

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

by

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## **Abstract**

Since the enactment of the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA) a fundamental conflict arose between the rights of a holder of either a prospecting or a mining right, and that of a landowner. On the one hand this can be explained by having regard to the impact the granting of a prospecting or a mining right may have on the rights of the landowner to whose land such a right relates. On the other hand, section 25 of the *Constitution of the Republic of South Africa, 1996* (Constitution), provides for the protection of property to a certain extent. The protection that the Constitution affords to a landowner, together with the rights granted to the holder of a prospecting or a mining right by the MPRDA, is the cause of such a fundamental conflict.

It is against this background that this study seeks to determine to what extent the MPRDA provides for the protection of a landowner's rights, having regard to the rights granted to the holder of a prospecting or a mining right, which is considered against the protection of property as afforded by the Constitution.

**Keywords:** Deprivation, expropriation, prospecting right, mining right, landowner, constitutionality, protection.

## Opsomming

Sedert die inwerkingtreding van die *Mineral and Petroleum Resources Development Act* 28 van 2002 (MPRDA) het 'n fundamentele konflik tussen die regte van 'n houer van 'n prospekter- of 'n mynreg, en die van 'n grondeienaar ontstaan. Aan die een kant kan die rede hiervoor verduidelik word deur te kyk na die impak wat die toestaan van 'n prospekter- of 'n mynreg het op die reg van 'n grondeienaar op wie so 'n prospekter- of mynreg betrekking het. Aan die ander kant maak artikel 25 van die *Grondwet van die Republiek van Suid-Afrika*, 1996 (Grondwet) voorsiening vir die beskerming van eiendom tot 'n sekere mate. Die fundamentele konflik word dus veroorsaak deur die beskerming wat die Grondwet aan 'n grondeienaar bied, teenoor die regte wat verleen word aan die houer van 'n prospekter- of 'n mynreg deur die MPRDA.

Dit is teen hierdie agtergrond wat hierdie studie poog om te bepaal tot in watter mate voorsiening gemaak word vir die beskerming van 'n grondeienaar se regte deur die MPRDA, terwyl daar ook gelet word op die regte wat aan 'n houer van 'n prospekter- of mynreg verleen word. Bogenoemde word dan ook beskou met inagneming van die beskerming wat die Grondwet aan eiendom verleen.

Trefwoorde: Ontneming, onteining, prospekterreg, mynreg, grondeienaar, grondwetlikheid, beskerming.

## List of abbreviations

ASSAL	Annual Survey of South African Law
CILSA	Comparative and International Law Journal of Southern Africa
CONSTITUTION	<i>Constitution of the Republic of South Africa</i> , 1996
EIA	Environmental Impact Assessment
IAP	Interested and affected party
MPRDA	<i>Mineral and Petroleum Resources Development Act</i> 28 of 2002
MPRDAA	<i>Mineral and Petroleum Resources Development Amendment Act</i> 49 of 2008
NEMA	<i>National Environmental Management Act</i> 107 of 1998
NEMAA	<i>National Environmental Management Amendment Act</i> 62 of 2008
SAJHR	South African Journal on Human Rights
SAPL	South African Public Law
STELL	Stellenbosch Law Review
THRHR	Journal of Contemporary Roman-Dutch Law
TSAR	Journal of South African Law

## 1 Introduction

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

The most comprehensive legal relationship a person (landowner) can have with regard to his<sup>2</sup> property (land) is known as ownership.<sup>3</sup> It is difficult to give an all-encompassing definition of ownership, but it can briefly be described as the most complete right a legal subject can have in relation to an object. This implies that the owner has the most comprehensive and absolute entitlements to his property.<sup>4</sup> However, it does not imply that ownership is absolute or has no limits at all. Ownership can *inter alia* be limited by the objective law, namely legislation and neighbour law, and by the subjective rights of other persons, namely limited real rights and personal rights.<sup>5</sup>

The *Constitution of the Republic of South Africa*, 1996 (hereafter Constitution) provides for the limitation of ownership<sup>6</sup> as contemplated above. The Constitution is the supreme law of the Republic, and any law or conduct inconsistent with it, is invalid. Section 25 of the Constitution, also known as the property clause,<sup>7</sup> guarantees the continued existence of the institution of property, *inter alia* ownership, but it also permits state

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

2 For ease of reading, the researcher will only refer to *his* from here onward.

3 See Badenhorst, Pienaar and Mostert *The Law of Property* 91-95.

4 See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-8.

5 Mostert and Pope (eds) *The Principles of the Law of Property* 91-92.

6 S 25 of the Constitution only refers to *property*, and does not specifically mention *ownership*, which forms part of the focus of this research. It should be noted however, that ownership is a right to property, and as such falls within the ambit of property as set out in s 25 of the Constitution; see Currie and De Waal *The Bill of Rights Handbook* 536-540 and Budlender "The Constitutional Protection of Property Rights" 1-19; see also Van der Walt *The Constitutional Property Clause* 30-71, Chaskalson and Lewis "Property" 2-6 and Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 63-68.

7 See Van der Walt *The Constitutional Property Clause* 3.

interference (infringement) in limited circumstances. This section prescribes the conditions under which an infringement on property will be constitutionally justifiable. Such infringement may take the form of deprivation, in terms of section 25(1), or expropriation, in terms of section 25(2).<sup>8</sup>

The *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter MPRDA) is a statute that seemingly allows for the infringement on a person's ownership over his land (property), as permitted by the Constitution.<sup>9</sup> This presumption is derived from the fact that the MPRDA confers a range of entitlements upon the holder of a prospecting right or a mining right,<sup>10</sup> with regard to land belonging to another.<sup>11</sup> In *Meepo v Kotze*<sup>12</sup> the Court stated that

a consideration of the provisions of the MPRDA inevitably leads to a realisation of the conflict between the rights of a holder of a prospecting or a mining right, and that of a landowner.<sup>13</sup>

Although section 25 of the Constitution allows for such a conflict, *id est* the infringement on property (ownership) by way of deprivation or expropriation, as a consequence, it also inadvertently protects the institution of property up to the extent to which the criteria for the valid deprivation and expropriation of property are prescribed. Consequently,

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8 Mostert and Pope (eds) *The Principles of the Law of Property* 119.

9 Whether such an infringement complies with the constitutional requirements will be discussed at a later stage.

10 The MPRDA also confers similar entitlements to the holder of a mining permit, an exploration right and a production right, but this research will only focus on the entitlements granted to the holder of a prospecting right or a mining right.

11 See *Agri South Africa v Minister of Minerals and Energy and Another* 2011 3 All SA 296 (GNP) par [44] and [52] (hereafter *Agri-case*). Take note that the MPRDA also abolished the *cuius est solum*-rule, however, this principle will be discussed at a later stage, see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-11.

12 *Meepo v Kotze* 2008 1 SA 104 (NC) (hereafter *Meepo-case*).

13 Par [8].

section 25 of the Constitution also protects property (ownership) to a certain extent.<sup>14</sup>

Similarly, although the MPRDA seemingly allows for the infringement on ownership of land, it also makes provision for the interests of landowners whose ownership may be affected by the granting of either a prospecting right or a mining right, through *inter alia* sections 5(4)(c), 16(4)(b), 22(4)(b) and 54.<sup>15</sup>

This research will attempt to determine to what extent the MPRDA provides for the protection of landowner's rights, especially considering that it is the MPRDA that allows for an apparent infringement on the ownership of land by conferring certain entitlements to the holder of a prospecting right or a mining right. Therefore, this research will focus on this apparent infringement as brought about by the MPRDA, together with the measures incorporated in the MPRDA to protect the rights of landowners, as well as the constitutionality of this apparent infringement and potentially protective measures.

The question, which forms the basis of this study, is whether the measures incorporated in the MPRDA are adequate to protect the constitutional property rights of a landowner, if a prospecting right or a mining right is granted on his land.

The point of departure to address this problem will be to discuss a few theoretical concepts, *id est* ownership, and the possible limitations on such ownership. Thereafter the implication of section 25 of the Constitution will

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14 Although s 25 of the Constitution is formulated negatively (*ie* a negative property clause), it is still an appropriate formulation for the constitutional *protection* of property; see *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) par [72] and Van der Walt *Constitutional Property Law* 26-32. Take note that all constitutional property clauses have this inherent tension between the protection of existing rights and the state's power to infringe on it, see Du Plessis *Compensation for Expropriation under the Constitution* 78.

15 Although speculative, it is the obvious conclusion considering the content of these sections.

be discussed. This will be done by critically analysing the concepts of both deprivation and expropriation. This will be followed by an essential discussion of the relevant provisions of the MPRDA, as well as the apparent imposition on ownership as brought about by the MPRDA. Should the research confirm that such an imposition exists, then the rights of landowners on the one hand, and those of the holders of a prospecting right or a mining right on the other hand, as prescribed by the MPRDA, will be examined. Thereafter these rights will be considered taking into account the constitutional provisions regarding property, that is, section 25 of the Constitution.<sup>16</sup> Finally this research will conclude by establishing whether the measures incorporated in the MPRDA are adequate to protect the constitutional property rights of a landowner, if a prospecting right or a mining right is granted on such an owner's land.

## **2 Overview of the content and extent of ownership**

### **2.1 Ownership**

Ownership can be described as the most complete right a legal subject can have in relation to an object.<sup>17</sup> It is the most comprehensive right that a person can have regarding a thing, because ownership is the real right that potentially confers the broadest range of entitlements to such a thing.<sup>18</sup> Ownership is often described with reference to this collection of entitlements,<sup>19</sup> although these entitlements flowing from ownership do not necessarily provide a complete picture of all the entitlements inherent in ownership.<sup>20</sup> The different entitlements that an owner can have depend on the specific type of property, and the governing circumstances of each situation.<sup>21</sup> The general principle is that the owner can do with his property

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16 In other words deprivation and expropriation.

17 See Badenhorst, Pienaar and Mostert *The Law of Property* 91-95, Mostert and Pope (eds) *The Principles of the Law of Property* 89-95, and Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-7-1-8 for a comprehensive analysis of the concept of ownership.

18 Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-8.

19 Badenhorst, Pienaar and Mostert *The Law of Property* 92.

20 Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9.

21 Mostert and Pope (eds) *The Principles of the Law of Property* 92.

as he deems fit.<sup>22</sup> This principle is derived from the entitlements usually associated with ownership, which include, but is not limited to, the following:

- the entitlement to use and enjoy the thing;
- the entitlement to possess the thing;
- the entitlement to the fruits, including the income from the thing;
- the entitlement to alienation and encumbrance of the thing;
- the entitlement to consume and destroy the thing;
- the entitlement to claim the thing from any unlawful possessor; and
- the entitlement to resist any unlawful invasion.<sup>23</sup>

According to the common law, ownership is regarded as *plena in re potestas*.<sup>24</sup> This implies that ownership is absolute and unrestricted, which is sustained by the two common law features of ownership, the maxims *superficies solo cedit*,<sup>25</sup> and *cuius est solum eius est usque ad coelum et ad inferos*.<sup>26</sup> The maxim *superficies solo cedit* suggests that everything attached to a specific piece of land belongs to the owner of that land. The *cuius est solum* maxim suggests that boundaries are only established vertically and not horizontally, which implies that the owner of the land is the owner of the sky above and everything contained in the soil.<sup>27</sup> However, this traditional view of ownership as full and uninhibited power over a thing can no longer be accepted in the modern socio-economic context.<sup>28</sup> This is derived from the view of our courts on ownership of

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22 *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 106-107.

23 Badenhorst, Pienaar and Mostert *The Law of Property* 92-93, see also Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9 and Van der Walt and Pienaar *Inleiding tot die Sakereg* 45-47.

24 The most extensive power of control and disposition over a thing; see Cowen (ed) *Cowen on Law: Selected Essays* 300-301 for a discussion of this principle, see also Mostert and Pope (eds) *The Principles of the Law of Property* 116.

25 The principle of accession.

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

27 See Badenhorst, Pienaar and Mostert *The Law of Property* 92, Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9-1-12, and Cowen (ed) *Cowen on Law: Selected Essays* 300-301 for a discussion of these two maxims.

28 Milton "Ownership" 697; see also Badenhorst, Pienaar and Mostert *The Law of Property* 93.

immovable property as expressed by Acting Judge Spoelstra in *Gien v Gien*.<sup>29</sup>

Ownership is the most complete real right a person can have with regard to a thing. 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 restrictions placed upon it by the rights of others. For this reason no owner ever has the unlimited right to exercise his entitlements in absolute freedom and in his own discretion.

This was not the first time the changing perception of ownership was expressed in a court, as seen from this *dictum* of Acting Chief Justice MacDonald in *King v Dykes*<sup>30</sup> when he stated that:

The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world. Legislation dealing with such matters ... all bear eloquent testimony of the existence of this more civilized and enlightened attitude towards the rights conferred by ownership of land [referring to legislative limitations on ownership].

Therefore, even though ownership is the most complete right a person can have with regard to a thing, it is not absolute or unlimited. Practically it means that one or more of the entitlements flowing from ownership may be taken away from, or disposed of by such owner.<sup>31</sup> This can occur through, *inter alia*, the subjective rights of other persons, which consist of limited real rights and personal rights, or by the objective law, which consist of legislation and neighbour law.<sup>32</sup> When an owner is deprived of an entitlement, or when he disposes of such an entitlement, the ownership

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29 *Gien v Gien* 1979 2 SA 1113 (T) 1120C-E.

30 *King v Dykes* 1971 3 SA 540 (RA) 545.

31 Take note that the owner can be deprived of an entitlement, or he can dispose of such an entitlement himself; see Badenhorst, Pienaar and Mostert *The Law of Property* 93.

32 Mostert and Pope (eds) *The Principles of the Law of Property* 95.

becomes limited. The possibility of such limitation is the reason why ownership is no longer regarded as absolute.<sup>33</sup>

From the discussion that will follow, it will become clear that all types of limitations on ownership do not necessarily occur voluntarily, or with the owner's consent.<sup>34</sup> However, considering the new constitutional era, where the Constitution is the supreme law of the Republic of South Africa,<sup>35</sup> constitutional requirements still have to be met for limitations on property (ownership)<sup>36</sup> to be justified.<sup>37</sup> These constitutional requirements are an integral part of this research, and will be discussed in depth hereunder. Before this will be done, however, a summary of the different types of limitations on ownership will follow to create some perspective in this regard.

## **2.2 Limitations**

Ownership can be limited by private law and public law; hence, there are different types of limitations.<sup>38</sup> These different limitations will be discussed separately for the sake of clarity.<sup>39</sup>

### **2.2.1 Private law**

Private law limitations are brought about by the rights of other persons, which include limited real rights (also known as *iura in re aliena*), personal rights and the rights of neighbours.<sup>40</sup>

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33 A further characteristic of ownership is that it is residuary, see Badenhorst, Pienaar and Mostert *The Law of Property* 93; However, this is not the case with expropriation, see *Harvey v Umhlathuze Municipality and Others* 2011 1 SA 601 (KZP).

34 This is why an owner cannot only dispose of his entitlements, but can also be deprived of such entitlements.

35 S 2 of the Constitution.

36 See note 6 above.

37 S 25 of the Constitution, *ie* deprivation and expropriation.

38 Mostert and Pope (eds) *The Principles of the Law of Property* 117, Badenhorst, Pienaar and Mostert *The Law of Property* 95.

39 This discussion will take the form of a summary, as not all of these limitations fall within the scope of this research.

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

### 2.2.1.1 Limited real rights

Limited real rights are similar to ownership, but ownership is independent, whereas a limited real right is derived from that ownership.<sup>41</sup> In other words, the holder of a limited real right obtains a certain entitlement (limited real right) with regard to a specific property, from the owner of such property.<sup>42</sup> Therefore, a limited real right restricts ownership or diminishes the owner's *dominium* over this property. This takes place, either by conferring on the holder of a limited real right certain powers inherent in ownership, or by preventing the owner from exercising his right of ownership to its full capacity.<sup>43</sup> Examples of limited real rights include servitudes, pledges and mortgages.<sup>44</sup>

### 2.2.1.2 Personal rights

Personal rights are best defined with a comparison to limited real rights. Limited real rights establish a direct relationship between the person and the specific property, whereas personal rights establish a relationship between one person and another person in respect of a delictual or contractual obligation.<sup>45</sup> Notwithstanding this distinction, on occasion, it remains difficult to distinguish between real rights and personal rights. Fortunately, our courts have developed a special approach to distinguish between these rights when it becomes problematic.<sup>46</sup> The difference entails that the holder of a real right can enforce his right against any person with regard to a specific property, whereas a personal right is only

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41 See Badenhorst, Pienaar and Mostert *The Law of Property* 297-328 for an in depth discussion of limited real rights, see also Mostert and Pope (eds) *The Principles of the Law of Property* 43.

42 This can occur voluntarily or through the operation of law.

43 Du Bois (ed) *Wille's Principles of South African Law* 435.

44 South African law do not recognise a *numerous clausus* of real rights, therefore this list is not exhaustive; see Du Bois (ed) *Wille's Principles of South African Law* 431-432.

45 Mostert and Pope (eds) *The Principles of the Law of Property* 45.

46 Mostert and Pope (eds) *The Principles of the Law of Property* 45. This approach is the *subtraction of the dominium*-test, see *Ex Parte Geldenhuys* 1926 OPD 155, *Lorentz v Melle and Others* 1978 3 SA 1044 (T) and *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (K); see also Carey Miller and Pope *Land Title in South Africa* 96-100.

enforceable against a specific person.<sup>47</sup> Take note that in relation to land, ownership can only be restricted by personal rights in strictly circumscribed circumstances.<sup>48</sup> The reason for this lies with the *Deeds Registries Act* 47 of 1973. In terms of this Act any condition that limits the ownership of land must be registered, and section 63(1) of the Act prescribes that no personal right shall be capable of registration. However, this section also prescribes that a personal right may be registered, if such a personal right is complimentary or otherwise ancillary to a registerable condition or right contained or conferred in a title deed; hence strictly circumscribed circumstances.<sup>49</sup>

### 2.2.1.3 Neighbour law

Neighbour law pertains to situations where an owner exercises his entitlements with regard to his property in close proximity to another owner who has similar entitlements with regard to his own property. In these situations, conflict can arise when the exercising of an entitlement infringes on the entitlements of the neighbouring owner. Neighbour law regulates the way in which such conflict between neighbours should be resolved. The general principle is that each owner is entitled to the use and enjoyment of his property, but this right must be exercised in a reasonable manner as to avoid unreasonable infringement of the neighbour's similar entitlement.<sup>50</sup> Therefore, ownership becomes limited when the exercising of a right with regard to a specific property must be reserved to avoid unreasonable infringement of another owner's similar right to his own property.

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47 This is known as the personalist theory. Another theory, known as the classical theory, has a different view with regard to this distinction; see Du Bois (ed) *Wille's Principles of South African Law* 428-430.

48 Mostert and Pope (eds) *The Principles of the Law of Property* 47, see also *Ex Parte Seunath* 1948 (4) SA 47 (T) 50.

49 See Carey Miller and Pope *Land Title in South Africa* 96-98.

50 This concept is known as *sic utere tuo ut alienum non laedas*, see Mostert and Pope (eds) *The Principles of the Law of Property* 132 and Van der Walt and Pienaar *Inleiding tot die Sakereg* 97. For an in depth discussion of neighbour law see Van der Walt *The Law of Neighbours*.

### 2.2.2 Public law

The vast majority of limitations on ownership originate from public law.<sup>51</sup> Public law limitations are imposed on all owners of a particular kind of property either for the benefit of society as a whole, or in the interest of certain sections of society.<sup>52</sup> Such limitations can be imposed through various ordinary statutes.<sup>53</sup> The limitations on ownership brought about by the MPRDA<sup>54</sup> or the *National Environmental Management Act* 107 of 1998 (hereafter NEMA),<sup>55</sup> can serve as examples of public law limitations. Take note however, that all limitations on ownership imposed by ordinary statutes must still be justified by the Constitution.<sup>56</sup> This occurs *via* sections 25 and 36 of the Constitution. Section 25 of the Constitution contains specific provisions regarding property (ownership),<sup>57</sup> and section 36 is the general limitation clause of the Constitution. A discussion of these sections will now follow.

## 3 Protection afforded to property in terms of the Constitution

Constitutional property clauses are notoriously difficult to interpret and it is unlikely that the interpretation of s 25 of the Constitution will be wholly spared these problems.<sup>58</sup>

According to section 2 of the Constitution, the Constitution is the supreme law of the Republic of South Africa. Any law or conduct inconsistent with it

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- 51 Mostert and Pope (eds) *The Principles of the Law of Property* 117.  
52 *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 2 SA 589 (N) 611A-B.  
53 Badenhorst, Pienaar and Mostert *The Law of Property* 97.  
54 These limitations are an essential part of this research, and will be discussed in depth hereunder.  
55 NEMA, in s 24, prescribes that an environmental authorisation is required before the commencement of certain activities; see also Mostert and Pope (eds) *The Principles of the Law of Property* 245-247.  
56 This is why s 25 protects ownership, see note 14 above; see also Mostert and Pope (eds) *The Principles of the Law of Property* 117 and Badenhorst and Malherbe 2001 TSAR 768.  
57 This includes deprivation and expropriation.  
58 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par [47] (hereafter *FNB-case*).

is invalid, and any obligation imposed by it, must be fulfilled.<sup>59</sup> Section 8 of the Constitution states that the Bill of Rights (chapter 2 of the Constitution), applies to all law, and binds the legislature, the executive, the judiciary and all organs of state, as well as natural and juristic persons.<sup>60</sup> Accordingly, the Constitution is the supreme law of South Africa, it is applicable to everyone in South Africa, and all other law has to comply with it. Section 25 of the Constitution contains specific provisions regarding property.<sup>61</sup> This section provides that no one may be deprived of property except in terms of law of general application, and such deprivation may not be arbitrary.<sup>62</sup> It also states that property may only be expropriated if it is for a public purpose or in the public interest, and such expropriation must be subject to compensation.<sup>63</sup> Thus, there are two important concepts in this section regarding property that require more attention, *id est* section 25(1), which provides for deprivation, and section 25(2), which provides for expropriation.

Before these two concepts are analysed separately hereunder, it is necessary to highlight a few features about them. Firstly, take note that all expropriations are deprivations, while only some deprivations are expropriations. In other words, expropriation is merely a particular species of deprivation,<sup>64</sup> which implies that there can be no expropriation if there is no deprivation.<sup>65</sup> Secondly, take note that it is sometimes difficult to distinguish between deprivation and expropriation.<sup>66</sup> It is however, very

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59 S 2 of the Constitution.

60 S 8(2) and (3) of the Constitution. The Bill of Rights can have direct or indirect application, depending on the presence of certain elements; see Currie and De Waal *The Bill of Rights Handbook* 32-35.

61 S 25 is also known as the property clause. Take note that s 25 falls within ch 2 of the Constitution, and as a result forms part of the Bill of Rights.

62 S 25(1) of the Constitution; see Badenhorst, Pienaar and Mostert *The Law of Property* 98.

63 S 25(2) of the Constitution; see Badenhorst, Pienaar and Mostert *The Law of Property* 540. Compensation must be determined in accordance with s 25(3) of the Constitution, and public interest is described in s 25(4) of the Constitution.

64 Deprivation will encompass all species of interference, and expropriation will only apply to a narrow species of interference, see *FNB-case* par [57]; see also *City of Cape Town v Rudolph* 2003 11 BCLR 123 (C) 1260F-G, Van der Walt *Constitutional Property Law* 181 and Currie and De Waal *The Bill of Rights Handbook* 541.

65 *Agri-case* par [8].

66 Mostert and Pope (eds) *The Principles of the Law of Property* 122.

important to be able to do so, for expropriations are subject to more stringent requirements, which include compensation.<sup>67</sup> Fortunately, a number of distinguishing characteristics exists that differentiate between these two concepts and these<sup>68</sup> can be scrutinized to determine whether a person is facing deprivation, or whether it is in fact expropriation.<sup>69</sup>

The most useful technique available to distinguish between these two concepts is to determine the intention with which a particular infringement of property is undertaken.<sup>70</sup> This intention refers to the reason for the infringement, or the purpose fulfilled by it, and as such can be analysed to determine whether it is deprivation or expropriation.<sup>71</sup> In this way, deprivation can be identified by the state's police power, that is, the power to execute regulatory measures without having to pay compensation.<sup>72</sup> Expropriation, on the other hand, can be identified by the power of eminent domain, that is, expropriation undertaken by the state being duly authorised by law, and upon payment of compensation.<sup>73</sup> Van der Walt<sup>74</sup> is also of the view that the power with which an infringement is authorised, together with its purpose and its effects are the best indicators available to determine whether an infringement amounts to either deprivation or expropriation, which supports the approach set out above.<sup>75</sup> Finally, take note that the

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67 Badenhorst, Pienaar and Mostert *The Law of Property* 541.

68 These characteristics include *inter alia* that expropriation takes place without the co-operation of the affected owner, it always involves a loss of property, the property is acquired by or on behalf of the state, it is brought about for a public purpose or public interest, there is some form of compensation, and it is a lawful exercise of legitimate state power. Other helpful techniques include determining the source of the power, the purpose of the limitation, the effect of the limitation, and the permanence thereof. See Van der Walt *Constitutional Property Law* 128-132 and 188-189.

69 Van der Walt *Constitutional Property Law* 128-132 and 188-189.

70 Badenhorst, Pienaar and Mostert *The Law of Property* 544.

71 The effect of an infringement on the holder of the affected interest (ownership) is a useful indicator of such intention. See Badenhorst, Pienaar and Mostert *The Law of Property* 540-544; See also Van der Walt *Constitutional Property Law* 128-132 and 188-189.

72 Badenhorst, Pienaar and Mostert *The Law of Property* 544.

73 Badenhorst, Pienaar and Mostert *The Law of Property* 544.

74 Van der Walt *Constitutional Property Law* 131.

75 This approach is similar, if not the same, as the one described above.

Constitution prescribes different requirements that have to be met for deprivation and expropriation to be constitutionally valid.<sup>76</sup>

### 3.1 Deprivation

Section 25(1) of the Constitution provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". The term *deprived* may lead to confusion because it "create[s] the mistaken impression that ... [it] refers to the taking away of property", as Van der Walt<sup>77</sup> pointed out. Judge Ackermann, in the *FNB*-case, resolved such confusion by stipulating that deprivation includes any interference with the use, enjoyment or exploitation of private property.<sup>78</sup> Take note that in a subsequent Constitutional Court case,<sup>79</sup> Judge Yacoob stated that:

whether there has been a deprivation depends on the extent of the interference with, or limitation of the use, enjoyment or exploitation [of property]. At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.<sup>80</sup>

Van der Walt, on the other hand, is of the view that this judgment cannot be accepted as a definition of deprivation.<sup>81</sup> He convincingly argues that, in determining whether deprivation has in fact occurred, "the simplest solution is to assume that every restriction on property, no matter how small or insubstantial, constitutes deprivation in terms of section 25(1) of the Constitution, and therefore it is subject to the requirements as set out in section 25(1)".<sup>82</sup> However, in the more recent *Agri*-case Judge Du Plessis

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76 S 25(1) and s 25(2) of the Constitution.

77 Van der Walt *Constitutional Property Law* 121; *FNB*-case par [57].

78 Currie and De Waal *The Bill of Rights Handbook* 541; *FNB*-case par [57].

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

80 *Mkontwana*-case par [32].

81 It was made subject to a disclaimer; see Van der Walt *Constitutional Property Law* 127.

82 Consequently s 25(1) allows for a wide category of limitations on property, see Van der Walt *The Constitutional Property Clause* 102, 127-128.

referred back to the definition of deprivation as given by Judge Yacoob, but he also added that deprivation should

not be given too limited a meaning. It should be emphasised however, that there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute 'deprivations' for the purpose of s 25(1).<sup>83</sup>

Therefore, for the purpose of this research, Judge Yacoob's description of deprivation will suffice.<sup>84</sup> Section 25(1) of the Constitution prescribes two requirements that have to be met for deprivation to be constitutionally valid. Firstly, section 25(1) prescribes that deprivation must be undertaken in terms of law of general application, and secondly it prescribes that no law may permit arbitrary deprivation.<sup>85</sup> These requirements will be discussed separately hereunder.

### 3.1.1 *Law of general application*

The requirement of law of general application is divided into two components, that is, deprivation must be authorised by law, and the law must be of general application. The first component is self-explanatory in that deprivation must be authorised by law,<sup>86</sup> the second requires that the law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application.<sup>87</sup> In theory, these two components can be summarized as having to satisfy the requirements of generality, non-

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83 See *Agri-case* par [64], this was the minority judgment of Judge O'Regan in the *FNB-case* par [90].

84 Viewed from a different perspective deprivation can also be described as the exercise of the state's ability to regulate the use of private property by restricting owners' entitlements, see Mostert and Pope (eds) *The Principles of the Law of Property* 119, but this research will not elaborate any further on this subject.

85 Van der Walt *Constitutional Property Law* 137.

86 This includes all forms of legislation, common law and customary law; see *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 SA 745 (CC) par [27], *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par [44] and Currie and De Waal *The Bill of Rights Handbook* 169.

87 See Currie and De Waal *The Bill of Rights Handbook* 168-169 and Van der Walt *Constitutional Property Law* 143-144.

arbitrariness, publicity and precision.<sup>88</sup> In practice however, these components will be satisfied by most statutes, regulations and the common law, as well as by most actions that flow from the operation and necessary implication of a statute, regulation and common law.<sup>89</sup> Take note that directives, policy documents or guidelines issued by government agencies or statutory bodies will probably not qualify as law of general application.<sup>90</sup>

Evidently, if a law singles out and encumbers just one individual or a small group of individuals, it will fall short of the requirement of law of general application.<sup>91</sup> Nevertheless, this principle cannot be applied too generally since most laws only apply to a certain class of people or property. This potentially problematic aspect has fortunately been addressed in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*.<sup>92</sup> In this case a test was formulated which makes it possible to determine whether a law will *merely* apply to a small class of people,<sup>93</sup> or whether it will apply to just one individual or a small group, whereby in the latter's case it will not qualify as a law of general application.<sup>94</sup> Consequently, by applying this test, the potentially problematic aspect can be resolved. Moreover, take note that Currie and De Waal<sup>95</sup> is of the view that "the law of general application requirement is unlikely to have much of

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88 Woolman "Limitation" 29; this is the test used regarding law of general application in terms of s 36 of the Constitution, however it is submitted that there is no difference between law of general application in terms of s 36, or in terms of s 25 of the Constitution; see Chaskalson and Lewis "Property" 13.

89 Woolman "Limitation" 29; see also *Park-Ross and Another v The Director, Offices for Serious Economic Offences* 1995 2 SA 148 (C) and Van der Walt *Constitutional Property Law* 143 whereby it was established that all original and delegated legislation will qualify as law of general application.

90 See Woolman "Limitation" 29 and Van der Walt *Constitutional Property Law* 143.

91 Van der Walt *Constitutional Property Law* 144.

92 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) 29H (hereafter Lebowa-case).

93 Many if not all laws apply to classes of people rather than universally.

94 Van der Walt *Constitutional Property Law* 240.

95 This view is supported in case law as in both the *FNB*-case, and the *Mkontwana*-case, which were Constitutional Court cases that dealt with section 25 of the Constitution, the Judges dispensed with this requirement with a mere sentence, see Currie and De Waal *The Bill of Rights Handbook* 542.

a role to play in s 25 cases".<sup>96</sup> A discussion of the requirement of non-arbitrariness will now follow.

### 3.1.2 Requirement of non-arbitrariness

Even if deprivation is permitted in terms of a law of general application, it still has to meet the other constitutional requirement, that is, it may not be arbitrary. This requirement flows from the provision in section 25(1) of the Constitution, which stipulates that "no law may permit arbitrary deprivation of property".<sup>97</sup> In the *FNB*-case Judge Ackermann stipulated that deprivation of property would be arbitrary if the law that permits it does not provide sufficient reason for that particular deprivation.<sup>98</sup> He went further and explained that sufficient reason is to be established by considering eight factors.<sup>99</sup> These factors include evaluating the relationship between the means employed, and the ends sought; considering a complexity of relationships; having regard to the relationship between the purpose and the person whose property is affected; having regard to the relationship between the purpose and the nature of the property as well as the extent of the deprivation; where the property is ownership of land a more compelling purpose will have to be established; the purpose have to be more compelling when the deprivation embraces all the incidents of ownership; it will be established by either a mere rational relationship or by a proportionality evaluation, depending on the interplay between the variable means and ends, the nature of the property and the extent of the deprivation; and it has to be decided on all the relevant facts of each

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96 Considering that this research will only deal with the provisions of the MPRDA, this topic will not be discussed any further. See also *Agri*-case par [76].

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

98 *FNB*-case par [100].

99 A consideration of these factors will amount to an arbitrariness test, see Van der Walt *Constitutional Property Law* 151-155.

particular case.<sup>100</sup> Take note that these factors lead to a consideration of proportionality in determining whether deprivation is non-arbitrary.<sup>101</sup>

According to Roux,<sup>102</sup> this test "turns out to be a chimera, promising more than it delivers". The reason for this, he argues, is "[because] ultimately it reserves to the court a great deal of discretion to decide future cases as it deems fit".<sup>103</sup> Roux<sup>104</sup> furthermore predicted that future constitutional property cases would be decided according to an all-things-considered assessment of the seriousness of the deprivation and its impact on the claimant. Roux could not have been more accurate with this prediction, since this is the current position regarding the determination of non-arbitrariness, given that the Constitutional Court has already deviated from the test as formulated in the *FNB*-case.<sup>105</sup>

In the subsequent *Mkontwana*-case the Constitutional Court applied the test of arbitrariness as formulated in the *FNB*-case, but a significant shift emanated due to a subtle rephrasing of the test.<sup>106</sup> Judge Yacoob indicated that "there would be sufficient reason for the deprivation if the government purpose was both legitimate and compelling".<sup>107</sup> Such a view is substantially different from the original methodology on arbitrariness as followed in the *FNB*-case because it is indicative of a consideration of mere rationality, and not proportionality, as in the *FNB*-case.<sup>108</sup> Therefore, although the same test as in the *FNB*-case was applied, the Constitutional Court could, with the wide discretion afforded by the structure of the test, move away from a consideration of proportionality and more towards a

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100 *FNB*-case par [100].

101 Take note that *proportionality* is more stringent than a consideration of mere *rationality*. Judge Ackermann concluded that "deprivation of property must be imposed with due regard for proportionality between the public interest served by such deprivation, and the private interest affected by it", see *FNB*-case par [98], Van der Walt *Constitutional Property Law* 145-148 and Mostert and Pope (eds) *The Principles of the Law of Property* 123-125.

102 Roux "The Arbitrary Deprivation Vortex: Constitutional Property Law after *FNB*" 5.

103 Roux "The Arbitrary Deprivation Vortex: Constitutional Property Law after *FNB*" 5.

104 Roux "The Arbitrary Deprivation Vortex: Constitutional Property Law after *FNB*" 7.

105 Van der Walt *Constitutional Property Law* 155.

106 Van der Walt *Constitutional Property Law* 156.

107 Par [51]; see also Van der Walt *Constitutional Property Law* 157.

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

consideration of mere rationality. In the most recent *Agri*-case Judge Du Plessis remarked that it is "apparent that when the court is considering section 25(1), the purpose of the act in question is really relevant as part of the inquiry into arbitrariness."<sup>109</sup> However, he concluded on this subject by stating,

it is in that context that the purpose of the act and the method of achieving, the proportionality between end and means, are relevant. Put differently, the purpose of an act of deprivation cannot change that which is a deprivation into not being deprivation.<sup>110</sup>

Accordingly, from these two substantially different Constitutional Court judgments, as well as the more recent *Agri*-case,<sup>111</sup> there is currently no certainty as to how a decision with regard to arbitrariness will be made, and each matter will therefore have to be decided on a case-to-case basis.<sup>112</sup>

### **3.2 Expropriation**

Section 25(2) of the Constitution provides that "property may be expropriated only in terms of law of general application", it must be "for public purposes or in the public interest",<sup>113</sup> and it is "subject to compensation".<sup>114</sup> Evidently, these<sup>115</sup> are the three requirements that have to be met for expropriation to be constitutionally valid, and these will be discussed separately hereunder.<sup>116</sup> Before this will be done, however a clarification of the concept of expropriation is warranted.

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109 *Agri*-case par [76].

110 *Agri*-case par [76].

111 Take note that this was a High Court decision, and not a Constitutional Court decision.

112 See Freedman 2006 *TSAR* 99 and Van der Walt *Constitutional Property Law* 157-160. In Du Plessis *Compensation for Expropriation under the Constitution* 88 it is also argued that "[t]he test for arbitrariness is not clear. The level of scrutiny lies on a continuum". Take note that deprivation also has to be procedurally fair, see Currie and De Waal *The Bill of Rights Handbook* 543-545 and the *Promotion of Administrative Justice Act* 3 of 2000.

113 S 25(4) of the Constitution elaborates on the requirement of public interest.

114 Compensation must be determined in accordance with s 25(3) of the Constitution.

115 The three quoted phrases in the previous sentence.

116 See in this regard Van der Walt *Constitutional Property Law* 14.

Judge Goldstone, in *Harksen v Lane NO*,<sup>117</sup> indicated that expropriation is characterised by "an acquisition of rights in property by a public authority for a public purpose".<sup>118</sup> According to Mostert and Pope, expropriation amounts to the exercise of the "state's ability to take private property without the consent of the owner, for a public purpose or in the public interest, against payment of compensation".<sup>119</sup> Van Der Walt,<sup>120</sup> on the other hand, pointed out that "it remains difficult to define expropriation accurately". Notwithstanding such difficulty, this research will attempt to give the reader an idea of what expropriation entails. Expropriation must be understood as a form of interference with property with two characteristics, namely appropriation, and expropriatory purpose.<sup>121</sup> Appropriation implies that there must be an extinction of the existing property rights, as well as an acquisition thereof by the public authority.<sup>122</sup> Judge Du Plessis confirmed this by stating that there must be an "appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right".<sup>123</sup> Expropriatory purpose means that property must be taken for a public purpose, and compensation must be paid, from public funds.<sup>124</sup> In other words, existing property rights (ownership) must be extinguished; it must be acquired by a public authority;<sup>125</sup> it must be acquired for a public purpose or in the public interest; and compensation must be paid from public funds for the

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117 *Harksen v Lane NO* 1998 1 SA 300 (CC) (hereafter *Harksen-case*).

118 See *Harksen-case* par [32].

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

120 See Van der Walt *Constitutional Property Law* 181-184, where Van der Walt explains the difficulty in defining expropriation.

121 Both need to be present, see Currie and De Waal *The Bill of Rights Handbook* 553.

122 Van der Schyff 2007 *CILSA* 310.

123 *Agri-case* par [78].

124 Currie and De Waal *The Bill of Rights Handbook* 551-554.

125 See *Agri-case* par [83], "It follows that in terms of the Constitution the content of the property rights expropriated need not always be acquired by the expropriator (the State). It would be sufficient if the property is expropriated ... in the public interest to be acquired by third parties."

extinguished rights.<sup>126</sup> Moreover, only if all these elements are present, will expropriation be regarded as to have taken place.<sup>127</sup> The reader is at this stage reminded that expropriation is regarded as a sub species of deprivation,<sup>128</sup> and therefore the additional requirements of deprivation have to be met for expropriation to be undertaken legitimately.<sup>129</sup>

The power to expropriate is granted to the State by the *Expropriation Act* 63 of 1975 (hereafter *Expropriation Act*), however, the *Expropriation Act* should be treated as supplementary to the constitutional right to expropriate (section 25(2) of the Constitution) as the Constitution is still the supreme law of the Republic.<sup>130</sup> Expropriation does not have to be undertaken solely in terms of the *Expropriation Act*, as various other statutes also provide the State, *via* its governmental institutions, with the power to expropriate.<sup>131</sup> A discussion of the specific requirements of expropriation as prescribed by section 25(2) of the Constitution will now follow.

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126 Compensation is a requirement for the constitutional validity of expropriation, see *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) (hereafter *Du Toit-case*) par [28] where it was stipulated that section 25(2)(b), which provide that expropriation must be subject to compensation, is peremptory. See also the subsequent Constitutional Court Judgment with regard to compensation in *Haffejee NO and Others v eThek wini Municipality and Others* 2011 ZACC 28 (hereafter *Haffejee-case*) whereby the Court had to consider whether the *determination* of compensation was a pre-requisite for the validity of expropriation - it is not. This Judgment nonetheless confirms, albeit implicitly, that compensation is a requirement for the constitutional validity of expropriation.

127 Currie and De Waal *The Bill of Rights Handbook* 553-554.

128 See note 70 above. Also note that as with deprivation, expropriation has to be procedurally fair, which coincides with the administrative law concept of procedural fairness, and if expropriation is a result of *conduct*, it will amount to administrative action, and the *Promotion of Administrative Justice Act* 3 of 2000 will be applicable; see Hoexter *Administrative Law in South Africa*.

129 Badenhorst, Pienaar and Mostert *The Law of Property* 564; these requirements, including the requirement of law of general application, will not be discussed again, for it will merely be a repetition. See also *Agri-case* par [78].

130 Badenhorst, Pienaar and Mostert *The Law of Property* 101. Take note that the *Expropriation Act* is pre-constitutional legislation, and therefore it is possible for some of its provisions to be in conflict with the Constitution – if so, then the *Expropriation Act's* provisions will be invalid, see Badenhorst, Pienaar and Mostert *The Law of Property* 559, see also the *Du toit-case* as well as the *Haffejee-case*. Take note that this issue will be addressed at a later stage in this research.

131 These statutes include for example the *Extension of Security of Tenure Act* 62 of 1997, the *Restitution of Land Rights Act* 22 of 1994 and the MPRDA.

### 3.2.1 Public purpose or public interest

According to Section 25(2)(a) of the Constitution expropriation may only be undertaken for a public purpose, or in the public interest. In the *Expropriation Act*, public purpose is defined as "any purpose connected with the administration of the provisions of any law by an organ of state".<sup>132</sup> In its simplest form public purpose means that anything that is done by an organ of state, which is beneficial to the public at large, or to the community as a whole, will be for a public purpose.<sup>133</sup> Public interest, on the other hand, is a broad concept and difficult to demarcate accurately. As of yet there is no existing definition of public interest in the context of section 25(2)(a) of the Constitution.<sup>134</sup> The most useful explanation of public interest emerged in the judgment of *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd*<sup>135</sup> where Judge Smalberger highlighted the difference between public purpose and public interest when he stated that:

The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. [It does not appear] that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case. One can conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of a portion of his land to relocate the services of B, who would otherwise have to be paid massive compensation, could be justified on the basis of it being in the public interest.<sup>136</sup>

In most cases, the prerogative of deciding what is in the public interest lies with the legislature.<sup>137</sup> Courts should therefore respect the choices made by the legislature as to where the public interest lies. This however, does not allow for unconstitutional application of the requirement, for the Courts

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132 See s 1 of the *Expropriation Act*.

133 Du Plessis *Compensation for Expropriation under the Constitution* 39, 94-95; Van der Walt *Constitutional Property Law* 242-245; Currie and De Waal *The Bill of Rights Handbook* 554.

134 Nginase *The Meaning of 'Public Purpose' and 'Public Interest' in Section 25 of the Final Constitution* 61.

135 *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd* 1990 2 All SA 526 (A).

136 Par [47]-[48].

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

must still ensure that the constitutional standards are met when determining where the public interest lies.<sup>138</sup>

The reason why the Constitution provides for this requirement is to prevent expropriation for improper and unlawful purposes, and to control legitimate exercises of the power to expropriate.<sup>139</sup> This requirement can be approached in a strict or wide sense, but for the purposes of expropriation, it should be approached in the wide sense. The wide sense refers to all purposes that pertain to, or benefit the public in general, as opposed to private individuals.<sup>140</sup> Because of this wide interpretation, it is assumed that the terms "public purpose" and "public interest" can be used interchangeably with reference to expropriation.<sup>141</sup>

This requirement can also be met, even if it benefits a private individual (as opposed to the public in general), as long as the purpose thereof is legitimate.<sup>142</sup> Sections 25(4)<sup>143</sup> and 25(8) of the Constitution further broaden the scope of this requirement, as particular interests are qualified as public interest in these sections. Section 25(8) stipulates that

no provision of [section 25] may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.

Accordingly, any piece of legislation, or any measures taken to achieve land, water or related reform, ought<sup>144</sup> to be in the public interest, and therefore the provisions of the MPRDA, for example, can be in the public

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138 Badenhorst, Pienaar and Mostert *The Law of Property* 567.

139 Van der Walt *Constitutional Property Law* 242.

140 Badenhorst, Pienaar and Mostert *The Law of Property* 567.

141 Therefore either *public purpose* or *public interest* has to be present, hence the use of the word *or* in s 25(2)(a) of the Constitution; see Mostert and Pope (eds) *The Principles of the Law of Property* 126.

142 Van der Walt 2008 ASSAL 259-263; this was also the finding of the Court in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 5 SA 661 (SE).

143 S 25(4) qualifies the nation's commitment to land reform, and reform to bring about equitable access to all South Africa's natural resources, as being in the public interest.

144 It may not impede the State; see section 25(8) of the Constitution.

interest, although a private individual and not the public in general, may benefit from it.<sup>145</sup>

In conclusion, it must be clarified that even though the meaning of neither public purpose nor public interest are exact, deprivation and expropriation will always be for a public purpose or in the public interest, unless "it is undertaken arbitrarily, capriciously or for improper purposes".<sup>146</sup> Besides, expropriation will satisfy the public purpose requirement even "if it benefits a private person as opposed to the public in general, as long as it primarily serves a legitimate public purpose, such as land reform".<sup>147</sup>

### 3.2.2 Compensation

Expropriation will only be constitutionally valid if compensation is paid to the affected owner.<sup>148</sup> The amount of compensation that has to be paid must be determined in accordance with the Constitution<sup>149</sup> as well as the *Expropriation Act*.<sup>150</sup> Take note however, that there are some discrepancies between these two statutes,<sup>151</sup> but this does not render the *Expropriation Act* invalid. These discrepancies merely lead to different factors that need to be taken into account when determining the amount of compensation payable.<sup>152</sup>

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145 Mostert and Pope (eds) *The Principles of the Law of Property* 126. Note that the State has custodianship over the minerals of South Africa since the enactment of the MPRDA, and access to land will not be the decisive factor when access to these minerals will become an issue, which may be regarded as in the public interest.

146 Van der Walt *Constitutional Property Law* 269.

147 Van der Walt *Constitutional Property Law* 269, Van der Walt 2008 ASSAL 259-263.

148 S 25(3) of the Constitution, see also *Du Toit*-case par [28], and note 126 above.

149 S 25(3)(a)-(e) of the Constitution.

150 S 12 of the *Expropriation Act*.

151 This includes the market value as required by the *Expropriation Act*, whereas the Constitution requires that further factors have to be taken into account. These discrepancies will be discussed hereunder.

152 See s 12(1) of the *Expropriation Act* for an example, as well as the *Du Toit*-case. See also note 126 above, Van der Walt *Constitutional Property Law* 269, and Badenhorst, Pienaar and Mostert *The Law of Property* 559. Further take note that the provisions which are not in conflict with the Constitution, must still be strictly adhered, see *Offit Enterprises (Pty) Ltd and Another v Premier, Eastern Cape Government and Others* 2006 JOL 16700 (SE) par [38] and Mostert 2006 ASSAL 406.

Section 12 of the *Expropriation Act* deals with the determination of compensation, and it is based on the notion of market value. Market value is the amount that the expropriated property would have realised if sold on the date of notice of the expropriation in the open market by a willing and well-informed seller to a willing and well-informed buyer (hypothetically).<sup>153</sup> Ancillary to this method, the constitutional requirements also have to be met. Section 25(3) of the Constitution provides that compensation must be calculated in a just and equitable manner and all the relevant circumstances have to be taken into account.<sup>154</sup> When these relevant circumstances are taken into account, it will undoubtedly have an effect on the market value of the property, which is the basis for determining compensation in terms of the *Expropriation Act*. Evidently, a discrepancy exists between the manner of calculating compensation in terms of the Constitution and the *Expropriation Act*; however, it has been solved to some extent in the judgment of *Khumalo v Potgieter*.<sup>155</sup> In this case the Court adopted a two-tiered approach for determining the amount of compensation payable, which entails that firstly, the market value of the property must be established (section 12 of the *Expropriation Act*), and secondly the validity of the amount in terms of section 25(3) of the Constitution must be determined. In the *Du Toit*-case, the same two-tiered approach was followed in determining the amount of compensation to be paid, but the Court went further and highlighted the fact that just and equitable compensation in terms of section 25(3) of the Constitution differs drastically from that in section 12 of the *Expropriation Act*.<sup>156</sup> Judge Langa, in the minority Judgment, then pointed out that "one cannot accept an approach that reconciles section 25(3) of the Constitution with section 12 of

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153 Badenhorst, Pienaar and Mostert *The Law of Property* 569.

154 The relevant circumstances include - s 25(3) of the Constitution:  
 (a) the current use of the property;  
 (b) the history of the acquisition and use of the property;  
 (c) the market value of the property;  
 (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and  
 (e) the purpose of the expropriation.

155 *Khumalo v Potgieter* 2000 2 All SA 456 (LCC).

156 *Du Toit*-case par [35]-[36].

the *Expropriation Act*.<sup>157</sup> Consequently, the Constitution requires that compensation must be calculated in a just and equitable manner, and this must be the primary means of calculating compensation, it cannot be regarded as secondary to the *Expropriation Act*.<sup>158</sup> Accordingly, the approach as set out in the *Du Toit*-case has to be followed to calculate the amount of compensation payable to an owner.<sup>159</sup>

### 3.3 General limitation clause

As with section 25 of the Constitution, section 36 also provides for a limitation of rights. This section provides that a right in the Bill of Rights may be limited in terms of "law of general application", although only to the extent that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This provision entails that there must be "sufficient proportionality between the infringement of the fundamental right,<sup>160</sup> and the benefits it is designed to achieve".<sup>161</sup> In other words, there must be a proportionate relationship between the limitation, and the benefit that is actually acquired from it.

This section poses some difficulty considering the question that even though a limitation on property might not meet the criteria as set out in section 25 of the Constitution, it may nevertheless be constitutionally justifiable in terms of section 36 of the Constitution. The difficulty in this regard lies in the fact that the requirements for a limitation to be constitutionally valid as set out in section 36, have already been included in section 25. The test used to determine whether a limitation is justifiable in

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157 *Du Toit*-case par [83].

158 Brink *Du Toit v Minister of Transport* CCT 22/04 – A Case Discussion 29.

159 Mostert and Pope (eds) *The Principles of the Law of Property* 127-128. Take note that a new *Expropriation Bill* was set to return to Parliament in January 2011 (which never happened), but the potential implication hereof cannot be discussed in this research, see Van der Walt 2008 ASSAL 231 and Anon 2010 <http://www.businessday.co.za>.

160 The rights in the Bill of Rights are also referred to as fundamental rights.

161 Currie and De Waal *The Bill of Rights Handbook* 172. The standard that has to be followed to determine the legitimacy of a limitation was set out in *S v Makwanyane* 1995 3 SA 391 (CC), but an in depth discussion hereof does not fall within the scope of this research.

terms of section 36 amounts to a proportionality test and for a limitation to be justifiable in terms of section 25, the non-arbitrariness test as formulated in the *FNB*-case has to be applied. However, the proportionality test is stronger than the non-arbitrariness test, and accordingly, if a limitation cannot be justified in terms of section 25, it may not be justifiable in terms of section 36 either; hence, it is unlikely for any violation (limitation on property) to be justified by section 36.<sup>162</sup> Judge Ackermann, in the *FNB*-case, nonetheless concluded that these two provisions are not mutually exclusive and must be applied conjunctively.<sup>163</sup> Therefore, in view of the *FNB*-case judgment, sections 25 and 36 must instead be applied to work cumulatively and simultaneously within the scheme in which the constitutionality of an imposition on property has to be determined.<sup>164</sup> Take note however, that it is highly improbable that section 36 will be applied to constitutional property disputes, but for the most singular and abnormal cases.<sup>165</sup>

The theoretical concept of ownership has been discussed in this research, together with the possible limitations on such ownership. This was followed by a discussion of the implication of section 25 and 36 of the Constitution. The focus of this research will now move towards the MPRDA.

#### **4 The effect of the MPRDA**

The question underlining this study is whether the measures incorporated in the MPRDA are adequate to protect the constitutional property rights of a landowner,<sup>166</sup> should a prospecting right or a mining right be granted on such a person's land. Before these specific measures will be discussed, this research will provide a brief outline of what the MPRDA is, and what transpired after its enactment.

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162 Currie and De Waal *The Bill of Rights Handbook* 562.

163 Badenhorst, Pienaar and Mostert *The Law of Property* 96.

164 Mostert 2003 *SAJHR* 587-588.

165 Badenhorst, Pienaar and Mostert *The Law of Property* 55; Van der Walt *Constitutional Property Law* 56-57.

166 As discussed in par 3 above.

#### 4.1 Outline of the MPRDA<sup>167</sup>

The MPRDA is the principle statute dealing with minerals and petroleum in South Africa and was enacted on the 1<sup>st</sup> of May 2004. The MPRDA stipulates that all mineral and petroleum resources are the common heritage of all the people of South Africa, and the State is the custodian thereof for the benefit of all South Africans.<sup>168</sup> As a result, all rights to minerals<sup>169</sup> have been severed from the landowner's right to his land (ownership), which formally included a right to the minerals.<sup>170</sup> This implies that the MPRDA abolished the common law principle of *cuius est solum*, which entails that the owner of the land is the owner of the sky above and everything contained in the soil.<sup>171</sup> In the *Meepo*-case the Court stipulated that the MPRDA effects a "prevalence of State power of control over the mineral resources of the Republic and the concomitant ousting of the [mineral] rights of the landowner and/or the holder of mineral rights".<sup>172</sup> Judge du Plessis in the *Agri*-case confirmed this by stipulating, "the MPRDA does not recognize the existence of common law mineral rights as they existed directly before the act took effect".<sup>173</sup> Consequently, the owner

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167 Such an outline can be quite extensive, but only the relevant aspects for this research will be mentioned herein.

168 For a critical discussion of the proper meaning of this phrase, see Van der Schyff 2008 *TSAR* 757-768 and Van den Berg 2009 *STELL* 139-158.

169 When referring to minerals and petroleum as envisaged in the MPRDA, the researcher will only make use of the term minerals.

170 The idea of separating the ownership of minerals from the ownership of land is not a new phenomenon. The common law allowed for the acquisition of the fruits of property, which resulted in the invention of a right to the minerals in the soil that was separate from the ownership of the landowner. Our Courts subsequently recognized and accepted such a right without question; see Milton "Ownership" 681, Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 23-30 and *Agri*-case par [2].

171 See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-11, Mostert and Pope (eds) *The Principles of the Law of Property* 269-273, Badenhorst and Mostert 2007 *TSAR* 469-479, and Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 250-251; there is an on-going academic debate about whether this is actually true, and in who does the ownership of unsevered minerals lie, but a discussion thereof does not fall within the scope of this research.

172 Par [8].

173 *Agri*-case par [2].

of the land no longer has control over the minerals in/on the land, which in itself is a limitation on the ownership of land.<sup>174</sup>

In addition to this, section 3(2)(a) of the MPRDA stipulates that the Minister of the Department of Mineral Resources may

grant, issue, refuse, control, administer and manage any reconnaissance permission, *prospecting right*, permission to remove, *mining right*, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.<sup>175</sup>

It is therefore the prerogative of the State to "grant, issue, refuse, control, administer and manage" (regulate) the exploitation of the minerals in South Africa.<sup>176</sup> In other words a right to exploit minerals, *inter alia* a prospecting right or a mining right,<sup>177</sup> must be obtained by applying for it in terms of the MPRDA,<sup>178</sup> and a landowner cannot exploit the minerals without applying for such a right merely because the minerals are located on his land. Clearly, the MPRDA had a profound effect on the old order mineral law as it existed prior to its enactment,<sup>179</sup> hence a discussion of the potential imposition on landowners as brought about by the MPRDA is warranted, and will now follow.

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174 This supports the notion that ownership is no longer regarded as absolute, as the landowner no longer has control over the minerals contained in the soil of his land. Accordingly, the owner has been deprived of one of the entitlements inherent in ownership (to refuse the commencement and continuance of the activities exercised in terms of s 5 of the MPRDA – a result of losing control of the minerals), and thus the ownership has been limited; see Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 257. Take note that this research will focus on the rights conferred upon the holder of a prospecting right and/or a mining right, and not the State as custodian of all the minerals, as this topic has been exhausted in other research. See note 168 above.

175 Emphasis added; for a discussion of these terms, see Badenhorst and Shone *OBITER* 37-41.

176 See Agri-case par [51] and Van den Berg 2009 *STELL* 158.

177 Other rights are available for the exploitation of minerals, but this research focuses on only these two.

178 S 5(4)(b) of the MPRDA.

179 The MPRDA brought an end to old order mineral law by repealing the common law, the *Minerals Act* 50 of 1991 and related statutes, see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 11-25-1-26. See also Agri-case par [22]-[33] for a summary of mineral rights prior to the enactment of the MPRDA.

## **4.2 Imposition on landowners as brought about by the MPRDA**

Section 5 of the MPRDA deals with the nature of *inter alia* a prospecting right and a mining right. This section prescribes what entitlements will be granted to a holder of a prospecting right and a mining right. Conversely this section also brings about an imposition on landowners, as these entitlements granted to the holder of a prospecting right or a mining right, are granted in respect of land belonging to another.<sup>180</sup> In essence section 5 of the MPRDA provides that a prospecting right or a mining right is a limited real right in respect of the land to which it relates;<sup>181</sup> the holder of such a right may enter the land with his employees together with his machinery, and construct infrastructure as may be required;<sup>182</sup> the holder may prospect or mine, whichever the case may be;<sup>183</sup> the holder may remove or dispose of any minerals found;<sup>184</sup> the holder may use the water on such land;<sup>185</sup> and the holder may carry out any other activity incidental to either prospecting or the mining.<sup>186</sup>

Section 5 of the MPRDA furthermore provides that a prospecting right or a mining right should be regarded as a limited real right,<sup>187</sup> which is the equivalent of a limited real right under the common law.<sup>188</sup> The holder of a prospecting right or mining right is furthermore entitled, by virtue of section 5(3) of the MPRDA to "enter", "bring equipment onto", "construct", "use water" and "carry out any other activity" on the land to which such right relates. However, the land to which these rights relate does not necessarily belong to the holder of a prospecting right or a mining right, and

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180 This notion will be explained hereunder.

181 S 5(1) of the MPRDA.

182 S 5(3)(a) of the MPRDA.

183 S 5(3)(b) of the MPRDA.

184 S 5(3)(c) of the MPRDA.

185 S 5(3)(d) of the MPRDA.

186 S 5(3)(e) of the MPRDA; this also includes other activities, but only prospecting and mining are relevant for this research.

187 S 5(1) of the MPRDA, see *Agri-case* par [52].

188 Mostert and Pope (eds) *The Principles of the Law of Property* 276.

could therefore belong to another individual.<sup>189</sup> Such an individual, on the other hand, has certain entitlements with respect to the land that he owns.<sup>190</sup> Yet section 5(3) grants entitlements to the holder of a prospecting or mining right even though the landowner has ownership over his land. These entitlements granted to the holder of a prospecting right or mining right include that such a holder may carry out any other activity incidental to prospecting or mining, therefore, the entitlements flowing from the right to prospect or mine are far-reaching and may very well impede on those entitlements held by the landowner.<sup>191</sup> In the *Meepo*-case the Court recognized that the "granting of a prospecting right as a necessary consequence results in serious inroads being made on the property rights of a landowner".<sup>192</sup> In *Joubert NNO and Others v Maranda Mining Company (Pty) Ltd and Others*<sup>193</sup> Judge Murphy furthermore stated that "the holder of a mining permit is able to encroach significantly upon the rights of the owner of the land where the mineral deposits exist".<sup>194</sup> In the *Bengwenyama*-case learned Judge Froneman also stressed that "the exercise of prospecting rights is highly invasive of the use by owners of their land, even if only restricted to surface use of the land".<sup>195</sup> Therefore, considering these judgments, it is accepted that an owner of land on the one hand, and a holder of a prospecting right or a mining right on the other hand, may have the same entitlements<sup>196</sup> in respect of the same piece of land, in terms of ownership and in terms of the prospecting right or the mining right, respectively.<sup>197</sup> However, it is highly unlikely that more than

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189 Ownership of the minerals is automatically severed from ownership of the land in terms of s 3(1) of the MPRDA, and the landowner is not necessarily the holder of the prospect or mining right with regard to that minerals.

190 See par 2.1 above.

191 Humby 2010 <http://www.fse.org.za> 1.

192 Par [13].

193 *Joubert NNO and Others v Maranda Mining Company (Pty) Ltd and Others* 2010 2 All SA 67 (GNP) par [5] (hereafter *Joubert*-case).

194 See also Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 257 with regard to the burden on ownership of land brought about by prospecting and/or mining rights.

195 Par [40].

196 This is not a reference to the entitlement of exploiting a mineral, but ancillary entitlements necessary to exploit the minerals, which the landowner also has, eg surface use.

197 It is inevitable that the holders of a prospecting right or a mining right will, at least to some extent, interfere with the surface use of land, see Badenhorst, Pienaar and Mostert *The Law of Property* 704-705.

one individual (owner of land on one hand, and the holder of a prospecting right or a mining right on the other) will be able to use the same entitlement;<sup>198</sup> therefore, the landowner's entitlement to his land has to be curtailed.<sup>199</sup>

This curtailment of the landowner's entitlement can be explained by section 4 of the MPRDA, which stipulates that when interpreting a provision of the MPRDA, any reasonable interpretation that is consistent with the objects of the Act must be preferred over any interpretation that is inconsistent with such objects. Secondly, section 4(2) stipulates that, as far as the common law is inconsistent with the Act, the provisions of the MPRDA will prevail.<sup>200</sup> Thirdly, Judge de Villiers, in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*,<sup>201</sup> also indicated that

in the cases of conflict, the entitlement of the mineral right holder to exploit the relevant minerals takes precedence over the entitlement of the surface owner to enjoy undisturbed possession.<sup>202</sup>

Accordingly, the entitlements of the holder of a prospecting right or mining right will have precedence over the entitlements of the owner of the land. Incidentally, this is how it has been all along, bearing in mind that in case law dating back to 1950 it was indicated that "in case of irreconcilable conflict, the use of the surface rights must be subordinated to mineral exploration".<sup>203</sup> Therefore, where the landowner is not the one claiming the mineral rights, or where such interests have been severed from the land,<sup>204</sup> South African courts have normally held that the mineral rights will prevail over land ownership.<sup>205</sup>

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198 Competition over the exercise of an entitlement will result in conflict.

199 This view will be addressed hereunder.

200 This section also allows for the apparent abrogation of the *cuius est solum*-principle whereby the Act will prevail if inconsistent with the common law.

201 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 1 All SA 230 (T) (hereafter *Anglo*-case).

202 *Anglo*-case 240; see also Badenhorst 2006 *OBITER* 541.

203 *Hudson v Mann* 1950 4 All SA 369 (T) 371; see also Badenhorst, Pienaar and Mostert *The Law of Property* 704-705.

204 As brought about by section 3(1) of the MPRDA.

205 Mwenda 1994 *SAPL* 89.

In summary it should be reiterated that after the enactment of the MPRDA, ownership of minerals have been severed from the ownership of land. Furthermore, these minerals may only be exploited, legally, by applying for *inter alia* a prospecting right or mining right. Thereafter, in accordance with section 5(3) of the MPRDA, specific entitlements will be conferred upon the holder of such a right to enable him to exercise his right to either prospect or mine. However, due to the granting of such a right, more than one individual will have the same entitlements in respect of the same piece of land. This will inevitably lead to conflict, and our Courts have ruled that the entitlements of a holder of a prospecting right or a mining right have precedence over the entitlements of a landowner in respect of that land, should any conflict between these individuals arise. Therefore if a prospecting right or a mining right is granted, the landowner will be deprived of the entitlements that he normally<sup>206</sup> would have in respect of his land, and such entitlements will be conferred upon the holder of a prospecting right or a mining right. Consequently, the MPRDA brings about an imposition on the ownership of land, in terms of section 5 of the Act.

Now that this imposition as brought about by the MPRDA on the ownership of land have been confirmed, the measures, if any, incorporated in the MPRDA for the protection of the landowner's rights,<sup>207</sup> will be discussed.

## **5      Exposition of the rights and obligations created by the MPRDA**

This chapter will focus on the rights and obligations of the holder of a prospecting right and a mining right, as well as those of a landowner. These respective rights and obligations amount to the measures incorporated in the MPRDA for the protection of a landowner's rights.

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206      Surface use, for example; see note 196 above.

207      In other words ownership.

### 5.1 *Rights and obligations of applicants and holders of a prospecting right or a mining right*<sup>208</sup>

Three provisions in the MPRDA have an inclination towards a consideration for the rights of landowners (obligation on applicants and holders of a prospecting right or a mining right), where such consideration is made up of various notification and consultation processes.<sup>209</sup> These notification and consultation processes are required during different stages in terms of the MPRDA, and this "is indicative of a serious concern for the rights and interests of landowners".<sup>210</sup> An outline of these stages will now follow, together with an exposition of the requirements that has to be adhered for both applicants and holders of a prospecting right or a mining right, during each stage.<sup>211</sup>

Before minerals can be exploited (legally), a right, *inter alia* a prospecting right or mining right, has to be acquired in terms of the MPRDA.<sup>212</sup> To acquire such a right, a person or entity would have to apply for it. The application process that has to be followed to acquire either a prospecting right or a mining right is similar, and is regulated in terms of sections 16 and 22 of the MPRDA, respectively.<sup>213</sup> However, before these sections will be discussed, the reader should first take note of section 10 of the MPRDA.

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208 The rights of holders of a prospecting right or a mining right were already included in the discussion above, and will therefore not be repeated here.

209 These provisions, together with what they entail, will be discussed hereunder; see *Bengwenyama*-case par [62]. Take note that rights confer obligations; therefore, although this is a discussion of the rights of landowners, it is also a discussion of the obligations of applicants and holders of prospecting rights or mining rights, see par 5.2 hereunder.

210 *Bengwenyama*-case par [63].

211 Other rights and permits also exist whereby a person can legally exploit minerals, see note 171 above. An example of such a right is a mining permit, and the application for such a permit is regulated in terms of s 27 of the MPRDA. Take note that a discussion of all these other rights do not fall within the scope of this research.

212 S 5(4)(b) of the MPRDA, see Badenhorst, Pienaar and Mostert *The Law of Property* 679.

213 See Humby 2010 <http://www.fse.org.za> 2. Incidentally, this process is indicative of the MPRDA having a concern for the rights of landowners.

Section 10 of the MPRDA stipulates that "within 14 days after accepting an application ... [for a prospecting or a mining right], the Regional Manager must make known that [such] an application ... has been received, and call upon all interested and affected parties (IAPs), to submit their comments regarding the application, within 30 days from the date of notice".<sup>214</sup> Then this section goes further and provides that if an IAP (landowner) objects to the granting of such a right, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections.<sup>215</sup> Therefore, within 14 days after an application for either a prospecting right or a mining right has been accepted, the Regional Manager must first notify the landowner of such an application, and then afford the landowner with an opportunity to comment on this application.<sup>216</sup>

Furthermore, if an application for a prospecting right has been accepted, it is required by the applicant in terms of section 16(4)(b) of the MPRDA to notify and consult with the landowner or lawful occupier of the land to which such application relates to. Similarly, if an application for a mining right has been accepted, it is required by the applicant in terms of section 22(4)(b) of the MPRDA to notify and consult with all the IAPs, which will subsequently include the landowner.<sup>217</sup> In *Doe Run Exploration SA (Pty) Ltd and Others v Minister of Minerals and Energy and Others*<sup>218</sup> the Court had to deal with the issue of consultation in terms of section 16(4)(b) of the MPRDA. The Judge in this case pointed out that the provisions of section 16(4) of the MPRDA (notification and consultation with affected parties and the owner and occupiers of the land) are peremptory and that strict compliance therewith is required. The Court went further and concluded that such

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214 S 10(b) of the MPRDA.

215 S 10(2) of the MPRDA; the Regional Manager must perform this duty as prescribed by Reg 3 of GN R 527 of 23 April 2004.

216 It is as of yet unclear as to what effect such a comment or objection may have on the application process, and no information will be available to a landowner regarding the proposed prospecting or mining, therefore a landowner will have no facts to base an objection on.

217 IAPs include all those directly interested or affected by the proposed activity; see Dowling *et al* 2007 <http://www.enviropaedia.com>.

218 *Doe Run Exploration SA (Pty) Ltd and Others v Minister of Minerals and Energy and Others* 2008 ZANHC 3 par [41] (hereafter *Doe-case*).

notification and consultation is quite clearly needed to enable IAPs or landowners to protect their rights. Judge Froneman, in the *Bengwenyama*-case, also emphasized the importance of such consultation as is evident from this *dictum* when he pointed out that "where third parties seek prospecting rights they 'must' engage with the owner of land before acquiring the right".<sup>219</sup> Section 105 of the MPRDA furthermore confirms the importance of this consultation by providing that the Regional Manager may, upon notification from the applicant of a prospecting or a mining right, whereby the landowner or lawful occupier of the land cannot be traced, grant consent to such an applicant to install a notice on a visible place on the land. The Judge in the *Doe*-case contended that although section 105 of the MPRDA can "hardly be described as an epitome of exemplary draftsmanship," it nevertheless implies that an applicant for a prospecting or mining right should take certain steps to ensure that notification and consultation are in fact undertaken, even though the landowner cannot readily be found.<sup>220</sup> Therefore, if an application for either a prospecting right or a mining right has been accepted, it is required by such an applicant to both notify and consult with the landowner of the land to which such an application relates.<sup>221</sup> Take note that the scope of this notification and consultation procedure has been explained in the very recent *Bengwenyama*-case. The learned Judge stated that "the purpose of the notification and subsequent consultation must be related to the impact that the granting of a prospecting right [or a mining right] will have on the landowner".<sup>222</sup> He elaborated further and stated that

the purpose of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right [or a mining right] and the landowner insofar as the interference with the landowner's rights to use the property is concerned.<sup>223</sup>

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219 *Doe*-case par [40], emphasis added.

220 Par [43].

221 See ss 16(4)(b) and 22(4)(b) of the MPRDA.

222 Par [64].

223 Par [65].

The Judge supported his contention by explaining that under the common law, a prospecting right or a mining right could only be acquired by concluding a contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the contract. With the MPRDA, the equivalent of such a contract is consultation, and the purpose thereof should be to "ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land".<sup>224</sup> However, the MPRDA does not "impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the MPRDA's provisions does not require engaging in good faith to attempt to reach accommodation in that regard".<sup>225</sup> Failure at this stage, he contended, might result in the holder of a prospecting right or a mining right having to pay compensation.<sup>226</sup> The Judge concluded by summarising what exactly is required by the consultation, and he stated that

The consultation process required by section 16(4)(b) of the MPRDA [the same goes for s 22(4)(b)] thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the Regional Manager.<sup>227</sup>

Lastly, it was stressed that in the case of non-compliance of such notification and consultation, the granting of a right to either prospect or mine will be procedurally unfair, and consequently it will be eligible for review.<sup>228</sup>

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224 Par [65].

225 Par [65].

226 Par [65]; see s 54 of the MPRDA, which will be discussed hereunder.

227 Par [67].

228 Par [68].

The MPRDA also anticipates consultative interaction after the approval of a prospecting right or a mining right, in section 5(4)(c), and this section prescribes that "no activity may commence without first notifying and consulting with the landowner or lawful occupier of the land in question". Therefore, the MPRDA also requires that notification and consultation must be undertaken after the granting of a right to either prospect or mine. It may seem that this section merely allows for a repetition of the notification and consultation process as envisaged in the sections as discussed above,<sup>229</sup> however, those consultation processes are required during the application process, whereas the consultation in terms of section 5(4)(c) must take place post the granting of the right to exploit the minerals, but before any activity commences. There is a substantial difference seeing that when applying for either a prospecting right or a mining right, the applicant has to submit an application form containing application related information.<sup>230</sup> However, if such an application has been accepted, the applicant must further submit an environmental management plan.<sup>231</sup> By comparing the contents of both the application form and the environmental management plan, it is evident that the consultation process as envisaged in section 5(4) of the MPRDA will be far more substantial. The reason for this lies in the fact that from the environmental management plan, the landowner will receive considerably more information with respect to the proposed impact, than he would from the application form. In the *Meepo*-case the Court highlighted that

the consultative process envisaged in section 5(4)(c) of the Act is intended to afford a landowner the opportunity of 'softening the blow' inevitably suffered as a consequence of the granting of a prospecting or other right under the Act.<sup>232</sup>

This, according to the Judge in the *Meepo*-case "is the only means afforded in the MPRDA to a landowner to protect his rights as such", and

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229 S 10 of the MPRDA, as well as ss 16(4)(b) and 22(4)(b) of the MPRDA, respectively, depending on whether the applicant applied for a prospecting right or a mining right.

230 See Regs 5 and 10 of GN R 527 of 23 April 2004, see also ss 16(4)(b) and 22(4)(b) of the MPRDA.

231 See Reg 52(2)(g) of GN R 527 of 23 April 2004, see also s 5(4)(a) of the MPRDA.

232 Par [15].

accordingly proper notice of the intention to enter the land for purposes of prospecting should be given to the landowner, followed by a consultative process.<sup>233</sup>

Take note however, that this obligation in terms of section 5(4)(c) of the MPRDA, as is the case with sections 16(4)(b) and 22(4)(b), does not place any duty upon the holder of a prospecting right or a mining right to negotiate with the landowner to agree on terms to occupy the land in question. According to Judge Murphy in the *Joubert*-case<sup>234</sup> the duty contemplated in section 5(4)(c) of the MPRDA is merely a duty to notify and consult. This duty only requires that the holder of a prospecting right or a mining right<sup>235</sup> must "engage in a consensus-seeking process involving the exchange of proposals and representations".<sup>236</sup> The Judge further stated that

in the event of a deadlock, after all consultative avenues have been exhausted, the scheme of the legislation anticipates that the permit holder [holder of a prospecting or a mining right] will be permitted to proceed immediately to exercise its rights under the permit [prospecting or mining right].<sup>237</sup>

Therefore, considering this *dictum*, the only inference that can be drawn is that the MPRDA does not prescribe that any consent from the landowner is necessary, mere notification and consultation is required.<sup>238</sup>

To conclude it must be reiterated that firstly, a landowner has to be notified by a Regional Manager within 14 days after an application for either a prospecting right or a mining right have been lodged, and an opportunity must be provided to the landowner for commenting thereon. Secondly, notification and consultation must be undertaken by the applicant of either

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233 Par [15]-[16]; excluding the other mechanisms employed by the MPRDA, *ie* ss 10, 16, 22 and 54.

234 Par [46].

235 The case refers to a mining permit, but the legislative requirements are the same whether it is an application in terms of s 16(4)(b) or s 22(4)(b) of the MPRDA.

236 Par [46].

237 Par [46].

238 Humby 2010 <http://www.fse.org.za> 2.

a prospecting right or a mining right within 14 days after such an application has been accepted. During this consultation, the parties have to ascertain whether an accommodation of sorts can be reached in respect of the impact that the proposed activity may have on the landowner's right to use his land (ownership).<sup>239</sup> Thirdly, notification and consultation must be undertaken after the granting of a right to either prospect or mine, but before any activity may commence. This consultation is the last opportunity that a landowner has to soften the blow that will inevitably be suffered by him.<sup>240</sup> Take note however, that even though consultation is required, neither sections 10, 16(4)(b) and 22(4)(b) or section 5(4)(c) of the MPRDA prescribes that consent of the landowner is required, in all instances, only notification and consultation is a prerequisite.<sup>241</sup>

Apart from these obligations placed upon the applicants and holders of a prospecting right or a mining right, the landowner also has certain obligations in terms of the MPRDA, and these will now be discussed.

## 5.2 *Rights and obligations of landowners*

When a right comes into existence, it automatically creates an obligation on another to allow the former to exercise that right. In other words, as was discussed above, where the applicant for a prospecting right or a mining right has to notify and consult with the landowner to which such application relates (obligation), the landowner, as a result, automatically obtains the right to be notified and consulted with.<sup>242</sup>

Similarly, where section 5(4)(a)-(e) of the MPRDA grant certain entitlements to the holder of a prospecting right or a mining right (right),<sup>243</sup>

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239 *Bengwenyama*-case par [65].

240 *Meepo*-case par [15]-[16].

241 See also *Joubert*-case in general for the requirements that an applicant has to follow, even though it is based on a mining permit, and not a prospecting right or a mining right.

242 As these have been discussed in the previous paragraph, they will not be repeated here.

243 See par 4.2 above.

the landowner must allow for such a holder to exercise his rights (obligation), *inter alia* by giving such a holder access to the land.<sup>244</sup> However, a landowner only has to allow for a holder of a prospecting right or a mining right to exercise his rights with respect to his land, *after* such a holder had complied with all the legal requirements as prescribed by the MPRDA.<sup>245</sup>

Section 54 of the MPRDA prescribes what steps need to be followed should a landowner refuse access to his land. The section stipulates that if a holder of a prospecting right or a mining right is prevented from entering the land,<sup>246</sup> or unreasonable demands are asked in return for access to the land by the landowner,<sup>247</sup> then such a holder must notify the Regional Manager. Thereafter the Regional Manager must call upon the owner to make representations regarding his refusal of access to the land,<sup>248</sup> and inform the landowner of the rights that the holder of a prospecting right or mining right has.<sup>249</sup> The Regional Manager must also inform the landowner of the steps that he can take in the event that he persists with the refusal of access to the land.<sup>250</sup> Lastly, if the Regional Manager concludes that the landowner has or is likely to suffer loss or damage as a result of the prospecting or mining operations, he must request that the parties concerned endeavour to reach an agreement for the payment of compensation for such loss or damage.<sup>251</sup>

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244 This includes all the entitlements as granted in terms of s 5(3) of the MPRDA. Take note that refusal of access to land is an entitlement inherent in ownership of land.

245 This includes the various notification and consultation procedures as well as other formal requirements. Non-compliance can be used as an argument when presenting reasons for refusal of access to the land to the Regional Manager - see the discussion hereunder; see also *Bengwenyama*-case par [38].

246 S 54(1)(a) of the MPRDA.

247 S 54(1)(b) of the MPRDA.

248 S 54(2)(a) of the MPRDA.

249 S 54(2)(b) and (c) of the MPRDA.

250 S 54(2)(d) of the MPRDA.

251 S 54(3) of the MPRDA; this is in accordance with the *Bengwenyama*-case par [65]. Also, note that a landowner has to inform the Regional Manager if he has or is likely to suffer any loss or damage as a result of the prospecting or mining, see s 54(7) of the MPRDA.

Section 54 of the MPRDA goes further and provides that if the parties (landowner and holder of a prospecting right or a mining right)<sup>252</sup> fail to reach an agreement, compensation must be determined by arbitration in accordance with the *Arbitration Act*, and if that fails, they may approach a Court.<sup>253</sup> Take note that if the holder of a prospecting or a mining right is at fault in preventing the parties from reaching an agreement, the Regional Manager may "suspend" the right of the holder of a prospecting or a mining right until the dispute is settled by arbitration, or by Court.<sup>254</sup>

The land of the owner may also be subject to expropriation. Section 54(5) of the MPRDA provides that if the Regional Manager concludes that further negotiation between the holder of the prospecting right or the mining right and the landowner may detrimentally affect the objects of the MPRDA,<sup>255</sup> the Manager may recommend to the Minister that the land be expropriated in terms of section 55 of the MPRDA.<sup>256</sup> Section 55 of the MPRDA prescribes that expropriation has to be undertaken in accordance with sections 25(2) and (3) of the Constitution,<sup>257</sup> and the expropriation must comply with sections 6, 7 and 9(1) of the *Expropriation Act*.<sup>258</sup> Accordingly, should expropriation be undertaken, it has to be done with due regard for the provisions of the Constitution, and the *Expropriation Act*. In addition, Item 12 of Schedule II of the MPRDA also stipulates that any person, who can prove that his property has been expropriated in terms of any provision of the MPRDA, may claim compensation from the State. In the *Meepo*-case the Court afforded a wide interpretation to expropriation as envisaged in this schedule.<sup>259</sup> Should such a wide interpretation remain, it would be possible for a landowner, whose surface use of his land is lost due to the

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252 The scope of this section is wider, but this research will only refer to the holder of a prospecting right and a mining right.

253 S 54(4) of the MPRDA; see also *Bengwenyama*-case par [38].

254 S 54(6) of the MPRDA.

255 Ss 2(c), (d), (f) or (g) of the MPRDA.

256 See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 18-6.

257 S 55(1) of the MPRDA.

258 S 55(2) of the MPRDA.

259 *Meepo*-case par [8].

granting of a prospecting or a mining right, to claim compensation for expropriation.<sup>260</sup>

Therefore to summarize, a landowner has the right to notification and consultation, and a landowner must allow the applicant and/or holder of a prospecting right or a mining right to exercise their rights.<sup>261</sup> Furthermore, in accordance with section 54 of the MPRDA, the landowner is entitled to be informed of the rights of the applicant and/or holder of a prospecting right or a mining right, and he may be requested by the Regional Manager to reach an agreement with such applicant and/or holder. If they are unable to reach an agreement, arbitration must be utilized, or a Court must be approached for assistance. Lastly, if such negotiation may detrimentally affect the objects of the MPRDA, expropriation may be recommended, and this must be undertaken in accordance with the requirements of expropriation as set out in the Constitution.

From this discussion above it should be clear that, currently, apart from section 54 of the MPRDA, "consultation is the only prescribed means whereby a landowner is to be apprised of the impact prospecting [or mining] activities may have on his land".<sup>262</sup> Consequently, these respective rights and obligations of both landowners and holders of a prospecting right or mining right will be considered with due regard to the provisions of section 25 of the Constitution, to determine whether the imposition on landowners as brought about by the MPRDA complies with the Constitution. Before this will be done, however, a brief discussion on a few amendments to the MPRDA will follow to highlight how these amendments may affect the rights and obligations as discussed above.

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260 This would have far-reaching consequences insofar as every owner of land whose use of land is lost due to the granting of a prospecting right, mining right or other right to exploit minerals would have a claim against the state based on expropriation; see Badenhorst and Mostert 2008 *TSAR* 824.

261 See par 5.1 above.

262 *Meepo*-case par [13].

### 5.3 Amendments to the MPRDA

Proposed amendments to the MPRDA were assented to in the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 (hereafter MPRDAA). The MPRDAA was promulgated on 19 April 2009, but has not yet been brought into effect.<sup>263</sup> Despite this fact, some of these amendments will still be discussed, for it will have an effect on the rights and obligations as discussed above, once proclaimed.<sup>264</sup>

In terms of section 5 of the MPRDAA section 5(4) of the MPRDA will be deleted, and it will be replaced by section 5A which merely requires giving the landowner or lawful occupier of the land in question at least 21 days written notice. Consequently, the requirement of consultation after the application phase, as was prescribed in terms of section 5(4) of the MPRDA, has been removed.<sup>265</sup> This may have a dire effect on the rights of landowners, considering that consultation at this stage was "intended to afford a landowner the opportunity of softening the blow inevitably suffered as a consequence of the granting of a prospecting or other right".<sup>266</sup>

Section 10 of the MPRDA, which prescribes that comments may be submitted by IAPs (landowners) once an application for a prospecting or a mining right has been accepted, has also been amended. Section 7 of the MPRDAA amended this section by changing "application received" to "application accepted". However, this is merely a technical amendment, and will have no impact on the effect of section 10 of the MPRDA because section 10 already referred to both "accepted" and "received", which was interpreted as "accepted".<sup>267</sup>

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263 See Anon 2010 <http://cer.org.za>. This date has yet to be announced by the Minister of Mineral Resources, and is therefore still unknown.

264 The purpose of these amendments is to streamline the provisions of the MPRDA with those of NEMA.

265 See par 5.1 above.

266 *Meepo-case* par [15].

267 Humby 2010 <http://www.fse.org.za> 9.

Sections 16 and 22 of the MPRDA have also been amended.<sup>268</sup> These amendments deleted the requirement of notification.<sup>269</sup> Consequently, the applicant of a prospecting right or a mining right does not have to notify the landowner of such application, but consultation still has to be undertaken. This amendment leads to confusion for it requires consultation, but no notification, but consultation cannot be initiated without first notifying of such consultation. Another amendment to sections 16 and 22 is that an environmental authorisation has to be lodged together with the application for either a prospecting or a mining right, which means that an environmental impact assessment (hereafter EIA) as set out in NEMA will have to be conducted when applying for a prospecting or a mining right.<sup>270</sup> Such an EIA has to be conducted in terms of Government Notice Regulation 543 in Government Gazette 33306 of 18 June 2010. In terms of Regulation 15 of these Regulations, an applicant must give written notice of a proposed activity to the landowner or person in control of the land, and the applicant must conduct a public participation process as contemplated in Regulation 54. In terms of Regulation 54(7) of these Regulations, the applicant must make sure that all the relevant information pertaining to such an application is made available to potential IAPs (landowners),<sup>271</sup> and participation must be facilitated in such a manner that all IAPs are provided with a reasonable opportunity to comment on the application.<sup>272</sup> Although this seems to provide for comprehensive participation by a landowner, it is still uncertain as to how much protection it will afford considering that the proposed impact as set out in the environmental management plan will at this stage still be unknown to the landowner. What effect these amendments may have on the rights and obligations of landowners and applicants and holders of a prospecting right or a mining right are, however, still unknown, and to say otherwise would be mere

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268 See par 5.1 above for a discussion hereof.

269 In terms of ss 12, 18 and 23 of the MPRDAA, respectively.

270 See Humby 2009 *SAPL* 13-29 for a full discussion on the integration of the NEMA EIA with the MPRDA. This is also in accordance with the amendments to NEMA as contemplated in the *National Environmental Management Amendment Act* 62 of 2008 (hereafter NEMAA).

271 Reg 54(7)(a) of GN R 543 in GG 33306 of 18 June 2010.

272 Reg 54(7)(b) of GN R 543 in GG 33306 of 18 June 2010.

speculation, therefore they will not be discussed any further.<sup>273</sup> A discussion of the rights and obligations of landowners and holders of a prospecting right or mining right with due regard to the provisions of section 25 of the Constitution will now follow.

## **6 Constitutional validity of the imposition brought about by the MPRDA**

At this point, it is necessary to determine whether the imposition on landowners as brought about by the MPRDA is constitutionally valid. This will establish whether the measures incorporated in the MPRDA are adequate to protect the constitutional rights of landowners (ownership). The structure for an enquiry into the constitutional validity of an imposition of section 25 as set out in the *FNB-case*<sup>274</sup> will be used as a guideline to do this, and it reads as follows:

- (a) Does that which is taken away ... amount to property for [the] purpose of section 25?
- (b) Has there been a deprivation of such property ...?
- (c) If there has, is such deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such deprivation justified under section 36 of the Constitution?
- (e) If it is, does it amount to expropriation for [the] purpose of section 25(2)?
- (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under section 36?

For ease of reading a separate discussion of deprivation and expropriation will now follow as *per* (a)-(d) and (e)-(g) above.

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273 See Anon 2009 <http://mailstreams.cambrient.com> for a full discussion of the possible effects of all the amendments brought about by the MPRDAA.

274 See *FNB-case* par [46].

## 6.1 Deprivation

In accordance with the structure as set out above, it is firstly necessary to determine whether that which is taken away amounts to property in terms of section 25 of the Constitution. Seeing that section 25(4)(b) of the Constitution stipulates that "for the purpose of this section property is not limited to land",<sup>275</sup> it is evident that land does in fact fall under the concept of property, hence land, for the purpose of this research, should be regarded as property in terms of section 25 of the Constitution.<sup>276</sup>

This research already confirmed that the MPRDA imposes on the ownership of a landowner.<sup>277</sup> However, whether this amounts to deprivation, is another question.<sup>278</sup> In the *Meepo*-case it was found that since the enactment of the MPRDA, the following changes appear to be apposite:

A consideration of the provisions of the MPRDA inevitably leads to a realisation of the conflict between the interests and/or rights of a holder of a prospecting or mining right and that of a landowner. All these rights are core rights enshrined in the Bill of Rights (sections 24 and 25 of the Constitution).<sup>279</sup>

This *dictum* was made with reference to the entitlements granted to the holder of a prospecting or a mining right in terms of the MPRDA, which is in conflict with the landowners' entitlements derived from the ownership of the land to which the prospecting right or mining right relate. Such a conflict can result in "serious inroads being made on the property rights of a landowner".<sup>280</sup> Evidently, this conflict (imposition) has also been confirmed in this research, and this makes sense when considering the entitlements usually associated with ownership of land, *inter alia* possession, use, enjoyment, consumption and disposition<sup>281</sup> and those associated with the

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275 "This section" refers to s 25 of the Constitution.

276 This is also true for ownership, see note 6 above.

277 See par 4.2 above.

278 This is requirement (b) in accordance with the *FNB*-case.

279 Par [8]; see also Badenhorst and Mostert 2008 *TSAR* 823.

280 Par [13].

281 Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9.

holder of a prospecting or a mining right, *inter alia* enter, use and carry out any activity.<sup>282</sup> The reader is also reminded that a prospecting right or mining right is a limited real right, and a limited real right restricts ownership or diminishes the owner's dominium over a specific property.<sup>283</sup> It is therefore apparent that some of the entitlements of the landowner in respect of his land are restricted by the granting of a prospecting right or a mining right on that land.<sup>284</sup>

The reader is furthermore reminded that for a deprivation to occur there must be a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society".<sup>285</sup> However, deprivation should "not be given too limited a meaning".<sup>286</sup> Considering this description of deprivation pertaining to the imposition on landowners as brought about by the MPRDA, it is contended that this imposition does in fact amount to deprivation of a landowner's right to his land, or at least to some of the entitlements inherent in his ownership.<sup>287</sup> In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>288</sup> Judge Skweyiya stipulated that "the physical taking of property is not required to constitute a deprivation, it suffices for one or more of the entitlements of ownership to be impacted upon". Further note that when Judge de Villiers had to consider the loss of the use of the surface to a landowner in the *Anglo*-case he stipulated that "it would result in ... depriving the owner, without his consent, of the final aspect of his ownership that is of practical value to him".<sup>289</sup> Judge de Villiers accordingly found that such deprivation of an

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282 S 5(3) of the MPRDA.

283 S 5(1) of the MPRDA, see par 4.2 above.

284 See par 4.2 above with regard to this imposition as brought about by the MPRDA, as well as the conflict that will inevitable arise when more than one individual is to *share* the same entitlement.

285 *Mkontwana*-case par [32].

286 See *Agri*-case par [64], this was the minority judgment of Judge O'Regan in the *FNB*-case par [90]; the reader is also reminded that other views exist with regard to deprivation, see par 3.1 above.

287 See par 3.1 above.

288 *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 1 SA 293 (CC) par [41].

289 *Anglo*-case 398B-D; see Badenhorst and Mostert 2007 (2) TSAR 417.

owner, without his consent constitutes a deprivation in terms of section 25 of the Constitution.<sup>290</sup>

Moreover, the MPRDA even anticipates that some sort of loss or damage may be suffered by the landowner because of the prospecting or mining operations. This follows from section 54(3) of the MPRDA which prescribes that the landowner and the holder of either a prospecting right or a mining right must endeavour to reach an agreement for the payment of compensation, should there be loss or damage due to prospecting or mining operations.<sup>291</sup> However, this provision does not preclude the fact that deprivation still occurs. Judge Du Plessis in the *Agri*-case contended that "deprivation of property is a legal fact", and "if an interference with the use, enjoyment and exploitation of property has occurred that is sufficient to constitute a deprivation, that fact cannot be undone by offering to the deprived party something in the place of the deprived property".<sup>292</sup>

Therefore, in light of the above, the only inference that can be drawn is that the MPRDA does in fact bring about a deprivation as contemplated in section 25(1) of the Constitution,<sup>293</sup> hence it is necessary to determine whether it complies with the constitutional requirements of deprivation.<sup>294</sup>

Section 25(1) of the Constitution prescribes that deprivation must be undertaken in terms of law of general application, and deprivation may not

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290 Badenhorst and Mostert 2007 (2) TSAR 417.

291 That is if the Regional Manager concluded that such loss or damage will occur, see s 54(3) of the MPRDA; see also par 5.2 above.

292 *Agri*-case par [72].

293 Take note that it will still be necessary to consider each situation on its own, especially in light of the fact that the holder of a prospecting right or mining right may exploit minerals in a different way, hence encroach on very different entitlements, and not all landowners may find such encroachment to be a deprivation.

294 That is number (c) in the *FNB*-case structure, see s 25(1) of the Constitution. Also take note that constitutional values should govern the resolution of conflicts that might arise between a holder of rights to minerals and an owner of land; see Mostert and Pope (eds) *The Principles of the Law of Property* 278-279. Further, note that horizontal application of s 25 of the Constitution is possible. In other words the provisions of s 25 may be invoked should a dispute between two private individuals arise, *ie* a landowner and the holder of a prospecting right or a mining right.

be arbitrary.<sup>295</sup> It is accepted that this deprivation is undertaken in terms of law of general application, as it is done in accordance with the MPRDA.<sup>296</sup> To determine whether this deprivation is arbitrary, the test for non-arbitrariness as laid out in the *FNB*-case has to be followed.<sup>297</sup> However, the reader is also reminded that in the *Mkontwana*-case, the Court already deviated from this test, which means that there is currently no legal certainty as to how this test should be applied.<sup>298</sup> Nevertheless, in the more recent *Agri*-case Judge Du Plessis still relied on both these Constitutional Court judgments, therefore this research will attempt to do the same.

Both the *FNB*-case and the *Mkontwana*-case requires that there must be sufficient reason for the deprivation, for if not, it will be arbitrary. There will be sufficient reason if there is a rational connection between the means employed and ends sought,<sup>299</sup> and there will be sufficient reason if "the government purpose [for the deprivation] is both legitimate and compelling".<sup>300</sup> Take note however, that this will have to be determined on a case-to-case basis, therefore for the purpose of this research this will be considered having regard to case law.

In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*<sup>301</sup> Judge Brand had to consider whether deprivation in the form of loss of the use of surface of land is arbitrary, and he found that "the owner cannot be said to be

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295 The first step of the structure in the *FNB*-case has already been followed, *ie* that the imposition amounts to deprivation, therefore this will not be repeated here.

296 "The MPRDA is a law of general application as is required by section 25(1) of the Constitution" see *Agri*-case par [76], see also par 3.1.1 above.

297 *FNB*-case par [100].

298 See par 3.1.2 above.

299 This is one of the factors as listed in the *FNB*-case par [100] that has to be considered to determine whether there is sufficient reason for the deprivation, see note 96 above; see also Mostert and Pope (eds) *The Principles of the Law of Property* 124. Take note that sufficient reason must be established by considering all the factors in the *FNB*-case par [100]. See also *Mkontwana*-case par [35] in which it was contended that "A mere rational connection between means and ends could be sufficient reason for a minimal deprivation", but unlike in the *FNB*-case, "the greater the extent of the deprivation, the more compelling the purpose and the closer the relationship between means and ends must be".

300 *Mkontwana*-case par [51]; see also Van der Walt *Constitutional Property Law* 157.

301 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 All SA 567 (SCA) par [27].

arbitrarily deprived of anything". However, the reasoning behind this argument lies in the fact that the owner in this case sold his mineral rights, and therefore the owner sold his use to his surface. At that time, the *Mineral Act* 50 of 1991 still regulated the use of minerals, and that is why the owner was responsible for his own predicament.<sup>302</sup> However, since the enactment of the MPRDA the State acts as custodian of all the unsevered minerals in South Africa.<sup>303</sup> As a result, a landowner cannot sell the minerals found in/on his land, since he is not the owner thereof. However, such an owner may still have to endure the same deprivation as the owner in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*<sup>304</sup> did. Therefore, considering the impact the MPRDA had on mineral rights, the argument pertaining to the loss of the use of land that arbitrary deprivation does not come into the picture at all,<sup>305</sup> cannot be sustained and should therefore be rejected.

The reader should also take cognisance of the fact that Judge Froneman, in the *Bengwenyama*-case found that the measures incorporated in the MPRDA are "indicative of a serious concern for the rights and interests of landowners".<sup>306</sup> Furthermore, in the *Meepo*-case it was found that

when interpreting the applicable provisions of the MPRDA and more particularly those provisions that may be suspect of more than one construction, preference should be given to that construction which would result in the most rational balance between the aforesaid conflicting interests and/or rights of a holder of a prospecting or mining right on the one hand and that of a land owner on the other.<sup>307</sup>

The judge in the *Meepo*-case then concluded and stated that

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302 The previous regime of the regulation of minerals will not be discussed in this research.

303 See par 4.1 and note 171 above.

304 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 All SA 567 (SCA); the minerals still have to be exploited, which means that the same deprivation will have to be endured with regard to the infringement on ownership.

305 Par [27].

306 Par [63]. These measures refer to the required consultation processes as discussed in par 5.1 above.

307 Par [8].

it was the intention of the Legislature to make provision in the MRPDA for a rational balance between *inter alia* the rights of a holder of a prospecting right on the one hand and the property rights of a land owner on the other hand, ... and the provisions of the act should be interpreted with due regard to the ... constitutional values and norms.<sup>308</sup>

Considering this *dictum*, the rational balance will in all probability amount to sufficient reason and therefore deprivation will most likely be non-arbitrary, and constitutionally valid.<sup>309</sup> This research therefore contends that the MPRDA does in fact bring about a deprivation of landowners' rights, and that such deprivation is constitutionally valid.<sup>310</sup> The next question is whether this deprivation amounts to expropriation, and this will be considered hereunder.

## 6.2 Expropriation

The reader is reminded that expropriation occurs when the existing property rights are extinguished and acquired by a public authority, it is acquired for a public purpose or in the public interest, and compensation is paid for these extinguished rights.<sup>311</sup> It is evident from the discussion above that some of the entitlements inherent in ownership are taken away from the landowner due to the imposition brought about by the MPRDA.<sup>312</sup> However, this does not necessarily imply that all the property rights are extinguished, as a landowner may still be able to exercise some of his entitlements to a certain extent. As a result, it will only be possible to determine whether the existing property rights are extinguished by analysing the extent of the imposition as brought about by the MPRDA. Naturally, this is a factual issue, and can therefore only be determined on a case-to-case basis.<sup>313</sup>

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308 Par [9].

309 Take note that this is merely an informed assumption; each matter should still be decided on a case-to-case basis.

310 Considering this contention it is not necessary to follow (d) in the *FNB*-case, see note 274 above.

311 See par 3.2 above.

312 See par 4.2 above.

313 Also note that the imposition as brought about by the MPRDA may only be temporary, however, if the property is expropriated, the landowner may not get his entitlements back, see note 33 above.

It is at this stage that section 54(5) of the MPRDA comes into play as the Regional Manager may recommend to the Minister that the land be expropriated in terms of section 55 of the MPRDA. Such a recommendation will be made depending on the outcome of negotiations between a landowner and the holder of a prospecting right or a mining right.<sup>314</sup> If the Regional Manager were to recommend expropriation, it has to be done in terms of section 55 of the MPRDA. Section 55 of the MPRDA prescribes that expropriation must be undertaken in accordance with sections 25(2) and (3) of the Constitution,<sup>315</sup> and the expropriation must comply with sections 6, 7 and 9(1) of the *Expropriation Act*.<sup>316</sup> Hence, if expropriation is undertaken in such a way, it will comply with section 25(2) of the Constitution. Furthermore, Item 12 of Schedule II of the MPRDA also provides that if a person can prove that his property has been expropriated in terms of any provision of the MPRDA, then he may claim compensation from the state. Therefore, if a landowner can prove that his property has been expropriated due to the of the granting of either a prospecting right or a mining right with regard to his land, then he will be eligible to claim compensation from the state for such expropriation. Considering these provisions, this research contends that should expropriation occur, it will be constitutionally valid.<sup>317</sup>

## 7 Conclusion and recommendation

The question posed by this research, whether the measures incorporated in the MPRDA are adequate to protect the constitutional property rights of a landowner, if a prospecting right or a mining right is granted on his land, now has to be answered.

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314 These negotiations are a requirement in the event that a landowner may suffer loss or damage, see s 54 of the MPRDA and par 5.2 above. Also note that this may lead to arbitration.

315 S 55(1) of the MPRDA.

316 S 55(2) of the MPRDA.

317 Considering this contention it is not necessary to follow (g) in the *FNB*-case, see note 274 above.

This research confirmed that if a prospecting right or a mining right is granted, it will inevitably lead to an imposition on the ownership of land.<sup>318</sup> Ownership, on the other hand, is the most absolute right that a person can have in relation to his land,<sup>319</sup> yet the MPRDA imposes on this right. Therefore, the MPRDA does impose on the rights of landowners.<sup>320</sup>

This research also confirmed that the imposition as brought about by the MPRDA amounts to deprivation,<sup>321</sup> and that such deprivation is constitutionally valid.<sup>322</sup> Furthermore, it is also possible for this imposition as brought about by the MPRDA to amount to expropriation. The imposition will amount to expropriation if a person can prove that expropriation has occurred, or if the Regional Manager recommends to the Minister that the land must be expropriated. It will, therefore, depend on the extent of the imposition on the ownership of land whether expropriation has occurred, or not. Even if the imposition amounts to expropriation, it will still be constitutionally valid if all the said requirements have been met.<sup>323</sup> Therefore, any imposition as brought about by the granting of either a prospecting right or a mining right in terms of the MPRDA, will be constitutionally valid.

If the imposition as brought about by the MPRDA is constitutionally valid, then it is evident that the MPRDA does in fact adequately protect the constitutional property rights of a landowner, if a prospecting right or mining right is granted on his land.

Therefore, even though a landowner may be deprived of his land or even though his land may be expropriated, he will have no option but to let it happen, as the MPRDA does adequately provide for his constitutional property rights. The only remedy that a landowner has when approached by either an applicant or holder of a prospecting right or mining right is to

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318 See par 4.2 above.

319 See par 2.1 above.

320 See par 4.2 above.

321 See par 6.1 above.

322 See par 6.1 above.

323 See par 6.2 above.

participate in the prescribed consultation procedures<sup>324</sup> as it "is the only means afforded in the MPRDA to a landowner to protect his rights as such",<sup>325</sup> since the MPRDA does not require that the landowner has to give consent.<sup>326</sup> Such participation will facilitate the landowner in the event that he may suffer any loss or damage as a result of prospecting or mining operations, with regard to any negotiation<sup>327</sup> or arbitration<sup>328</sup> pertaining to compensation, and the same goes for knowing whether the land may be expropriated.<sup>329</sup>

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324 See par 5.1 above.

325 *Meepo*-case par [15]-[16].

326 See par 5.1 above.

327 See par 5.2 above.

328 See par 5.2 above.

329 See par 5.2 above.

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