; *Webb v Giddy*, 1878, 3 AC 908, pp. 929, 930; *Vos v Colonial Government*, 1802, 14 NLR 206; *Divisional Council of the Cape Division v De Villiers*, 1877, 2 AC 567; *Kimberley Divisional Council v London and S.A. Exploration Co Ltd*, 1885, 2 BUCH AC 84.

31 G Stone, *The mining laws...*, Vol. 3 (London, HM Stationery Office, 1922), p. 6.

32 *Master v African Mines Corporation Ltd*, 1907, TS 925, pp. 930, 931.

33 MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 73; *CJ De Villiers, Henderson v Hanekom*, 1903, 20 SC 513, p. 519.

34 G Stone, *The mining laws...*, Vol. 3 (London, HM Stationery Office, 1922), p. 4.

subsequently in the three main Boer republics.³⁵

Cape Colony³⁶

Section 4 of Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure reads:³⁷

Government reserves no other rights but those on mines of precious stones, gold, or silver,...: Other mines of iron, lead, copper, tin, coal, slate or limestone are to belong to the proprietor.

This sets the scene for the development of the mining dispensation in the Cape Province, as the reservation of rights to precious stones and minerals was echoed through the line of mining legislation applicable to the province. While rent and royalties had to be paid by prospectors and miners under the Mining Leases Act³⁸ for mining on crown land, no such regulations were applicable to private land.³⁹ These leases were capable of being dispensed of or sublet with the consent of relevant authority.⁴⁰ However, the Precious Stones and Minerals Mining Act⁴¹ extended the issuance of a prospecting licence to private land where the right to precious stones or minerals was reserved to the State, without the consent of the owner.⁴² The landowner was compensated for surface damage by being allocated half a share of the licence moneys.⁴³ Provision was also made for the payment of royalty to the State or person in whom the reservation of precious stones and minerals vested.⁴⁴

35 It is trite that the migration away from British control in the Cape Colony started between 1830 and 1840. This historic migration led to the founding of numerous Boer republics, the Republic of Natal, the Orange Free State Republic and the Transvaal being the most notable.

36 The most important legislation applicable to mining in the Cape were Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure, 6 August 1813; The Mining Lease Act, 12, 1865; Mineral Lands Leasing Act, 9, 1877; Crown Lands Act, 14, 1878; Precious Stones and Minerals Mining Act, 19, 1883; The Disposal of Crown Lands Act, 15, 1887; Precious Stones and Minerals Mining Law Amendment Act, 44, 1887; The Gold Mining Act, 10, 1888; The Alluvial Diamond Digging Law Amendment Act, 31, 1893; Precious Minerals Act, 31, 1898; Precious Stones Act, 11, 1899; Mineral Law Amendment Act, 16, 1907. These Acts are not discussed in detail in this article. Reference will only be made to the principles relevant to this study, drawn from the legislation.

37 It is clear from *Cape Coast Exploration Ltd v The Registrar of Deeds*, 1935, CPD 200, p. 204 and *R v Boshoff*, 1938, CPD 113, p. 115 that parties sometimes overlooked the fact that rights to minerals had been reserved to the state.

38 Mining Lease Act, 12, 1865, section 4.

39 Mining Lease Act, 12, 1865, section 6.

40 Mining Lease Act, 12, 1865, section 12.

41 Precious Stones and Minerals Mining Act, 19, 1883.

42 Precious Stones and Minerals Mining Act, 19, 1883, section 2.

43 Precious Stones and Minerals Mining Act, 19, 1883, section 23.

44 Precious Stones and Minerals Mining Act, 19, 1883, section 33.

Owners of private land, not subject to reservation of minerals or precious stones, could allow the prospecting and working of minerals on their land. Rents and royalties were fixed by the landowner, but the owner was obliged to pay 10% to the State “towards order and good government.”⁴⁵ However, where the number of claims or the area being mined exceeded a stipulated maximum, the land could be proclaimed.⁴⁶

Under the Disposal of Crown Lands Act⁴⁷ the State was given the prerogative to resume ownership of any land where the rights to precious minerals and stones had been reserved for mining purposes on payment of compensation.⁴⁸ With the promulgation of the Precious Stones and Minerals Mining Act,⁴⁹ however, landowner’s rights were protected by allowing them to prospect without a licence. Once minerals were discovered they had the same rights as the holders of a prospecting licence.⁵⁰ The owner’s consent was also required when application for a prospecting licence was made.⁵¹ Prospecting licences were again required for both state land and private land, with a reservation in favour of the crown of precious stones, gold, silver and platinum under the Precious Minerals Act, 31 of 1898. The consent of the owner was still required before such licence could be issued to a third party,⁵² but landowners were free to prospect without a licence.⁵³ Proclamation of land could only occur on private land if the owner had permitted prospecting thereupon.⁵⁴

Dale⁵⁵ indicates that the Mineral Law Amendment Act⁵⁶ was promulgated in 1907 as a catch-all piece of legislation, designed to vary the 1898 Act to cope with problems that had arisen in the intervening years. Landowners’ rights were recognised in the sense that, with regard to precious minerals, owners were entitled to peg owner’s claims. Landowners were also granted the first right to obtain a dredging lease for mining in rivers or ground not suited for ordinary mining and their consent was required before such a lease could

45 Precious Stones and Minerals Mining Act, 19, 1883, section 77.

46 Precious Stones and Minerals Mining Act, 19, 1883, section 76.

47 Disposal of Crown Lands Act, 15, 1887.

48 Disposal of Crown Lands Act, 15, 1887, sections 5(d), (e).

49 The extension occurred under the Precious Stones and Minerals Mining Law Amendment Act, 44, 1887.

50 The Precious Stones and Minerals Mining Act, 19, 1883 as amended by the Precious Stones and Minerals Mining Law Amendment Act, 44, 1887 section 5(1).

51 The Precious Stones and Minerals Mining Act, 19, 1883 as amended by the Precious Stones and Minerals Mining Law Amendment Act, 44, 1887 section 5(2).

52 Precious Minerals Act, 31, 1898, section 6.

53 Precious Minerals Act, 31, 1898, section 59.

54 Precious Minerals Act, 31, 1898, section 29.

55 MO Dale, “A historical and comparative study ...” (LLD, UNISA, 1979), p. 225.

56 Mineral Law Amendment Act, 16, 1907.

be granted to other parties.⁵⁷

Transvaal Republic⁵⁸

The Grondwet van de Zuid-Afrikaanse Republiek⁵⁹ was enacted on 13 February 1858. Section 7 declared that all land not yet alienated was State property, but obtainable by the public. Section 29⁶⁰ determined that owners of land, where minerals had been found, would be compelled to lease or sell such land to the government for a reasonable price.⁶¹ This provision, approximating to a right of expropriation,⁶² was later repealed by section 68.⁶³ Mining companies were thereafter allowed to steer the exploitation of mines under the auspices of the Executive Council, protecting the State's interests in the mining enterprise.

Ordinance 5 of 1866⁶⁴ was the first major ordinance dealing with the “voorziening ... omtrent het ontginnen en bewerken van mijnen”⁶⁵ [provision ... for the exploitation and working of mines]. This Ordinance contained conditions for the founding of mining companies. The concept that the State was to share in the proceeds of the mineral wealth of the land was embodied in a provision that royalty was to be paid to government.⁶⁶ Government was also to be notified of the discovery of any precious metals.⁶⁷ The policy towards mining during 1866 was to allow private enterprise under a certain measure of State control.

The differentiation between base minerals and precious minerals was created in Law 1 of 1871. The state assumed full control of the mining for precious

57 MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 225.

58 The South African republic was informally known as the Transvaal republic.

59 Constitution of the South African Republic.

60 Created by Volksraadsresolutions (hereafter referred to as VRR), 14-23 September 1858.

61 The provision reads: “Met betrekking tot het voorstel van den Uitvoerenden Raad, omtrent plaatsen waar mineralen gevonden worden, eigenaars van dergelijke plaatsen verplichtende dezelve aan het Gouvernement tegen een billijken prijs te verhuren of te verkoopen, werd dit voorstel door den Volksraad eenparig goedgekeurd en bekrachtigd.” [With regard to the suggestion of the Executive Council about the land where minerals are found, that owners of such land are compelled to sell or lease such land to the Government at a fair price, the suggestion is unilaterally approved and confirmed].

62 MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 176.

63 Created by VRR, 21 September 1859.

64 Promulgated on 31 October 1866.

65 Preamble of the said Ordinance.

66 Ordinance 5, 1866 article 2 (The sections of the VRR are referred to as articles and therefore this word is used when referring to them).

67 Ordinance 5, 1866 article 3.

stones and metals. Section 1 provided:⁶⁸

Het mijnregt op alle edelgesteenten en edele metalen behoort aan den Staat, behoudens de reeds verkregene regten van privaten personen...

[Freely translated: The mining rights in respect of all precious stones and precious minerals belong to the State except for rights previously obtained by private persons...]

Where precious metals and stones were found on private land, the state could take over the administration of the diggings subject to the payment of compensation.⁶⁹ No digging could commence without a licence being issued to the prospective miner⁷⁰ and no miner could transfer his entitlement without notifying the state.⁷¹ All other mineral rights on private land, unless reserved by the state in the Land Grant, belonged to the landowner. Landowners could mine freely themselves or grant the right to mine to others.⁷² The essence of this Act was the reservation of the right to mine precious stones and metals by the state, recognising state control of diggings, including diggings on private land, and to provide for the payment of licence fees.⁷³

The provisions of the ensuing Law 2 of 1872 were basically similar to that of the preceding Act. It is important to note that both these Acts recognised the existence of private rights:

Mijnregt behoort aan den Staat, behoudens reeds verkregene private regten...

[Freely translated: Mining rights belong to the State except for rights already obtained by private persons...]

In contrast with this state of affairs, Law 7 of 1874, the next statute regulating the exploitation of precious stones and minerals, began with the forthright statement that the right to mine precious stones and metals belonged to the state without the previous qualification in regard to existing rights. This state of affairs whereby landowners' entitlements to their land were grossly infringed was revised by the enactment of Law 6 of 1875. Section 3 hereof

⁶⁸ It is interesting to note that Law 8 of 1885 was the first Act where it was clarified which stones were considered precious stones, and where gold was taken to be the precious metal dealt with by the Act. By Proclamation, 8 January 1887; Law 8, 1885 was extended to apply to silver.

⁶⁹ Law 1, 1871 article 15. The compensation would be equal to "de helft van de opbrengst der door den Staat te trekken licentiegelden" [half of the proceeds of the licensing fees charged by the State].

⁷⁰ Law 1, 1871 article 14(b).

⁷¹ Law 1, 1871 article 14(d).

⁷² MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 185.

⁷³ MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 178.

stated that:

Het mijnregt op alle edelgesteenten of edele metalen behoort aan den Staat, met uitzondering nogthans van alle vroegere wettige overmaking van dat het aan een privaet persoon, personen of vennootschappen...

[Freely translated: Mining rights relating to all precious stones and precious minerals belong to the State with the exception of rights already obtained by a private person, persons or partnerships...]

While it was still provided that any person was entitled to purchase a digger's licence from the state permitting him to prospect or dig on government land and on private land, the permission of the landowner had to be obtained before any activities could commence on private land.⁷⁴ Provision was made for a special licence which the surface owner of private land could sell to diggers. The owner of private land could thus, indeed, prevent prospecting on his own land. Whenever precious stones or -metals were however discovered on private land, Government was entitled to take over the management of trading and digging interests.⁷⁵ The surface owner was compensated by being paid one half of the digger's licence fees and all of the trading stand licence fees. Contrary to the preceding policy, the rights and entitlements of private land owners were thus protected to a great extent.

Law 6 of 1875 was repealed eight years later by the enactment of Law 1 of 1883. This statute overturned the fundamentally recognised principle that the ownership of precious stones and precious metals could not be separated from ownership of land. Section 2 provided that the ownership of and mining rights in respect of all precious stones and metals belonged to the state, with the exception of all previous allocations of such rights to private persons or partnerships by means of concession. It is clear that it was not merely the right to minerals that was designated to the state, but that a separation of ownership of land and of precious metals and precious stones, before severance, was envisaged. This is contrary to the *cuius est solum* maxim. It also amounted to statutory expropriation.⁷⁶ However, this far-reaching statute was again repealed with the enactment of Law 8 of 1885. The latter once again determined that only the mining right and entitlement of disposition

⁷⁴ Law, 6, 1875, section 18.

⁷⁵ Law, 6, 1875, section 20.

⁷⁶ This view is supported by MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 182 who states that this "seems to be a form of statutory expropriation."

in respect of precious stones and minerals belonged to the state, and not the minerals in the land. It is clear that the idea of allocating to the state the ownership in precious stones and precious metals has disappeared. The State only reserved the entitlement to mine the minerals and the entitlement of disposition regarding the minerals.⁷⁷ Private land could be proclaimed in consultation with the owner.⁷⁸ The owner's interests were protected by, amongst others, granting him ten claims and half of the licence fees of all the claims pegged on the land.⁷⁹ All these measures indicated the state's desire to exploit the mineral potential of the land.⁸⁰

A change in policy towards the dealing with private land occurred once again with an amendment to Law 8 of 1885.⁸¹ This amendment deprived the owner of private land from the entitlement to prevent the proclamation of his land. The owner was compensated for this deprivation by increasing the number of owner's claims available to him on the proclamation of the land.

Law 8 of 1889 introduced an entirely new Gold Law. Although the provisions thereof basically confirmed preceding law, a change of policy occurred yet again in relation to private land. It was stated that Government could not proclaim the land of a private owner, unless the owner himself had prospected or permitted prospecting to take place. This stipulation is also found in Law 18 of 1892.

Law 10 of 1891 contained an interesting provision applicable to rights granted with reference to precious stones and metals, which is echoed in Law 18 of 1892. For the first time provision was made for compensation to be paid to any person whose "verleende rechten" [granted rights] were expropriated for public purposes.⁸² This statute was also the first to deal with base minerals in addition to precious stones and minerals. It authorised the granting of a licence to mine delfstof⁸³ to an applicant who had the consent of the landowner. The provisions were only applicable to proclaimed land and State land and not to unproclaimed private land. The trend to regulate the mining of base metals on proclaimed and State land was continued with the

⁷⁷ Law, 8, 1885, section 6.

⁷⁸ Law, 8, 1885, section 10.

⁷⁹ Law, 8, 1885, sections 14 and 15.

⁸⁰ MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 187.

⁸¹ Passed on 29 July 1886.

⁸² Article 59 of both the Acts.

⁸³ This included, but was not restricted to: "Steenkolen, asbestos, aluminium, kobalt, fosphaat, lood, koper, tin, zwavel..." [coal, asbestos, aluminium, cobalt, phosphorous, lead, copper, tin, sulphur...].

passing of Law 18 of 1892. This statute contained Bepalingen [Stipulations] with reference to specific minerals. It was stipulated that stone makers, rock quarries and chalk burners should obtain licences for their activities.⁸⁴ The consent of landowners was required before such licences could be issued.⁸⁵ It was expressly stipulated in section 12 of the statute that the State could decline the renewal of a licence “zonder tot schadevergoeding verplicht te zijn” [without being compelled to pay compensation].

The next important statute to be mentioned is Law 17 of 1895. This was the first statute dealing comprehensively with base metals and minerals. Corresponding with the *cuius est solum* maxim, the entitlements to dispose of and mine for base minerals and metals accrued the landowner or his nominee.⁸⁶ To ensure that the State was not excluded from any profit made, royalties were payable to the State.⁸⁷

The abovementioned statutes set the pace for the development of the mineral law dispensation in the Transvaal. The Gold Laws, 19 of 1895 and 21 of 1896 and the Base Minerals and Metals Law, 14 of 1897 were mere repetitions of their predecessors with minor amendments.⁸⁸ From 1898 precious stones and metals were dealt with by different laws, namely the Gold Law, 15 of 1898 and the Precious Stones Law, 22 of 1898.

After the South African War the British assumed control of Transvaal. The Crown Land Disposal Ordinance, 57 of 1903 provided that all rights to minerals, mineral products and precious stones on crown land “shall” be reserved by the crown.⁸⁹ This provision was refined by Ordinance, 13 of 1906 by replacing the words “shall be reserved” with “may be reserved”. It must be noted that this provision referred to base and precious metals as well as minerals. This was the first time that the reservation of base mineral and metal rights to the State were mentioned, as precious stones and precious metals were the objects of preceding legislation wherein rights were reserved by the State. Provision was, moreover made for the payment of compensation where private land was proclaimed by the State.

84 Article 1 of the Bepalingen annexed to the Act. These provisions were carried forward by the Brick Making, Lime Burning and Quarrying (Proclaimed Lands), Ordinance 7, 1905.

85 Article 6, Bepalingen annexed to the Act.

86 Law, 17, 1895, section 1. This is a revision of the *status quo* whereby a licence for base minerals and metals was required for mining on private proclaimed land.

87 Law, 17, 1895, section 3. On promulgation royalties were determined on 1% of the value of the explored minerals.

88 MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 193.

89 Crown Land Disposal Ordinance, 57, 1903, section 7(1).

The Precious Stone Law, 22 of 1898 was repealed by the Precious Stone Ordinance, 66 of 1903. No major policy changes regarding the mining of precious stones occurred, save for providing that the same rights granted to landowners in terms of the ordinance were granted to persons to whom the rights to precious stones had been reserved.⁹⁰ This is an indication that recognition was given to the separate holding of mineral rights.

The 1898 Gold Law was revised in 1908 by the Precious and Base Metals Act, 35 of 1908. This Act amalgamated provisions dealing with precious metals and base minerals.⁹¹ For the first time the phrase “holder of the mineral right” was defined in legislation although the term ‘rights to minerals’ was not defined. The reality of the idea that mineral right holding can be separated from landownership had been formally acknowledged. This Act did not contain any other policy-changing provisions. The interests of the private holder of mineral rights were preserved and no prospecting could take place on private land without the owner’s consent. Prospecting and digging were still controlled by granting licences and permits against the necessary payment. Mining leases could be issued on proclaimed land. Revenue was provided for the State by way of royalty and the surface owner’s interests were protected by the imposition of a rental. This Act remained applicable until 1967, although it was amended several times.⁹²

Republic of the Orange Free State⁹³

The first principles embodied in legislation⁹⁴ provided for freedom of landowners to prospect on their own land,⁹⁵ the prospecting on State land by means of prospecting licences, the proclamation of land on the discovery of minerals and the issuance of discoverer’s, owner’s and public’s claims.⁹⁶ No major changes were implemented after the assumption of control by the British.⁹⁷ The Precious Metal Ordinance, 3 of 1904 did not specifically reserve the right to mine and remove precious metals to the State, but restricted

⁹⁰ Precious Stone Ordinance, 66, 1903, section 21.

⁹¹ MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 199.

⁹² The Act was *inter alia* amended by The Mineral Law Amendment Act, 36, 1934.

⁹³ The Orange Free State was initially known as the Orange River Colony.

⁹⁴ OVS Wetboek, Chapter CXV, compiled in 1892. The provisions relating to diamonds were dealt with in Chapter CXVI and the diggings at Jagersfontein in Chapter CXXI.

⁹⁵ OVS Wetboek, Chapter CXV, section 1, compiled in 1892.

⁹⁶ MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 204.

⁹⁷ MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 205.

the right of persons to mine them to such an extent that the implied effect was the same.⁹⁸ To guarantee the productive working of claims, provisions were later made for the forfeiture of claims that were not being worked continuously.⁹⁹ Base metals and minerals were governed by Ordinance 8 of 1904. This Ordinance provided for the right of the landowner to prospect. Any prospector, who wanted to obtain a prospecting license, could only do so with the consent of the landowner.¹⁰⁰ No provisions were made for the proclamation of land for base minerals. The State's interest was protected by the imposition of a State royalty. In the Crown Land Disposal Ordinance, 13 of 1908, all precious stones as well as precious and base minerals and other minerals¹⁰¹ on crown land alienated under the ordinance, were reserved to the crown. Once again, as was the case with Transvaal Law 1 of 1883, a reservation of the minerals themselves, and not only the mineral rights, was found. This deviation from the *cuius est solum* maxim was in line with the English system but negated the principle underlying the mineral law dispensation of that time.

Republic of Natal¹⁰²

The system used in Natal was very straightforward. It was based on the principle that the right to mine in respect of all minerals, base and precious, was vested in the State.¹⁰³ Landowners' rights were curtailed because prospecting on private land without the consent of the owner was possible.¹⁰⁴ However, landowners had the prerogative of prospecting-in-the-first-instance on their

98 MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 206.

99 Ordinance 9, 1908.

100 A licence was also necessary for prospecting for and mining base minerals on crown land.

101 The provisions were not applicable to stone.

102 Legislation applicable to mining in Natal were The Mineral Leases Law, 15, 1867; Law, 16, 1869; Law, 23, 1883; Law, 17, 1887; Law, 34, 1888; Natal Mines Act, 43, 1899. These Acts are not being discussed in detail in this work. Reference will only be made to the principles relevant for this work, drawn from the legislation. See *Minister of Agriculture v Elandslaagte Collieries Ltd*, 26, 1905, NLR 475, p. 479 for an extensive exposition of Natal mining laws up to 1905.

103 This basic philosophy of Natal mining legislation is contained in section 4 of Law, 17, 1887.

104 Under Law, 16, 1869 persons could prospect freely without the consent of the landowner. Law, 23, 1883 authorised a government appointee to prospect for coal on notice to any landowner, compensation for damages being provided by the state. Law, 17, 1887 prescribed that any prospective prospector should obtain the owner's consent when applying for a prospecting licence. Should the owner not consent to the granting of a licence, application could be made to the Resident Magistrate. The same principle applied under Law, 34, 1888, with the Commissioner of Mines named as the authority that could grant consent where a landowner unreasonably withheld consent.

own land.¹⁰⁵ The emphasis in Natal was on public exploitation of minerals throughout the Colony and ensuring that land would not lie unexploited merely due to the caprice of the landowner. The Natal Mines Act¹⁰⁶ changed this state of affairs with regard to coal, limestone and other specified minerals¹⁰⁷ by granting the rights to these minerals to the landowner.

From a legal reflection the exposition of pre-Union mining legislation given above, indicates that the State stringently exercised its regulatory power concerning minerals. Although the common law *cuius est solum*-maxim applied in South Africa, the rights of private landowners were restricted when weighed against the national benefits that could be procured through mining.

Post Union mining legislation¹⁰⁸

In terms of section 135 of South African Act, 9 of 1909, existing legislation of the individual Colonies - which were to form the Union of South Africa - continued to be in force until they were expressly repealed, subject to subsequent legislation that was introduced from time to time.¹⁰⁹ Section 123 of the Act provided that all rights in and to mines and minerals and all rights in connection with the searching for, working of and disposing of precious stones, which were vested in the government of any of the colonies at the establishment of the Union, would on such establishment vest in the Governor-General-in-Council.

The tendency to reserve rights relating to minerals for the State was continued with the promulgation of the Land Settlement Act, 12 of 1912. This reservation applied to all minerals in land granted under the Act.¹¹⁰ However, this was changed by the Land Settlement Amendment Act, 23 of 1917, when it was provided that all rights to minerals were to follow alienation of the

¹⁰⁵ Law, 17, 1887 stipulated that a landowner had to obtain a prospecting licence to prospect for precious metals. This requirement was not carried forward by Law, 34, 1888. Under this Act the landowner, or anybody authorised by him, could prospect for and mine precious metals without a licence.

¹⁰⁶ Natal Mines Act, 43, 1899, section 59.

¹⁰⁷ Stratified ironstone, slate and soapstone, Natal Mines Act, 43, 1899, section 59.

¹⁰⁸ Only major amendments and policy changing Acts will be discussed in this section. For thorough discussion see MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), pp. 226–237.

¹⁰⁹ MO Dale, "A historical and comparative study..." (LLD, UNISA, 1979), p. 226; BLS Franklin and M Kaplan, *The mining and mineral laws...* (Durban, Butterworths, 1982), p. 1. This principle is also found in section 107 of the Republic of South Africa Constitution Act, 32, 1961.

¹¹⁰ Land Settlement Act, 12, 1912, section 31(1).

land.¹¹¹ The Transvaal Mining Leases and Mineral Law Amendment Act, 30 of 1918 provided for the granting of mining leases to holders of mineral rights or to third parties by tender.¹¹² Compensation was given to the landowner in rent being payable,¹¹³ and the State received its royalty.¹¹⁴

A new system of dealing with mineral rights that had been reserved to the State was introduced by the Reserved Minerals Development Act, 55 of 1926. This Act was applicable in all the provinces. In the Cape the application of the Act was restricted to reserved base minerals.¹¹⁵ Section 2 stipulated that the owner of the land, in respect of which “minerals”¹¹⁶ had been reserved to the State, would have the exclusive right of prospecting for such minerals. He could prospect on his land by himself or by nominee.¹¹⁷ The only condition was that a prospecting licence had to be obtained. This did not mean that the owner could frustrate the State’s exploitation of the reserved minerals, as the Governor General could authorise any third party to prospect on behalf of the State where the owner did not “avail himself” of the rights under the Act.¹¹⁸ After discovery, the owner’s rights were only protected in the sense that he was either allowed all the rights of a discoverer of minerals on State land¹¹⁹ - where the land was proclaimed as a public digging - or he was entitled to a mining lease if proclamation did not occur.

Precious stones were dealt with in the Precious Stones Act, 44 of 1927. The right to mine for and dispose of precious stones was again vested in the State.¹²⁰ Prospecting permits were issued irrespective of the landowner’s consent. The Base Minerals Amendment Act¹²¹ deviated from previous policy with regard to base minerals. Dale¹²² states that the philosophy of the Act was to promote the prospecting and mining for base minerals in the same way as had been done in respect of precious metals and precious stones,

111 Land Settlement Amendment Act, 23, 1917, section 16. With the proclamation of the Land Settlement Act, 21, 1956, the system whereby the mineral rights on land granted under the Act were to be reserved to the state was re-introduced.

112 MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 228.

113 Transvaal Mining Leases and Mineral Law Amendment Act, 30, 1918, section 4.

114 Transvaal Mining Leases and Mineral Law Amendment Act, 30 of 1918, section 5.

115 Reserved Minerals Development Act, 55, 1926, section 1(1).

116 The “reservation of minerals to the Crown” was defined as the reservation of any minerals or the right of mining and prospecting therefore. Once again, ownership of minerals themselves is implied.

117 Reserved Minerals Development Act, 55, 1926, section 2.

118 Reserved Minerals Development Act, 55, 1926, section 14.

119 Reserved Minerals Development Act, 55, 1926, section 7.

120 Precious Stones Act, 44, 1927, section 1.

121 Base Minerals Amendment Act, 39, 1942 – Specifically section 3, through which the minister is entitled to the right to prospect on private land if the holder of the base mineral rights does not prospect.

122 MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), pp. 233, 234.

thus ensuring that the development of base mineral deposits could not be frustrated by the private holder of minerals rights. It was, therefore, provided in the Act that the Minister of Mines could investigate the occurrence of base minerals on any land¹²³ and that prospecting leases could be issued to third parties.¹²⁴ Provision was also made for the payment of a rental to the mineral right holder and compensation for surface damage to the surface owner.¹²⁵

Consolidation of mining laws 1964-1967

In the years 1964–1967, the host of pre-Union and post-Union legislation were mainly consolidated into four major Acts applicable throughout the Republic of South Africa to simplify and unify the exploitation of the country's mineral riches.¹²⁶ They were the Precious Stones Act, 73 of 1964 (hereafter referred to as the *PSA*), the Mining Rights Act, 20 of 1967 (hereafter referred to as the *MRA*),¹²⁷ the Mining Titles Registration Act, 16 of 1967¹²⁸ and the Atomic Energy Act, 90 of 1967.¹²⁹

Section 2 of the *MRA* contains the core of the basic philosophy underlying the mining legislation applicable up to the promulgation of the Minerals Act, 50 of 1991. It is clearly stated in this section that while the rights of prospecting for natural oil and of mining for and disposing of precious metals and natural oil is vested in the State, the right of prospecting for and disposing of base minerals on any land is vested in the holder of the right to base minerals in respect to that land.

It is clear that a reservation of certain mineral rights relating to precious metals and natural oils occurred in favour of the State. This was not the case with base minerals where the rights to prospect and mine vested in the mineral

123 Base Minerals Amendment Act, 39, 1942, section 2.

124 Base Minerals Amendment Act, 39, 1942, section 3(1).

125 Base Minerals Amendment Act, 39, 1942, section 3(2)(b).

126 BLS Franklin and M Kaplan, *The mining and mineral laws...* (Durban, Butterworths, 1982), p. 2; MO Dale, "A historical and comparative study ..." (LLD, UNISA, 1979), p. 237. It is important to note that these four Acts were the major Acts and not the only Acts dealing with minerals and mining. For a full discussion of the remaining 26 Acts see BLS Franklin and M Kaplan, *The mining and mineral laws...* (Durban, Butterworths, 1982), pp. 210-227.

127 This Act amended and consolidated the law in relation to the prospecting for and mining and disposal of precious metals, base minerals and natural oils.

128 This Act regulated the registration of mining titles and other rights relating to prospecting and mining, stand titles and other deeds and documents.

129 This Act provided for the regulating of prospecting and mining for and the processing, enrichment, re-possessing, possession and disposal of source material and the production of nuclear and atomic energy and radio-active nuclides.

right holder *aka* (primarily) the landowner.¹³⁰ Section 3 of the MRA provided that the general power of control and administration of all mining operations was vested in the State. Although the mineral rights were in the hands of the landowner, the State regulated the exercise of entitlement flowing from these rights.

The right to prospect and mine for any precious metals, base minerals or precious stones and natural oil depended on the class of land in which they occurred. In both the MRA and the PSA specific categories of land are defined for the purpose of the application of the Acts relating to prospecting and mining. State land,¹³¹ alienated State land,¹³² private land,¹³³ and land referred to in section 16 of the MRA¹³⁴ are distinguished. A host of different modes of acquisition of the right to prospect or mine and different prospecting rights of authorisations and different mining rights flowed from these classifications.¹³⁵ Franklin and Kaplan¹³⁶ point out that these statutes did not vest the dominium in the minerals or the mineral rights in the State. It was only the prospecting, mining and disposal of the minerals that was to a greater or lesser extent controlled and regulated by the State. However, the effect of this regulation was that only subordinate rights to mine were conferred on applicants.¹³⁷

When legislation applicable to mining is taken into consideration, it is clear that the aim of all the enacted legislation was to streamline the exploitation of minerals in order to produce revenue for the country. Before 1991 the reservation of certain rights relating to minerals in favour of the State was often encountered in legislation. Sometimes this reservation was applicable only to precious stones and metals, but it is apparent from the historical overview that a few instances existed before 1967 where even base minerals were subject to the reservation of certain rights pertaining to minerals in favour of the State. The appellate division specified in *Geduld Proprietary Mines Ltd v*

130 The reader is reminded of the fact that the landowner could sever the mineral right from land ownership.

131 This is land which is owned by the state, not held by a lessee, and where the state was also the holder of the right to the substances which were to be prospected for and mined on the land.

132 This is land which is not held by the state, or land which is held by a lessee and the title deed or lease contained a reservation to the state of the right to the particular substance which was to be prospected for and mined on the land.

133 This is land in respect of which the state was not the holder of the right to the metals, minerals or precious stones which were to be prospected or mined for. It was immaterial who held the surface rights.

134 This is land where the right to precious metals and minerals were held in undivided shares by the state and private entities.

135 M Kaplan and MO Dale, *A guide to the Minerals Act, 1991* (Durban, Butterworths, 1992), p. 4.

136 BLS Franklin and M Kaplan, *The mining and mineral laws...* (Durban, Butterworths, 1982), p. 36.

137 M Kaplan and MO Dale, *A guide to the Minerals Act...* (Durban, Butterworths, 1992), p. 48.

Government Mining Engineer¹³⁸ that, although the right to mine special metals was vested in the State, the intention was to permit the public to mine under State control. This decision was in line with a previous decision of the appellate division. In *Turffontein Estates Ltd v Mining Commissioner of Johannesburg*¹³⁹ the court indicated that the successive Gold Laws of Transvaal resulted in an apportionment of rights between the landowner, the discoverer and the general public, while generating a financial benefit to the State.

Except for the few instances where “minerals” were reserved to the State in certain pre-Union pieces of legislation, it was mainly incidences of mineral rights, namely the right to prospect or the right to mine, that were reserved to the State. As such, these reservations should be regarded as stringent regulatory stipulations that curtailed landowners in the exercise of their full rights of dominium as landowners. Where, for instance, the sole right of mining for and disposing of minerals vested in the State, the landowner was deprived of ‘all beneficial ownership’¹⁴⁰ relating to the minerals’.¹⁴¹ The concept of the reservation of the right to mine to the State constituted a subtraction from the dominium of the landowner.¹⁴² The dominium of the unsevered precious and base minerals and metals remained in the *dominus* of the land, the landowner.¹⁴³

A new era dawned for South African mineral law with the promulgation of the Minerals Act, 50 of 1991. This Act regulated the mining of minerals until the Mineral and Petroleum Resources Development Act, 28 of 2002 became operational in 2004. As the Minerals Act represents a specific phase in South African statutory mineral law, it forms part of the discussion that focuses on the extent of the State’s regulatory powers regarding the exploitation of minerals.

The Minerals Act, 50 of 1991

The Minerals Act, of 1991 (hereafter referred to as the Minerals Act)

138 *Geduld Proprietary Mines Ltd v Government Mining Engineer*, 1932, AD 214, pp. 220, 221.

139 *Turffontein Estates Ltd v Mining Commissioner of Johannesburg*, 1917, AD 419, p. 428.

140 *Modderfontein B Gold Mining Co Ltd v CIR*, 1923, AD 34, p. 44.

141 MO Dale, “A historical and comparative study...” (LLD, UNISA, 1979), p. 264 states that the use of the word “minerals” in this case is unfortunate, because ownership in the minerals remains wholly vested in the landowner until the minerals are severed from the land.

142 *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds*, 1953, 1 SA 600 (O), p. 604; *SA Permanent Building Society v Liquidator of Isipingo Beach Homes*, 1961, 1 SA 305 (N).

143 *Modderfontein B Gold Mining Co Ltd v CIR*, 1923, AD 34, p. 44.

brought an end to the differentiation in the dealing with rights to minerals. The Minerals Act simplified the law on mineral exploitation by doing away with the differentiation between different classes of land¹⁴⁴ and minerals.¹⁴⁵ Section 5(1) of the Minerals Act specifically recognised the common law rights of landowners in relation to mining. The Act recognised that the holders of mineral rights – who were the landowners unless the mineral rights were severed from land ownership - had the prerogative to decide if, and by whom, prospecting and mining activities could take place on their land. The Minerals Act still regulated the prospecting and mining activities, but third parties could not conduct prospecting or mining activities without the consent of the mineral rights holder. In terms of this Act holders of mineral rights had to consent¹⁴⁶ to the issuance of a prospecting permit or mining authorisation.¹⁴⁷ To ensure the optimal exploitation of the country's minerals, section 17 provided for the ministerial authorisation for prospecting or mining where the consent of the holder of the mineral rights could not be obtained. This was restricted to mineral rights that were already severed from ownership of land in two situations, namely where the holder of the mineral rights could not be traced, or where a person was entitled to a mineral or undivided share therein by virtue of intestate succession or any testamentary disposition and he has not obtained cession thereof within two years after he became so entitled.

Section 18 of the Act granted the right to the State to investigate the presence, nature and extent of minerals on any land and section 24 provided for the expropriation of surface or mineral rights against the payment of compensation to the person whose right had been expropriated. Mineral rights could only be exercised in accordance with and subject to the provisions of this Act. The exercising of the rights was regulated by the State and the authorisations were intended as a control measure to ensure achievement of the objectives of the Act. The authorisations needed for prospecting and mining were premised on the holding of the underlying common law rights. No State authorisation was needed for the acquisition of these rights but it was a prerequisite for the issue of such authorisations. These authorisations did not confer any rights. They merely authorised the exercise of the common law rights already held.

144 These being state land, alienated state land and private land.

145 In previous legislation a distinction was made between precious metals, base minerals, natural oil, precious stones, source material and tiger's eye. It is important to note that the right to certain diamonds still vested in the state – S 46, Minerals Act 50, 1991, section 46.

146 Consent would normally be contained in a prospecting contract or a mineral lease.

147 Minerals Act 50, 1991, sections 6(1)(b); 9(1)(b).

Kaplan and Dale¹⁴⁸ point out that the Minerals Act further aimed to encourage the alienation of mineral rights held by the State, so that all mineral rights would be held by private entities. The State was placed in a position equivalent to any other holder of rights to minerals. Owners of alienated State land were given a preferent right to acquire the rights to the relevant minerals. Royalties were only paid to the State in respect of mining rights where the State was the holder of the applicable right to the mineral.

Conclusion

The question underlying this article was whether a historical overview of South Africa's mining legislation could indicate if the provisions of the MPRDA, through which the State procured for its sole prerogative the discretion to regulate every aspect of the exploitation of South Africa's minerals and petroleum, are enigmatic and a novel concept in South African mineral law. A very interesting perspective is revealed when the timeline of mining legislation is considered. The overview provided indicates that the exploitation of the country's mineral resources has always been strictly regulated by the State. Save for the few short-lived instances where "minerals" were reserved to the State in the abovementioned examples of pre-Union legislation, only certain incidences of mineral rights, namely the right to prospect or the right to mine, were from time to time reserved to the State. These reservations should be regarded as stringent regulatory stipulations that curtailed landowners in the exercise of their full rights of dominium as landowners. Although the Minerals Act purported to place the full extent of common law rights towards all minerals firmly in the hands of the holders of these rights, State intervention and required authorisation for exercising these rights were so drastic that Badenhorst¹⁴⁹ opined that "it is still a policy of partial State holding, although in another disguise."

The MPRDA diverts completely from the immediate preceding Minerals Act where the underlying policy was to advance mining by limiting the State's regulatory power to the actual mining activities and not expanding it to interfere with the landowner's rights to decide whether, and if so, by whom mining activities could be conducted. The MPRDA grants the State

¹⁴⁸ M Kaplan and MO Dale, *A guide to the Minerals Act...* (Durban, Butterworths, 1992), p. 14.

¹⁴⁹ PJ Badenhorst, "Die juridiese bevoegdheid om minerale te ontgin in die Suid-Afrikaanse reg" (LLD, UP, 1992), p. 200.

the sole authority, and responsibility, to manage the exploitation of the nation's mineral resources. The historical overview indicated that there were several eras in the South African mineral law history during which the State played an overwhelmingly assertive role in the country's mining activities and before 1967 at several instances acquired the prerogative through legislation to determine that third parties could mine on land owned by other. The conclusive answer is thus that the MPRDA is not enigmatic, neither is it the first statute in the history of South African mineral law through which the State obtained the prerogative to regulate mining without requiring the consent of affected landowners.¹⁵⁰ As in the past, the State determined which modus of regulation would best suite the policy considerations of the day. In this era, aimed at reforming the South African society in an effort to ensure the equitable distribution and exploitation of the country's mineral resources, the State claimed for itself the sole prerogative to decide when and where, which minerals will be mined and by whom it will be done.

¹⁵⁰ The reader should take note that the MPRDA nonetheless contains other enigmatic and novel provisions. The fact of the matter, however, is that these are not found in the state's power to solely determine the extent of the mining activities within the borders of the Republic.