

**Ownership of historic mine and tailings dumps and expropriation**

Mini-dissertation submitted in partial fulfilment of the requirements of the degree  
Magister Legum in Environmental Law and Governance at the North-West  
University, Potchefstroom Campus

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Successfully completed modules: LLMO881

LLMO883

LLMO884

LLMO886

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December 2014

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## LIST OF ABBREVIATIONS

<i>FNB</i>	<i>First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC)</i>
<i>MPRDA</i>	<i>Mineral and Petroleum Resources Development Act 28 of 2002</i>
<i>MPRDAA</i>	<i>Mineral and Petroleum Resources Development Amendment Act 49 of 2008</i>
<i>par</i>	<i>paragraph</i>
<i>s</i>	<i>section</i>
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SAPR/PL</i>	<i>Suid-Afrikaanse Publikereg/South African Public Law</i>
<i>SCA</i>	<i>Supreme Court of Appeal</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>TSAR</i>	<i>Tydskrif vir Suid-Afrikaanse Reg</i>
<i>Vol</i>	<i>Volume</i>

## ABSTRACT

When mining companies extract minerals from the earth, they leave huge deposits of soil and ore next to the mining site. These deposits are commonly known as tailings. In most instances, tailings contain a considerable amount of valuable mineral resources which cannot be exploited because of a lack of appropriate equipment, or as a result of economic non-viability. However, many mining companies choose to keep and maintain these tailings, in the hope that such minerals can later be exploited when time or technology allows for this.

Under common-law the owner of a property is considered to also own any minerals contained on the property, in terms of the principle of *cuius est solum*. In South African law, however, a practice evolved whereby owners of minerals separated rights to minerals from the surface rights on the property. This created a mining right which was independent from the land and could be transferred to third parties, often in return for compensation. Under the *Minerals Act* of 1991 the owner of a mining right over a property (be that the owner of the property or a third-party mining right holder) also held the mining right to tailings which were created as a result of mining activities under the right. Thus, if a mining company performed mining activities on a property, the company was also free to exploit the tailings which were left next to its mine, regardless of whether the dump had remained there for a long period of time. Owing to South Africa's long history of mining, some tailings are over a century old and resemble small mountains rather than mining deposits.

The *Mineral and Petroleum Resources Development Act* of 2002 changed the entire mineral legislative regime in South Africa. Whereas owners of land were previously free to separate and sell their rights to minerals to anyone they wished, the MPRDA placed the country's mineral and petroleum resources under the state's "custodianship." Where the law talks about custodianship, however, it supposedly refers only to minerals that have not yet been extracted from the earth. It is well established in South African law that, once a mineral is extracted, it becomes the movable property of the person who extracted it – in other words, that of the mining company. Does this mean that minerals in tailings also fall under the state's custodianship? The Free State High Court did not think so. In the case of *De Beers v*

*Ataqua* it held that, in terms of the common law principles of acquisition by way of attachment, tailings are clearly movable property and therefore belong to the mining company who created them. For the MPRDA to hold otherwise would amount to expropriation. The state did not wish for some mining activities to be regulated by a different set of legislation, so it amended the MPRDA to try and define "residue deposits" (the name by which the MPRDA calls tailings) more clearly. However, due to the legislature's unfortunate choice of wording, tailings created before the enactment of the MPRDA are still, strictly speaking, not regulated by that Act. So the legislature proposed another amendment to the Act, this time making sure that any historical mine dump created at any point in South Africa's history are placed under the Act's regime.

The subject matter of this study is whether the above amendments to the MPRDA could be considered to be expropriation. For background purposes, a brief overview of the *Ataqua* decision as well as the subsequent amendments to the MPRDA will be given. Then the history of mining legislation and the development of a separate mining right will be summarised. The reason for this summary is to establish whether, in terms of constitutional litigation, a clear right has been established for purposes of protection under section 25 of the Constitution. The last phase of the study will look at the particular characteristics of expropriation and ask the question whether acquisition of a right by the state is always a fundamental requirement for expropriation to take place. It is submitted that the destruction of an entire class of property by way of legislation, amounts to so-called "institutional expropriation," which is subject to compensation in terms of section 25.

**Key words:** custodianship, expropriation, mineral rights, residue deposits, tailings.

# 1 Introduction

## 1.1 The nature of tailings dumps

When mining companies extract minerals from the earth, they unearth huge amounts of ore which are usually deposited next to the mining area. In some instances these "dumps" or "stockpiles" of ore may contain considerable amounts of unextracted minerals, which can extend the economic lifespan of a mining operation.<sup>1</sup> However, the lack of appropriate technology historically prevented companies from exploiting the ore to its full potential.<sup>2</sup> As a result the dumps were usually left on the mining property and carefully treated until technological advances make it economically viable to extract the remaining minerals from the mining or tailings dumps.<sup>3</sup>

## 1.2 Tailings in terms of the *Minerals Act*

Under pre-1991 mining legislation, dumps of left-over ore were simply referred to as "mine dumps."<sup>4</sup> The *Minerals Act* 50 of 1991 ("Minerals Act") introduced the concept of "tailings" in section 1, where it was defined as:

Any waste rock, slimes or residue derived from any mining operation or processing of any mineral.<sup>5</sup>

In terms of the *Minerals Act*, a person who held rights to minerals over a property was also the holder of the rights to minerals with regards to tailings produced from the mining operations in terms of that right.<sup>6</sup> This meant that a mining company operating on a certain property would automatically be the holder of the right to any minerals occurring in the dumps produced from the operation, regardless of whether that company is also the owner of the land or not. Section 5(1) of the *Minerals Act*

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<sup>1</sup> A good example is the Barberton Tailings Retreatment Project (BTRP) in Mpumalanga, which commenced in 2012 and is estimated to deliver 160 000 ounces of gold over a period of nine years. See *Inside Mining* 03/2012 "A Phoenix gold equivalent" page 28-29.

<sup>2</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 19.

<sup>3</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 19.

<sup>4</sup> Badenhorst and Van Heerden 2010 *Stell LR* 116-131.

<sup>5</sup> S 1 of the *Minerals Act* 50 of 1991.

<sup>6</sup> This is because s 1 of the *Minerals Act* defined a "holder", in relation to the right to a mineral which occurs in or on tailings, as:

The person who is the holder of the mining right (in respect of the land) from which such tailings have been produced.

stated that the holder of a right to any mineral in respect of land or tailings would have the right to enter upon such land or the land on which the tailings are situated; and to prospect and mine for such mineral on or in such land or tailings. The holder also had a right to freely dispose of that right in terms of the same section.

### 1.3 The legal regime-change in terms of the MPRDA

In the *Mineral and Petroleum Resources Development Act 28 of 2002* ("MPRDA") the definition for tailings was not repeated: Instead, the MPRDA introduced two new concepts, namely "residue deposits" and "residue stockpiles." The MPRDA, prior to its amendment in 2013, defined residue deposits as "any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right or production right."<sup>7</sup>

A residue stockpile, prior to the amendment of the MPRDA, was defined as:

Any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or production right.<sup>8</sup>

The only difference between residue deposits and stockpiles according to these definitions was that a "residue deposit" referred to residue stockpiles that remained after the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right or production right.<sup>9</sup> Even more importantly, the MPRDA introduced the concept of state custodianship over the country's mineral resources. Persons who previously held rights to minerals in terms of the *Minerals Act* were given a window period of five years to convert these rights (now referred to as "old order rights" in Schedule II of the MPRDA) to mining rights under new conditions set by the Minister of Mineral Resources. Failing such conversion within the allocated time period, an old order right would simply cease to exist.<sup>10</sup>

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<sup>7</sup> S 1 of the *Mineral and Petroleum Resources Development Act 28 of 2002* ("MPRDA").

<sup>8</sup> Definition of "residue deposit" in s 1 of the MPRDA.

<sup>9</sup> Definition of "residue stockpile" in s 1 of the MPRDA.

<sup>10</sup> Item 7(8) to Schedule II of the MPRDA.

1.4 *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O)

Confusion arose regarding the effect of the MPRDA on the rights to minerals which were severed from the earth and dumped on tailings next to mining sites. The matter came before the Free State High Court in the case of *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others*<sup>11</sup> Between 1887 and 1971, De Beers Consolidated Mines Ltd ("De Beers") owned and operated a diamond mine on subdivision 16 of the farm Jagersfontein ("the farm") through a subsidiary known as the New Jagersfontein Mining and Exploration Company ("the New Company").<sup>12</sup> When the New Company was dissolved around 1973, it ceded all its rights in precious stones and metals, base minerals and oils on the farm to De Beers. It also transferred all of its corporeal and incorporeal assets (including the farm) to De Beers.<sup>13</sup> The mine on the farm was closed down and stripped of its entire infrastructure, but the tailings dumps next to the mining area remained on the farm. De Beers alleged that it had, at all times, been fully aware that the tailings dumps still contained diamondiferous material which could be re-exploited, economic circumstances permitting.<sup>14</sup> In 2006 the Department of Mineral Resources issued a prospecting licence to Ataquia Mining (Pty) Ltd ("Ataquia"), allowing them to prospect on the historic tailings dumps. De Beers applied for an order declaring it to be the owner of the historic tailings dumps on the farm; that Ataquia Mining was not entitled to conduct prospecting operations on the tailings dumps situated on the farm; and also that the Department was not empowered to allocate prospecting rights to third parties on the dumps.

Two legal questions arose from the dispute: Firstly, whether the diamonds found in the tailings dumps, containing diamondiferous material on the farm, "are diamonds or minerals for purposes of the interpretation of the Mineral and Petroleum Resources Development Act" and secondly, to whom the historic tailings dumps, which originated from ore mined on the farm by the New Company and De Beers, now

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<sup>11</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O)

<sup>12</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 4.

<sup>13</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 6.

<sup>14</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 4.

belonged to.<sup>15</sup> The dumps in dispute originated from the kimberlite ore mined by the New Company and, since 1941, by De Beers. Counsel for De Beers argued that when the New Company severed the ore from the earth, it became the owner of the ore with the diamonds contained therein, such ore then being movable objects created through severance.<sup>16</sup> After extracting certain diamonds, the ore was deposited in what is now referred to as the historic tailings dumps on the farm. Whether the ore, after processing, became movable, was one of the key disputes in the matter. Counsel for the Department of Mineral Resources contended that De Beers had not proven that the dumps were movables and did therefore not acquire ownership in the tailings dumps.<sup>17</sup>

To advance its argument that the kimberlite ore (tailings dumps) became movable property, De Beers submitted in its founding papers that it was always known, throughout the history of the mine, that recovery processes left diamonds in the tailings and that the tailings dumps still contained unrecovered diamonds.<sup>18</sup> For this reason the dumps were not simply discarded but kept for re-treatment as and when technology became available. This would have given De Beers the option to recover diamonds contained in the dumps under circumstances where mining of the ore or blue ground could not take place as a result of war or economic depression, for example. Thus it was never the intention of either the New Company or De Beers to discard the tailings and to attach them permanently to the land. In this regard De Beers submitted a historical summary of the re-treatments of the dumps, indicating that such treatments took place at regular intervals between 1903 and 1913, and thereafter annually from 1919 to 1932.<sup>19</sup> The Department of Mineral Resources did not dispute De Beers' allegations regarding its intention to keep the tailings for re-treatment. According to counsel for the Department, however, this should not be the overriding factor in instances where the nature of the dumps and the manner of their attachment to the land are clear, but only in instances where these factors are

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<sup>15</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 2.

<sup>16</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 16.

<sup>17</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 17.

<sup>18</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 19.

<sup>19</sup> *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 19.

inconclusive.<sup>20</sup> In its opposing affidavit the Department submitted that the tailings dumps could by nature accede to the land, and that their mere weight could form an effective attachment to the land.<sup>21</sup>

According to the full bench, through Beckley J, there were three factors to be taken into account in deciding this question: 1) the nature of the dumps; 2) the manner of the annexation; and 3) the intention of the owner of the movables at the time of the annexation.<sup>22</sup> Regarding the nature of the dumps and the manner of annexation, the Department pointed out that the tailings dumps were enormous in size, in fact similar in size to some of the surrounding natural *koppies* – a contention the Department backed up with some photographs annexed to its papers.<sup>23</sup> The court noted that, despite their size, it appeared to be common cause that the dumps were still distinguishable from the surface of the farm. The Department also admitted that the tailings dumps were capable of being removed without “injuring the land.”<sup>24</sup> Counsel for the Department argued that, taking into account the above-mentioned factors – chiefly the size of the dumps – the dumps had indeed acceded to the land, having been left there for more than a century.<sup>25</sup> He further submitted that the nature of the dumps and their manner of annexation are pointers to the third factor, namely the intention of the owner of a movable and that, only when the attachment is inconclusive, does the subjective intention become the overriding factor. As noted by the court, this submission follows the so-called “traditional approach” to accession.<sup>26</sup>

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<sup>20</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 24.

<sup>21</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 20.

<sup>22</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 21.

<sup>23</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 23.

<sup>24</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 23.

<sup>25</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 24.

<sup>26</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 25, referring to *The Law of South Africa* Vol 18, par 23. The traditional approach entails that a court first looks at the nature of the movable object and the manner in which it attached to the immovable object. If these factors prove inconclusive, the subjective intention (*ipse dixit*) of the owner of the movable can be taken into consideration and is often treated as the deciding factor.

De Beers' argument was based on the so-called "modern approach" suggested by Nienaber JA in *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*,<sup>27</sup> namely that the subjective intention – or *ipse dixit* – of the owner of the dumps is determinant and, furthermore, that the nature of the material and their manner of annexation are, as a question of degree, only indicative of the intention.<sup>28</sup> If the court accepted, for the sake of argument, that De Beers had indeed intended for the dumps to remain movable, and that the *ipse dixit* is therefore determinant, the only remaining question was whether the other two factors – the nature of the dumps and their manner of annexation – was also indicative of the intention of De Beers at the time of the annexation. The court held that these requirements were indeed both compatible with and indicative of that intention. It was thus satisfied that De Beers had successfully shown that the tailings dumps are to be considered as the movable property of the mining company.<sup>29</sup> The court further held that, once mineral-containing ore were severed from the "mother rock" (in other words, the earth), such ore became a new object.<sup>30</sup> Prior to the enactment of the MPRDA, such severance vested ownership in the mineral title holder. For this reason, the court held that the MPRDA cannot be said to apply to minerals contained in historic tailings dumps, as this would lead, in effect, to the expropriation of a movable object which vested in the mining company through severance.<sup>31</sup>

### 1.5 Amendments to the MPRDA after the *De Beers* decision

Following the *De Beers* decision the legislature was faced with a *lacuna* which it sought to amend, as the Minister of Mineral Resources had no regulatory control over objects which could, for purposes of the MPRDA, still be mined. (According to the court in *De Beers* such control vested in the Minister of Environmental Affairs, as mine dumps were under the regime of NEMA.<sup>32</sup>) To address this, Parliament aimed to remove "ambiguities in certain definitions" of the MPRDA by way of the

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<sup>27</sup> *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 3 SA 273 (SCA).

<sup>28</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 25.

<sup>29</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 25.

<sup>30</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 68.

<sup>31</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 68.

<sup>32</sup> *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* [2009] JOL 24502 (O) at par 68.

amendments to the Act. The *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 (“MPRDAA”), which came into effect on 7 June 2013, amended the definitions of both residue deposits and stockpiles. In terms of the amended Act, a residue deposit now refers to:

Any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, [or] production right or an old order right.<sup>33</sup>

Furthermore, the definition of a residue stockpile is now amended to mean:

Any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit [or], production right or an old order right.<sup>34</sup>

The inclusion of the term “old-order right” in the new definitions, however, led to new problems as illustrated by the Supreme Court of Appeal’s judgment in *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others*.<sup>35</sup> In the latter case the court held that the concept of old-order rights referred to a very specific genre of right, which was created by the MPRDA and which had not by themselves existed prior to the Act coming into force.<sup>36</sup> For a common law mineral right to have continued in terms of the MPRDA’s transitional arrangements, it had to underlie a valid mining authorisation under the *Minerals Act*.<sup>37</sup> Thus the effect of including “old-order rights” within the definition of residue stockpiles and deposits is that only stockpiles and deposits created under old order rights after the enactment of the MPRDA on 1 May 2004 would effectively fall under the jurisdiction of the Act.<sup>38</sup> Furthermore, since legislation only applies prospectively and not retrospectively (unless clearly stated otherwise in the relevant legislation), and the MPRDAA only

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<sup>33</sup> Definition of “residue deposit” in s 1 of the MPRDAA.

<sup>34</sup> Definition of “residue stockpile” in s 1 of the MPRDAA.

<sup>35</sup> *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (641/09) [2010] ZASCA 109 (17 September 2010).

<sup>36</sup> *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (641/09) [2010] ZASCA 109 (17 September 2010) at par 37.

<sup>37</sup> *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (641/09) [2010] ZASCA 109 (17 September 2010) at par 37.

<sup>38</sup> *The Times* 18 July 2014. See also Hartzler and Du Plessis 2014 *SA Public Law* to be published.

came into effect on 7 June 2013, only mine dumps created under old order rights after 7 June 2013 would effectively be regulated by the MPRDA.<sup>39</sup> By that time, most – if not all – of the so-called old-order rights had either been converted or had lapsed following the lapse of the transitional time period in Schedule II of the MPRDA.

As a result, the legislature now aims to bring even more radical changes to statutory provisions regarding historic mine dumps with the enactment of the *Draft Mineral and Petroleum Resources Development Bill* (hereafter referred to as “the Draft Bill.”) If passed, the proposed amended definition of a residue deposit would now read:

Residue stockpile means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry and, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiles, stored or accumulated within the mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right or an old order right including historic mines and dumps created before the implementation of the Act.<sup>40</sup>

This would obviously lead to the legal problem that a movable asset – namely mineral-containing ore which were severed from the earth – would now effectively be removed from the possession of its owner and placed under the custodianship of the state. For this reason, the legislature also proposes to amend the definition of “land” in the MPRDA to include “the surface of the land and the sea, as well as residue deposits and residue stock piles on such land, where appropriate.”<sup>41</sup> A new definition is introduced by the Draft Bill, namely “historic residue stockpiles” which are described as:

Any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is or was stockpiled, stored or accumulated for potential re-use, or which is or was disposed of, by the holder of any right or title (including common law ownership) other than a

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<sup>39</sup> *The Times* 18 July 2014. See also Hartzer and Du Plessis 2014 *SA Public Law* to be published.

<sup>40</sup> CI 1(q) of the *MPRD Amendment Bill* of 2013.

<sup>41</sup> CI 1(n) of the *MPRD Amendment Bill* of 2013.

prospecting right, mining right, mining permit, exploration right or production right issued in terms of this Act.<sup>42</sup>

Historic residue stockpiles will be regulated in terms of the proposed new section 42A(1) of the MPRDA, as set out in the Draft Bill. According to this new section it is proposed that all historic residue stockpiles and deposits not currently regulated by the MPRDA belong to the owners thereof, for a period of two years after the promulgation of the Draft Bill. During this two-year period, owners of historic residue stockpiles and deposits will have an exclusive right to apply for a mining right or mining permit over these dumps. Should they decide not to apply for such a permit within the two-year period, the custodianship over the historic residue stockpiles or deposits will revert to the state.

Although the Draft Bill has been passed in both houses of Parliament, the assenting thereto by the President has been halted – reportedly following an intervention by the Minister of Mineral Resources due to the latter’s concern over the Draft Bill’s effect on investor confidence.<sup>43</sup> However, should the Draft Bill eventually be signed into law, it proposes *inter alia* that mine dumps be included in the definition of “land” in the MPRDA. It also proposes a stipulation that all mine dumps, current and historic, be subjected to the jurisdiction of the MPRDA.

## 1.6 Research question and methodology

This leads to the research question that underlies this study, namely whether owners of historic tailings dumps would have a possible claim for compensation based on expropriation after the promulgation of the MPRDAA and in light of more drastic changes proposed by the Draft Bill. The question is underpinned by two issues: Arguably not all owners of historic residue stockpiles or deposits would have the means to apply for mining permits over the dumps, given the stringent requirements for the awarding of mining rights in terms of the MPRDA. Consequently such owners would lose their rights. Secondly, in terms of item 12(1) of Schedule II of the MPRDA, any person who can prove that his rights have been expropriated in terms of any provision of the Act has a claim for compensation.

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<sup>42</sup> CI 1(q) of the *MPRD Amendment Bill* of 2013.

<sup>43</sup> *Business Day* 20 June 2014.

The research question will be addressed in the following manner: Firstly it will be established whether the rights to minerals relating to historic tailings dumps constitute property for purposes of section 25 of the Constitution, known as the constitutional property clause. Secondly, the protection of property in terms of section 25 of the Constitution will be discussed, specifically where it relates to the concept of state custodianship in South African mineral and petroleum law. Since the MPRDAA, and potentially the Draft Bill, is changing the legal regime with regards to an entire class of property – namely the rights to minerals relating to historic mine dumps – it needs to be determined whether such a regime change could constitute a form of expropriation. This will be done by way of evaluating the characteristics of expropriation set out in recent South African case law, together with suggestions made in academic literature.

## **2 Rights to minerals as constitutional property rights**

This chapter considers whether the rights to minerals contained in the ore left over in the tailings dumps, constitutes property for purposes of section 25 of the Constitution. The reason for this question has to do with the two-step methodology adopted by our courts when dealing with infringements of a constitutional nature. The first step requires the complainant to provide proof of a constitutional right that was subjected to a limitation. If such a right has been established, the next step is to determine whether the right was actually infringed upon, and whether the infringement is justified in terms of the limitation clause in section 36 of the Constitution. Thus, if this methodology is applied to the research question of this study, it would first need to be established whether a landowner's rights to minerals in the historic tailings dumps on a piece of land, constitutes property for purposes of section 25. This question will be answered by first providing a brief discussion of mineral rights as a *genus* of common law property rights in general. Thereafter, it has to be established whether the common-law view of mineral rights pertaining to minerals in mine dumps have substantially been altered by the enactment of the MPRDA. The rights in minerals in general will be discussed first from both a common-law and constitutional perspective, whereafter the focus will shift to rights to minerals contained in tailings.

### **2.1 Rights in minerals as *sui generis* real rights**

Property is a notoriously difficult concept to define, and is often charged with emotional overtones.<sup>44</sup> In everyday legal use, however, it usually refers to one of two things: either the objects of rights with a pecuniary value; or to the rights that persons can have in relation to such objects.<sup>45</sup> This confusion between rights and their objects dates all the way back to Roman law.<sup>46</sup> Some lawyers in the Roman-Dutch tradition prefer to conceptualise property as a legal relationship between persons and corporeal (physically tangible) things.<sup>47</sup> A legal relationship typically involves a right and, sometimes, a corresponding duty. Two such types of relationships can be identified, namely relationships based on rights and those based on possession.<sup>48</sup> Collectively, these relationships are referred to as "proprietary relationships."<sup>49</sup> Alternatively it could be stated that a person's estate is made up of all his or her proprietary relationships, or property. Thus, property includes any asset which has proprietary value, in other words, which can form part of a person's estate.

In this section, the focus is placed on rights-based relationships (or rights in property), not possession. In legal systems inherited from Roman law, the main theoretical distinction is usually between real rights and personal rights – the latter also known as creditor's rights.<sup>50</sup> (A third category of proprietary rights would be immaterial property rights, such as patents or copyrights.) This distinction originates from the Roman classification of remedies into *actions in rem* and *actions in personam*.<sup>51</sup> *Actiones in rem* were, almost literally, actions against the thing itself and could be instituted against any person who was in possession of the thing. *Actiones in personam* on the other hand, were aimed at one or more specific persons against whom the claimant had a right to performance.<sup>52</sup> From this classification, a distinction

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<sup>44</sup> Van der Merwe with Pope "The law of property" in Du Bois (ed.) *Wille's Principles of South African Law* 408; Van der Merwe *The Law of South Africa* Vol 27, par 5.

<sup>45</sup> Van der Merwe with Pope "The law of property" in Du Bois (ed.) *Wille's Principles of South African Law* 408; Van der Merwe *The Law of South Africa* Vol 27, par 5.

<sup>46</sup> Van der Merwe with Pope "The law of property" in Du Bois (ed.) *Wille's Principles of South African Law* 408; Van der Merwe *The Law of South Africa* Vol 27, par 5.

<sup>47</sup> Currie and De Waal *The Bill of Rights Handbook* 536.

<sup>48</sup> Mostert and Pope (ed.) *The Principles of the Law of Property* 41. A proprietary relationship based on possession is sometimes referred to as a "possessory right".

<sup>49</sup> Mostert and Pope (ed.) *The Principles of the Law of Property* 41.

<sup>50</sup> Van der Merwe *Sakereg* 58; Van der Merwe with Pope "The law of property" in Du Bois (ed.) *Wille's Principles of South African Law* 428; Van der Walt and Pienaar *Introduction to the Law of Property* 26-27.

<sup>51</sup> Van der Merwe *Sakereg* 58; Van der Merwe with Pope "The law of property" in Du Bois (ed.) *Wille's Principles of South African Law* 428.

<sup>52</sup> Van der Merwe with Pope "The law of property" in Du Bois (ed.) *Wille's Principles of South African Law* 430.

between real rights (rights held in respect of the thing) and personal rights (rights enforceable against a specific person) developed.<sup>53</sup> Roman law recognised only a *numerus clausus* (closed system) of real rights, since the Romans were not in favour of unnecessarily burdening the land.<sup>54</sup> Roman-Dutch law put an end to the closed system of real rights; likewise, South African law does not recognise a *numerus clausus*.<sup>55</sup> South African law did, however, discard some of the categories of real rights which became irrelevant in a post-feudal society. Many of the real rights originating in Roman law continue to play an important role in our common law. Of these real rights, ownership is by far the most extensive private right which a person can hold with regard to a corporeal thing, and confers the most complete or comprehensive control over a thing.<sup>56</sup> For this reason ownership is usually contrasted to so-called limited real rights, which include mortgage, pledge, servitude and lease.<sup>57</sup>

Servitudes are limited real rights which give the holder the right or entitlement to use or enjoy another person's property.<sup>58</sup> Servitudes can be divided into the broad categories of praedial and personal servitudes. A praedial servitude applies to two or more pieces of land, whilst a personal servitude is constituted in favour of a specific person.<sup>59</sup> In South African law the practice evolved whereby rights to minerals could be separated from the surface rights on a piece of land, and which could be ceded to any third party the owner of the land wished to cede it to.<sup>60</sup> This would create a right in favour of the third party that was completely independent from the land, but which, nonetheless, was in favour of a particular person. Consequently, although rights in minerals are universally accepted to be real rights,<sup>61</sup> South African law has traditionally treated them as servitudes. Sometimes they are also described as

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<sup>53</sup> Van der Merwe *Sakereg* 59.

<sup>54</sup> Van der Merwe "Things" in Joubert (ed.) *The Law of South Africa* Vol 27, par 62. The real rights recognised by Roman law were *dominium* (ownership), *servitudes* (servitudes), *pignus* (pledge), *hypotheca* (mortgage), *emphyteusis* (perpetual quitrent) and *superficies* (a building grant).

<sup>55</sup> Van der Merwe "Things" in Joubert (ed.) *The Law of South Africa* Vol 27, par 62.

<sup>56</sup> Van der Merwe "Things" in Joubert (ed.) *The Law of South Africa* Vol 27, par 134.

<sup>57</sup> Van der Merwe "Things" in Joubert (ed.) *The Law of South Africa* Vol 27, par 134.

<sup>58</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

<sup>59</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

<sup>60</sup> Badenhorst 2010 127 *SALJ* 646-672 at 649, referring to Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 4.

<sup>61</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 335.

"quasi-servitudes," or more particularly as personal quasi-servitudes, in case law.<sup>62</sup> For example, in *Webb v Beaver Investments (Pty) Ltd*,<sup>63</sup> Ramsbottom J said: "It may be that by the use of suitable words a praedial servitude of rights in minerals can be constituted in favour of a *praedium dominians*, but by long tradition the servitude of rights in minerals has been regarded as freely transferable and consequently as being a personal quasi-servitude."<sup>64</sup> Prior to this, however, Brink J suggested in *Ex parte Pierce*<sup>65</sup> that it is perhaps "correct to say that rights in minerals constitute a class of real rights *sui generis*."<sup>66</sup> The latter approach is also supported by other cases<sup>67</sup> and by the majority of academic writers.<sup>68</sup> Badenhorst, Pienaar and Mostert submit that in the light of fundamental differences between rights in minerals and the traditional servitudes, they should preferably be regarded as real rights *sui generis*.<sup>69</sup> Van der Merwe and Pope agree with the characterisation of rights to minerals as constituting a class of real rights *sui generis*.<sup>70</sup> The authors agree that they are (statutory) limited real rights and thus registrable in the Deeds Registry and enforceable against successors in title of the land.<sup>71</sup> Furthermore they can be severed from the title to and ownership of land and held under a separate mining right title.<sup>72</sup> As in the case of other real rights, rights in minerals include such competencies as are necessary for their exercise.<sup>73</sup> However, the following differences can be pointed out between rights in minerals and personal servitudes:<sup>74</sup>

- (a) unlike personal servitudes, rights in minerals are freely transferable and capable of being transmitted to heirs;

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<sup>62</sup> Van der Merwe with Pope "The law of property, the concept of property and real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 432; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 335.

<sup>63</sup> *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T).

<sup>64</sup> *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) at 25.

<sup>65</sup> *Ex parte Pierce* 1950 3 SA 628 (O).

<sup>66</sup> *Ex parte Pierce* 1950 3 SA 628 (O) at 634.

<sup>67</sup> See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 335 for examples.

<sup>68</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 335.

<sup>69</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 335.

<sup>70</sup> Van der Merwe with Pope "Servitudes and other real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 621.

<sup>71</sup> S 70(1); s 64(1) and (2)(bis) of the *Deeds Registries Act* 47 of 1937.

<sup>72</sup> S 70(4) of the *Deeds Registries Act* 47 of 1937.

<sup>73</sup> Van der Merwe with Pope "Servitudes and other real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 622.

<sup>74</sup> See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 335; Van der Merwe with Pope "Servitudes and other real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 622.

- (b) once a separate title to minerals has been created, it cannot afterwards again be merged with the title to the land when the holder of the rights in minerals acquires ownership of the land, or vice versa;
- (c) the maxim *nulli res sua servit* (translation: no one can have a servitude over his own property) does not apply to rights in minerals;
- (d) it is not possible to have a servitude over a servitude (*servitutis servitutis non potest*), but rights in minerals may be subject to a usufruct;
- (e) personal servitudes have to be exercised without impairment of the essential qualities of the servient thing (*salva rei substantia*); this requirement does not apply to rights in minerals;
- (f) in determining the ambit of rights in minerals, they are not interpreted as though they were servitudes; and
- (g) unlike personal servitudes, rights in minerals are transferable and transmissible to heirs with the Minister's consent and are not exercised *salva rei substantia*.

In addition, mineral rights also differ from praedial servitudes in that they are constituted in favour of a beneficiary and not a praedial tenement, and with the Minister's consent can be alienated separately from the land to which they are accessory.<sup>75</sup>

## 2.2 Characterisation of rights to minerals under the 1996 Constitution

At the time of the introduction of the Constitution, South African common law regarded rights to minerals to constitute limited real rights, while the Supreme Court of Appeal described it as a quasi-servitude.<sup>76</sup> In the meantime the Constitution was accepted and a new question arose: Could mineral rights be regarded as "property" (including "limited real rights") and be protected by section 25 of the Constitution? In

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<sup>75</sup> Van der Merwe with Pope "Servitudes and other real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 621, referring to *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 4 SA 499 (A) at 509; *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) at 25.

<sup>76</sup> Section 5(1) of the MPRDA now expressly characterises prospecting and mining rights, as well as exploration and production rights, as limited real rights.

*Lebowa Mineral Trust Beneficiaries Forum v President of South Africa*,<sup>77</sup> the Transvaal Provincial Division<sup>78</sup> controversially ruled that section 25 does not protect mineral rights from the preceding era as property, as it did not regard such rights to be real rights according to the "relevant principles of common law."<sup>79</sup> The ruling was severely criticised by scholars.<sup>80</sup> In 2012, in *Minister of Minerals and Energy v Agri South Africa*,<sup>81</sup> the Supreme Court of Appeal held a similar view as the court in *Lebowa* – although Wallis JA, who handed down the main judgment, did not refer to the prior. The Supreme Court of Appeal's reasoning was that the rights to minerals held by a landowner under the *Minerals Act* might have had value but were effectively worthless without the landowner obtaining state authorisation to mine on the property.<sup>82</sup> A concurring judgment by Nugent JA found that rights to minerals under the *Minerals Act* had no inherent value, but merely increased the value of the property over which the rights were held.<sup>83</sup> The Constitutional Court rejected this line of reasoning in the subsequent appeal judgment of *Agri SA v Minister of Minerals and Energy*.<sup>84</sup> According to Moegoeng CJ, the fundamental difference between the approach of the Supreme Court of Appeal and the Constitutional Court lies in the characterisation of "old-order rights" to minerals.<sup>85</sup>

The Supreme Court of Appeal's premise was that the right to mine had always vested in the state and that the MPRDA was simply the latest in a long line of statutes to reaffirm this principle.<sup>86</sup> The Constitutional Court noted, however, that this argument possibly stems from confusion over the distinctive concepts of a "right to mine" and "mineral rights."<sup>87</sup> Minerals rights refer to ownership of the minerals located on a piece of land, whilst the right to mine refers to a person's authority to exploit those minerals. Before statutory regulation of the exploitation of minerals, the owner of minerals could have exploited the minerals without state authorisation.

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<sup>77</sup> *Lebowa Mineral Trust Beneficiaries Forum v President of South Africa* 2002 1 BCLR 23 (T); [2001] JOL 9196 (T).

<sup>78</sup> Now known as the Gauteng Division of the High Court.

<sup>79</sup> *Lebowa Mineral Trust Beneficiaries Forum v President of South Africa* 2002 1 BCLR 23 (T); [2001] JOL 9196 (T) at 19.

<sup>80</sup> Van der Walt 2002 *SAPR/PL* 260-265; Van der Walt 2004 *SAPR/PL* 54; Badenhorst and Vrancken 2001 *Obiter* 496-507; Roux *Property* 46-13.

<sup>81</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA).

<sup>82</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at par 85.

<sup>83</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at par 117.

<sup>84</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC).

<sup>85</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 33.

<sup>86</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at par 69.

<sup>87</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 38.

“Mineral rights” in the original sense thus included both ownership of minerals and the right to exploit them. Only when the state assumed regulatory authority for the exploitation of minerals, did the need arise to differentiate more clearly between the above concepts.<sup>88</sup> Despite the state’s regulatory authority, it could only grant mining authorisation to persons who actually owned the minerals on the property. There were two exceptions to this rule in the *Minerals Act*, namely where the owner of the minerals could not be located, or where ownership of the minerals was transferred by way of intestate succession and the lawful successor had not claimed ownership within a prescribed period of two years. Prior to the *Minerals Act*, the *Mining Rights Act* also recognised the proprietary aspect or value of mineral ownership by requiring third parties to pay royalties to the owner of minerals in the event that prospecting leases were granted by the state to such third parties. In terms of the *Minerals Act*, the state could only compel exploitation of minerals by expropriation against the payment of compensation.<sup>89</sup> Furthermore, according to the Constitutional Court, the state had no power to compel the exploitation of privately owned minerals prior to the *Minerals Act*.<sup>90</sup> What was thus missing from both the majority and minority judgments<sup>91</sup> in the Supreme Court of Appeal, as per Moegoeng CJ, was “adequate acknowledgement of the entitlement not to mine, or the ability not to exploit minerals, as one of the essential components of mineral ownership” (my emphasis).<sup>92</sup> This alone, according to the Constitutional Court, provided a complete answer to the notion that mineral ownership either had no independent existence or independent value.<sup>93</sup>

From the majority judgment in *Agri SA*,<sup>94</sup> it can thus be concluded that the rights to minerals contained in tailings dumps, which a holder would have held in terms of the *Minerals Act* would constitute property for purposes of section 25, as such a right had both an independent existence and independent value. The owner of the right namely had no obligation to exploit the right and he was free to cede it to a third

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<sup>88</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 38. According to Moegoeng CJ at par 39, that clarity could have been achieved by discarding the concepts of the “right to mine” and “mineral rights” in favour of “exploitation rights” and “ownership of the minerals”.

<sup>89</sup> S 24 of the *Minerals Act* 50 of 1991.

<sup>90</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 41.

<sup>91</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA).

<sup>92</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 43.

<sup>93</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 43.

<sup>94</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC).

party in return for compensation. Such a right thus not only added to the value of the land itself, as noted by Nugent JA in *Agri SA*,<sup>95</sup> but held an economic value in its own right.

### 2.3 Summary

This section dealt with the question whether rights to minerals constitute property for purposes of protection under section 25 of the Constitution. The question was dealt with in two steps. Firstly the common law view of rights to minerals was considered. Mineral rights are universally held to be real rights and, more particularly limited real rights in the form of servitudes. In South African law, however, it was often characterised as *sui generis* real rights due to certain unique features which distinguishes it from more traditional servitudes. The MPRDA acknowledges rights to minerals as being limited real rights. Secondly, recent case law relating to the proprietary nature of rights to minerals was evaluated. In the past the courts have often over-relied on the state's exclusive authority to grant mining licences without which an owner of minerals on a property was prohibited to exploit such minerals, to find the right to minerals on a property to be inherently worthless without state authorisation to mine. According to the Constitutional Court, this reasoning is founded upon confusion between ownership of minerals on the one hand, and the right to exploit such minerals on the other. Prior to regulation of mining in South Africa, these rights were one and the same. It was only after the first mining legislation was enacted that the need for clear differentiation arose. The court noted another important element that was missing from the line of reasoning previously held by courts relating to the exact nature of mineral rights: Prior to the enactment of the MPRDA, a mineral owner had namely the right not to exploit his or her minerals if he/she chose not to. Alternatively, the owner also had the exclusive right to sterilise the minerals on the property. Neither of these rights could be infringed upon, other than by way of expropriation accompanied by compensation. For this reason, the court found that pre-MPRDA mineral rights have always had independent value and, as such, should be regarded as property for purposes of section 25. Likewise, it can be concluded that the rights to minerals regarding tailings as formulated in the *Minerals Act* constituted property with an independent nature and value for purposes

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<sup>95</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at par 117.

of section 25. With this in mind, the study will now consider the second part of the constitutional enquiry, namely whether the right to property in terms of section 25 was infringed upon by the MPRDAA or could in future be infringed upon by the provisions of the Draft Bill.

### **3 Expropriation in terms of section 25 of the Constitution**

So far it has been established that the rights to minerals in tailings dumps constitute property for purposes of section 25. This would settle the first question of the two-stage approach adopted by courts when presented with constitutional challenges, namely whether the claimant has established an actual right which is in danger of being infringed. The second aspect, whether the right has been infringed, must now be considered. The right that was established in the previous section is the constitutional right to property, as set out in section 25 of the Constitution.

Section 25(1) states that no one may be deprived of property except in terms of law of general application, and that deprivation may never happen in an arbitrary manner. Section 25(2) further provides that property may only be expropriated in terms of law of general application, subject to payment of compensation, and for a legitimate public purpose or in the public interest.

The issue that needs to be addressed is whether the rights in minerals relating to historic tailings dumps have been expropriated by the MPRDAA's provisions regarding residue deposits and residue stockpiles, or whether it could, in future, be expropriated by the provisions of the Draft Bill. In order to answer this question, the following methodology will be adopted: Firstly, in this chapter, a theoretical overview of expropriation as a legal concept will be provided. It needs to be established whether South African law recognises certain definitive characteristics for expropriation. Secondly, in the following chapter, the concept of state custodianship will be discussed against the background of expropriation, since the Draft Bill proposes that historic residue stockpiles are placed under state custodianship after two years following its coming into force.<sup>96</sup>

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<sup>96</sup> See chapter 1.

### 3.1 The legal nature of expropriation

#### 3.1.1 Private-law limitations on ownership

In South African case law, ownership was previously described as the most complete real right that a person can have regarding a thing.<sup>97</sup> It included the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume the property (*ius abutendi*), but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim property from anyone who unlawfully withholds it (*ius vindicandi*) and to resist any unlawful invasion of property (*ius negandi*).<sup>98</sup> However, ownership has never been considered to be an absolute and unencumbered right.<sup>99</sup> Various restrictions or limitations are placed on the entitlements of an owner of property, both by objective law and by the rights of other.<sup>100</sup> These limitations can be divided into three main categories: public law limitations; limitations imposed in the interests of neighbour relations; and individual restrictions which are imposed in a particular case by reason of a right to a thing (such as a limited real right) or by a personal obligation where the owner undertakes not to deal with his or her property in a certain manner.<sup>101</sup> This subsection deals primarily with public law restrictions – in other words, restrictions imposed by the state on all owners of a particular kind of property, either for the benefit of society as a whole or in the interests of certain sections of society.<sup>102</sup>

#### 3.1.2 Limitations on ownership in terms of the Constitution

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<sup>97</sup> *Gien v Gien* 1979 2 SA 1113 (T). See the reference the Constitutional Court made to *Gien's* formulation of ownership in *Van der Merwe and Another v Taylor NO and Others* 2008 1 SA 1 (CC) at par 26.

<sup>98</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 94; Van der Merwe with Pope "Ownership" in Du Bois (ed.) *Wille's Principles of South African Law* 470.

<sup>99</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 94; Van der Merwe with Pope "Ownership" in Du Bois (ed.) *Wille's Principles of South African Law* 470. See *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 2 SA 589 (N) at 6101.

<sup>100</sup> In *Gien v Gien* 1979 2 SA 1113 at 1120D-H, Spoelstra AJ noted: "The point of departure is that a person, as far as an immovable is concerned, can do on and with his property as he likes. However, this apparently unlimited freedom is only partially true. The absolute entitlements of an owner exist within the boundaries of the law. The restrictions can emerge from either objective law or from the restrictions placed upon it by the rights of others."

<sup>101</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 96. Van der Walt and Pienaar *Introduction to the Law of Property* 82 also mention creditor's rights of third parties against the owner as a fourth category, although this arguably amounts to a personal obligation which can be included under individual restrictions based on a legal relationship between the parties.

<sup>102</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 96; Van der Merwe with Pope "Ownership" in Du Bois (ed.) *Wille's Principles of South African Law* 474; Mostert and Pope (eds) *The Principles of the Law of Property* 89.

The Constitution provides for two types of permissible impositions or limitations on ownership: the specific limitation provisions contained in section 25 and the general limitation clause in section 36. These two types of provisions are not mutually exclusive and must be applied conjunctively.<sup>103</sup> Section 25 permits the state to either deprive an owner from some of the entitlements of ownership<sup>104</sup> or to expropriate ownership;<sup>105</sup> however, in both instances certain requirements need to be met. Deprivation occurs where use of privately owned property is restricted.<sup>106</sup> It is usually defined in contrast to expropriation and seen as a less intrusive limitation of property.<sup>107</sup> Expropriation consists of compulsory state acquisition of private property, whereas deprivation occurs where the state simply regulates the use of enjoyment of private property in the public interest.<sup>108</sup> The purpose of the distinction between deprivations and expropriation is to enable the state to regulate use of property without fear of incurring liability to owners of rights in the course of such regulation.<sup>109</sup>

Owners' rights over movables are restricted by, *inter alia*, regulations regarding traffic; protection of animals; possession and distribution of printed matter and films; possession and use of dangerous firearms; and the use of radio, television and electronic media.<sup>110</sup> These represent examples of deprivations as it involves neither the extinguishing of an owner's rights, nor the acquisition by the state of such. A deprivation must be authorised by "law of general application." In other words, it must be authorised by law that applies to everyone and does not target only particular individual or group of individuals.<sup>111</sup> This is in line with section 36(1) of the Constitution, which also provides that a right contained in the Bill of Rights may only be limited in terms of law of general application. Deprivations may furthermore not be

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<sup>103</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 97, noting Badenhorst and Malherbe 2001 *TSAR* 768; Gildenhuys *Onteieningsreg* 102.

<sup>104</sup> S 25(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>105</sup> S 25(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>106</sup> Van der Merwe with Pope "Ownership" in Du Bois (ed.) *Wille's Principles of South African Law* 474.

<sup>107</sup> Mostert and Badenhorst "Property and the Bill of Rights" in *Bill of Rights Compendium* 3FB7.2.1; Van der Walt *Constitutional Property Law* 335.

<sup>108</sup> Van der Walt *Constitutional Property Law* 335.

<sup>109</sup> *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) at 1246B.

<sup>110</sup> See Van der Merwe with Pope "Ownership" in Du Bois (ed.) *Wille's Principles of South African Law* 474 for various examples.

<sup>111</sup> See Van der Merwe with Pope "Ownership" in Du Bois (ed.) *Wille's Principles of South African Law* 474

arbitrary.<sup>112</sup> An arbitrary deprivation takes place capriciously and is neither based on reason nor principle.<sup>113</sup> However, according to the Constitutional Court, “arbitrary” is not limited to “non-rational deprivations, in the sense there being no rational connection between the means and end.”<sup>114</sup> A deprivation of property is “arbitrary” when the law referred to in section 25(1) does not provide sufficient reasons for the particular in question or is procedurally unfair.<sup>115</sup> Sufficient reasons are established by considering various aspects of deprivation, the purpose to be served and the relationship affected thereby.<sup>116</sup> According to the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality*,<sup>117</sup> a court maintains a wide discretion with regards to the enquiry whether a deprivation was arbitrary or not.<sup>118</sup>

Expropriation is permitted by section 25(2) of the Constitution, provided that it occurs in terms of law of general application; for a public purpose or in the public interest;<sup>119</sup> and subject to the payment of compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.<sup>120</sup> Expropriation can be defined as the unilateral termination of a person’s patrimonial rights with regards to property, in conjunction with the unilateral acquisition thereof by the state or by someone else.<sup>121</sup> Whether acquisition is a necessity for expropriation to occur, is the subject of much debate in South African law. According to Gildenhuys, as well as Chaskalson and Lewis, mere termination of a person’s rights without the simultaneous acquisition of those rights by the expropriator – either for itself or another party – can never amount to

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<sup>112</sup> S 25(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>113</sup> *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) at 29H.

<sup>114</sup> *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at 798G.

<sup>115</sup> *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at 810G-H.

<sup>116</sup> *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at 740H, 811E-F.

<sup>117</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).

<sup>118</sup> See also Freedman 2006 1 TSAR 83; Van der Walt 2005 1 SALJ 75.

<sup>119</sup> S 25(2)(a) of the *Constitution of the Republic of South Africa*, 1996.

<sup>120</sup> S 25(2)(b) of the *Constitution of the Republic of South Africa*, 1996.

<sup>121</sup> Gildenhuys *Onteieningsreg* 8.

expropriation.<sup>122</sup> Mostert and Badenhorst note that, although termination of the individual holder's rights is often coupled with an acquisition of benefits by the state, the entitlements acquired by the state may be different from those lost by the individual holder.<sup>123</sup> In *Harksen v Lane N.O.*<sup>124</sup> the Constitutional Court, in its interpretation of the concept "to expropriate"<sup>125</sup> relied upon an examination of existing, pre-constitutional expropriation decisions. It pointed out that South African law has long recognised the distinction between expropriation, which "involves acquisition of rights in property by a public authority" and deprivation of rights in property, which falls short of compulsory acquisition.<sup>126</sup> According to the court, this acquisition of the right through expropriation causes the "abatement or extinction, as the case may be, of any other existing right held by another, which is inconsistent with the appropriated right."<sup>127</sup>

This approach has been criticised for not leaving any room for possible theoretical overlaps between the two types of infringement, namely deprivation and expropriation.<sup>128</sup> Van der Walt notes that the court in *Harksen* assumed a categorical distinction between the two infringement types, in the sense that they are distinct entities with characteristics that distinguish them from each other clearly and exhaustively.<sup>129</sup> A prospective litigant who wishes to attack the constitutional validity of an infringement on his or her property would thus have to choose between the two and argue either that there was an unconstitutional deprivation or an unconstitutional expropriation. By implication the court would not consider the other option of its own accord.<sup>130</sup> The Constitutional Court adopted a different approach to *Harksen* in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>131</sup> (hereafter referred to as *FNB*), indicating that expropriations are not to be regarded

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<sup>122</sup> Chaskalson and Lewis "Property" in *Constitutional Law of South Africa* 31-12; Gildenhuys *Onteieningsreg* 8.

<sup>123</sup> Mostert and Badenhorst "Property and the Bill of Rights" in *Bill of Rights Compendium* 3FB7.2.1.

<sup>124</sup> *Harksen v Lane N.O.* 1998 1 SA 300 (CC).

<sup>125</sup> As formulated in section 28 of the Interim Constitution, 1993.

<sup>126</sup> *Harksen v Lane N.O.* 1998 1 SA 300 (CC) at 315G-H.

<sup>127</sup> *Harksen v Lane N.O.* 1998 1 SA 300 (CC) at 315G-H.

<sup>128</sup> Mostert and Badenhorst "Property and the Bill of Rights" in *Bill of Rights Compendium* 3FB7.2.1; Van der Walt *Constitutional Property Law* 339-340; Van der Walt and Botha 1998 13 *SAPL* 1.

<sup>129</sup> Van der Walt *Constitutional Property Law* 340.

<sup>130</sup> Van der Walt *Constitutional Property Law* 340.

<sup>131</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

as separate from deprivation, but as a particular subcategory of it.<sup>132</sup> This means that the section 25(1) requirements for deprivation must also apply to expropriation, in addition to the more specific section 25(2) and 25(3) requirements. Thus an investigation into the constitutional validity of any limitation of property should always start with the requirements of section 25(1), which, according to Van der Walt, is a major departure from the *Harksen* approach.<sup>133</sup>

The approach in *FNB* seems to regard deprivation and expropriation as points on a *continuum*, where the severity of the imposition on ownership in a particular case would determine whether, in addition to the requirements for deprivation, those for expropriation should also be met.<sup>134</sup> Van der Walt notes that this methodology postpones the distinction between deprivation and expropriation to a later stage, and in many cases, the question whether the imposition amounts to expropriation will not feature at all.<sup>135</sup> If a deprivation proves to be in conflict with section 25(1) and cannot be justified in terms of section 36, according to the Constitutional Court, "that is the end of the matter."<sup>136</sup> According to the logic applied in *FNB*, a court should always investigate the deprivation issue first, regardless of whether it was raised by the applicant alleging the infringement.<sup>137</sup>

In subsequent decisions, courts have signalled their willingness to proceed directly to expropriation analysis in terms of section 25(2) and (3).<sup>138</sup> In *Agri SA v Minister of Minerals and Energy*,<sup>139</sup> the Supreme Court of Appeal held that the first issue to consider in a challenge under section 25(1) and (2) will always be whether there was deprivation of property. However, according to the court, "that does not necessarily mean that the court must consider whether the particular deprivation was arbitrary,

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<sup>132</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at 57-60, 100.

<sup>133</sup> Van der Walt *Constitutional Property Law* 342. However, in *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA), Wallis JA disagreed with Van der Walt, noting: "It would be surprising to conclude that *FNB* departed from *Harksen* without saying so expressly, given their proximity in time and that *Harksen* is not even referred to in the judgment in *FNB*. What is more Ackermann J, who wrote *FNB*, had concurred in *Harksen*." (11F-G)

<sup>134</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 98.

<sup>135</sup> Van der Walt *Constitutional Property Law* 342.

<sup>136</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at par 58.

<sup>137</sup> Van der Walt *Constitutional Property Law* 343.

<sup>138</sup> *Du Toit v Minister of Transport* 2006 1 SA 297 (CC); *Haffejee NO and Others v eThewini Municipality and Others* 2011 ZACC 28 (25 August 2011).

<sup>139</sup> *Agri SA v Minister of Minerals and Energy* 2012 5 SA 1 (SCA).

when the only point in issue is whether an expropriation has occurred.”<sup>140</sup> If the applicant is content not to allege that the deprivation was arbitrary, there is no reason for the court to enquire into that question.<sup>141</sup> Where the issue is whether expropriation had occurred, the important question will be whether the imposition on property satisfies the characteristics which distinguish expropriation from other forms of deprivation.<sup>142</sup>

To prove expropriation, a claimant would have to establish that the state has acquired the substance or core content of what the claimant was deprived of.<sup>143</sup> The rights acquired by the state do not have to be exactly the same as the rights that were lost, but there has to be sufficient congruence or substantial similarity between what was lost and what was acquired.<sup>144</sup> There are, however, many instances where a person can effectively lose his rights to use and disposal of property, without the state actually acquiring the property. This leads to a grey area between non-acquisitive deprivation and acquisitive expropriation where the affected party would, from a categorical perspective at least, be left without a remedy. For this reason, courts in some jurisdictions treat excessive regulatory action in this so-called grey area as constructive expropriation requiring compensation because of its unfair or excessive effects on individual property holders.<sup>145</sup>

South African courts, however, have consistently been weary of recognising a form of expropriation that does not involve acquisition of the affected rights by the state. In *Harksen* the court noted that the distinction between expropriation, which involves acquisition by the state, and deprivation, which fall short of compulsory acquisition, has been long established in South African law.<sup>146</sup> The Supreme Court in *Steinberg v South Peninsula Municipality*,<sup>147</sup> considered the possibility of treating severe impositions on property that were not intended to be expropriations as “constructive

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<sup>140</sup> *Agri SA v Minister of Minerals and Energy* 2012 5 SA 1 (SCA) at 11C-D.

<sup>141</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at 11D.

<sup>142</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at 11E.

<sup>143</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 19B.

<sup>144</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 19B-C.

<sup>145</sup> Van der Walt *Constitutional Property Law* 338, 350; Mostert 2003 *SAJHR* 567. Van der Walt no longer favours the recognition of so-called constructive expropriation, instead suggesting the German practice of paying equalisation compensation for excessively harsh regulatory deprivation. Badenhorst, Pienaar and Mostert also favour a *continuum* approach rather than the doctrine of constructive expropriation, in view of the manner in which section 25(1) and (2) are formulated.

<sup>146</sup> *Harksen v Lane NO* 1998 1 SA 300 (CC) at par 32-33.

<sup>147</sup> *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

expropriations,” but eventually left the question unanswered due to concerns over the effect that the doctrine would have on the incentive for land reform in South Africa.<sup>148</sup> In *Reflect-it-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*,<sup>149</sup> Nkabinde J stated that “courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state.”<sup>150</sup> The Supreme Court of Appeal in *Agri South Africa* left the question unanswered, since the point was not argued by either party’s counsel.<sup>151</sup>

The Constitutional Court in *Agri SA* noted that, in determining the meaning of acquisition with regards to expropriation, courts must strike a delicate balance between a transformative imperative and the protection of property, both of which are afforded by the Constitution.<sup>152</sup> On one hand, an overly liberal approach to the concept of acquisition would blur the line drawn by the Constitution between deprivation and expropriation. This would undermine the imperative to transform the economy by opening up access to land and natural resources previously denied to the majority of the country’s people.<sup>153</sup> It would also harm the economy by threatening the security of tenure of those who prospect and mine for minerals and, at the same time, growing the economy and creating jobs. Likewise, if the meaning of acquisition is interpreted too narrowly, it could militate against the constitutional protection afforded to property rights by section 25(2).<sup>154</sup> Thus, rather than applying a so-called “one-size-fits-all” approach to the issue of acquisition, the court proposes a case-by-case determination of whether acquisition had in fact taken place.<sup>155</sup> This is because acquisition can take a variety of possible manifestations, depending on the nature of the right involved.<sup>156</sup> Froneman J, in a minority judgment, criticised his colleagues’ overemphasis on the element of acquisition in determining whether

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<sup>148</sup> *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) at par 8.

<sup>149</sup> *Reflect-it-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC).

<sup>150</sup> *Reflect-it-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC) at par 64.

<sup>151</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) at 13A.

<sup>152</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 21E-F.

<sup>153</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 21D-E.

<sup>154</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 21C-F.

<sup>155</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 21F-G.

<sup>156</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 22A.

expropriation had been effected by the MPRDA.<sup>157</sup> Instead, he proposed an approach whereby a form of "institutional expropriation" is acknowledged in instances where the legislature makes radical changes to an entire legal regime, or otherwise destroys an entire class of property through the enactment of law. Froneman J's proposal will be discussed in more detail in the following chapter. However it is submitted that this approach, as echoed in the academic literature of Van der Walt, is to be preferred above an approach whereby acquisition is made the defining characteristic by which expropriation should stand and fall. This would arguably give the legislature far too much width to enact legislation which falls outside the scope of reasonable interference with a person's use and enjoyment of property. Furthermore, as illustrated by Froneman J, an approach recognising "institutional expropriation" need not hamper the state's obligation towards land and economic reform, if such expropriation is coupled with a form of "compensation in kind."

The following section deals with the question whether proposed state custodianship over historic residue stockpiles and deposits in terms of the Draft Bill actually amounts to such a form of institutional expropriation.

#### **4 State custodianship over mineral resources**

Under the common law principle of *cuius est solum eius est usque ad coelum et ad inferos* (commonly referred to as the *cuius est solum* principle), the owner of land also owned the minerals *in situ* located on the land.<sup>158</sup> A mineral right could be severed from the surface rights and transferred to a transferee,<sup>159</sup> whether or not such a transfer was in return for compensation. Although the owner of the land remained, strictly speaking, the owner of the minerals *in situ*, the holder of a transferred mineral right was entitled to search for minerals on the property, as well as remove and appropriate such minerals.<sup>160</sup> The MPRDA introduced the concept of

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<sup>157</sup> *Agri SA v Minister of Mineral Resources* 2012 4 SA 1 (CC) at 25C-D.

<sup>158</sup> Badenhorst 2010 127 SALJ 646-672 at 649, referring to Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 4.

<sup>159</sup> Badenhorst 2010 127 SALJ 650.

<sup>160</sup> Badenhorst 2010 127 SALJ 650, referring to *Van Vuren v Registrar of Deeds* 1907 TS 289 at 294; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315; *Ex parte Pierce* 1950 3 SA 628 (O) at 634C-D; *Erasmus v Afrikander Property Mines Ltd* 1976 1 SA 950 (W) at 95E; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) at 509G-H; *Anglo Operations v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) at 371.

state custodianship into our mineral and petroleum legal regime, although by then it had already been incorporated into the water (through the *National Water Act*) and environmental law regimes (through the *National Environmental Management Act* 107 of 1998, or NEMA). The question arises as to what extent the concept of state custodianship changed the common law position regarding minerals *in situ* since severed mineral ore contained in tailings dumps have acceded to the land, as argued in chapter 2 above. For purposes of this study, the aspects regarding the constitutionality of state custodianship over minerals in general will be limited to a brief overview. The more important question to be answered is whether the mineral rights of owners of historic tailings dumps have been substantially diminished or even completely destroyed by the amendments to the definitions of residue deposits and residue stockpiles in the MPRDAA, or is threatened as such by the proposed provisions in the Draft Bill. However, in order to address this, it is necessary to provide a broad overview of what state custodianship over minerals entails.

#### 4.1 State custodianship over minerals in South Africa

Section 3(1) of the MPRDA states that mineral and petroleum resources are regarded as the common heritage of the people of South Africa and that the state is appointed the custodian thereof for the benefit of all the people of South Africa.<sup>161</sup> Since the Draft Bill proposes to include historic residue stockpiles under the MPRDA's definition of "land," this would essentially amount to minerals contained in tailings to return to a state of *in situ* for purposes of mineral law. This leads to the question whether ownership of minerals *in situ* is now vested in the state, or whether it still vests in the owner of the land, in terms of the common law principle of *cuius est solum*. Badenhorst *et al* have argued that section 3(1) vests mineral resources in the state and that these resources thereby become *res publicae*.<sup>162</sup> Traditionally a distinction is made between things which are capable of being privately owned (*res in commercio*) and things that are not capable of being privately owned (*res extra*

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<sup>161</sup> Badenhorst, Mostert and Dendy "Minerals and petroleum" in Joubert (ed.) *The Law of South Africa* par 101; Dale *et al* *South African Mineral and Petroleum Law* MPRDA-121; Van der Merwe with Pope "Servitudes and other real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 619. In this section the focus will be on minerals.

<sup>162</sup> Badenhorst *et al* *Mineral and Petroleum Law of South Africa* at 13-4.

*commercio*).<sup>163</sup> Public things (*res publicae*) are a class of things which belong (though not in private ownership) to an entire civil community and are often referred to as state property or public property.<sup>164</sup> Although it belongs to the inhabitants generally it is held by the state for the benefit of the inhabitants.<sup>165</sup>

In modern law it is important to distinguish between things which are held by the state in its public capacity and things held by the state in its private capacity.<sup>166</sup> The former is intended to directly benefit members of the community concerned, such as public road; whereas the latter often only indirectly benefits the public, such as administrative buildings.<sup>167</sup> Only things which are owned by the state in its public capacity and which directly benefits the public-at-large, are considered to be *res publicae*. Dale *et al* has criticised the view held by Badenhorst *et al*, pointing out that under Roman law minerals were never regarded as *res publicae*.<sup>168</sup> Furthermore, according to Dale *et al* South African common law always regarded *res publicae* as things that are available for use by the public, but which vested in the state.<sup>169</sup> There appears to be no provision in the MPRDA that clearly vests ownership of minerals *in situ* in the state, or which states that minerals *in situ* belong to anyone else but the owner of the land.<sup>170</sup> In terms of the Roman-Dutch common law principle of *cuius est solum*, ownership of minerals *in situ* vests in the owner of the land. Badenhorst *et al* suggested that this principle has been abrogated by section 4(1) of the MPRDA, which states that insofar common law is inconsistent with the Act, the Act would prevail.<sup>171</sup> However, Dale *et al* disagree on this point, noting that the provisions of the Act do not warrant such a radical departure from the common law view, as ownership is nowhere explicitly vested in the state – not even in early and initial drafts of the Act.<sup>172</sup> If state custodianship amounts to ownership vesting in the state, this would mean that the owner of land on which minerals can be found, would even

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<sup>163</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32; Van der Merwe with Pope "The law of property, the concept of property and real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 416.

<sup>164</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 34.

<sup>165</sup> Van der Merwe with Pope "The law of property, the concept of property and real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 416.

<sup>166</sup> Van der Merwe with Pope "The law of property, the concept of property and real rights" in Du Bois (ed.) *Wille's Principles of South African Law* 416.

<sup>167</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 34.

<sup>168</sup> Dale *et al South African Mineral and Petroleum Law* MPRDA-122.

<sup>169</sup> Dale *et al South African Mineral and Petroleum Law* MPRDA-122.

<sup>170</sup> Dale *et al South African Mineral and Petroleum Law* MPRDA-122.

<sup>171</sup> Badenhorst *et al Mineral and Petroleum Law of South Africa* 13-3.

<sup>172</sup> Dale *et al South African Mineral and Petroleum Law* MPRDA-123.

be deprived of the land itself, since the MPRDA's definition of minerals is so wide that the land as such, topsoil included, qualifies as a mineral.<sup>173</sup>

Van der Schyff has added a third perspective to the debate, arguing that the public trust doctrine has now been incorporated into the South African mineral law dispensation.<sup>174</sup> The wording of section 3(1) is problematic, since it refers to the country's mineral wealth "belonging" to the people of South Africa. The nation, however, as a whole has no legal personality which would enable it to acquire or hold ownership.<sup>175</sup> The public trust doctrine seems to provide a solution. Van der Schyff indicates that the doctrine is not a legacy of the South African Roman-Dutch Law based common law system, and that it contradicts "everything that a Roman-Dutch schooled lawyer was taught."<sup>176</sup> Property subject to this doctrine falls into a special category not previously recognised in South African law. According to her, minerals have changed from private property to a public resource.<sup>177</sup> To ground her argument, she points to the current system of mineral royalties: Whereas contractual royalties were previously paid by the holder of the mineral right to the landowner, to compensate him or her for the depletion of mineral resources on his or her land, such royalties are in terms of the MPRDA to be paid to the state, as custodian of the nation's mineral wealth.<sup>178</sup>

In terms of the public trust doctrine, the state acquires property under a different title from normal private ownership. If the state owned ordinary property, it would be free to sell such property in the open market under the obligation that its dealings should be governed by the principles of good governance.<sup>179</sup> However, as custodian, the state holds the property solely as representative of the nation and for the nation's benefit.<sup>180</sup> Thus, the state's holding of the property goes hand-in-hand with a

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<sup>173</sup> Dale *et al* *South African Mineral and Petroleum Law* MPRDA-123. A "mineral" is defined in s 1 of the MPRDA as "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under the water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes (...)".

<sup>174</sup> See Van der Schyff *The Constitutionality of the MPRDA* and "Who 'owns' the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act" 2008 *TSAR* 757.

<sup>175</sup> Van der Schyff *The Constitutionality of the MPRDA* 241.

<sup>176</sup> Van der Schyff *The Constitutionality of the MPRDA* 241-2.

<sup>177</sup> Van der Schyff *The Constitutionality of the MPRDA* 242.

<sup>178</sup> Van der Schyff *The Constitutionality of the MPRDA* 242.

<sup>179</sup> Van der Schyff *The Constitutionality of the MPRDA* 242.

<sup>180</sup> Van der Schyff *The Constitutionality of the MPRDA* 243.

fiduciary duty not normally associated with private ownership. It has been pointed out, by both Dale<sup>181</sup> and Van der Schyff, that early traces of the public trust doctrine are already recognisable in the *National Water Act* 36 of 1998, whose preamble “recognizes” that water is a national resource that “belongs to all people,” but then declares the national government as the public trustee of the nation’s water resources. However, Dale argues that the public trust doctrine was historically embraced by American courts for the specific reason that the United States (US) at the time lacked sufficient environmental laws and regulations.<sup>182</sup> He points to more recent US Supreme Court decisions where claims of sovereign ownership were dismissed as “legal fictions” which simply serve as an expression of the government’s important public interest in the subject matter at hand.<sup>183</sup> According to Dale,<sup>184</sup> it is unnecessary to introduce the public trust doctrine in South Africa, where a fundamental right to the environment is provided for in the Constitution,<sup>185</sup> and is enforceable by anyone acting in the public interest.<sup>186</sup>

The Constitutional Court provided some clarity on the controversy surrounding the effect of the MPRDA on private ownership of mineral rights, in two recent judgments namely the *Agri SA* and *Sishen* judgments. It appears that the court has, after all, opted for an approach not dissimilar to the public trust doctrine. In *Agri SA v Minister for Minerals and Energy*,<sup>187</sup> Moegoeng CJ noted that, prior to the enactment of the MPRDA, mineral rights holders could dispose freely of such rights and were also free to sterilise it if they wished. Since mineral rights holders were not compelled to exploit minerals to which they held such rights, they could also keep the rights as a valuable investment or asset. The rights could be bequeathed or mortgaged and, as stated above, constituted property for purposes of section 25 of the Constitution.<sup>188</sup>

The right to freely sterilise mineral rights were terminated with effect from 1 May 2004, as well as the right to sell or lease mineral rights prior to securing the authorisation to prospect or mine. Old order rights to prospect or mine continued to

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<sup>181</sup> Dale *et al* MPRDA-125

<sup>182</sup> Dale *et al* MPRDA-126.

<sup>183</sup> Dale *et al* MPRDA-126.

<sup>184</sup> Dale *et al* MPRDA-126.

<sup>185</sup> S 24 of the *Constitution of the Republic of South Africa*, 1996.

<sup>186</sup> S 38(d) of the *Constitution of the Republic of South Africa*, 1996; s 32(1)(d) and (e) of the *National Environmental Management Act* 107 of 1998.

<sup>187</sup> *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC)

<sup>188</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 50.

exist in terms of the transitional period set out in Item 8 of the transitional arrangements in Schedule II of the MPRDA, during which time holders of old order rights were afforded an opportunity to convert such rights to new order rights. Such conversion was however subject to certain conditions which not all applicants would be able to fulfil. Holders of old order rights who did not, or could not, convert their rights within the window period lost all their mineral rights permanently.<sup>189</sup> According to the court, their loss was not limited to the extinction of the right to sterilise, sell or lease the rights, but was “a total and permanent loss.”<sup>190</sup>

Does this mean that ownership of the rights in minerals was acquired by the state? According to Moegoeng CJ, the answer is no. It is important to note that whilst the Chief Justice refers to “mineral rights” in his argument, what he actually describes are “exploitation” rights, in line with his distinction set out in paragraph 38 of the judgment.<sup>191</sup> In other words, the state has taken custodianship of “exploitation rights,” but has not acquired “ownership of the minerals,” as Agri South Africa had alleged in its application. Furthermore, he is critical of what he calls a “too narrow” view of acquisition whereby individual property rights are physically transferred from one holder (i.e. the private owner) to another (in this instance, the state).<sup>192</sup> Unlike situations where, for example, the state acquires land for governmental projects or acquiring mineral rights so that it could exploit such rights on its own, the state is not seeking to acquire mineral rights through the enactment of the MPRDA for its own purposes. The aim of the MPRDA is simply to enable the state to act as a facilitator to provide broader and equitable access to mineral and petroleum resources. What’s more, according to Moegoeng CJ, the core content of the mineral right was left intact save for the holder’s right to sterilise the minerals in question. All rights holders were afforded an opportunity to convert their rights to new order rights, and enjoy them in almost the same way as they had done previously. It is simply an unfortunate fact that some holders, due to their precarious financial position, were unable to apply for a conversion. For this reason, the Constitutional Court in *Agri SA*, through Moegoeng CJ, held that the state did not acquire ownership of “old order mineral rights” through

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<sup>189</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 52.

<sup>190</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 52.

<sup>191</sup> According to Moegoeng CJ “exploitation rights” could refer to a traditional “right to mine”, whereas “ownership of the minerals” could replace the concept of “mineral rights”.

<sup>192</sup> See *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 63, as well as section 3.3.2 above.

the effect of the MPRDA. The court did not discuss "mineral rights" that did not fall under the ambit of the MPRDA's definition of "old order rights."

In the *Sishen* case,<sup>193</sup> Jafta J illustrated the aim of the MPRDA through a purposive perspective. Whereas the *Minerals Act* provided that only mineral owners could be granted permission to mine, this meant that the majority of the country's population were automatically excluded from partaking in the mining industry. Very few black people owned land due to legal instruments prohibiting ownership.<sup>194</sup> As a result, a drastic overhaul of the legal regime was necessary to open up opportunities for blacks to enter the industry, which was one of the main aims of the MPRDA. Since the MPRDA was enacted to overhaul the apartheid structures in the mining industry, in the words of Jafta, "it had to destroy the lifeline of those structures".<sup>195</sup> In doing so, the MPRDA abolished private ownership of mineral rights.<sup>196</sup> Although old order rights were, to some extent, kept intact for a window period by the transitional arrangements in the MPRDA, they ceased to exist upon conversion or once the window period lapsed. Ownership of all mineral and petroleum resources is now vested in the nation, according to the court in *Sishen*.<sup>197</sup>

#### 4.2 Effect of state custodianship from a constitutional property clause perspective

As established in the previous subsection, the Constitutional Court in *Sishen*<sup>198</sup> confirmed that the MPRDA vested ownership of the country's mineral resources "in the nation." Dale *et al* were of the opinion that although the owner of the land remains the owner of the minerals *in situ*, his competence or right to exploit such minerals has been destroyed by the Act in the sense that it has been removed *in toto* from South African law.<sup>199</sup> This phenomenon has been described as as institutional

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<sup>193</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 2 SA 603 (CC).

<sup>194</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 2 SA 603 (CC) at par 13.

<sup>195</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 2 SA 603 (CC) at par 16.

<sup>196</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 2 SA 603 (CC) at par 16.

<sup>197</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 2 SA 603 (CC) at par 16.

<sup>198</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 2 SA 603 (CC).

<sup>199</sup> Dale *et al* *South African Mineral and Petroleum Law* MPRDA-123. In *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) the Supreme Court of Appeal relied on a doctoral

expropriation in that the legal institution of the rights of an owner to deal with and to exploit his minerals has been obliterated in South African law.<sup>200</sup> Although Dale *et al* wrote their view prior to the judgments in *Agri SA* and *Sishen*, more recently Van der Walt supported this notion. He noted that even prior to the enactment of the MPRDA, the creation, recognition and protection of mineral and mining rights were extensively regulated by a host of mining and mineral rights.<sup>201</sup> The difference, however, is that pre-2002 mineral rights were recognised as valuable property interests that could be held in private ownership, even if they were subject to extensive state regulation. This situation was radically changed by the MPRDA, which, instead of extending or amending this regulatory scheme based on private ownership, replaced the existing rights-based regime with a licence-based regime.<sup>202</sup> This was achieved by a process whereby owners of so-called "old order rights" had an opportunity to convert their rights to "new order rights," failing which they would permanently lose those rights. Van der Walt lists various reasons why these "new order rights" could generally be described as weaker than their old order counterparts.<sup>203</sup>

The remaining issue that needs to be addressed is whether such a radical regime change to the legal regime is constitutionally valid in light of section 25 of the Bill of Rights. According to Van der Walt, this question raises both an institutional and an individual issue regarding constitutional validity.<sup>204</sup> The institutional issue is whether abolishing a whole dispensation or regime of existing private rights and replacing it with a state-controlled system of use rights, licences and permits is constitutionally permissible.<sup>205</sup> Critics of the new mineral regime would argue that such an extensive regime change amounts to nationalisation; on the other hand, it could be argued that

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thesis by Dale (published in 1979) to conclude that the development of mineral rights in South Africa was always based on the basic premise that the right to mine is under the suzerainty of the state and that the MPRDA is simply the latest iteration of legislation that confirms that principle. The court did not make mention of Dale's later submission that the MPRDA effected a form of institutional expropriation, nor to Van der Walt's distinction between the inherent value of old order rights as opposed to new order rights (see footnote 78 below).

<sup>200</sup> Dale *et al South African Mineral and Petroleum Law* MPRDA-123.

<sup>201</sup> Van der Walt *Constitutional Property Law* 404.

<sup>202</sup> Van der Walt *Constitutional Property Law* 404.

<sup>203</sup> Van der Walt *Constitutional Property Law* 407-408. Firstly, according to Van der Walt, new order rights do not automatically vest in the holders of their old order predecessors, but had to be applied for. Secondly they are not permanent like their predecessors or most real rights in the traditional private law system. Thirdly they cannot be transferred and encumbered freely like their predecessors, but only with the written consent of the Minister of Mineral Resources.

<sup>204</sup> Van der Walt *Constitutional Property Law* 411.

<sup>205</sup> Van der Walt *Constitutional Property Law* 412.

the new constitutional dispensation authorises and even requires transformation of the old system, based on the legitimate constitutional goals of reforming a dispensation characterised by inequality and injustices and ensuring sustainable use of scarce natural resources, provided that the transformational scheme is rationally legitimate and procedurally fair.<sup>206</sup>

Section 25(4)(a) of the Constitution enjoins the courts to bear in mind, as they interpret section 25, that the public interest referred to in section 25(2) includes the nation's commitment to land reform and reforms to bring about equitable access to the country's natural resources. Whether the institutional change is legitimate would, however, not only depend on the existing of compelling reasons, but also whether adequate provision was made to ensure procedural fairness and compensation for individual losses caused by it.<sup>207</sup>

As noted above, in the *Agri SA* majority judgement,<sup>208</sup> Moegoeng CJ found that, to prove expropriation a claimant have to establish that the state has acquired the substance or core content of what he was deprived of.<sup>209</sup> In his view this was not the effect of the MPRDA. Froneman J, in a minority judgment, criticised his colleagues' overemphasis on the element of acquisition in determining whether expropriation

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<sup>206</sup> German law provides a good argument in favour of such an institutional regime change, particularly since the German constitution, unlike its South African counterpart, makes a clear distinction between an institutional and an individual property guarantee, which implies even stricter scrutiny of institutional changes. According to German theory, the so-called positively framed part of article 14.1 GG of the German constitution guarantees the institution of private ownership against abolition, while the negatively framed part of article 14.1 guarantees individual property interests against unfair state interference. In this regard see Van der Walt *Constitutional Property Law* 414-416. See BVerfGE 24, 367 (1968) (*Deichordnung*); BVerfGE 58, 300 (1981) (*Naßauskiesung*); BVerfGE 83, 201 (1991) (*Vorkaufsrecht*).

<sup>207</sup> Van der Walt *Constitutional Property Law* 416. In BVerfGE 24, 367 (1968) (*Deichordnung*) a new law was passed which reclassified property that constituted or contained dykes or flood installations in the Hamburg area as public property, subsequent to a major flood in the area. The law had the effect of removing the affected property from the property market and the German civil code. The property would in future be administered by the city and dyke management institutions. Provision was made for re-transfer of property into private hands as soon as it was no longer needed for this purpose and for compensation to private landowners who suffered loss because of this change. The Federal Constitutional Court (FCC) decided that this law was justified by the importance of the purpose, which was clearly in the public interest. A later decision (BVerfGE 42, 263 (1976) (*Contergan*)), referred to by Van der Walt, went even further. A law was passed which transformed a private-law fund – set up with money from a delictual settlement between the producers and some victims of a pregnancy drug – into a public-law fund, added public money into it and reopened the fund for potential claimants who were not parties to the original settlement. The scheme was upheld by the FCC even though it replaced the system of private rights with a system of public rights and even though it reduced the money value of the initial claims based on a civil judgment.

<sup>208</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC).

<sup>209</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at par 58.

had been effected by the MPRDA.<sup>210</sup> He noted that the MPRDA "abolished private ownership of minerals, based either on land ownership or the holding of severed real rights to the minerals which existed under the mining law dispensation enacted prior to the Constitution."<sup>211</sup> While Froneman J did not object to such an "institutional change of the legal regime," he objected to the approach adopted in the majority judgment of laying down general and definitive requirements of what constitutes acquisition and then to determine whether these requirements were met in a particular case.<sup>212</sup> What the MPRDA seeks to do is to balance existing rights with the public interest, by ensuring the continuation of a substituted form of the pre-existing right for a limited period of time, during which the pre-existing rights holder is afforded an exclusive right to convert this into new order rights. According to Froneman J, this is known as "compensation in kind" and the transitional provisions of the MPRDA must thus also be interpreted as "compensation in kind" measures.<sup>213</sup> Although pre-existing rights holders were expropriated of their old order rights to minerals, they were compensated "in kind" by having an opportunity to apply for a continuation of their rights, albeit with slightly different rights of use and disposal than what they were previously entitled to. This form of compensation is, however, only afforded to those who wished to exploit the minerals to which they held pre-MPRDA rights, whilst old order rights obviously also held non-exploitative value.<sup>214</sup> The MPRDA's transitional provisions provided no "compensation in kind" to persons who did not wish to exploit the minerals to which they held pre-existing mining rights. According to Froneman J, persons falling into this category would have the best chance of succeeding with an expropriation claim provided for by the MPRDA.<sup>215</sup>

### 4.3 Summary

In this section the main question to be addressed was whether section 3(1) of the MPRDA, which placed the country's mineral resources under the custodianship of the state, had the effect of vesting ownership of minerals *in situ* in the state. The

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<sup>210</sup> *Agri SA v Minister of Mineral Resources* 2012 4 SA 1 (CC) at 25C-D.

<sup>211</sup> *Agri SA v Minister of Mineral Resources* 2012 4 SA 1 (CC) at 25D-E.

<sup>212</sup> *Agri SA v Minister of Mineral Resources* 2012 4 SA 1 (CC) at 25D-E; 28C.

<sup>213</sup> *Agri SA v Minister of Mineral Resources* 2012 4 SA 1 (CC) at 29E; 30D.

<sup>214</sup> This is because the holder of an old order right, instead of exploiting the minerals on his property by himself, also had the option of separating the mineral right from the *dominium* of the land, and leasing or ceding it to third parties in return for compensation.

<sup>215</sup> *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) at 36B-C.

Constitutional Court, in its *Sishen* judgment, made it very clear that mineral and petroleum resources now vests in the nation and that the MPRDA abolished private ownership of mineral rights. This, according to Dale *et al* and Van der Walt, amounts to a form of "institutional expropriation," in that an entire system of private-law rights has been replaced by a system of licences and permits under the authority of the state. Although mineral rights in South Africa has always been subject to extensive state regulations, holders of old order rights could nonetheless freely dispose of their rights, which is no longer the case. This has a clear monetary effect on the value of a pre-MPRDA holder's patrimony as illustrated above. The Constitutional Court, in the majority judgment in *Agri SA*, held that the MPRDA effected no expropriation of old order mineral rights, as the state never intended, nor was permitted, to acquire those rights. Froneman J, however, criticised this strict reliance on acquisition as a requirement for expropriation, and supported the view that the MPRDA amounts to an institutional change of the legal regime, albeit one that is justifiable given South Africa's previous economic dispensation and the constitutional imperative to reform access to land and natural resources. What the MPRDA seeks to do, according to Froneman J, is provide "compensation in kind" for rights holders affected by the institutional regime change, by affording them an opportunity to convert their old order rights to MPRDA rights. For the majority of rights holders, who wish to exploit the minerals they held rights to under the previous dispensation, this form of compensation would be sufficient. Pre-MPRDA holders, who do not wish to exploit their rights to minerals, would have a possible right to recourse under item 12 of Schedule I of the MPRDA. It is submitted that the view of Dale and Van der Walt, supported by the minority judgment of Froneman J, is correct; that the MPRDA did effect institutional expropriation.

## **5 Conclusion**

The research question to this study was whether the amendments made to the MPRDA, as well as proposed further amendments in terms of the Draft Bill, constitute expropriation of holders' rights to minerals contained in tailings left on historic mining sites. The two most important provisions of the MPRDAA for purposes of this study were the amendments to the definitions of residue deposits and residue stockpiles. The Draft Bill proposes further amendments to these

definitions, as well as amending the definition of land, as set out in the introduction. Furthermore the Draft Bill introduces the concept of historic residue stockpiles which, according to the proposed new section 42A to the Act, will give owners of tailings dumps the exclusive option to apply for mining rights over their tailings. After this period, tailings in respect of which mining rights were not applied will revert to the state's custodianship. As stated in the introduction, the *Minerals Act* had only a definition for tailings, which were defined as "any waste rock, slimes or residue derived from any mining operation or processing of any mineral."<sup>216</sup> The MPRDA had no definition for tailings, but included it in its definition of residue stockpiles, namely "any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right." This must be read conjunctively with the MPRDA's definition of residue deposits which are described as "any residue stockpiles that were left on a historical mining area after operations had ceased or the relevant mining licence had expired."<sup>217</sup> The MPRDAA amended these definitions by adding the phrase "... or an old order right," at the end of both. In effect this would mean that "tailings... which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of... an old order right," is now clearly placed under the legal regime of the MPRDA. It was established in the sections above that the MPRDA had the effect of abolishing old order rights to minerals completely and vesting the country's mineral and petroleum resources in the nation. A "mineral" is described in section 1 of the MPRDA to mean "any sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits." It follows then that the rights to minerals in historic tailings dumps are now also regarded as vesting in the nation. The Draft Bill goes even further with its amending of the definition of "land," effectively changing tailings from movable property created through severance, to immovable property under state custodianship. This is an approach not dissimilar to the public trust doctrine developed in American law, which Van der Schyff suggests has been incorporated in South African law, first through a change in the water law regime and then through environmental law. In terms of the public trust doctrine, the state

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<sup>216</sup> S 1 of the *Minerals Act* 50 of 1991.

<sup>217</sup> Definition of "residue deposit" in s 1 of the MPRDA.

acquires a class of property, albeit under a different title than traditional private-law ownership. It could be said to resemble a form of *res publicae*, with the difference that the state does not actually own the property, but acts as its trustee for the benefit of the nation as a whole.

The *Minerals Act* previously described a “holder” – in relation to the right to a mineral which occurs in or on tailings – as being the person who is the holder of the mining right (in respect of the land) from which such tailings have been produced. In other words, a person who holds a right to minerals over a certain property is also the holder of mineral rights in relation to any tailings which are produced from mining operations in terms of that right. This would be the mining company operating on the property, regardless of whether that company is also the owner of the land or not. Section 5(1) of the *Minerals Act* stated that the holder of a right to any mineral in respect of land or tailings shall have the right to enter upon such land or the land on which the tailings are situated; and to prospect and mine for such mineral on or in such land or tailings. The holder also had a right to freely dispose of that right in terms of the same section. This means that a mining company had a clear statutory right to minerals contained in tailings produced from its mining operations in terms of the *Minerals Act*, although this was qualified by section 5(2) of the same act, which provided that a holder needed a mining authorisation to prospect or mine for minerals in terms of the said right. The authority to freely dispose of such a right to minerals, however, had a clear economic value for the holder and, if such holder was also the landowner, would also have added to the value of the property in question.<sup>218</sup> The MPRDA has replaced this rights-based regime with a licence-based regime which removed a landowner's rights to use and dispose of a right to mine without consent of the state. This can be said to amount to institutional expropriation, meaning that the entire institution of private ownership regarding a specific legal object, has been abolished.

It is submitted that there are sound policy reasons for bringing tailings dumps in line with the mineral legal regime in South Africa, of which considerations of black economic empowerment are the most important. The state has an obligation to expand historically disadvantaged persons' entry and participation in the mining

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<sup>218</sup> See *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) at par 51.

sector, which can be deduced from the objects of the MPRDA in section 2, as well as the principle of state custodianship as set out in section 3.<sup>219</sup> However, it is also commonly accepted that mining is one of the most capital-intensive industries in any economy, requiring huge capital outlay from the outset, which many new entrants to the industry will simply not have. One way to promote more opportunities is for the state to grant prospecting and mining licences to unused or underutilised tailings dumps, which, relative to deep underground or opencast mining, is arguably a much more affordable method of extracting minerals, whilst still yielding sufficient revenue as to be economically viable. Whether re-processing of tailings dumps is indeed an economically viable alternative to traditional methods of mining, is beyond the scope of this study, suffice to say that it would arguably satisfy the reasonableness element for institutional expropriation to be constitutionally valid.

The second important consideration is that of compensation. Institutional expropriation, like traditional expropriation, would require payment of compensation in terms of section 25(2) of the Constitution. However, according to Froneman J, this matter can be dealt with by considering the nature of compensation. By providing old-order rights holders with an exclusive opportunity to convert their old-order rights to new order rights in terms of the new proposed section 42A, the legislature intends to provide affected rights holders with "compensation in kind," which doesn't have a monetary value *per se*, but which nonetheless ensures that the affected party does not incur patrimonial damage as a result of the legal regime reform.

In conclusion it is submitted that the particular amendments to the MPRDA which this study was concerned with, amounts to expropriation of a holder's rights to minerals contained in historic tailings dumps, and that compensation will be provided for in the proposed new Draft Bill.

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<sup>219</sup> See s 2(c) and (d), and 3(1) of the MPRDA.

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